UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

Deric W. PRESCOTT	)	**Misc. Dkt. No. 2022-03**
Lieutenant Colonel (O-5)	)	
U.S. Air Force,	)	
Petitioner	)	
	)	**NOTICE OF**
v.	)	**DOCKETING**
	)	
UNITED STATES,	)	
Respondent	)	**Special Panel**

Pursuant to Article 73, UCMJ, 10 U.S.C. § 873, a Petition for New Trial in the above styled case was received by this court on 2 May 2022.

Accordingly, it is by the court on this 2d day of May, 2022,

ORDERED:

This petition has been assigned Misc. Dkt. No. 2022-03 and has been referred to a Special Panel for appellate review. The Special Panel in this matter shall be constituted as follows:

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
RICHARDSON, NATALIE D., Colonel, Appellate Military Judge
ANNEXSTAD, WILLIAM J., Colonel, Appellate Military Judge

Pursuant to Rule 21(c) of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, the Respondent may file an answer within 30 days from the date of this notice. A reply may be filed by Petitioner not later than 7 days after the filing of Respondent's answer.

FOR THE COURT

[redacted]

FLEMING E. KEEFE, Capt, USAF
Commissioner

UNITED STATES OF AMERICA, *Appellee*, v. Deric W. PRESCOTT Lieutenant Colonel (O-5) U.S. Air Force, *Appellant*.	PETITION FOR NEW TRIAL Special Panel AFCCA No. 39931 Tried at Peterson Air Force Base, Colorado on 28 October – 8 November and 30 December 2019, before a General Court-Martial Convened by 14 AF/CC.

TO THE HONORABLE, THE JUDGE ADVOCATE GENERAL OF THE AIR FORCE

COMES NOW Petitioner, Lieutenant Colonel Deric W. Prescott, who, by and through counsel, hereby files this petition with The Judge Advocate General of the Air Force for a new trial pursuant to Article 73, Uniform Code of Military Justice; Rule for Courts-Martial (R.C.M.) 1210; and Air Force Instruction 51-201, *Administration of Military Justice*, Chapter 14, Section 14G (18 January 2019, as amended by Air Force Guidance Memorandum dated 30 October 2019).

Pursuant to R.C.M. 1210(c)(1)-(9), Lt Col Prescott provides the following information:

1. Name, service number, and current address of the accused: Deric W. Prescott, DoD ID No. [redacted], residing at [redacted]

2. Date and location of the trial: 29 October – 8 November and 30 December 2019; Peterson Air Force Base, Colorado.

3. Type of court-martial and the title or position of the convening authority: General court-martial convened by 14 AF/CC.

4. Request for the new trial: Lt Col Prescott hereby requests a new trial as to the findings of Guilty and the sentence.

5. The sentence as approved: Lt Col Prescott was sentenced to a dismissal. On 3 June 2020, a convening authority approved the sentence as adjudged.

6. A brief description of any finding or sentence believed to be unjust: Lt Col Prescott submits the findings of Guilty of one charge and one specification brought under Article 80, UCMJ, and one charge and one specification brought under Article 107, UCMJ, and the sentence, must be set aside and a new trial authorized because of newly discovered evidence.

7. Declarations pertinent to the matters in RCM 1210(c)(6): Dr. [redacted] declaration, along with a declaration signed by Lt Col Prescott are attached as described above.

8. Declarations of each person expected to be a witness in the event of a new trial: See Item 7, above.

Evidence Supporting Petition

The focus of this petition is on newly discovered evidence which consists of an expert opinion provided by [redacted] Psy.D., a clinical psychologist who has been treating Lt Col Prescott from January 2021 to the present. (See Attachment 1, Dr. [redacted]'s Declaration (4 pages), dated 4/28/2022). In the course of treating Lt Col Prescott over the last twelve plus months and relying upon other treatment Lt Col Prescott received after trial, Dr. [redacted] came to the following diagnoses: Post Traumatic Stress Disorder; Obsessive Compulsive Disorder; Major Depressive Disorder, Recurrent, moderate. (Atch 1 at 2).

