BEFORE THE ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

In RE: Former Army SPC Michael G. New	**)**	**APPLICATION FOR CORRECTION OF MILITARY RECORDS**

I. OVERVIEW OF BASIS FOR APPLICATION.

This application seeks to correct the military record of the 1996 court-martial conviction and bad conduct discharge of former Army Specialist Michael G. New ("New") on a charge of disobedience of a lawful order, after depriving New of discovery critical to his defense throughout the entire period of his court-martial trial and during his direct appeals. To secure New's conviction and discharge, the prosecutor knowingly misled both the military judge and defense counsel as to the existence, description, and availability of two classified documents: Presidential Decision Directive ("PDD 25") and Presidential Review Directive ("PRD 13"). Both documents were requested by New through discovery and were not only relevant, but highly material, to New's defense that the order to wear the United Nations ("U.N.") uniform that he disobeyed was unlawful — as a violation of the United Nations Participation Act ("UNPA").

At the court-martial, the prosecutor knowingly misrepresented to the military judge and defense counsel that the classified PDD 25 was a readily available and straight-forward document "of 8 to ten" pages when, in fact, the document was much more detailed — 29 pages of legal and political strategy underlying the deployment of the American military into service under United Nations command. Also, at the court-martial, the prosecutor either knowingly

concealed PRD 13, the precursor to PDD 25, or willfully failed to exercise due diligence to conduct a search for that document, as mandated by statute and Executive Order.

It was not until long after the court-martial proceeding came to a close, and appeals exhausted, that New gained access to the two critical classified documents through the Mandatory Declassification Review Request process.[1] And it was even later that, through a Freedom of Information Action ("FOIA") request, New would learn from the Army Court of Criminal Appeals ("ACCA") that there were actually two or more different versions of PDD 25 in his official court-martial record. Not only did these multiple PDD 25 documents significantly differ from one another in page length and content, both differed substantially in length and content from the actual classified PDD 25 document secured by New after declassification via the Mandatory Review process.[2]

Under the U.S. Supreme Court rule of Brady v. Maryland, 373 U.S. 83 (1963), applicable to criminal proceedings, and under the even "broader discovery" rule of United States v. Eshalomi, 23 M.J. 12 (C.M.A. 1986),[3] applicable to court-martials, the prosecutor failed to perform his constitutional duty to produce the then-classified PDD 25 as required by court order, denying New's liberty and property without due process of law. And, in further

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[1] *See* Letters dated November 18, 2009, from Rob Seibert, Mandatory Review Archivist, William J. Clinton Presidential Library, to Herbert W. Titus in Appendix C at C-1 and C-33.

[2] *Compare* the two classified documents in Appendix C obtained by New via the Mandatory Declassification Review Process *with* the two unclassified documents in Appendix D produced by ACCA in response to New's Freedom of Information ("FOIA") request.

[3] *See* United States v. Trigueros, 69 M.J. 604, 610 (ACCA 2010).

violation of Article 46 of the Uniform Code of Military Justice ("UCMJ"), and Rule for Courts-Martial 701, and Executive Order, the prosecutor denied New's statutory and executive order-based discovery rights, having either concealed such documents, or at the very least, having failed to comply with the "due diligence" rule to locate and produce the then-classified PRD 13. *See* United States v. Simmons, 38 M.J. 370, 381 (CMA 1993).

Denying New access to the classified documents, in turn, facilitated the Clinton Administration's policy conscripting New (and other members of the United States Armed Forces) to serve in multilateral U.N. operations without complying with the UNPA. Enacted into law in the 1940's, the UNPA was specifically designed to protect American servicemen and women by "rules for the Government and Regulation of the land and naval forces" enacted by Congress under Article I. Section 8, Clause 14 of the United States Constitution.[4] UNPA section 6 required specific congressional approval of the deployment of American armed forces as combatants, and UNPA section 7 limited noncombatant assistance to the U.N. not to exceed 1,000 personnel at any one time. Not only was New denied the protection of the UNPA, he was prosecuted for, and convicted of, disobedience of an order, the unlawfulness of which would have been strongly supported by evidence contained in two classified documents, access to which New was denied.

Today, Michael New labors under the "ineradicable stigma"[5] of a bad conduct discharge for doing what he was trained to do as an American soldier — disobey an unlawful

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[4] *See* H. Rep. No. 1383 (79th Cong., 1st Sess. (1945)), reprinted in USCCS at 933-35, and H. Rep. No. 591(81st Cong., 1st Sess. (1949)), reprinted in USCCS at 2072.

[5] *See* R. at 946, l. 24 - 947, l. 14 (App. A at A-51 – A-52).

order. He was deprived of his constitutional rights to have all relevant and material evidence in support of his defense that the order of which he was charged of having disobeyed was unlawful. In the interests of justice this Board has within its power and mission to expunge that stigma by blotting out his court-martial conviction and bad conduct discharge, upgrading New's discharge to an honorable one.

II. OVERVIEW OF MICHAEL G. NEW'S SERVICE RECORD AND POSITION.

On February 17, 1993, Michael G. New entered active duty in the United States Army. Trained as a Medical Specialist, New served with distinction, earning the Army Achievement Medal, the National Defense Service Medal, Army Service Ribbon, Sharpshooter Marksmanship Badge (Rifle), and Sharpshooter Marksmanship Badge (Grenade). New also earned the Army Achievement Medal for his quick response to treat, and then to obtain immediate medical attention for, his platoon sergeant who had been injured in an accidental explosion during a training exercise.

An exemplary soldier, New remained in good standing with his unit's senior medic who asked him to participate in a special training exercise to demonstrate to the V Corps Commander, Lieutenant General Abrams, that the unit was prepared for the Macedonian deployment — even though the senior medic was well aware of New's position against the wearing of the U.N. uniform in preparation for that deployment. *See* Court-Martial Record ("R.") at 902, 1. 20 – 904, 1. 2 (Appendix ("App.") A at A-48 – A-50). Not only did the senior medic's confidence reflect positively on New's "technical competence," but it attested to New's respect for the chain of command, demonstrated by his diligent consideration of the information offered him during the weeks of study and review that New underwent before

concluding that he could not obey the unlawful order to wear the U.N. uniform to serve "under U.N. Command." *See* Memorandum from Michael G. New to Chain of Command dated 19 Sep 95, R. Exh. XXVII (App. B at B-14 – B-16).

