IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S, Respondent	BRIEF ON BEHALF OF RESPONDENT
v.	**Docket No. ARMY 20130679**
First Lieutenant (O-2) **CLINT A. LORANCE,** United States Army, Petitioner	Tried at Fort Bragg, North Carolina, on 25 April 2013, 22 July 2013, and 30 July 2013 through 1 August 2013, before a general court-martial convened by Commander, Headquarters, 82nd Airborne Division, Colonel Kirsten Brunson, Military Judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

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Statement of the Case

A panel of officers sitting as a general court-martial convicted First Lieutenant Clint A. Lorance (petitioner), contrary to his pleas, of two specifications of unpremeditated murder, one specification of attempted murder, one specification of reckless endangerment, two specifications of communicating a threat, one specification of soliciting a false official statement, and one specification of obstructing justice under Articles 118, 80, and 134, Uniform Code of Military Justice, 10 U.S.C §§ 880, 918, 934 (2012) [hereinafter UCMJ]. (Charge Sheet; R. at 919). The court sentenced appellant to forfeit all pay and allowances, to be confined for twenty years, and to be dismissed from the service. (R. at 985). The convening authority approved the sentence with the exception of one year of the confinement. (Action).

Statement of Facts

The facts at trial were largely uncontested; the dispute centered on whether petitioner had the right to use force in self-defense. Petitioner deployed with his unit to Afghanistan in 2012. (R. at 191-92). Before the deployment, his unit ensured that all soldiers were trained on the rules of engagement (ROE). (R. at 192). Petitioner served first as a liaison officer between his squadron and his brigade. (R. at

191-92). During the course of his service, he was able to frequently observe discussions about the ROE and the legality of combat engagements. (Pros. Ex. 1).

The Chairman of the Joint Chiefs of Staff's Standing ROE were in effect during petitioner's deployment. (Pros. Ex. 8). Under the ROE, soldiers were permitted to use force in defense of themselves and others upon the commission of hostile acts or the demonstration of imminent hostile intent. (Pros. Ex. 8, Encl. A, ¶ 3a). The ROE also provided for the use of force against declared hostile forces and individuals without their committing hostile acts or demonstrating hostile intent. (Pros. Ex. 8, Encl. A, ¶ 3d). However, the ROE withheld the authority to declare a force or individual hostile to certain levels of command.[1] (Pros. Ex. 8, Encl. A, ¶ 3d). During petitioner's deployment there were no declared hostile forces. (R. at 694). In addition to the Standing ROE, the ROE during petitioner's deployment required soldiers to have "positive identification" of threats before engaging them with force. (R. at 197).

When one of the platoon leaders within the squadron was wounded, petitioner was selected to take over the platoon. (R. at 242). Petitioner told a fellow officer that he was concerned about his standing among his peers because he did not have a Ranger Tab or Combat Infantryman Badge (CIB), and noted that

[1] The document establishing the level of command authorized to declare a force hostile is classified and was not admitted at trial.

there was not much time left in the deployment for him to earn a CIB. (R. at 782, 784). The CIB is awarded for infantrymen who actively participate in ground combat with an infantry unit. Army Reg. 600-8-22, Personnel—General: Military Awards, para. 8-6 (25 Jun. 2015). Petitioner's new troop commander, Captain (CPT) Swanson, briefed petitioner before he took over the platoon, emphasizing the importance of the ROE and establishing positive identification before engaging. (R. at 706). Petitioner told CPT Swanson that one of his top priorities was to increase attendance by the locals in his area of operations at weekly *shuras*.[2] (R. at 703).

Petitioner was aware that his new platoon had recently suffered several casualties. (R. at 165, 289, 300). He told the platoon members that, under him, there would be no more casualties. (R. at 300, 503). When petitioner arrived at the platoon, his first act was to threaten a local Afghan's young child with death. (R. at 256). Next, petitioner directed two of his marksman to fire shots from towers into the nearby village in the vicinity of the villagers as they went about their business. (R. at 244-46, 257-66, 298). Petitioner explained that he loved the platoon and hated the Afghans, and that the purpose of the firing was to make the Afghans want to come to his *shura* to complain. (R. at 244, 300). He laughed

[2] In Afghanistan, a *shura* is a meeting held within the community to decide important issues.

and said, "[I]t's funny watching those fuckers dance." (R. at 296). He then told one of the soldiers to report to their higher headquarters that the platoon had received fire from the village. (R. at 298). The soldier refused to do so. (R. at 298-99).

The next day, on 2 July 2012, petitioner planned a dismounted patrol in the village, before which he gave a brief to the platoon. (R. at 301-02). At the brief, petitioner told the platoon that anyone found riding a two-wheeled motorcycle was to be engaged on sight. (R. at 302, 362, 448, 526-27, 628, 640). The use of motorcycles by the local population was exceedingly common. (R. at 224, 361, 694). Witnesses disagreed on whether petitioner told them that the change had come from a higher headquarters or the Afghan army. (R. at 362, 504, 640). Petitioner also posted a sign in the platoon headquarters that said there would be no motorcycles permitted in the village. (R. at 745). Petitioner briefed the platoon that the purpose of the patrol was to get revenge for one of the recent casualties by conducting a "shock-and-awe" campaign. (R. at 527).