Dr. [redacted] added, in presenting his conclusions:

1. LtCol Deric Prescott suffers from Post Traumatic Stress Disorder and demonstrates a complex presentation of this disorder. Traumas stem from both his childhood and events relating to the current legal troubles. These events exacerbated already existing trauma issues from his childhood.
2. LtCol Deric Prescott also suffers from Obsessive Compulsive Disorder, which manifests in his tendency to accumulate and adhere to and connect with items and possessions that

have any and all emotional significance for him. This tendency is also informed by emotional trauma issues from his childhood.

3. LtCol Prescott is someone who strictly and concretely interprets rules, procedures and guidelines.
4. It is my clinical opinion that at the times in 2017 and 2018 when the offenses were allegedly committed, LtCol Deric Prescott did not have the ability to form specific intent to commit crimes of the nature to which he has been accused and found guilty. This is based on my complete understanding of his clinical history and his personality structure.

(Atch 1 at 3-4).

These new diagnoses were not discovered until after the findings of guilty were announced on 8 November 2019, as reflected in the history of mental health treatment timeline provided in Lt Col Prescott's two-page declaration, dated 29 APR 2022, the record of trial and by the R.C.M. 706 Sanity Board. Even though Dr [redacted] an expert forensic psychologist, was provided to the Defense as a consultant and testified at trial as a defense witness, he did not come to the same conclusions at Dr. [redacted] This can be attributed to the lengthy inpatient treatment and therapy Lt Col Prescott received upon and following the announcement of the findings of guilt. In other words it took extensive treatment over a lengthy period of time before the new diagnoses were could be reached.

Neither the defense expert at trial, nor the members of the sanity board actually *treated* Lt Col Prescott. While they performed tests and interviewed Lt Col Prescott, it took the lengthy post-trial inpatient and outpatient treatment process to fully identify and develop the new diagnoses. The Defense exercised due diligence by seeking an expert psychologist to assist in preparing Lt Col Prescott's defense for trial. There is no way, however, the Defense could have reasonably

discovered the new evidence, given how long it took for the inpatient and outpatient experts to reach their conclusions. Even the sanity board held at the request of the Government did not reach these diagnoses.

The original record of trial is in the possession of the Air Force Court of Criminal Appeals.

Law

Before relief can be granted under Article 73, UCMJ, 10 USC § 873, Petition for a new trial, R.C.M. 1210(f)(2), adds the requirements for newly discovered evidence that:

> (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.

MCM, United States (2019 edition), Part II.

Petitions for new trial are generally disfavored and will not be granted absent a manifest injustice. *United States v. Rios*, 48 M.J. (C.A.A.F. 1998); *United States v. Niles*, 45 M.J. 435 (C.A.A.F. 1996). The petitioner bears a heavy burden of showing that a new trial is an appropriate remedy. *United States v. Giambra*, 38 M.J. 240 (C.M.A. 1993)(victim recantation issue).

Lt Col Prescott did not at trial and does not now claim lack of mental responsibility and does not dispute the findings of the sanity board to the extent they found mental responsibility at the time of the alleged offenses. The new evidence, however, supports a partial mental responsibility defense at the time of the alleged offenses as recognized under military law. See R.C.M. 916(k)(2); *Ellis v Jacob*, 26 M.J. 90 (C.M.A. 1988). This defense could have been presented to negate the specific intent required under Article 80 and Article 107, UCMJ, the offenses of which Lt Col Prescott was convicted.

In light of Dr. [redacted]'s conclusion "that at the times in 2017 and 2018 when the offenses were allegedly committed, LtCol Deric Prescott did not have the ability to form specific intent to

commit crimes of the nature to which he has been accused and found guilty", it is reasonable to also conclude that had this new evidence been presented at trial, "if considered by a court-martial in the light of all other pertinent evidence" a substantially more favorable result would have probably been produced. (Atch 1 at 3-4, R.C.M. 1210(f)(2)(C)).

WHEREFORE, Appellant respectfully requests that this petition be granted.

Respectfully submitted,

[redacted]

FRANK J. SPINNER
Attorney at Law

[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was sent to AFLOA/JAJM, a designated representative of the Judge Advocate General of the Air Force, by email on 29 April 2022.

Respectfully submitted,

[redacted]

FRANK J. SPINNER
Attorney at Law

[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In re **DERIC W. PRESCOTT,** Lieutenant Colonel (O-5) United States Air Force *Petitioner*	)	**UNITED STATES' OPPOSITION TO PETITION FOR NEW TRIAL** Before Panel No. Special Misc. Dkt. No. 2022-03 26 May 2022

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

ISSUE PRESENTED[1]

WHETHER PETITIONER IS ENTITLED TO A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE WHEN THAT EVIDENCE IS A PSYCHOLOGIST'S OPINION SUPPORTING A PARTIAL MENTAL RESPONSIBILITY DEFENSE.