New did not reach this conclusion fecklessly. Rather, the order to wear the U.N. uniform prompted him to reflect on the importance of a military uniform "as a sign of allegiance and faithfulness to the authority or power … which issues that uniform." *Id.* at B-18. To that end, New recalled that he "was recruited for and voluntarily joined the U.S. Army to serve as an American soldier," and that he had done just that, having served in Kuwait" the year before, and having "offered to serve anywhere in the world in my American uniform." *Id.* Even though he loved serving his country in the Army, New expressed his willingness "to sadly and reluctantly withdraw from the Army quietly," rather than wear the U.N. uniform, but his offer was to no avail. *Id.*

Remaining steadfast, New was prepared to obey every lawful order. Convinced, however, that the U.N. Charter was based on different political and legal principles from the U.S. Constitution and the nation's Declaration of Independence, New realized that he could not obey an order that would violate his oath as an "American soldier and fighting man." *Id.* at B-19. He simply could not submit to the orders of a foreign officer.

In a letter dated the same day as the date of New's memorandum communicating his concerns to his chain of command, Colonel Michael Chapman of the Department of the Army Office of the Chief of Legislative Liaison confirmed New's concerns. Responding to an inquiry of New's parents as to the protections that New could expect while serving as an American soldier under U.N. command, Colonel Chapman wrote that U.S. Army "[p]ersonnel

serving with a U.N. Peacekeeping Force are afforded protections under The Convention on Privileges and Immunities of the U.N." R. App. Exh. III at 2 (App. B at B-2). However, Colonel Chapman admitted that the U.N.'s adversaries might "refuse to recognize" the U.N. Convention. In such case, the Colonel could not assure Mr. and Mrs. New, that those adversary nations would be obliged to treat their son as a prisoner of war under the 1949 Geneva Convention, but could only advise them that "the U.S. would demand that their captors treat New in a manner consistent with the Geneva Convention." As New informed his chain of command, "it is difficult, if not impossible to judge the legality of any orders to become a U.N. soldier, and in the face of any doubt, I do not intend to surrender my status as an American soldier to wear the uniform of a foreign power." R. App. Exh. XXVII at 3 (App. B. at B-16).

III. STATEMENT OF THE CASE FOR CORRECTION OF MILITARY RECORD.

In August 1995, while stationed in Schweinfurt, Germany assigned to the 1st Battalion, 15th Infantry Regiment, 3d Infantry Division (1/15 Infantry), New learned that his infantry unit would be deployed in October 1995 to a multinational U.N. operation to Macedonia, and that the Macedonian deployment would require him to wear the U.N. uniform which consisted of a shoulder patch, blue scarf, badge, blue field cap, and blue beret, signifying that, when so deployed, New would be under the "operational control of a U.N. Commander."[6] As soon as he learned that he would be required to wear the uniform of a "foreign power," New explained to his squad and platoon leaders that he could not wear the prescribed uniform unless the order

[6] *See* R. App. Exh. III, Letter to Mr. and Mrs. Daniel New from Dept. of Army (App. B. at B-1 – B-3).

was consistent with his oath to preserve, protect, and defend the Constitution of the United States. R. App. Exh. XXVII (App. B at B-14 – B-16).

From August 1995 until October 10, 1995, New's chain of command urged him to wear the prescribed uniform, advising him that, if he disobeyed an order to wear the U.N. uniform, he would be in violation of Article 92(2) of the Uniform Code of Military Justice ("UCMJ"). *See, e.g.,* R. App. Exh. XXXV (App. B at B-43 – B-44). Taking seriously what he had been taught by Field Manual 22-100 on Leadership, New soberly and thoughtfully came to the conclusion that he could not wear that uniform without violating his oath of office to defend, protect, and preserve the Constitution of the United States. *See* Memorandum from Michael G. New to Chain of Command dated 19 Sep 95. App. Exh. XXVII (App. B at B-14 – B-16).

Others did not take the issue of the lawfulness of the order to be a matter of import. On October 2, 1995, an Army JAG officer conducted an extensive legal and policy briefing on the Macedonian operation,[7] concluding with the question — "Why do we wear U.N. Uniform items?" — and then jokingly answering his own question: "Because they look fabulous!" *See* R. at 690, l. 2 - 692, l. 10 (App. A at A-44 – A-46).

Immediately following this flippant remark, New's commanding officer ordered New's unit to wear the U.N. Uniform, effective at "0900 hours, 2 October 1995." Two days later the order was reissued, and on 10 October 1995, New's company reported dressed in the U.N. uniform, except for New who reported in his standard Army BDU. Thereafter, New was

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[7] *See* Task Force Able Sentry Information Briefing. R. App. Exh. XXVIII (App. B at B-17 – B-42).

charged, specifying:

> In that Specialist Michael G. New, U.S. Army, having knowledge of a lawful order issued by LTC Stephen R. Layfield on 2 OCT 95 and CPT Roger H. Palmateer on 4 OCT 95, to wear the prescribed uniform for the deployment to Macedonia, i.e., U.N. patches and cap, an order which it was his duty to obey, did, at or near, Schweinfurt, Germany, on or about 10 OCT 95, fail to obey the same. [R. at 15. (App. A at A-2 – A-4).]

Tried on this charge by special court-martial, on January 24, 1996, New was convicted of disobeying a lawful order and sentenced to a bad conduct discharge, with no sentence to confinement. R. at 847, ll. 1-5 (App. A at A-47) and 953, ll. 5-7 (App. A at A-53).

