IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
v.	)	
	)	Crim. App. Dkt. No.
Sergeant (E-5) **JEROME J. FORREST,** United States Army, Appellant	)	ARMY 20200715
	)	USCA Dkt. No. 25-0081/AR

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v.	)	
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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Issue I

WHETHER TRIAL DEFENSE COUNSEL WERE INEFFECTIVE IN PREPARING FOR TRIAL BY (1) FAILING TO REASONABLY INVESTIGATE APPELLANT'S TRAUMATIC BRAIN INJURY (TBI) (2) FAILING TO REASONABLY PRESENT EVIDENCE OF TBI FOR FINDINGS AND SENTENCE AND (3) FAILING TO INVESTIGATE AND PREPARE A CASE IN MITIGATION?

Issue II

WHETHER THE APPELLATE JUDGE WHO AUTHORED THE OPINION IN APPELLANT'S CASE WAS PRECLUDED FROM DOING SO BECAUSE SHE HAD RETIRED FROM THE BENCH WHEN THE OPINION WAS EFFECTIVE AND HELD A POSITION PRESENTING A CONFLICT?

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals [Army Court] reviewed this case pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2018) [UCMJ]. The statutory basis for this Court's jurisdiction rests upon Article 67(a)(3), UCMJ, 10 U.S.C. § 867 (a)(3).

Statement of the Case

On December 16, 2020, a military judge sitting as a general court-martial convicted appellant, contrary to his plea, of one specification of unpremeditated murder, in violation of Article 118, Uniform Code of Military Justice, 10 U.S.C. § 918 (2018) [UCMJ]. (R. at 1206). The military judge sentenced appellant to reduction to the grade of E-1, confinement for life with eligibility for parole, and a dishonorable discharge. (R. at 1273). On February 3, 2021, the convening authority approved the findings and sentence, (Action), and the military judge entered judgment. (Judgment).

The Army Court issued a memorandum opinion on November 22, 2024, affirming the findings and sentence. *United States v. Forrest*, ARMY 20200715, 2024 CCA LEXIS 504 (Army Ct. Crim. App. Nov. 22, 2024). Appellant filed the Supplement to Petition for Grant of Review on March 3, 2025. On March 24, 2025, this Court ordered the Appellee file an answer to the supplement.

Statement of Facts

On December 17, 2018, appellant beat his wife to death while her two sons—ages twelve and ten—locked themselves in a room upstairs and her baby granddaughter slept on the couch in the next room. (R. at 128, 320, 368, 372–73, 504).

On the night of the murder, appellant and his wife got into an argument. (R. at 319). CH, one of the victim's sons, saw appellant jump on the victim and straddle her while she lay on her back in the kitchen—the same room where she was later found dead. (R. at 322, 325–26, 525, 529; Pros. Ex. 6, p. 12; Pros. Ex. 23). After calling the police, CH went upstairs to his room and heard "glass and [the] sound of someone punching something." (R. at 308, 340). CH no longer had his phone, so he used his PlayStation to send text and audio messages to his older brother, who lived on post with their older sister, Ms. KK. (R. at 339, 402–03; App. Ex. 40).

Ms. KK drove to appellant's house. (R. at 407). When she got there, CH came downstairs and opened the door, but appellant slammed the door shut on her. (R. at 407–09). Ms. KK walked around to the back of the house and looked inside through a window. (R. at 411–12). Ms. KK saw her mom lying dead in the kitchen with her "face bashed in" like "putty." (R. at 412). Appellant was also in

the kitchen. (R. at 412). Ms. KK screamed, alerting some of her neighbors, including Sergeant JB, who came to the house to investigate. (R. at 413, 514).

Shortly after arriving, Sergeant JB saw appellant open the garage door and attempt to leave the garage in his vehicle, but he was unable to because of another car in the driveway blocking him in. (R. at 516). Law enforcement arrived on the scene and cleared the house. (R. at 525–41). They arrested appellant, who was sitting in his vehicle in the garage, covered in his wife's blood, with a bloody broken chair leg in the passenger seat next to him. (R. at 537–41, 609, 748, 751, 765–775; Pros. Ex. 9, p. 8, Pros. Ex. 12).