STATEMENT OF STATUTORY JURISDICTION[2]

This Court has jurisdiction to act on Petitioner's request for a new trial under Article 73, Uniform Code of Military Justice (UCMJ). Petitioner filed this petition with The Judge

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[1] The United States recast the issue based on Petitioner's argument in his brief:

> In light of Dr. [redacted]'s] conclusion 'that at the times in 2017 and 2018 when the offenses were allegedly committed, [Appellant] did not have the ability to form specific intent to commit crimes of the nature to which he has been accused and found guilty,' it is reasonable to also conclude that had this new evidence been presented at trial, 'if considered by a court-martial in the light of all other pertinent evidence' a substantially more favorable result would have probably been produced.

(Pet. at 4-5.)

[2] All references to the Uniform Code of Military Justice (UCMJ), Military Rules of Evidence (Mil. R. Evid.), and Rules for Courts-Martial (R.C.M.) are to the 2019 edition of the Manual for Courts-Martial (MCM), unless otherwise noted.

Advocate General (TJAG) while his case was still pending before this Court. Consistent with Article 73 and R.C.M. 1210, TJAG referred the petition to this Court for action.

STATEMENT OF THE CASE

A general court-martial composed of officer members convicted Appellant, contrary to his pleas, of one specification of attempted larceny and one specification of making a false official statement in violations of Article 80 and 107, UCMJ.[3] United States v. Prescott, No. ACM 39931, 2022 CCA LEXIS 205, at *2 (A.F. Ct. Crim. App. 1 Apr. 2022) (unpub. op.) The court-martial sentenced Appellant to be dismissed from the service, and the sentence was approved by the convening authority. Id.

This Court completed its review in accordance with Articles 59(a) and 66(d), UCMJ. It affirmed the findings and sentence after concluding they were correct in fact and law, and that no error was materially prejudicial to Petitioner's substantial rights. Id. at 86. Petitioner then filed a request for reconsideration on 29 April 2022, and a petition for a new trial on 30 April 2022. The factual predicate for both filings is a declaration from a clinical psychologist, Dr. [redacted].

STATEMENT OF FACTS

Court-Martial Convictions

Petitioner submitted a claim on 168 items in the Defense Personal Property System (DPS) following his 2011 permanent change of station (PCS). Id. at 3. Petitioner demanded more than $32,000 in reimbursement, but received $16,309.22 to settle the claim. Id. Petitioner filed another claim on 151 items – asserting about $30,000 in damages – following his 2014 PCS and received $20,538.24 from the shipping company. Id. He received an additional $6,995,90

[3] The members acquitted Appellant of one specification of larceny with regard to his 2014 household goods claim, and three specifications of making false official statements. Prescott, 2022 CCA LEXIS at 19.

after filing a claim with the Air Force Claims Service Center for items the shipping company declined to reimburse. Id. at 3-4.

Petitioner was transferred in 2016 and again filed a household goods claim in connection with the move. Id. at 11. His 2017 claim against the shipping company requested over $41,000 in reimbursement for 146 damaged or missing items. Id. This included over 1,000 pounds of allegedly missing household goods from a sealed "Code 2"[4] shipment, some of which were marked delivered on inventory sheets. Id. at 13. This claim was denied in its entirety and a criminal investigation ensued. Id. at 14.

This Court conducted a detailed legal and factual sufficiency review of Petitioner's case. It observed "one of the most telling aspects of the evidence in the Prosecution's favor is that [Petitioner] claimed approximately 70 items – with an estimated weight over 1,000 pounds – were entirely or partially missing from his 2016 shipment, where his goods had been sealed inside 12 crates and a sofa box, all of which containers had been delivered essentially undamaged to his residence at Minot AFB." Id. at 24. Because Petitioner testified the moving company "picked up all of the items on the inventory and had not erroneously left anything behind in San Antonio," this Court identified "three apparent possibilities" for the panel members to weigh:

> (1) That the items were taken by moving company employees at some point in the process, and not delivered; (2) that the items were delivered by Appellant mistakenly but honestly claimed them as missing; (3) that the items were delivered and Appellant knowingly falsely claimed them as missing . . .