As the platoon left their strong point several locals approached to complain about being shot at the day before. (R. at 308). Petitioner dispersed them by threatening them with his weapon and counting down from five. (R. at 450, 529, 642). As the platoon continued on its patrol, Private First Class (PFC)

Skelton reported to petitioner that he saw a motorcycle in the village with three men on it. (R. at 534). Private First Class Skelton did not report any other facts to petitioner, only that there were three men on a motorcycle. (R. at 534-35). Petitioner ordered PFC Skelton to shoot the men, and PFC Skelton attempted to do so, missing. (R. at 365, 452, 534-35, 668). The men on the motorcycle stopped, dismounted, and tried to talk to some of the Afghan soldiers who were accompanying the platoon, but the Afghans sent them away. (R. at 540-41). The men returned to the bike and re-mounted it. (R. at 738). Petitioner then ordered another soldier, Private (PVT) Shilo, positioned in a support position in the turret of a vehicle, to open fire on the men. (R. at 738). Private Shilo did so, killing two of them. (R. at 739). The third man, who was wearing all white, ran away. (R. at 366, 545). Petitioner then told PVT Shilo to open fire on the motorcycle itself, but PVT Shilo refused because a twelve-year-old boy was nearby. (R. at 743-44, 748-49).

A short time later helicopter support (known as close combat attack or CCA) arrived in the area. (R. at 367). Private Thomas was the only member of the platoon who was on the fires radio network, and thus the only one who could communicate with the helicopters. (R. at 367-68). Private Thomas told petitioner that the helicopters had arrived, and petitioner

responded, "Thomas, I want that guy dead by CCA, time: Now." (R. at 368-69). When PVT Thomas asked if he could provide a better description of the man in white, petitioner responded, "[Y]ou never want to give CCA a good description of the person because that makes them seem innocent." (R. at 370).

As the patrol entered the village, petitioner said, "That's one hell of a gate code, a KIA [killed-in-action]." (R. at 456). Soon after, the platoon sergeant caught up with petitioner and asked what happened. (R. at 497). Petitioner lied, telling him that the helicopters had reported that the men on the motorcycle had weapons. (R. at 498). The platoon sergeant responded that the platoon must conduct a battle damage assessment (BDA) of the engagement site. (R. at 498). Typically, the BDA would be completed with equipment that allowed the platoon to capture biometric data on the casualty and test for explosive residue on the body. (R. at 371-72, 647). Private First Class Skelton had this equipment but other soldiers were conducting the BDA. (R. at 372, 549). When PFC Skelton offered to use the equipment to assist in the BDA, petitioner told him to stop, saying, "[Y]ou're not going to like the results." (R. at 372, 549).

The soldiers conducting the BDA found two dead men and the motorcycle, still standing with the kickstand. (R. at 646-47). The soldiers were approached by a male and female and some

children, all of whom were crying, carrying large sheets, and saying they were relatives. (R. at 454). On the bodies, the soldiers found an identification card, a set of keys, a small flashlight, a rolled piece of paper, three cucumbers, some pens, a small pair of scissors, and a gourd. (R. at 648, 651; Pros. Ex. 7). They did not find any weapons or evidence of bomb-making. (R. at 647). Petitioner then interrupted the BDA and told the villagers to take the bodies away. (R. at 372-3). Then, petitioner told the radio operator to tell their higher headquarters that they could not conduct BDA because the locals had already taken the bodies. (R. at 552-53, 630-31). Petitioner explained to the radio operator, "Say exactly what I say; I've worked in the [tactical operations center] before. I know what they need to know so that they don't ask questions." (R. at 553, 630). When the radio operator refused to give the false report, petitioner grabbed the radio microphone and did so himself. (R. at 631, 709).

As the platoon entered the village and started conducting BDA, a crowd of about ten to twenty people began massing at a position to the north of the platoon. (R. at 323-24, 330). A motorcycle left the crowd and began travelling toward one element of the platoon. (R. at 329-30). Petitioner told the element to shoot the motorcyclist. (R. at 329-30). A soldier refused, and instead detained the driver. (R. at 330).

Petitioner responded, "[F]ine, fucking whatever. Just hold on to him." (R. at 331). This man's hands tested positive for explosive residue. (R. at 593). The detention of the motorcyclist occurred about 200 to 250 meters from the murders. (R. at 594).

About fifteen minutes later, the platoon got a report that their higher headquarters had intercepted radio transmissions from certain other locals discussing the platoon's position and apparently planning an attack. (R. at 510-11). Based on this information, a member of the platoon shot and killed two men carrying radios. (R. at 510-11). This engagement occurred about 700 meters away from the murder of the motorcycle riders. (R. at 512-14).

When the patrol was completed, petitioner said, "[W]oo-hoo, that's fucking awesome." (R. at 333). When the soldiers voiced their displeasure, he responded, "[Y]ou're right, you're right. Next time we'll stick to our ROE." (R. at 333-34).

Private First Class Skelton was responsible for preparing storyboard intelligence reports after each mission. (R. at 554). Petitioner told him not to include the information learned from the BDA conducted on the dead bodies. (R. at 554). However, because the platoon had taken a detainee, PFC Skelton went to the troop headquarters to process him. (R. at 554-55). Sensing that something wrong had occurred, PFC Skelton handed

the troop commander the personal effects taken from the bodies and told him that there may have been civilian casualties on the mission. (R. at 555; 713). An investigation was begun and petitioner was moved back to the headquarters area, where he told a bunkmate, "I can't wait to get back and I'll shoot every motorcycle I see." (R. at 469).

The defense argued that petitioner acted in self-defense based on the speed of the motorcycle and his knowledge of the enemy's past use of motorcycles. (R. at 879-83). The panel found petitioner guilty of the murder of the two dead men, the attempted murder of the man in white, and various other offenses. (Charge Sheet; R. at 919).