A. The Lawfulness of the Order Was Substantially Based on PDD 25.

Prior to issuing the order to wear the U.N. uniform, Major David Osborne twice counseled New, advising him that the deployment of New's unit to the multilateral U.S. operation was based on PDD 25. Major Osborne provided New with a copy of an unclassified "executive summary" of PDD 25 to read and study. R. App. Exh. LXXV, Osborne Sworn Statement (App. B at B-142 – B-144). At the October 2, 1995 briefing, immediately before the first order to wear the U.N. uniform was issued, an Army JAG officer stated that the order was lawful because it rested, in part, on PDD 25. *See* R. at 64, l. 13 – 66, l. 20; 73, l. 1 – 75, l. 12 (App. A at A-7 – A-9, A-10 – A-12). At the outset of the court-martial proceeding, New's defense counsel sought discovery of documents that he reasonably believed supported New's claim that the order to wear the U.N. uniform for the Macedonian deployment violated the UNPA. *See* App. Exh. XXII (App. B at B-4 – B-13). Among the documents requested through discovery was PDD 25, together with a related document PDD/PRD 13. *Id.* at Item 1(a) and (11) (App. B at B-6 and B-8).

B. New's Discovery Request for the Classified Version of PDD 25 is Granted.

At the pre-trial proceeding, New's defense counsel requested that New be afforded access to the actual, classified PDD 25. *See* R. at 16, l. 24 – 17, l. 16 (App. A at A-5 – A-7). In response, the prosecutor announced that "the government is not inclined to present that [document]" on the ground that it was "[ir]relevant." *See* R. at 167, ll. 11 – 168, l. 12 (App. A at A-13 – A-14). Yet, prior to the court-martial, the prosecutor — then acting in his capacity as a JAG officer briefing on the legality of the order — had represented to New that PDD 25 was one of the "legal bases" supporting the order requiring New to wear the U.N. uniform. *See* App. Exh. XXVI at 18 (App. B at B-34).

At the court-martial, however, the JAG officer, having shifted into the role of prosecutor, did an about-face, insisting that PDD 25 was totally irrelevant to any issue raised in the court-martial proceeding. R. at 168, l. 1 – 170, l. 12 (App. A at A-14 – A-16). Notwithstanding the strident opposition of the prosecutor, the military judge ordered the prosecutor to provide defense counsel access to the actual, classified PDD 25. R. at 171, ll. 14-17 (App. A at A-17).

C. The Prosecutor Promises to Produce the Classified Version of PDD 25 "Now."

Assuming that the prosecutor did not have immediate access to the classified PDD 25, in Germany, defense counsel requested that the classified version be produced at a mutually agreeable future time and place within the United States. R. at 172, ll. 1-2 (App. A at A-18). Expressing concern that such an arrangement might delay the court-martial proceeding, the prosecutor offered to produce the classified PDD 25 for defense counsel's review — "now."

R. at 172, ll. 13-20 (App. A at A-18). Concerned that the proposed timetable would not give defense counsel sufficient time to examine the new document before trial, defense counsel asked the prosecutor: "How long a document is it?" R. at 172, ll. 21-23 (App. A at A-18). The prosecutor replied: "My recollection of it is somewhere in the eight to 10 pages --." R. at 172, ll. 24-25 (App. A at A-18). Relying solely upon the prosecutor's word, defense counsel immediately dropped his request for a stateside production of the classified document. R. at 173, ll. 1-2. (App. A at A-19).

After securing defense counsel's agreement, the prosecutor then asked the military judge if, by furnishing the requested eight to 10-page document — as the prosecutor had described it — that would be all that he would "have to give them." R. at 173, ll. 4-7 (App. A at A-19). The military judge agreed. R. at 173, ll.8-23 (App. A at A-19).

D. The Military Judge Denies New's Discovery Request for PDD/PRD 13.

In conjunction with his request for production of the classified PDD 25, defense counsel also requested production of a related document variously described as PDD 13 or PRD 13. R. at 180, l. 18 – 181, l. 2 (App. A at A-20 – A-21). While New's counsel was unsure whether the PDD/PRD 13 document was classified, he was confident that such a document existed, and was the direct "predecessor" of PDD 25, stating to the military judge: "[Y]ou can't understand PDD 25 … without understanding what was done under PDD 13." R. at 181, ll. 20-21 (App. A at A-21).

Pressed to move on, and under the impression that PDD/PRD 13 might be in the public domain, the military judge denied defense counsel's discovery request, stating that "you have as good a chance of locating it as the government, so I will not make an order that the

government produce that item." R. at 181, l. 25 – 182, 1. 3 (App. A at A-21 – A-22). In a final effort, defense counsel asked the military judge if he could "ask … if trial counsel has a copy of that document or any document related to –." R. at 182, ll. 4-5 (App. A at A–22). Cutting defense counsel off, the military judge stated his "impression … from an earlier argument [that the prosecutor] didn't have any idea what it was." R. at 182, ll. 6-7 (App. A at A-22). The prosecutor offered: "That's correct." R. at 182, l. 8 (App. A at A-22).

In fact, however, the prosecutor must have known that a document titled PDD/PRD 13 existed, because he had previously opposed the production of PDD 25, in part, on the ground that "it will take us down a road from which there is no return" — "You will see in their request there's a Presidential Directive 13; don't know what that is, but my guess is that –" R. at 169, l. 23 – 170, l. 2 (App. A at A-15 – A-16). Before the prosecutor could finish revealing his concerns about the relationship between "Presidential Directive 13" and PDD 25, the military judge cut the prosecutor off:

> I'm going to deal with Presidential Directive 13 in a little bit, but what I want to know right now is, why should I not give the defense, with an appropriate order, the opportunity to look at [PDD 25]. [R. at 170, ll. 1-6 (App. A at A-16).]

Later, after settling the PDD 25 discovery details, the military judge failed to refocus his attention on the defense counsel's effort to obtain discovery of PDD/PRD 13, placing the entire burden on New and his defense counsel.

E. The Post Court-Martial Discovery of Classified PDD 25 and PRD 13.

After exhausting his remedies to overturn his conviction and bad conduct discharge both by direct appeal[8] from, and by a collateral attack[9] on, his conviction, New filed a Mandatory Declassification Review Request with the Clinton Presidential Library seeking declassification of PDD 25 and PDD/PRD 13.[10] On November 18, 2009, the Government declassified both documents and provided them to New.[11] At that point not only could New confirm the existence of PRD 13, but also that the classified PRD 13 was, as New's defense counsel had represented at the court-martial, essential to understanding PDD 25. *See* R. at 181, ll. 20-21 (App. A at A-21).