[4] Code 2 shipments "involve[] sealing the servicemember's personal property inside wooden crates at the pickup location" and those crates "remain sealed throughout their transportation and storage until they are opened at the ultimate delivery location for unloading." Prescott, 2022 CCA at 4-5. These "shipments are generally considered more secure" than routine household goods shipments. Id. at 5.

Id.

This Court explained in detail the unlikelihood, based on the evidence adduced at trial, that Petitioner's good were stolen by moving company employees or that Petitioner could have honestly, but mistakenly, claimed more than 1,000 pounds of missing household goods. Id. at 25-28. After detailing certain "[i]mplausible explanations" offered by Petitioner and salient facts about items that were claimed missing or damaged, this Court found the convictions were legally and factually sufficient. Id. at 29-41.

Turning to the false official statement conviction, Petitioner sought reimbursement for damage to "an input plug on the rear" of a Fender speaker in 2011. Id. at 50. The claims inspector viewed and photographed the speaker, but did not find any damage. Id. Petitioner again sough reimbursement for damage to the "back outlet" of the same speaker in 2017. Id. In a statement to Air Force Office of Special Investigations (OSI) agents, Petitioner wrote:

> In 2011, the movers smashed in the front screen and broke the back outlet. Around 2013, I was able to pull the outlet/plug back out. In 2016, there were additional scratches on the speaker and I noticed that the rear plug had broken again. I put in a claim for the broken plug.

Id.

The government introduced a photograph taken by another claim inspector in March 2017 showing the claimed damage to the speaker. Id. That inspector testified and "described the damage as one of the 'recessed parallel inputs' being missing." Id. On cross-examination, Petitioner "acknowledged that if the front of one of his speakers was 'smashed in,' he 'usually would' claim it unless he forgot to for some reason." Id. at 50-51.

Petitioner's "Newly Discovered" Evidence

A four-page declaration from a clinical psychologist, Dr. [redacted], was attached to the petition. (Attachment 1.) Dr. [redacted] has treated Petitioner once per week since 13 January 2021, and

identified Petitioner's "current diagnoses" – Post-Traumatic Stress Disorder (PTSD), Obsessive Compulsive Disorder (OCD), and Major Depressive Disorder. (Id. at 1-2.)

Dr. [redacted] opined that, through "clinical interactions, [he] formulated an understanding of [Petitioner's] unique and idiosyncratic personality structure." (Id. at 3.) Dr. [redacted] continued: "[Petitioner] is an individual ardent to order, law and rules" who "is quite literal and concrete in his thinking process and his understanding of rules and procedures." (Id.) He characterized Petitioner as "an individual beholden to sentimentality and items from his past that represent emotional traumas and difficulties from differing periods of his formative years." (Id.) And, "Because of these traumas, [Petitioner] formed attachments with possessions." (Id.) Dr. [redacted] then offered the following "conclusions" for the Court:

> (1) "[Petitioner] suffers from [PTSD] and demonstrates a complex presentation of this disorder. Traumas stem from both his childhood and events relating to the current legal troubles. These events exacerbated already existing trauma issues from his childhood."
>
> (2) "[Petitioner] also suffers from [OCD], which manifests in his tendency to accumulate and adhere to and connect with items and possessions that have any and all emotional significance for him. This tendency is also informed by emotional trauma issues from his childhood."
>
> (3) "[Petitioner] is someone who strictly and concretely interprets rules, procedures, and guidelines."
>
> (4) Dr. [redacted]'s "clinical opinion [is] that at the times in 2017 and 2018 when the offenses were allegedly committed, [Petitioner] did not have the ability to form specific intent to commit crimes of the nature to which he has been . . . found guilty."

(Id. ta 3-4.)

Petitioner also attached a declaration to explain the timeline of his mental health treatment "as best as [he] can recall" from 2005 through March 2020. (Attachment 2 at 1.)