The victim died from "blunt force head trauma due to bludgeoning." (R. at 874). The mechanism of death was "respiratory depression from . . . brain swelling . . . and a mechanical obstruction of her airway which was caused by the maxillofacial injuries and also the blood that was pooling in the back of her [throat]." (R. at 862). Appellant inflicted significant injuries on his wife prior to her death, including the loss of her eye and the fracture and avulsion (tearing away) of the lower portion of her jaw. (R. at 840, 844–45; Pros. Ex. 20, pp. 7, 9). During the victim's autopsy, the medical examiner found teeth and bone shards in her stomach and esophagus, which indicated she was alive and swallowed them during the assault. (R. at 849–50).

The Army Court ultimately found that appellant failed to demonstrate his trial defense counsel were deficient, and even if he had met this burden, he failed to establish prejudice under *Strickland v. Washington*. *United States v. Forrest*, 2024 CCA LEXIS 504, *2 (Army Ct. Crim. App. Nov. 22, 2024).

Summary of Argument

Appellant suffered no prejudice as a result of any alleged deficiencies in his counsel's performance. There is no reasonable probability Appellant would have been acquitted of murder, he concedes as much in his supplemental brief to this Court. However, there is also no reasonable probability appellant would have received a less severe sentence. This is true because Appellant's counsel were not deficient. They filed the necessary motions in an attempt to raise Appellant's head injury as mitigation evidence, but failed to succeed due to a lack of evidence and cooperation by Appellant.

Additionally, there is not a reasonable probability that if defense counsel had called servicemembers who served with Appellant that this evidence would have mitigated Appellant's conduct. Appellant's military career was short and the admitting evidence of Appellant's service would have opened the door to prejudicial evidence in rebuttal. The same is true of evidence of Appellant's good character. Lastly, additional pretrial preparation with the witnesses defense counsel did call would not have had an impact on Appellant's sentence. This is

evident both based on the underlying evidence Appellant was convicted of, and that he received life with the possibility for parole.

The Army Court lawfully conducted its review. The participation of Senior Judge Walker in the deliberative process and memorandum opinion was proper because she was in regular active service of the court and maintained her ability to remove herself from the opinion if she experienced a change of heart prior to the issuance of the opinion. Her participation in this case was in accordance with the Joint Rules, this court's precedent, and historic practices of military courts of appeals over the past forty years.

Lastly, removing Senior Judge Walker from participating in the opinion, does not change the result. Accordingly, because Appellant's assigned error does not materially prejudice Appellant's substantial rights, Appellant's petition for grant of review should be denied.

Issue I

WHETHER TRIAL DEFENSE COUNSEL WERE INEFFECTIVE IN PREPARING FOR TRIAL BY (1) FAILING TO REASONABLY INVESTIGATE APPELLANT'S TRAUMATIC BRAIN INJURY (TBI) (2) FAILING TO REASONABLY PRESENT EVIDENCE OF TBI FOR FINDINGS AND SENTENCE AND (3) FAILING TO INVESTIGATE AND PREPARE A CASE IN MITIGATION?

Additional Facts

Prior to trial, Appellant requested the convening authority appoint Dr. JG as an expert consultant in the field of neuropsychology, and the convening authority denied the request. (App. Ex. III, p. 3). Appellant filed a motion to compel, stating that he was in a car accident resulting in a head injury the week prior to the murder and arguing, in relevant part, Dr. JG was necessary for two reasons: (1) to determine whether appellant suffered from a brain injury that may have "affected his cognition, judgment, or impulse control"; and (2) to assist in sentencing preparation, including "conducting mitigation interviews" and "assisting the defense in the presentation of a historical psychological background of [appellant]." (App. Ex. III, pp. 3–4).

After hearing argument at an Article 39(a), UCMJ, session, the military judge denied the motion to compel Dr. JG. (R. at 107–120; 184–190). For each of the proposed bases for expert assistance, the military judge found appellant failed to demonstrate both that Dr. JG would be of assistance and that denial of her assistance was reasonably likely to result in a fundamentally unfair trial. (R. at 189).