Also, at this time, New learned that the now-declassified PDD 25 was **not** as the prosecutor had represented it to be at the court-martial proceeding. Rather than a document of "eight to 10" pages in length, PDD 25 was 29 pages long and substantially different in content. *See* PDD 25 at App. C at C-4 – C-32.

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[8] *See* United States v. New, 50 M.J. 729 (ACCA 1999); United States v. New, 55 M.J. 95 (CAAF 2001), *cert. den*ied, New v. United States, 534 U.S. 955 (2001).

[9] United States ex rel New v. Rumsfeld, 350 F. Supp. 2d 80 (D.D.C. 2004); United States ex rel Rumsfeld, 448 F.3d 403 (D.C. Cir. 2006), *cert. denied.*, United States *ex rel.* New v. Gates, 550 U.S. 903 (2007).

[10] The letters are included in Appendix C, attached hereto, at pages C-1 and C-33.

[11] Both the declassified PDD 25 and PRD 13 documents are included in Appendix C beginning at pages C-4 and C-36, respectively.

F. PDD 25 and PRD 13 Contained Material Exculpatory Evidence.

After review and study of the actual classified PDD 25 and finally having access to PRD 13, New discovered that both documents in fact contained important exculpatory evidence that was material to New's motion to dismiss the court-martial charge on the ground that the Macedonian deployment, for which the order to wear the U.N. uniform had been prescribed, violated the UNPA.

If New's counsel had had access to the actual classified PRD 13 at the court-martial, he could have demonstrated that on February 15, 1993, well in advance of the 1995 deployment of New's unit to the UN operation in Macedonia, the Clinton Administration itself acknowledged that "the UN Participation Act need[ed] [to] … be modified" to meet the new challenges and environments for multilateral peacekeeping operations, and setting that issue for review, including congressional amendments to the UNPA statute. *See* PRD 13 in App. C, at C-54 – C-55.

Additionally, well in advance of the order issued to New's unit to deploy to the UN peace operation in Macedonia — the actual classified PDD 25 virtually admitted that the Clinton administration lacked authority for the Macedonian deployent, stating:

> [A]t some future appropriate time, the Administration will seek the following legislative changes:
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> – Amending Section 7 of the UN Participation Act first to remove the limitations on detailing personnel to the UN in Chapter VI operations and then, to the extent that it is politically feasible, to delete the prohibition against using that section as authority to support Chapter VII operations and combatant missions. [*See* PDD 25 in App. C at C-16.]

G. PDD 25 and PRD 13 Reveal a Strategy of Noncompliance with UNPA.

With respect to UN multilateral operations in support of UN combatant "peace enforcement

operations" (such as the defense evidence showed that the Macedonian deployment was[12]), New's access to the actual classified PRD 13 would have allowed him to demonstrate that PDD 25 omitted altogether compliance with UNPA Section 6's requirement that the President obtain prior specific approval from Congress to deploy any American armed forces to such operations. *See* PDD 25 (Annex II) in App. C at C-21. Moreover, with respect to UN multilateral operations in support of UN noncombatant peace operations, PDD 25 failed to include any discussion of its six-fold inventory of factors required by law to be considered for deployment under the UNPA Section 7 and its 1,000-military personnel limit in UN operations at any one time. *See* PDD 25 (Annex II) in App. C at C-21. Instead, PDD 25 exposed a Presidential strategy to circumvent, rather than to comply with, the UNPA. Instead of obtaining the required congressional authorization, the Clinton Administration substituted and extended congressional briefing and consultation by[13]:

- "[E]xpanding its consultations with the bipartisan leaders and senior leadership of the relevant committees of both Houses of Congress.
- "[A]scertaining Congressional views when it is giving serious consideration to the deployment of U.S. military units in a UN peace operation.
- "[H]olding monthly briefings for the combined majority and minority staffs of the foreign affairs, armed services, and appropriations committees.
- "[P]roviding … Congress with … a comprehensive annual report on peace operation activities conducted during the previous fiscal year." [*Id.* in App. C at C-31.]

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[12] *See* R. at 335, l. 23 - 349, l. 15 (App. A at A-29 – A-43).

[13] *See* PDD 25 (Annex VIII) in App. C at C-30.

H. Depriving New of Access to PDD 25 and PRD 13 Prejudiced New's Defense.

Having been denied access to the classified documents, defense counsel was unfairly (i) compelled to base New's defense on legal arguments supported only by the testimony of an expert witness in an attempt to counter the Government's claim that the Macedonian deployment was a UN Chapter VII peace enforcement (combatant) operation, not a Chapter VI peacekeeping (noncombatant) one; and (ii) limited to refuting the four letters from President Clinton to the Speaker of the House[14] which had been introduced by the prosecutor in support of the Government's claim. *See* R. at 321, l. 3 – 323, l. 10 (App. A at A-23 – A-25).

Although the President referred to the UNPA in two of the four letters, not one of them purported to demonstrate compliance with the UNPA. *See* App. Exh. LII, Encl. 1 (App. B at B-50 – B-58). Rather, each letter stated that it was being sent for information purposes "[i]n keeping with the **spirit** of the War Powers Resolution." App. Exh. LII at Facts Para. 5 (App. B at B-46) (emphasis added). Although the President described the Macedonian deployment to be "noncombatant," he failed to provide to the Speaker that the deployment complied with the statutory requirement that at the time of the noncombatant deployment there would not be more than 1,000 U.S. personnel "on detail to the United Nations as any one time," as required by Section 7 of the UNPA. *See* H. Rep. No. 591 at 2070 and 2072. And, although the President tied the Macedonian deployment to the overall UN combatant operation in the former Yugoslavia, the President made no effort to separate that deployment from the larger combatant operation. Yet, under Section 6 of the UNPA, the President was been required to obtain Congress's specific

[14] *See* R. App. Exh. LII, Encl. 1 (App. B at B-50 – B-58).

authorization of "arms and provisions" **before** deploying American armed forces in a combatant role in a multilateral U.N. operation. *See* H. Rep. 1383 at 933. Rather, to New's prejudice, the presidential letters were calculated to obscure and evade UNPA's specific rules, as if the Macedonian deployment was a matter well within the President's discretionary prerogative as Commander in Chief.