The petition alleges newly discovered evidence relating to the identities of the victims. Petitioner claims that the evidence was discovered by counsel and an investigator after the trial based on information available on a number of unclassified government databases. (Pet'r Br. 1, 7, 9, 18). Petitioner's expert affiant explains that the information was obtained "in the ordinary course of business" from these databases. (Def. App. Ex. K). The alleged newly discovered evidence is summarized in graphic format in print and video media. (Def. App. Ex. G; Def. App. Ex. K). Each exhibit summarizes the information supposedly discovered on the databases and synthesizes it with information found in the Criminal

Investigation Division (CID) file and record of trial (ROT) in the "wire diagram" format customarily used by intelligence professionals. (Def. App. Ex. G; Def. App. Ex. K). The underlying information from the databases is not included; rather, petitioner has provided to this court only the summary of appellate counsel and his expert consultant. (Def. App. Ex. G; Def. App. Ex. K).

In summarizing how the newly discovered evidence relates to the facts elicited at trial, petitioner breaks sharply from the ROT in several important respects. First, petitioner's affiant states that helicopter assets were in the vicinity of the platoon before the murders, and reported a massing of individuals on motorcycles directly and exclusively to petitioner. (Def. App. Ex. K). This is contrary to the evidence in the record. Rather, the air assets arrived after the murders, and communicated exclusively with the radio operator. (R. at 366-69).

Second, the video affidavit states that the victims ignored posted signs restricting access to the road and the warnings of Afghan soldiers to stop when they were killed, and thus, they were "killed for disregarding lawful commands and driving on a restricted roadway." (Def. App. Ex. K). There is simply no evidence of this in the ROT or anything submitted to either this court or the convening authority by petitioner. To the

contrary, PVT Shilo testified that he killed the victims when they were mounted on the motorcycle while it was parked and not moving. (R. at 738-39). The ROT contains no evidence of signs in the road. These are just two examples; petitioner's submitted affidavit is riddled with this sort of unsupported assertion, and is more in the nature of a closing argument-by-Powerpoint than a statement of the purported newly discovered evidence. Even taking it entirely at face value, it establishes only: (1) that the two deceased victims *knew* a man who had been detained before the murders, and who can be linked in some manner to a *subsequent* improvised explosive device (IED) event, *i.e.*, one that occurred *after* the murders; and (2) that the victim wearing white who survived can be linked in some manner to a separate IED event, which also took place *after* the murders. (Def. App. Ex. G; Def. App. Ex. K).

Argument

This court should deny the petition because petitioner has failed to establish that the evidence is such that it would not have been discovered at the time of trial in the exercise of due diligence. Further, the evidence does not establish that the victims were targetable enemies, and thus would not probably produce a substantially more favorable result for petitioner. Even assuming for the sake of argument that the evidence conclusively establishes that the victims were enemies, it would

nonetheless not support any defense because of the lack of any evidence that petitioner knew of the victims' identities when he ordered them killed. Finally, this court should not consider the effect the purported newly discovered evidence may have had on the initial disposition of this case, or petitioner's extra-legal arguments.[3]

An accused may petition a court of criminal appeals for a new trial on the basis of newly discovered evidence within two years of the convening authority's approval of his sentence. UCMJ art. 73. However, "'requests for a new trial . . . are generally disfavored,' and are 'granted only if a manifest injustice would result absent a new trial . . . based on proffered newly discovered evidence." *United States v. Hull*, 70 M.J. 145, 152 (C.A.A.F. 2011) (quoting *United States v. Williams*, 37 M.J. 352, 356 (C.M.A. 1993)).

> A new trial shall not be granted on the grounds of newly discovered evidence unless the petition shows that:
>
> (A) The evidence was discovered after trial;
>
> (B) The evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and

[3] Petitioner's proffered evidence relates only to his murder and attempted murder convictions, the Specification of Charge I and the Specifications of Charge III, and has no bearing on petitioner's various other convictions under Article 134, UCMJ.

> (C) The newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

Rule for Courts-Martial [hereinafter R.C.M.] 1210(f)(2). A court of criminal appeals has "the 'prerogative' of weighing 'testimony at trial against the' post-trial evidence 'to determine which is credible.'" *United States v. Brooks*, 49 M.J. 64, 68 (C.A.A.F. 1998) (quoting *United States v. Bacon*, 12 M.J. 489, 492 (C.M.A. 1982)). Accordingly, "[t]he Courts of Criminal Appeals 'are free to exercise . . . their factfinding powers.'" *Id.* (quoting *Bacon*, 12 M.J. at 492).

A. Petitioner has failed to show that the evidence could not have been discovered at trial through due diligence.

In attempting to show a discovery violation at trial,[4] petitioner highlights the availability of the evidence and its location on unclassified government networks. (Pet'r Br. 9). Petitioner does not explain how he came into possession of the evidence, except to say that he did so "after expending many man hours and substantial funds . . . " and "in the ordinary course of business." (Pet'r Br. 18; Def. App. Ex. K).

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[4] Petitioner argues at length that legal error occurred in the prosecution's non-disclosure of the purported newly discovered evidence. (Pet'r Br. 13-19). But legal error is not required in the consideration of a petition for a new trial, only that the evidence is newly discovered, that it could not have been discovered before through due diligence, and that a substantially more favorable result would occur if a court-martial considered the evidence. R.C.M. 1210(f)(2).