ARGUMENT

Standard of Review

This Court reviews requests for new trials using the rubric of Article 73 and R.C.M. 1210(f)(2). *See* United States v. Sztuka, 43 M.J. 261, 268 (C.A.A.F. 1995) ("The determination whether sufficient grounds exist under RCM 1210(f)(2) for ordering a new trial rests with the authority considering the petition.") This Court has the prerogative to weigh this post-trial evidence "in terms of credibility as well as materiality." United States v. Bacon, 12 M.J. 489, 492 (C.M.A. 1982) (quotation omitted). It is also "free to exercise" fact finding authority under Article 66(d), UCMJ, when reviewing petitions for a new trial. Id. (citation omitted).

Law

A petitioner may request a new trial under Article 73 on the grounds of newly discovered evidence or fraud on the court. But a new trial "shall not be granted" for newly discovered evidence unless the petition shows that:

> (A)The evidence was discovered after the 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
>
> (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.

R.C.M. 1210(f)(2); *see also* United States v. Luke, 69 M.J. 309 (C.A.A.F. 2011).

To show a new trial is warranted, "[t]he burden is heavier than that borne by an appellant during the normal course of appellate review." Bacon, 12 M.J. at 491 (citations omitted). "[T]he provisions of Article 73 are not designed to permit an accused to relitigate general matters which were presented below and decided adversely to him." Id. at 492 (citations omitted). And a petitioner should not "be granted a new trial merely because his trial tactics failed." Id. (citations

omitted). Thus, requests for a new trial are "generally disfavored" and are "granted only if a manifest injustice would result absent a new trial[.]" 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))

Analysis

Petitioner argues his PTSD and OCD diagnosis prevented him from forming the requisite intent to make a false official statement or attempt larceny. The declaration from Petitioner's treating psychologist, Dr. [redacted], contains sweeping conclusions about Petitioner's mental health in 2017 and 2018, but offers scant explanation in support of the same. These unexplained conclusions fall short of meeting Petitioner's heavy burden to show that a manifest injustice would result without a new trial. This additional evidence about Petitioner's mental health was developed after trial, to be sure. *See* R.C.M. 1210(f)(2)(A). But Petitioner failed to demonstrate that similar evidence could not have been developed at the time of trial in the exercise of due diligence. *See* R.C.M. 1210(f)(2)(B). And Petitioner failed to demonstrate that his additional evidence, in the light of all other pertinent evidence, would probably produce a substantially more favorable result. *See* R.C.M. 1210(f)(2)(C). The petition should therefore be denied.

A. The additional evidence about Petitioner's mental health was developed after trial.

Petitioner was convicted on 8 November 2019, but the presentencing hearing was continued until 30 December 2019 because "some medical issues that arose after the announcement of findings" necessitated a continuance. (R. at 1968, 1970-71.) Dr. [redacted] began treating Petitioner about one year later. (Attachment 1 at 1.) And 15 months after that, Dr. [redacted] concluded in his declaration that Petitioner was not able to form the requisite specific intent to commit a false official statement or attempt larceny. (Id. at 4.) This additional evidence about Petitioner's mental health was therefore developed after trial.

The underlying mental health issues are a different matter. In his declaration, Dr. [redacted] provided Petitioner's "current diagnosis," and implied these underlying mental health conditions were present in 2017 and 2018 when Petitioner committed the charged offenses. (Id. at 2.) Petitioner also documented "as best as [he] can recall" his mental health treatment since 2005. This included "approximately two months of inpatient mental health treatment" with a "treating psychologist" in November 2019 that resulted in a PTSD diagnosis. (Attachment 2 at 2.) This diagnosis came on the heels of mental health treatment in 2017 and 2018 with various psychologists and psychiatrists. (Id. at 1-2.) Petitioner was therefore diagnosed with PTSD – at the latest – before presentencing proceedings began.[5]

Turning to his diagnosis with OCD, Petitioner's summarized treatment history does not identify a prior diagnosis for OCD. But the defense forensic psychologist, Dr. [redacted], evaluated Petitioner and diagnosed him with "Hoarding Disorder with Excessive Acquisition," among other things. (R. at 1688.) Dr. [redacted] explained that Hoarding Disorder "used to be kind of subsumed under . . . OCD. Now, it's in a section called . . . Obsessive Compulsive and Related Disorders. So it's definitely very strongly related to OCD, but not everybody who has OCD also has a hoarding disorder." (Id. at 1688-89.) Because of this "very strongly related" diagnosis, Petitioner's later diagnosis with OCD is newly discovered in only the most technical sense.