Standard of Review

Claims of ineffective assistance of counsel are reviewed de novo. *United States v. Akbar*, 74 M.J. 364, 379 (C.A.A.F. 2015).

Law

Appellant bears the burden of establishing ineffective assistance of counsel. *United States v. Rose*, 71 M.J. 138, 143 (C.A.A.F. 2012). To prevail on a claim of ineffective assistance of counsel, appellant must demonstrate his counsel's deficient performance and that he suffered prejudice because of that deficiency. *United States v. Green*, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). To demonstrate prejudice, there must be a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

"[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Id.* at 697.

Argument

A. Appellant suffered no prejudice.

This Court does not need to reach the question of whether appellant's defense counsel were deficient. As the Army Court found, "if it is easier to

dispose of [appellant's] claim on the ground of lack of sufficient prejudice . . . [then] that course should be followed." *Id.*; *Forrest*, 2024 CCA LEXIS 504, at *23–25. Given the overwhelming evidence demonstrating appellant's guilt and the egregiousness of his crime, there is no reasonable probability that, even absent defense counsel's alleged infirmities, the outcome either on the merits or at sentencing would have been different.

1. There is no reasonable probability appellant would have been acquitted of murder.

Appellant conceded to the Army Court, and this Court, that the evidence proving his guilt was substantial, and "there was a high likelihood [he] would be convicted." (Appellant's Br. 19; Appellant's Supp. Br. 27). The Army Court properly concluded that trial defense counsel were not deficient, but even if appellant could meet this burden, he could not show prejudice. *Forrest*, 2024 CCA LEXIS 504, at *2. Indeed, the evidence against Appellant was overwhelming. The last time anybody other than appellant saw the victim alive, appellant was fighting with her. (R. at 338). After going upstairs to his room, CH heard what sounded like someone hitting something. (R. at 340). When appellant was arrested, he was covered in the victim's blood and had the murder weapon next to him in the car. (R. at 609; Pros. Ex. 18, p. 1). The physical evidence at the crime scene, the DNA evidence, (R. at 765–775), the blood splatter analysis, (R. at 977–78), and the medical examiner's findings, (R. at 874), were all consistent with a

theory that appellant beat his wife to death with a broken chair leg. Appellant has not presented sufficient evidence to show that any alleged errors by defense counsel were significant enough to demonstrate a reasonable probability of a different outcome. As Appellant concedes, "[b]ased on the facts of [his] case, he was going to be convicted of killing his wife." (Appellant's Supp. Pet. 27).

Appellant asserts that the "defense had the ability to present a compelling case that TBI played a substantial role in his murder of his wife." (Appellant's Supp. Pet. 28). However, looking at the evidence appellant provided in support of this conclusion, it is far too speculative to rise to the level of a reasonable probability.

Dr. PM, a forensic psychologist who provided an affidavit filed with appellant's brief, submitted that he would have recommended additional testing on appellant "to ascertain whether there [were] deficits in executive functioning." (Def. App. Ex. A, p. 3). He then suggests that "[d]eficits in executive functioning *may* result in poor impulse control and reactive unplanned behavior," and additional "testing *may* also have yielded findings relevant to his mental state at the time of the offense . . . ." (Def. App. Ex. A, p. 3) (emphasis added). Lieutenant Commander (LCDR) JH, a forensic psychiatrist, also provided a memorandum filed with appellant's brief to the Army Court and concluded that "[e]xpert assistance to the defense team in interpretation of the full [R.C.M. 706] report

would very likely have led to additional investigation"—though it appears that he believes this information would be relevant for sentencing and not on the merits. (Def. App. Ex. B, p. 3).

Regardless, neither Dr. PM nor LCDR JH speculate as to what the results of any of the tests would have been, and this is for a good reason: it would be pure conjecture. Likewise, it would require this Court to guess what the test results would have been to find that Appellant met his burden in demonstrating that they were reasonably likely to result in a different outcome.