Petitioner has thus failed to meet his burden of establishing that the evidence could not have been discovered "at the time of trial in the exercise of due diligence." R.C.M. 1210(f)(2)(B). All that can be gleaned from the petition is that petitioner exercised due diligence only after trial, and that his due diligence allowed him to discover the evidence. He has failed to show that the same efforts before trial would not have discovered the evidence. While petitioner alleges that the government failed to disclose the evidence, nothing in the record or the petition even hints at a government effort to purposely hide the evidence from petitioner. Much of the purported newly discovered evidence is based on a review of the CID file, which was certainly disclosed to petitioner at trial, as the record reflects no motion for discovery of the file.

Apparently, had petitioner looked for this evidence before trial in whatever manner he looked for it after trial he would have discovered it and had it available for use. He has therefore failed in his burden before this court to show that the evidence could not have been found through reasonable diligence at trial, and this court should therefore deny the petition.

B. Petitioner has failed to show that the evidence would probably produce a substantially more favorable result at a court-martial.

The affidavit's summary of the evidence purportedly on the government databases is insufficient for this court to draw the conclusion urged by petitioner, that the victims were enemy combatants. Even if the victims were enemy combatants, the result at trial would be the same because the ROE did not permit the offensive targeting of enemy combatants and petitioner has not shown any new reason for him to have thought that they were enemy combatants at the time of the offenses. Any effect the newly discovered evidence could have had on the initial disposition of this case is not pertinent for purposes of the petition because courts reviewing petitions for a new trial are concerned only with the evidence's potential effect on a court-martial. Finally, petitioner's extra-legal argument that the government witnesses would have altered their testimony had they believed the victims were enemies should be dismissed outright.

1. The evidence does not establish that the victims were enemy combatants.

"A death, injury, or other act caused or done in the proper performance of a legal duty is justified and not unlawful." R.C.M. 916(c). Additionally, one element of murder is that the killing was "unlawful." *Manual for Courts-Martial, United*

States (2012 ed.) [hereinafter *MCM*], pt. IV, ¶ 43b(2)(c). A killing is unlawful "when done without justification or excuse." *MCM*, pt. IV, ¶ 43c(1) (citing R.C.M. 916). "[I]t is lawful to kill an enemy 'in the heat and exercise of war.'" *United States v. Calley*, 22 U.S.C.M.A. 534, 540, 48 C.M.R. 19, 25 (1973) (citing Digest of Opinions of the Judge Advocates General of the Army (1912) 1074-75 n.3); *see also* R.C.M. 916(c) discussion.

Whether a given killing was lawfully done in the exercise of war requires reference to the law of armed conflict. *See* Dep't of Def., Law of War Manual [hereinafter LOW Manual] § 1.3.2.1 (2015) (describing the law of armed conflict as the *lex specialis* governing armed conflict). The non-binding discussion to R.C.M. 916(c) provides that the legal duty "may be imposed by statute, regulation, or rule." However, no domestic statute, regulation, or rule provides for the lawful targeting of enemy combatants, yet the same discussion goes on to state, "[K]illing an enemy combatant in battle is justified." R.C.M. 916(e) discussion. "The customary law of war is part of U.S. law insofar as it is not inconsistent with any treaty to which the United States is a Party, or a controlling executive or legislative act." LOW Manual § 1.10.2.2 (citing *The Paquete Habana*, 175 U.S. 677, 700 (1900)). Accordingly, especially given the use of the word "may," R.C.M. 916(c)'s discussion should be read as providing a non-exhaustive list of possible

sources of the legal duty and, in the context of targeting in combat, this court should look to the law of armed conflict as defining the proper performance of the legal duty to engage the enemy.[5]

Under the law of armed conflict, "a combatant's 'killing, wounding, or other warlike acts are not individual crimes or offenses,'" so long as such actions are "done in accordance with the law of war." LOW Manual § 4.4.3 (quoting E.D. Townsend, Assistant Adjutant General, General Orders No. 100, *Instructions for the Government of Armies of the United States in the Field* art. 57 (24 Apr. 1863), *reprinted in Instructions for the Government of Armies of the United States in the Field* (Government Printing Office, 1898)[6]). The foundational principles applicable to international armed conflicts are equally applicable to non-international armed conflicts, such as the war in Afghanistan. LOW Manual § 17.1.2.2 (citing *Prosecutor v. Tadic*, ICTY Appeals Chamber, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on

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[5] *See* Model Penal Code § 3.03(1)(d) (1962) (providing an enumerated justification defense for the use of force when required or authorized by "the law governing the armed services or the lawful conduct of war"). Persuasively, the drafters of the Model Penal Code explained, "The law that defines [the] duty is to be looked to for the justification of the conduct . . . ." Model Penal Code § 3.03(1)(d) explanatory note. *See also* 2 Wayne R. LaFave, *Substantive Criminal Law* § 10.2(c) (2nd ed. 2003) (defense applies if act is done "within the rules of warfare.").

[6] These instructions are generally known as the Lieber Code.

Jurisdiction, ¶ 119 (2 Oct. 1995)).[7] Two such principles are military necessity and distinction. LOW Manual § 2.1. Under these principles, a combatant may lawfully target both persons belonging to a non-state armed group (such as the Taliban or al-Qaeda) and civilians taking a direct part in hostilities. LOW Manual §§ 5.8.3, 5.9.