[5] The United States recognizes that a new mental health diagnosis discovered after announcement of a guilty verdict in a members trial could not form the basis for reconsideration of findings. *See* R.C.M. 924(a) ("Members may reconsider any finding reached by them before such finding is announced in open session.) It also recognizes that, in the context of a failure to state an offense claim, our superior Court opined "the line of demarcation that separates the 'trial' stage of the court-martial and the 'after trial' stage of a court-martial is the moment of time '*before findings and sentence*.'" United States v. Turner, 79 M.J. 401, 405 (C.A.A.F. 2020) (quoting United States v. Watkins, 21 M.J. 208, 209 (C.M.A. 1986)) (emphasis in original). But this Court need not resolve whether Petitioner was diagnosed with PTSD before or after trial because he otherwise failed to meet his burden for a new trial.

These facts notwithstanding, the additional evidence about Petitioner's mental health, and Dr. [redacted]'s conclusions about how it impacted his culpability, was developed after trial.

B. Petitioner failed to show the evidence could not have been discovered at the time of trial in the exercise of due diligence.

In United States v. Harris, our superior Court reaffirmed the due diligence standard in R.C.M. 1210 applied "to the efforts of defense counsel." 61 M.J. 391, 394 (C.A.A.F. 2005) (citations omitted). Therefore, this inquiry is focused on the actions of trial defense counsel rather than Petitioner, despite Petitioner's extensive legal training and experience. To that end, trial defense counsel did obtain both a sanity board and forensic psychologist to assist with defending against the charged offenses. In some contexts, these efforts would constitute "the requisite due diligence" when petitioning for a new trial. Id. at 395 (requesting a sanity board to explore lack of mental responsibility for client with bipolar disorder was sufficient due diligence). But the context of this petition shows that more was required.

In Harris, the petitioner – a junior enlisted soldier – withheld information from the clinical psychologist who conducted his sanity board. 61 M.J. at 393-94. The confinement facility later referred the petitioner for a psychiatric assessment because of his prescription history. Id. at 393. The psychiatrist then diagnosed the petitioner with Bipolar Type I disorder after learning more about his family history and behavior surrounding the charged offenses. Id. This later diagnosis, and the corresponding conclusion that petitioner lacked mental responsibility, was the newly discovered evidence that justified a new trial.

Here, Petitioner "does not dispute the findings of the sanity board to the extent they found mental responsibility at the time of the alleged offenses." (Pet. at 4.) And there is no evidence before this Court that Petitioner withheld information from the sanity board, the mental health professionals that treated him before trial, or any member of the trial defense team. This

includes the defense forensic psychologist. Trial defense counsel understood that partial mental responsibility was a potential defense to the charges. (R. at 1666.) Indeed, they provided notice to the military judge about potentially asserting such a defense. (App. Ex. CLXV at 12.) That defense counsel notified the military judge about this potential defense, but then disclaimed any intent to pursue it before calling Dr. [redacted] to testify, suggests the defense made a strategic or tactical decision. That decision could have been to not pursue a partial mental responsibility defense through Dr. [redacted] because it would not withstand scrutiny on cross-examination. It could have been something else. But we don't know because Petitioner makes no effort to explain what efforts, if any, trial defense counsel undertook to inform this strategic decision.[6] That is patently insufficient to demonstrate due diligence.

Petitioner instead suggests that no amount of due diligence could have produced Dr. [redacted]'s conclusions before trial because "it took extensive treatment over a lengthy period of time before the new diagnoses were [sic] could be reached." (Pet. at 3.) A claim suggesting that no amount of due diligence could have uncovered the evidence forwarded in support for a new trial requires significant proof, given society's interest in the finality of court-martial convictions. *See* United States v. Niles, 52 M.J. 716, 720 (A. Ct. Crim. App. 2000) (interpreting Article 73 "in a manner that leads to the orderly administration of justice.") (citation omitted). But the proof is lacking. Importantly, Dr. [redacted] does not assert that his "understanding of [Petitioner's] unique and idiosyncratic personality structure" (Attachment 1 at 3) could only be reached through extensive treatment over a lengthy period of time. Whether it took days, weeks, or months is entirely unclear from the evidence that Petitioner provided.

[6] The United States notes that counsel representing Petitioner also represented him at trial. (R. at 2.)