Had defense counsel been armed with the classified PDD 25 and PRD 13, he could have specifically contradicted the President's letters for the subterfuge that they were — a distraction to divert congressional attention from the UNPA to other matters. Deprived of the classified PDD 25 by the prosecutor's devious scheme, New was left — unfairly and to his prejudice — with a single weapon at his court-martial to counter the President: the expert testimony of a former congressional staff member. *See* R. at 335, l. 23 – 349, l. 15 (App. A at A-29 – A-43).

If defense counsel had been given access to the classified documents, he could have used the Government's own documents, issued by the President of the United States, to impeach the Government's claim. Denied such access, defense counsel was unjustly forced to pit the testimony of an expert witness (who also lacked access to the classified materials) against the four letters signed by the President of the United States sent to the Speaker of the House. As a result, the military judge was hard-put to rule against the prosecutor's claim that the order requiring New to wear the U.N. uniform was a lawful order. It would indeed have been a Hobson's choice, whether to agree with the President, his commander-in-chief, or to side with a "retired Senate staff member," no matter how extensive the latter's experience and education, or valid his legal position. *See* R. at 323, l. 15 – 326, l. 12 (App. A at A-25 – A-28). Had defense counsel been provided with the classified version of PDD 25, he could have impeached and contradicted four

signed presidential letters with an official presidential decision directive signed **by that same President**. The Government's deceptive prosecutorial conduct worked an injustice to New.

I. New's Petition for Coram Nobis Relief: An Incomplete Record.

After obtaining the newly discovered relevant, material, and exculpatory evidence in the now-declassified PDD 25 and PRD 13, New once again sought judicial relief from his court-martial conviction and sentence.

On May 16, 2012, pursuant to Rule 20 of the military Joint Rules of Practice and Procedure of the Courts of Criminal Appeals, New filed a Petition for Extraordinary Relief in the Nature of a Writ of Appeal Coram Nobis in ACCA. Two weeks later, on May 30, 2012, ACCA summarily, without opinion, denied the petition.

A writ-appeal was then taken to the Court of Appeals for the Armed Forces ("CAAF") . In its Answer to New's writ-appeal, the Government faulted New's claim of prosecutor misconduct, because that claim was allegedly based upon an incomplete record. In particular, the Government asserted that New's claim of misconduct "at this stage of the proceedings" was unsupportable "[b]ecause the document purporting to be PDD 25 that was disclosed to the defense at the time of trial was never included within the record of trial." Thus, the Government contended that it was "impossible to know at this point whether [there is any PDD 25 document that] matches the [declassified] PDD 25 attached" to New's coram nobis petition. *See* Answer to Petitioner's Writ-Appeal Petition ("Govt. Coram Nobis Answer") at 15, n. 67. USCA Misc. Dkt. No. 12-8025/AR. On September 10, 2012, CAAF summarily denied New's writ-appeal petition.

However, in response to the new allegation in the Government's Answer that the record was incomplete, New turned to the Freedom of Information Act to determine what, if any, PDD

documents were in the official court-martial record kept by the Government.

J. New Files FOIA Request And Obtains Records Related to PDD 25.

On December 24, 2013, on New's behalf, the Michael New Action Fund submitted a FOIA request to the Department of Defense seeking numerous "records related to the 1995-96 court martial trial and conviction of Michael G. New on a charge of disobedience of a lawful order." Among the records sought were "[a]ll records related to the preparation and distribution" of an information paper dated October 5, 1995 concerning "the Authority to Deploy a U.S. Army unit to the 'Former Yugoslav Republic of Macedonia,' … including but not limited to records related to the classified version of [PDD] 25 or the executive summary thereof."[15]

On April 22, 2015, in response to the FOIA request, the Clerk of the Court for ACCA produced two different PDD 25 documents, along with other records "from the court martial record of Michael G. New that [New] requested under the Freedom of Information Act."[16] The two PDD 25 documents produced in response to the FOIA request bore the title and date: "The Clinton Administration's Policy on Reforming Multilateral Peace Operations - May 1994."[17] However, unlike the actual classified version of PDD 25 which was 29 pages in length, the two PDD 25 documents produced by the ACCA clerk from the record are 10 and 15 pages long, respectively. *See id.* (App. D at D-12 - D-21 and D-22 – D-37).

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[15] *See* Letter dated December 24, 2013, from Herbert W. Titus to Office of Freedom of Information, Department of Defense re: FOIA Request of Michael G. New Action Fund in App. D at D-1.

[16] *See* Letter dated April 22, 2015, from Scott F. Bailey, U.S. Army Court of Criminal Appeals, to Herb Titus in App. D at D-11.

[17] *See* App. D at D-12 – D-21 and at D-22 – D-37.

The 15-page document appears to be identical to the document that was attached as Enclosure IV to the Government's Response to New's Motion to Dismiss filed at the court-martial on January 11, 1996.[18] The prosecutor well knew that the document was not the classified version in that he represented the document as "the unclassified summary of PDD 25." *See* Exh. LII at 4 (App. B at B-48). Furthermore, unlike the 29-page classified PDD 25 document which references the UNPA limits placed upon the deployment of American armed forces in U.N. combatant operations,[19] the 15-page executive summary of that classified document omits entirely any reference to the UNPA as it relates to U.N. multilateral peace keeping or enforcement operations. *See* App. D at D-27.

The 10-page document appears to be an incomplete version of the 15-page executive summary. *See* App. D at D-12 – D-21. Yet the document is hand-numbered seriatim from "1 of 10 pgs" to "10 of 10 pgs," and hand-stamped and hand-marked "APPELLATE EXHIBIT XII" and "Encl 18,"indicating that the prosecutor or someone in his office had preliminarily prepared the document for introduction in the court-martial proceeding. *See* App. D at D-12. Like the 15-page executive summary, the 10-page unclassified document in the record contained nothing addressing the legality under UNPA of the deployment of an American soldier to a U.N. multilateral operation.