Here, petitioner fails to show that his proffered evidence would probably result in a substantially more favorable result because the evidence falls far short of establishing that his victims were lawful targets. First, petitioner has failed to provide this court with the substantive evidence on which he apparently relies. By reading petitioner's submissions to the convening authority, it appears he would seek to establish the identities of his victims through the statements of witnesses interviewed by CID special agents during their investigation. But petitioner has not provided this court with those statements, or for that matter any affidavit from the witnesses or the special agents who interviewed them. *See* R.C.M. 1210(c)(9) (requiring the provision of "[t]he affidavit of each person whom the accused expects to present as a witness in the event of a new trial.").

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[7] *See also* LOW Manual § 3.3.1 (citing *Hamdan v. Rumsfeld*, 415 F.3d 33, 44 (D.C. Cir. 2005) (Williams, J., concurring), *revs'd*, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (defining non-international armed conflict).

Building on what he asserts to be his victims' identities, petitioner would apparently then seek to establish these individuals' hostility to US interests with the data he claims to have discovered on government databases. But petitioner has not provided a copy of that data to this court. Instead, the video affidavit simply summarizes what the affiant claims to have found on those databases in a conclusory and argumentative fashion. This court should not take the extreme and "disfavored" step of granting a new trial on so minimal a showing. *Cf. Hull*, 70 M.J. at 152 (holding that staff judge advocate did not err in advising convening authority to deny new trial petition based on vague and uncorroborated unsworn statement of a new witness).

Second, even taking petitioner's summary of the database evidence at face value, it does not establish any basis for a new trial. At best, such an approach would show that petitioner's deceased victims engaged in no nefarious acts themselves, but *knew* a man who was once detained, and who is "associated" with an "IED event" that occurred after the murders. It would further show that the surviving victim of the attempted murder was, similarly, involved in some fashion with another *later* IED "event." The precise contours and vagaries of what constitutes a member of a non-state armed group or a civilian directly participating in hostilities under the law of

armed conflict are unimportant, as under no theory does the evidence before this court do any work toward establishing that the victims were lawful targets. It is as likely that these individuals decided to participate in hostile acts because of petitioner's murder of their friends and family as it is that they intended to all along. Petitioner's intelligence-based, extended web of associations may well be useful to a commander in combat in prioritizing his efforts, but does little to show that a court-martial would "probably" render a "substantially" more favorable result. R.C.M. 1210(f)(2)(C). Accordingly, petitioner has failed to meet his heavy burden, and this court should deny the petition for a new trial.

2. Even assuming the victims were enemy combatants, the ROE prevented petitioner from targeting them.

Even assuming for the sake of argument that the victims were enemies, petitioner was not authorized to target them without their committing a hostile act or demonstrating imminent hostile intent. A justification defense is only available if the act is done in the "proper" performance of a legal duty. R.C.M. 916(c). An accused's superior commanders or other competent authorities may limit the scope of what actions are justified with the ROE, even if those actions would otherwise be justified under the law of armed conflict. *Cf. United States v. Smith*, 68 M.J. 316, 320-21 (C.A.A.F. 2010); *accord* LOW Manual §

1.6.5. "A competent authority is 'a person authorized by applicable law to give . . . an order.'" *Id.* at 320 (quoting *United States v. Deisher*, 61 M.J. 313, 317 (C.A.A.F. 2005)).

In *Smith*, the appellant was convicted of offenses related to his use of dogs to intimidate detainees in Iraq. He claimed that his brigade-level commander had ordered him to use the dog, and asserted that it was legal error for the military judge to not give an obedience to orders instruction. *Id.* However, the evidence also showed that a superior directive withheld the approval for the use of dogs to the division-level commander. *Id.* at 320-21. The court held that, because only the division-level commander could give an order to use the dog in the manner the appellant did, even if the order was given by the brigade-level commander, it was not lawful, and there was no instructional error. *Id.*

Like in *Smith*, here, a competent authority limited petitioner's authority to offensively engage any and all lawful targets as he pleased. The Chairman of the Joint Chiefs of Staff limited the authority to declare a force or specific terrorist hostile to certain levels of command. (Pros. Ex. 1, Encl. A, ¶ 3d). Petitioner's immediate superior, his troop commander, testified that no forces were declared hostile and that he had no authority to declare a force hostile. (R. at

694). It follows that petitioner was not himself authorized to declare a force or individual hostile.

In the absence of a declared hostile force, petitioner was authorized to use force only in self-defense or the defense of others. (Pros. Ex. 1, Encl. A, ¶ 3a). To hold otherwise would be to hold that the Chairman of the Joint Chiefs of Staff is incapable of preventing his subordinates from engaging any targets they wish, so long as the target is lawful under the law of armed conflict. Very much to the contrary:

> The difference between a military organization and a mob is the role of command and control in channeling, directing, and restraining human behavior . . . . The only way the mission can be performed is if all elements perform their functions in accordance with the guidance and restrictions imposed by the command . . . . The harsh reality of command responsibility is that military leaders constantly face difficult choices in meeting the competing demands of operational goals and force protection, while at the same time addressing a host of related issues concerning the environment, innocent civilians, and collateral damage resulting from the use of force. It is the commander, not the subordinate, who must assess these competing concerns and develop command priorities. Given the destructive weaponry that our nation entrusts to our military leaders, there is no other way to control and direct the awesome power that is vested in the armed forces . . . . Every officer and enlisted person under [a] command has a duty to perform in support of the commander's priorities, and is guided in that duty by orders that both direct and

> restrict the servicemember's scope of action.

United States v. Rockwood, 52 M.J. 98, 107-08 (C.A.A.F. 1998).