Moreover, Petitioner was evaluated by several mental health professionals before trial, and Dr. [redacted] does not explain why those qualified individuals came to different conclusions about Petitioner's mental responsibility. Instead, Dr. [redacted] draws a general (and unexplained) distinction between a forensic consultant and "a treating psychologist." (Attachment 1 at 3.) It remains that Petitioner underwent a battery of psychological tests before trial that were either conducted or reviewed by Dr. [redacted]. (R. at 1683-86.) Dr. [redacted] described evaluations that occurred in December 2018, almost one year before trial on the merits began. (R. at 1684.) Dr. [redacted] opined that his evaluation of Petitioner "felt much more like a clinical evaluation" even though no treatment recommendations followed. (Id. at 1714.) Looking at this issue from a purely longitudinal perspective, it is unclear why distinctions between treating or forensic psychologists prevented Dr. [redacted] from developing similar evidence on partial mental responsibility.

To the extent that Petitioner believes that a clinical setting is essential to identifying the salient aspects of his mental health issues, Petitioner was also *treated* by mental health professional prior to trial. (Attachment 2 at 1-2.) At various points in 2017, Petitioner was treated by a neuropsychologist, and a "treating psychiatrist" and "treating psychologist" under the Limited Privilege Suicide Prevention (LPSP) program. (Attachment 2 at 1.) In 2018, Petitioner participated in an "Intensive Outpatient Program" along with "additional LPSP mental health treatment." (Id.) The petition provides no insight for this Court as to why those individuals could not have assisted the defense team in developing a partial mental responsibility defense.

Petitioner has the burden to show due diligence when asking for a new trial. It is a heavy burden because the remedy is disfavored under the law. Petitioner attempted to meet his burden in showing due diligence by drawing a general (and unexplained) distinction between treating

and forensic mental health professionals. But that is insufficient. Moreover, rather than demonstrate that a partial mental responsibility defense could not be developed at trial in the exercise of due diligence, the record suggests the defense explored that potential defense and rejected it for strategic reasons. Petitioner has not explained what those reasons might be, or shown how Dr. [redacted]'s conclusions would stand up to even basic scrutiny at trial. And he should not receive "a new trial merely because his trial tactics failed." Bacon, 12 M.J. at 491 (citations omitted). Petitioner has failed to show conclusions like those contained in Dr. [redacted]'s declaration could not have been discovered in the exercise of due diligence, and his petition for a new trial should be denied. *See* R.C.M. 1210(f)(2)(B).

C. To the extent this newly discovered evidence can be evaluated, Petitioner has not shown it probably would have produced a more favorable result at trial.[7]

The sweeping nature of Dr. [redacted]'s conclusions about Petitioner's specific intent in 2017 and 2018 make it difficult to evaluate. According to Dr. [redacted], Petitioner lacked "the ability to form the specific intent" to commit the charged offenses because of his PTSD and OCD. (Attachment 1 at 3.) But Dr. [redacted] does not explain what aspect(s) of these diagnoses prevented a trained lawyer from intending to deceive when making a false official statement, MCM, Part IV, para. 31(b)(4) (2016 ed.), or from intending to deprive another of their lawful property. MCM Part IV, para. 46(b)(1)(d) (2016 ed.). Common sense cuts against this claim, so one would expect a mental health professional like Dr. [redacted] to explain the scientific basis for his conclusions. He does not. And that is fatal to this petition.

[7] Our superior Court has applied a different standard "for lower courts considering the impact of newly discovered evidence regarding mental responsibility." Harris, 61 M.J. at 396 ("that no reasonable doubt exists as to the sanity of the accused.") (quoting United States v. Triplett, 21 C.M.A. 497, 502 (C.M.A. 1972)) This standard for lack of mental responsibility has never been extended to potential defenses of partial mental responsibility.

The numerous assertions that go unexplained in Dr. [redacted]'s declaration should cause any reviewing authority to treat it with extreme skepticism. Regarding Petitioner's "current diagnosis," Dr. [redacted] attributes the PTSD to, "Traumas [that] stem from both [Petitioner's] childhood and events relating to the current legal troubles. These events exacerbated already existing trauma from his childhood." (Id. at 1, 3.) Dr. [redacted] does not provide any insight into what these preexisting traumas might be, but is clear that Petitioner's legal troubles – which post-date his crimes – are a significant aspect of his PTSD diagnosis. That makes some sense given that Petitioner appears to have been diagnosed with PTSD after the members returned their verdict. Even so, Dr. [redacted] declined to differentiate between the PTSD experienced at the time of the charged offenses, and the PTSD experienced after a lengthy criminal prosecution and appeal. It is therefore unclear how Petitioner's current "complex presentation of this disorder" manifested itself in 2017 and 2018, and whether it was severe enough to create a viable partial mental responsibility defense.