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[18] *Compare* App. D at D-22 – D-37 *with* App. B. at B-122 – B-138.

[19] *See* PDD 25 (App. C at C-16). *See also* PRD 13 (App. C at C-63 ("Relationship to UN Participation Act. Does it need to be modified?")).

K. The Prosecutor's Nondisclosure Respecting the Order to Produce the Classified PDD 25 at the Court-Martial Was Due to Misconduct.

In the Coram Nobis proceeding, the Government's Answer rejected New's claim on the ground that "at this stage of the proceedings … the non-disclosure [of the classified PDD 25 document] was due to prosecutorial misconduct."[20] It is now known that the reasons given by the Government were contrived.

First, in the Coram Nobis proceeding, the Government contended that there was no way for anyone to know whether the classified PDD 25 was actually produced because the PDD 25 document that presumably was produced "was never included within the **record of trial**," and therefore, it was impossible at that stage of the proceedings "whether [the PDD 25 document actually produced] **matches** the [declassified] PDD 25 attached by [New]" to his Coram Nobis petition. *Id.* at 15, n.67 (emphasis added). Indeed, after the FOIA production of the two PDD 25 documents that were discovered in the larger ACCA "court-martial record," it is now known that no document produced at the court-martial matches the actual, now-declassified PDD 25.

Second, in the Coram Nobis proceeding, the Government contended that "[i]t [was] unclear from the face of the record [that] counsel's reference to the [previously classified PDD 25] document being '8-10 pages' was a statement made in full knowledge of its truth, or merely uninformed conjecture." Coram Nobis Answer at 15, n.67. After the FOIA production, however, it is quite clear that the prosecutor knew full well that the document that he represented

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[20] *See* In re New v. United States (CAAF): Crim. App. Dkt. No. Misc. 20120479. (USCA Misc. Dkt. No. 12-8025/AR). Answer to Petitioner's Writ-Appeal Petition for Review of Army Court of Criminal Appeals Decision on Application for Extraordinary Relief in the Form of a Writ of Error Coram Nobis ("Coram Nobis Answer") at 15 n. 67.

to be eight-to-10 pages long could not have been the classified PDD 25, but must have been an unclassified version. Thus, the prosecutor must have known that the documents on which he based his statement were edited versions of the actual PDD 25. *See* R. at 172, ll.15-18 (App. A at A-18).

Instead of rectifying this broken promise in the Coram Nobis proceeding, the Government shifted the blame to defense counsel for having "never objected about receiving an incomplete copy of PDD 25." Coram Nobis Answer at 15, n.67. But the Government cannot explain how defense counsel could possibly have known that whatever PDD 25 document he was shown was "incomplete." Defense counsel would have had no access to the actual, classified PDD 25 and, therefore, he was not in any position to determine whether the PDD 25 that the prosecutor did produce was the "complete" document.

In light of this newly acquired evidence from the official ACCA files, obtained by means of New's FOIA request, there is substantial and clear evidence that "the non-disclosure" of the actual, complete, classified PDD 25 "was due to prosecutorial misconduct."

IV. THIS APPLICATION FOR CORRECTION IS TIMELY.

10 U.S.C. § 1552 provides that no correction be made of any military record unless the claimant "files a request for the correction within three years after he discovers the error or injustice," or if the board "finds it to be in the interest of justice." New's application for correction of his military record is both timely and in the interests of justice.

A. This Application is Timely Filed.

Following the summary denial of New's Coram Nobis Petition and the unsuccessful attempt to obtain Supreme Court review of that petition, New once again pursued possible avenues of relief from his bad conduct discharge. On December 24, 2013, prompted, in part, by the Government's claim that the record "at this stage of the proceedings" was insufficient to support New's claim of "prosecutorial misconduct," New filed a Freedom of Information Act request seeking numerous documents related to New's court-martial, including "records related to the classified version of PDD 25." On April 22, 2015, in response to the FOIA request, the ACCA clerk of court produced two PDD 25 documents from the official court file, neither of which matched the classified PDD 25. This production has now answered, and refuted, three of the claims posed by the Government in footnote 67 of its Coram Nobis Answer:

First, in its footnote, the Government erroneously claimed that "[b]ecause the document purporting to be PDD 25 that was disclosed to the defense at the time of trial was never included within the record of trial, it is impossible to know at this point whether it matches the PDD 25 attached by [New]." Since the FOIA production disclosed that there were two PDD 25 documents in the record, one 10 pages long and the other 15 pages long, whereas the classified PDD 25 document is 29 pages long, it is now not only possible to know whether the documents "match," but also to know that they do not, in fact, match either in length or in material content.

Second, in its footnoted Answer, the Government asserted that "[i]t is unclear from the face of the record whether trial counsel's reference to the document being '8-10 pages' was a statement made in full knowledge of its truth, or merely uninformed conjecture." The FOIA production of the two unclassified documents indicates that the prosecutor had to have been aware

of these documents, including their length and content. In fact, the prosecutor was neither "uninformed" nor guessing. Rather, he was making a firm statement calculated to obtain defense counsel's reliance. *See* R. at 172, l.8 – 173, l.2, App. A at A-18 – A-19.

Third, in its footnoted Answer, the Government states that "[w]hat is clear is that defense counsel never objected about receiving an incomplete copy of PDD 25." That remarkable assertion ignores the fact that, until the recent production of the PDD 25 documents pursuant to New's FOIA request, defense counsel had no basis upon which to determine whether the document shown him was the actual classified version of PDD 25. Indeed, defense counsel had only the prosecutor's word, which has now been demonstrated to be both false and misleading.

According to 15 U.S.C. § 1552(b), this application is timely if it is filed within three years after the error **or** injustice is discovered. Full discovery of the error or injustice occurred on April 22, 2015, when New was given access to the official court-martial file and the resultant discovery of the two PDD 25 documents therein. Thus, the Application is timely, having been filed within the three-year statute. *See* Baxter v. Claytor, 652 F.2d 181 (D.C. Cir. 1981). *See also* Oleson v. United States, 535 F.2d 624, 172 Ct. Cl. 9, 17-19 (1965).