Because the ROE restricted the scope of petitioner's action by prohibiting the offensive targeting of forces, he was not permitted to target whomever he wished, but only to act in self-defense, upon the commission of a hostile act or the demonstration of imminent hostile intent. (Pros. Ex. 1, Encl. A, ¶ 3a). Whether petitioner was authorized to use force in self-defense or the defense of others was the factual issue most extensively litigated at trial, and nothing about the purported newly discovered evidence could have changed the disposition of that issue.[8] Accordingly, even if the victims were enemy combatants, petitioner was not authorized to order their death, a court-martial would not "probably" produce a "substantially" more favorable result at a new trial, and this court should deny the petition for a new trial.

3. Even if the victims were enemy combatants, petitioner did not know it, and the result at trial would have been the same.

Petitioner offers a number of possible defenses that could have been raised had the court-martial been presented with his

[8] As discussed more thoroughly below, nothing about petitioner's proffered new evidence goes to show that petitioner knew his victims' identities, affiliations, or later activities at the time he ordered PVT Shilo to kill them.

purported newly discovered evidence, including negating the unlawfulness of the killings and attempted killing, raising a defense of justification, and supporting his trial defense of self-defense or defense of others. (Pet'r Br. 23-24). Each of these defenses is a justification defense. "'Justification' was not traditionally a separate defense in Anglo-American jurisprudence, but rather denoted a category of defenses that included 'necessity,' 'self-defense,' and 'public duty.'" *Rockwood*, 52 M.J. at 112 n.15 (citing Model Penal Code art. 3).

A common thread runs through justification defenses, a mental state requirement for the accused. For necessity, the accused must have a reasonable belief that some greater harm will occur if he does not commit the offense. *See id.* at 113-14. For self-defense and defense of others, the focus is entirely on the mental state of the accused; no other consideration is relevant. *See* R.C.M. 916(e). For obedience to orders, the accused must reasonably believe the order given was lawful. *See* R.C.M. 916(d). For the use of force to effect an arrest, the accused must have reasonably believed the force was necessary. *See* R.C.M. 916(c) discussion (requiring force to be "reasonably necessary"). Public duty defenses require a mental state for the accused. *See United States v. Bear*, 439 F.3d 565, 568 (9th Cir. 2006) (explaining that defendant must "reasonably believe that a government agent authorized her to engage in

illegal acts."); Model Penal Code § 3.07(3) (requiring belief that force is immediately necessary for use of force to prevent escape defense); Model Penal Code § 3.07(4) (requiring belief that arrest is lawful for use of force in aid of arrest defense); Model Penal Code § 3.07(5) (requiring belief that force is immediately necessary for use of force to prevent suicide or commission of a crime defense). For parental discipline, the accused must have "the purpose of safeguarding or promoting the welfare of the minor . . . ." *United States v. Robertson*, 36 M.J. 190, 191 (C.M.A. 1992) (quoting Model Penal Code § 3.08(1)).

A mental state requirement applies to the justification defense of killing an enemy combatant, in order to make the killing a "proper" execution of a lawful duty. R.C.M. 916(e). Consistent with the law of armed conflict, soldiers must make targeting decisions "in good faith and based on their assessment of the information available to them at the time." LOW Manual § 5.4.2. Accordingly, the law of armed conflict eschews post-hoc analysis and declines "to second-guess military decisions with the benefit of hindsight." *Id.* (citing *United States v. List, et al.* (The Hostage Case), XI TRIALS OF WAR CRIMINALS BEFORE THE NMT 1295-96). In addition to this law of armed conflict-based requirement of good faith, commanders may impose a heightened mental state requirement. *Id.* at § 5.5.3.1 (providing the example of the requirement of "positive identification," which

has generally meant "a reasonable certainty that the proposed target is a legitimate military target."). To hold that no mental state is required would be to hold that a soldier can kill whomever he wants, willy-nilly, and escape liability on the post-hoc, fortuitous finding that the victim was actually a lawful target. This would eradicate the principle of distinction from military justice and prevent commanders from using the ROE to heighten the mental state required, thereby "channeling, directing, and restraining human behavior." *Rockwood*, 52 M.J. at 107.

Here, nothing about the proffered new evidence would go to establish that petitioner had any new reason to believe his victims were enemy combatants. Petitioner asserts, as he must to prevail on the petition, that the evidence of his victims' nefarious activities and associations was not known to him until after the court-martial. (Pet'r Br. 13). This fact is dispositive of his justification claim. If petitioner did not know of the identities, activities, and associations of his victims until after he ordered their deaths, that information cannot have affected his reason to believe they were lawful targets. Accordingly, the newly discovered evidence could not have undercut the government's evidence of unlawfulness or established a justification defense.

The timing of petitioner's realization of his victims' purported enemy status is similarly dispositive of his claim that a self-defense or defense of others claim would be supported by the evidence. For self-defense to apply the accused must have "(A) [a]pprehended, on reasonable grounds, that death or grievous bodily harm was about to be inflicted wrongfully on the accused; and (B) [b]elieved that the force the accused used was necessary for protection against death or grievous bodily harm." R.C.M. 916(e)(1). The same principles apply to defense of another. R.C.M. 916(e)(5).