The same can be said for the OCD diagnosis. Dr. [redacted] writes that Petitioner's OCD "manifests itself in his tendency to accumulate or adhere to and connect with items and possessions that have any and all emotional significance for him." (Id. at 3.) This diagnosis was "also informed by emotional trauma issues from [Petitioner's] childhood," whatever those might be. (Id.) Again, Dr. [redacted] does not provide any insight into what aspects of OCD might prevent a trained lawyer from intending to deceive through a written statement to OSI, or defraud a shipping company by claiming reimbursement on more than 1,000 pounds of property that allegedly went missing during a Code 2 household goods shipment. Without more analysis and explanation, Petitioner has not carried his heavy burden to show entitlement to show that Dr. [redacted]'s conclusions would have produced a more favorable result at trial.

The information Dr. [redacted] relied on raises further doubt about the credibility and materiality of his conclusions. Dr. [redacted] reviewed treatment records from two organizations, both of which treated Petitioner *after* he was convicted. (Id. at 2.) Dr. [redacted] supplemented this limited information with his "direct clinical assessment and observations" of Petitioner and the Sanity Board Long Report. However, it does not appear that Dr. [redacted] reviewed any medical or mental health records from *before* Petitioner's conviction.[8] (Id. at 2.) Nor did he review other information – like the OSI Report of Investigation – to understand Petitioner's behavior surrounding his crimes. (Id.)

Instead, it appears the Sanity Board Long Report and clinical conversations with Petitioner constitute the entirety of Dr. [redacted]'s understanding about the charged offenses. The mental health professionals that conducted the sanity board reviewed discovery about the offenses, as did the defense forensic psychologist. (App. Ex. XIII; R. at 1683-84.) That would appear to be an important part of any judgment about mental responsibility, partial or otherwise. Indeed, the defense forensic psychologist emphasized that his review of discovery surrounding the offense would have been more in depth if he was "focusing strictly on intent or other kinds of forensic issues like that" before testifying. (R. at 1683-84.) It strains credulity to suggest that Dr. [redacted] could reliably offer conclusions about Petitioner's mental responsibility in 2017 and 2018 without educating himself on the underlying crimes. This undermines both the credibility and materiality of Dr. [redacted]'s conclusion.

This Court has the ability to weigh Dr. [redacted]'s unsupported conclusion against the other evidence in the record. Bacon, 12 M.J. at 492. Petitioner has been evaluated by numerous

[8] Records *may* have been summarized in the Sanity Board Long Form report. (App. Ex. XIII) (identifying the scope of mental health records the sanity board was required to review when assessing Petitioner's mental responsibility.)

mental health professionals, and Dr. [redacted]'s sweeping conclusion is the outlier. This Court can be confident that any conclusions offered by Dr. [redacted] at a new trial would be challenged by the government to ensure his testimony more aligned with reliable principles and methods used by experts in the field. *See* R.C.M. 702(e). Furthermore, absent additional compelling information not included in Dr. [redacted]'s declarations, it is unlikely that a reasonable factfinder would accept that PTSD or OCD could be severe enough to prevent an otherwise competent adult from forming the requisite intent to deceive or deprive another. In light of these facts, Petitioner has not shown "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." R.C.M. 1210(f)(2)(C). His petition should therefore be denied.

CONCLUSION

Petitioner has not met his heavy burden to show entitlement to a new trial. Petitioner failed to show the evidence could not have been discovered in the exercise of due diligence, and has failed to demonstrate that a partial mental responsibility defense grounded in a PTSD and OCD diagnoses would probably produce a substantially more favorable result. No manifest injustice would result from this Court denying the petition.

FOR THESE REASONS, the United States respectfully requests that this Honorable Court deny Petitioner's request for a new trial.

[redacted]
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, civilian appellate defense counsel at law***@aol.com, and the appellate defense division on 26 May 2022.

[redacted]

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