B. The Application Should be Granted in the Interests of Justice.

As is the case with civilian criminal proceedings, military trial counsel, like civilian prosecutors, have a "duty is to do justice, not merely to obtain a conviction." *See* A. Kozinski, "Criminal Law 2.0," 44 Geo. L. J. Ann. Rev. Crim. Proc. iii (2015) (civilian); Note, "Prosecutorial Power and the Legitimacy of the Military Justice System," 123 Harv. L. Rev. 937, 942 (2010) (military). "Principal" among their prosecutorial duties, is that both must "turn over to the defense exculpatory evidence in the possession of the prosecution and the police." Kozinski

at viii. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) and United States v. Giglio, 405 U.S. 150, 154 (1972) (civilian). *See also* United States v. Trigueros, 69 MJ 604 (ACCA 2010) (military). However, as Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit recently observed, "[t]here is reason to doubt that prosecutors [in civilian criminal cases] comply with these obligations fully." Kozinski at viii.

CAAF has stated with pride that "the military justice system has been a leader with respect to open discovery and disclosure of exculpatory information to the defense … with 'broader discovery than is required in Federal [civilian] practice.'"[21] Indeed, Article 46 of the Uniform Code of Military Justice ("UCMJ") provides specifically that "'the trial counsel, the defense counsel, and the court-martial shall have **equal opportunity** to obtain witnesses and other evidence,' including the police." *Id.* at 440 (emphasis added). Additionally, the prosecutor in a court-martial is duty-bound "to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Id.* at 441. This "due diligence" rule extends to "the files" of other government entities whenever a "defense discovery request … involve[s] a **specified type of information** within a specified entity." *Id.* (emphasis added). At stake whenever a prosecutor even appears to seek "personal gains rather than just outcomes" is the very legitimacy of the administration of the UCMJ. *See* Note, 123 Harv. L. Rev. at 942.

The prosecutor's effort respecting Mr. New's requests for the production of PDD 25 and PRD 13 fell far short of these high standards, thereby depriving New of his (i) liberty and property without due process of law under Brady v. Maryland, 373 U.S. 83 (1963), and (ii) discovery

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[21] United States v. Williams, 50 M.J. 436, 439-40 (CAAF 1999).

rights under Article 46, UCMJ, and Rule 701 for Courts-Martial [hereinafter "R.C.M."]. *See* United States v. Williams, 50 M.J. 436, 441-42 (CAAF 1999).

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87. As the Supreme Court stated in United States v. Trombetta,[22] and as cited in Trigueros,[23] the purpose of the due process guarantee is to ensure that "criminal defendants [are] afforded a meaningful opportunity to present a complete defense." Trombetta, 467 U.S. at 485 (emphasis added). As the Trombetta Court observed, this "constitutionally guaranteed access … delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system." *Id.*

1. Classified PDD 25 and PRD 13 Were Necessary for a Complete Defense.

"Impeachment evidence …, as well as exculpatory evidence, falls within the Brady rule." United States v. Bagley, 473 U.S. 667, 676 (1985). As pointed out in Section III above, the classified versions of both PDD 25 and PRD 13 contained information that called into question the veracity of the representations made by the prosecutor in New's court-martial that the Macedonian deployment conformed to the strictures placed by the UNPA on the powers of the president to deploy an American soldier to serve in a multilateral UN "peace operation." Rather, the classified version of PDD 25 contains ample evidence that the Clinton Administration adopted

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[22] 467 U.S. 479 (1984).

[23] 69 MJ at 609.

a policy deploying American armed forces to UN multilateral operations in disregard of the UNPA. By blocking access to the classified PDD 25 and PRD 13 documents, the Government prevented New from developing fully his UNPA defense required to overcome the strong presumption of the lawfulness of a military order.

The military judge was persuaded that the classified version of PDD 25 was necessary for New to make a complete defense. The prosecutor subverted this order by substituting an "eight to 10" page document for the actual 29-page classified document. Additionally, the prosecutor deliberately and cleverly evaded New's effort to obtain a copy of PRD 13, understating his knowledge that it existed. *See* R. at 169, l.23 – 170, l.2 and 182, ll.6-8, App. A at A-15 – A-16 and at A-22. By such understatement, neither the prosecutor nor the military judge exercised "due diligence" to determine whether PRD 13 might be necessary for New's complete defense.

"[A]n incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist." Bagley, 473 U.S. at 682. Indeed, as the Government conceded in Bagley, "[i]n reliance on [a] misleading representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued." *Id*. (emphasis added). Thus, the Bagley Court concluded:

> [T]he more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption. [*Id.*, 473 U.S. at 682-83.]

2. The Prosecutor's Failure to Exercise Due Diligence Deprived New of Access to Documents Material to His Defense.

Depriving defense counsel of access to the classified PDD 25 and PRD 13 documents made it nearly impossible for New to demonstrate that the Macedonian deployment was unlawful, including that it violated the UNPA. *See* Section III, *supra*. If the deployment was unlawful, then the order to wear the UN uniform prescribed for that deployment was unlawful, and New could not legally have been convicted of, and punished for, disobeying a lawful order, as charged.

The classified PDD 25 and PRD 13 documents deliberately withheld by the prosecutor would have provided strong support not only for New's claim at his court-martial that the deployment for which the UN uniform was prescribed violated the UNPA, but also that the Clinton administration made no effort to comply with the UNPA in the Macedonian deployment. Deprived of access to these two revealing documents, New and his defense counsel were severely handicapped in their effort to rebut the presumption of the legality of the order to wear the prescribed UN uniform for the multilateral Macedonian deployment. Specifically, New was denied the opportunity to contradict directly the self-serving and obfuscating statements contained in four presidential letters — introduced in support of the prosecutor's claim that the Macedonian deployment was undertaken in compliance with the UNPA — statements and actions detailed in the classified PDD 25 documents that demonstrated flagrant disregard for the limitations placed by Congress upon the President's authority to deploy American service member to U.N. multilateral peace operations. Given the particularly heavy burden placed upon a soldier to rebut the presumption of the lawfulness of a military order,[24] the denial of access to such crucial

[24] United States v. New, 55 M.J. at 106-07.

evidence was highly prejudicial.