Certainly, if an accused knows of a person's associations or activities before targeting him, such knowledge could inform the reasonableness of his apprehension of harm. But petitioner did not know of the evidence until after trial. "It is undisputed that 1LT Lorance never fired his weapon and did not actually see the threat as he was below a large grape berm while PFC Skelton fired from above." (Pet'r Br. 25). Instead, petitioner argued that what he knew about the enemy's use of motorcycles provided him with a reasonable apprehension of harm. (R. at 879-83). The panel resolved this against him. Even assuming his victims were in fact enemy fighters, it would have done nothing to assist in his self-defense or defense of others defenses because he did not know it at the time he killed them. Accordingly, the purported newly discovered evidence does not

support a self-defense or defense of others defense, even assuming it conclusively establishes that the victims were enemies, and the evidence would not probably cause a substantially more favorable result at a court-martial. This court should therefore deny the petition.[9]

4. Any effect the evidence could have had on the initial disposition of the case is irrelevant.

Petitioner argues that a substantially more favorable result in the form of an initial disposition of other than court-martial could have been produced for him had various pre-referral military justice actors known of the proffered evidence. Even if this were true, it would not assist petitioner here. To grant a petition for a new trial, a court must find that "[t]he newly discovered evidence, *if considered by a court-martial* in light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused." R.C.M. 1210(f)(2)(C) (emphasis added). As the plain language of the rule makes clear, a court may not grant a petition for a new trial on the basis of the newly discovered evidence's possible effect on initial disposition, but rather

[9] Petitioner also argues that the evidence would support a mistake of fact defense. (Pet'r Br. 24). This contention is illogical. A mistake of fact defense only applies when the accused is ignorant of or mistaken as to some fact. R.C.M. 916(j)(1). Assuming again that the purported newly discovered evidence conclusively establishes that the victims were enemies, and assuming even further that petitioner believed or knew this at the time he killed them, the evidence does precisely the opposite of establishing a mistake of fact; it establishes that there was no mistake.

only on the outcome of a court-martial. Accordingly, this court should deny the petition.

5. Petitioner's extra-legal arguments should be ignored.

Petitioner states:

> Had the evidence been disclosed, the defense could have used it when conducting pretrial interviews of the prosecution's main witnesses. If the paratroopers of 1st platoon knew that the military-aged-males were actually IED makers and insurgent fighters linked to U.S. casualties, their testimony offered to convict 1LT Lorance, [sic] would probably have been different on direct-examination and on cross-examination as to all the issues in this court-martial.

(Pet'r Br. 21-22). The apparent implication is that, had the witnesses known of the newly discovered evidence, they would have become biased against the victims and altered their testimony in favor of petitioner.

Petitioner is not entitled to a new trial so that he can create a bias in the government witnesses in the hope that they alter their testimony from the truth. This contention should be disregarded.

Conclusion

WHEREFORE, the Government respectfully requests this Honorable Court deny the petition for a new trial.

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Appendix

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Model Penal Code

PART I. GENERAL PROVISIONS
ARTICLE 3. GENERAL PRINCIPLES OF JUSTIFICATION

Model Penal Code § 3.03

§ 3.03. Execution of Public Duty.

(1) Except as provided in Subsection (2) of this Section, conduct is justifiable when it is required or authorized by:

(a) the law defining the duties or functions of a public officer or the assistance to be rendered to such officer in the performance of his duties; or

(b) the law governing the execution of legal process; or

(c) the judgment or order of a competent court or tribunal; or

(d) the law governing the armed services or the lawful conduct of war; or

(e) any other provision of law imposing a public duty.

(2) The other sections of this Article apply to:

(a) the use of force upon or toward the person of another for any of the purposes dealt with in such sections; and

(b) the use of deadly force for any purpose, unless the use of such force is otherwise expressly authorized by law or occurs in the lawful conduct of war.

(3) The justification afforded by Subsection (1) of this Section applies:

(a) when the actor believes his conduct to be required or authorized by the judgment or direction of a competent court or tribunal or in the lawful execution of legal process, notwithstanding lack of jurisdiction of the court or defect in the legal process; and

(b) when the actor believes his conduct to be required or authorized to assist a public officer in the performance of his duties, notwithstanding that the officer exceeded his legal authority.

NOTES:

Explanatory Note

Subsection (1) provides the general justification for conduct required or authorized by public or official duty. The law that defines such duty is to be looked to for the justification of the conduct.

Subsection (2) qualifies Subsection (1) by providing that the other sections of Article 3 control the situations to which they specifically refer and that the use of deadly force is never authorized except when specifically authorized by law, as by the succeeding sections, or when it occurs in the lawful conduct of war.

Subsection (3) prescribes two situations in which the actor's mistaken belief in his legal authority will supply a justification. The lack of jurisdiction of a court or a defect in legal process will not undercut the justification if the actor

believes his conduct to be required or authorized by the judgment or direction of a competent court or tribunal or by valid legal process. Also, the justification is not undercut when the actor believes that his conduct is required or authorized to assist a public officer in the performance of his duties, even though the officer is in fact acting in excess of his authority.

For detailed Comment, *see* MPC Part I Commentaries, vol. 2, at 23.

Model Penal Code

PART I. GENERAL PROVISIONS
ARTICLE 3. GENERAL PRINCIPLES OF JUSTIFICATION

Model Penal Code § 3.07

§ 3.07. Use of Force in Law Enforcement.

(1) Use of Force Justifiable to Effect an Arrest. Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward the person of another is justifiable when the actor is making or assisting in making an arrest and the actor believes that such force is immediately necessary to effect a lawful arrest.

(2) Limitations on the Use of Force.

(a) The use of force is not justifiable under this Section unless:

(i) the actor makes known the purpose of the arrest or believes that it is otherwise known by or cannot reasonably be made known to the person to be arrested; and

(ii) when the arrest is made under a warrant, the warrant is valid or believed by the actor to be valid.