3. The UCMJ Mandates Broader Discovery Than Brady.

Also, it is well-established that military law "provides for broader discovery than due process and Brady require." Trigueros, 69 M.J. at 610. Broader than the Brady rule, Article 46, UCMJ "mandate[s] that 'the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe.'" Williams, 50 M.J. at 440 (emphasis added). According to regulations, "documents, tangible objects, and reports … must be disclosed upon request. RCM 701(a)(2) and (5)." *Id.*, at 440, n.3. Indeed, in United States v. Simmons, 38 M.J. 376 (CMA 1993), CAAF has "held that the prosecution 'must exercise due diligence' in reviewing the files of other government entities to determine whether such files contain[ed] discoverable information." Williams, 50 M.J. at 441 (emphasis added).

There is no question that the prosecutor knew of, or could have easily discovered, the custodian of the classified PDD 25 and PRD 13 documents. After all, prior to the court-martial, in his role as briefing officer, the prosecutor counsel had obtained an unclassified version of PDD 25 which he and others had used in an effort to persuade New that the Macedonian deployment was lawful. R. App. Exh. LXXV (App. B at B-142 – B-144). There are only two options. The prosecutor either (i) misrepresented the "eight to 10" page document as the actual PDD 25 classified document, or (ii) neglected his duty to ensure that the "eight to 10" page document that he represented for production the classified PDD 25 was, in fact, the actual documents that he represented it to be. In either event, it is in the interests of justice that the relief herein sought must be granted.

As for classified PRD 13, New explicitly tied it to PDD 25, which alone should have sufficed to lead the prosecutor and military judge to make appropriate inquiries. There is nothing in the record to support any claim other than the prosecutor's having made no such inquiry, dismissing defense counsel's query with an offhand remark that he had no idea if PRD 13 even existed. *See* R. at 167, l.21 – 173, l.25 (App. A at A-13 – A-19) and R. at 180, l.18 – 182, l.8 (App. A at A-20 – A-22). "The prosecutor's obligation under Article 46[,] [however,] is to remove obstacles to defense access to information and to provide such other assistance as may be needed to ensure that the defense has an equal opportunity to obtain evidence." Williams, 50 M.J. at 442.

The prosecutor simply failed to perform his duty either with respect to PDD 25 or to PRD 13. Instead, the prosecutor engaged in the very kind of "gamesmanship" that the broad military discovery rule is designed to eliminate. See Adens, 56 M.J. at 731.

4. The Classified PDD 25 and PRD 13 Documents Were Material to New's Defense.

The Government's breach of its duty to produce the two classified documents was also "material" to New's defense. Indeed, the Government's failure to produce the two documents directly and significantly impaired New's effort to overcome the strong presumption that the order to wear the U.N. uniform for the deployment to Macedonia was lawful. *See* Section III, *supra*. There is, then, no question that New's due process claim is of the most fundamental character.

As ACCA has recently observed: "The Due Process Clause of the Fifth Amendment guarantees that 'criminal defendants be afforded a meaningful opportunity to present a **complete** defense.'" United States v. Trigueros, 69 M.J. 604, 609 (ACCA 2010) (emphasis added). To

that end, the Supreme Court has identified a "group of constitutional privileges [to] deliver[] exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system." Trombetta, 467 U.S. at 485. Such discovery privileges have been granted because "[u]nder the Due Process Clause…, criminal prosecutions must comport with prevailing notions of fundamental fairness." *Id.* (emphasis added).

This principle is so fundamental that "[t]he military criminal justice system contains much broader rights of discovery than is available under the Constitution or in most civilian jurisdictions." *See* United States v. Adens, 56 M.J. 724, 731 (ACCA 2002). Quoting from the Manual for Courts-Martial, United States (2000 ed.), Adens reads:

> "[E]xperience has shown that broad discovery contributes substantially to the truth-finding process and to the efficiency with which it functions. It is essential to the administration of military justice." [*Id.*, 56 M.J. at 731 (emphasis added).]

V. CONCLUSION

New's claim that the Government breached its duty of disclosure under (i) the Brady due process principle, and (ii) Article 46, UCMJ and R.C.M. 701, brings this Application within the jurisdiction of this Board "to correct an error or remove an injustice" with "the power to remove all traces of an invalid court martial from [New's] record and to change a [bad conduct] discharge into an honorable one." Baxter v. Claytor, 652 F.2d 181,185 (D.C. Cir. 1981). Indeed, this "Board has a nondiscretionary, judicially enforceable duty to exercise this power to correct such records if the records are based on unconstitutional military trials." *Id. See also* Ashe v. McNamara, 355 F.2d 277, 281 (1st Cir. 1965).

In United States v. New, 55 M.J. 95 (CAAF 2001), CAAF recognized that, although a

member of American Armed forces is obliged to obey orders, and although military orders are presumed lawful, the "term 'lawful' recognizes the right to challenge the validity of a[n] order with respect to a superior source of law." *Id*. at 100. However, it is not necessary for this Board to determine the lawfulness of President Clinton's deployment order in order to grant New's application for relief. Rather, it is only necessary for this Board to recognize that the inexcusable actions of the prosecutor denied New his right to present a complete defense at his court-martial, and to take appropriate action to see that justice is done.

As demonstrated throughout Section III, *supra*, the prosecutor acted unfairly and unjustly, depriving New of any meaningful opportunity to challenge the legality of the order issued by the President in violation of the UNPA. Without access to the classified PDD 25. New was not only severely crippled in his effort to discredit the President's deceptive letters, but virtually precluded from any prospect of success. Based on the facts of this case, including the evidence of injustice and prejudice New has suffered because of the above-described prosecutorial deception, justice compels the relief that New seeks.

VI. REQUEST TO APPEAR BEFORE THE BOARD.

Pursuant to 32 C.F.R. § 581.3(b)(4)(iii) and (f), New respectfully requests that, in the interests of justice, he be allowed to appear before the ABCMR and be heard.

VII. REQUEST FOR RELIEF.

For the reasons stated, we respectfully request that Mr. New's court-martial conviction and bad conduct discharge be expunged from his military record, and that his discharge be upgraded to honorable.

Respectfully submitted,

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