(b) The use of deadly force is not justifiable under this Section unless:

(i) the arrest is for a felony; and

(ii) the person effecting the arrest is authorized to act as a peace officer or is assisting a person whom he believes to be authorized to act as a peace officer; and

(iii) the actor believes that the force employed creates no substantial risk of injury to innocent persons; and

(iv) the actor believes that:

(A) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or

(B) there is a substantial risk that the person to be arrested will cause death or serious bodily injury if his apprehension is delayed.

(3) Use of Force to Prevent Escape from Custody. The use of force to prevent the escape of an arrested person from custody is justifiable when the force could justifiably have been employed to effect the arrest under which the person is in custody, except that a guard or other person authorized to act as a peace officer is justified in using any force, including deadly force, that he believes to be immediately necessary to prevent the escape of a person from a jail, prison, or other institution for the detention of persons charged with or convicted of a crime.

(4) Use of Force by Private Person Assisting an Unlawful Arrest.

(a) A private person who is summoned by a peace officer to assist in effecting an unlawful arrest, is justified in using any force that he would be justified in using if the arrest were lawful, provided that he does not believe the arrest is unlawful.

(b) A private person who assists another private person in effecting an unlawful arrest, or who, not being summoned, assists a peace officer in effecting an unlawful arrest, is justified in using any force that he would be justified in using if the arrest were lawful, provided that (i) he believes the arrest is lawful, and (ii) the arrest would be lawful if the facts were as he believes them to be.

(5) Use of Force to Prevent Suicide or the Commission of a Crime.

(a) The use of force upon or toward the person of another is justifiable when the actor believes that such force is immediately necessary to prevent such other person from committing suicide, inflicting serious bodily injury upon himself, committing or consummating the commission of a crime involving or threatening bodily injury, damage to or loss of property or a breach of the peace, except that:

(i) any limitations imposed by the other provisions of this Article on the justifiable use of force in self-protection, for the protection of others, the protection of property, the effectuation of an arrest or the prevention of an escape from custody shall apply notwithstanding the criminality of the conduct against which such force is used; and

(ii) the use of deadly force is not in any event justifiable under this Subsection unless:

(A) the actor believes that there is a substantial risk that the person whom he seeks to prevent from committing a crime will cause death or serious bodily injury to another unless the commission or the consummation of the crime is prevented and that the use of such force presents no substantial risk of injury to innocent persons; or

(B) the actor believes that the use of such force is necessary to suppress a riot or mutiny after the rioters or mutineers have been ordered to disperse and warned, in any particular manner that the law may require, that such force will be used if they do not obey.

(b) The justification afforded by this Subsection extends to the use of confinement as preventive force only if the actor takes all reasonable measures to terminate the confinement as soon as he knows that he safely can, unless the person confined has been arrested on a charge of crime.

NOTES:

Explanatory Note

Subsection (1) states the basic principle governing justification for the use of force to effect an arrest. Subject to the qualifications stated in this section and the treatment of mistakes under Section 3.09, the actor must believe that the degree of force that he uses is immediately necessary to effect a lawful arrest.

Subsection (2) states a number of limitations on the authority to use force. If the arrest is under a warrant, the warrant must be valid or believed by the actor to be valid. The actor must make known the purpose of the arrest, unless he believes that the purpose is already known or cannot reasonably be made known. The use of deadly force is restricted to occasions when four conditions are met: the arrest must be for a felony; the actor must be a peace officer or must be assisting one he believes to be authorized to act as a peace officer; the actor must believe that no substantial risk of harm to innocent people will be caused by the force employed; and the actor must believe that the crime for which the arrest is made involved the use or threatened use of deadly force or that a delay in apprehension will create a substantial risk that the person to be arrested will cause death or serious bodily injury.

Subsection (3) deals with the analogous problem of the use of force to prevent escape from custody. Force is justified in this context whenever it would have been justified to effect the arrest under which the custody is maintained, except that the justification for the use of deadly force is broadened in some circumstances. Deadly force may be used in this context by a person authorized to act as a peace officer or by a guard if it is believed to be immediately necessary to prevent an escape from a jail, prison or other institution that is used for the detention of persons charged with or convicted of crime.

Subsection (4) states two special rules relating to the use of force by a private person who assists a peace officer in making an arrest that later turns out to be unlawful. If the actor is summoned by the peace officer for help and if he does not believe the arrest to be unlawful, then he is justified in using any force that would be justified if the arrest were

lawful. The operation of Section 3.09(1) is thus modified in this context. If the actor is not summoned by the peace officer or if he assists another private person, then he is justified in using any force that would be justified if the arrest were lawful, provided that he believes the arrest to be lawful and that the arrest would be lawful if the facts were as he believed them to be.

Subsection (5) deals with the related subject of the use of force to prevent suicides or to prevent the commission of crime. The actor may use force when immediately necessary for these purposes, with two exceptions. First, any limitations on the use of force for the specific purposes dealt with by other provisions in this article apply notwithstanding the criminality of the conduct against which the force is being used, e.g., self-defense. Second, deadly force is not justifiable for crime prevention unless the actor believes that there is a substantial risk that the person he uses force against will cause death or serious bodily injury unless the crime is prevented and that the use of such force presents no substantial risk of injury to innocent persons. Deadly force is also justifiable if the actor believes such force necessary to suppress a riot or a mutiny, after warning that such force may be used has been given.

For detailed Comment, *see* MPC Part I Commentaries, vol. 2, at 106.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original of the foregoing was delivered by hand to this Honorable Court and a copy was served upon Appellate Defense Counsel by hand on 12 November 2015.

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