As speculative and broad-brushed as these assertions were, their value—and thus appellant's argument—is further diminished by the results of appellant's R.C.M. 706 inquiry before trial:

> The Sanity Board determined (a) that the Accused, at the time of the alleged criminal conduct, did not suffer from a severe mental disease or defect; (b) that the Accused, at the time of the alleged criminal misconduct, and as a result of such severe mental disease or defect, was not unable to appreciate the nature and quality or wrongfulness of his conduct; (c) that the clinical psychiatric diagnosis was "Relationship Distress With Spouse or Intimate partner;" and (d) that the Accused was not presently suffering from a mental disease or defect rendering the accused unable to understand the nature of the proceedings or to conduct or cooperate intelligently in his defense.

(App. Ex. XIX, pp. 1–2).

Even in a light most favorable to Appellant, the evidence he offers on appeal shows only the mere possibility that further testing would have revealed evidence relevant to a defense that may have been available to him at trial. There is no

reason to believe—and indeed not a reasonable probability—that he would have prevailed on that defense. "A claim of ineffective assistance of counsel cannot rest on speculation." *United States v. Anderson*, 55 M.J. 198, 203 (C.A.A.F. 2001). Therefore, his claim of prejudice fails.

2. There is no reasonable probability appellant would have received a less severe sentence.

Appellant was convicted of murdering his wife while her young children hid upstairs and her infant granddaughter slept on the couch in the next room. (R. at 320). The manner in which appellant killed his wife was especially heinous. He bludgeoned her to death with a broken chair leg. Further, even though he beat her to the point that she lost an eye, (Pros. Ex. 20, p. 9), the lower portion of her jaw was removed from her face, (Pros. Ex. 20, p. 7), and she swallowed her teeth and shards of her broken bones, she may still have survived. (R. at 851). The medical examiner believed her injuries were survivable if she had received "immediate attention and airway management," which may have been possible "with early arrival of an ambulance . . . ." (R. at 864). But instead of seeking medical attention, appellant made a "clean-up effort" and tried to flee the scene. (R. at 516, 944). Appellant faced life in prison *without* eligibility for parole, but he was sentenced to life *with* eligibility for parole. *Manual for Courts-Martial, United States*, (2019 ed.) [*MCM*], pt. IV, ¶ 56.d.(2); (R. at 1273). It is not clear how testimony that he "[led] the way when it came to physical fitness," (Appellant's Br.

19), or any other evidence Appellant provided would have mitigated his crime and resulted in a less severe sentence. Simply put, Appellant has failed to meet his burden of demonstrating prejudice. *Strickland*, 466 U.S. at 694.

B. Appellant's defense counsel were not deficient.

Even if this court does consider the question of whether Appellant's defense counsel were deficient, it should reach the same conclusion as the prejudice analysis: Appellant has failed to carry his burden. The arguments alleging error and the evidence supporting those arguments fall well short of demonstrating constitutional error on the part of defense counsel.

1. Presentencing.

Appellant argues that his defense counsel were deficient by failing to investigate and present evidence during presentencing about appellant's military service, evidence that his crime was out of character, and evidence that his car accident may have played a role in his offense. (Appellant's Supp. Pet. 28–30). Each of these arguments ignores the evidence to the contrary contained in the record.

A. Military service.

Appellant served in the Army for less than two years before committing murder. (Pros. Ex. 48). This short period of time did not produce a great body of work for defense counsel to present to the military judge for her consideration. In

spite of this, defense counsel called the court's attention to Appellant's accomplishments during his brief military career. (R. at 1265). Appellant argues that there were several noncommissioned officers who would have said "positive things" about appellant. (Appellant's Supp. Br. 19). Considering the generic nature of these observations, it cannot be said that omitting this evidence was "so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *Strickland*, 466 U.S. at 687. This is especially true in light of the evidence in the record that the government could have used to impeach the witness's testimony. For example, the statement that Appellant was a "great guy" is severely diminished by his attempt to flee the crime scene. (Def. App. Ex. H; R. at 516).[1]

Importantly, as the Army Court found, trial defense counsel had "strategic reasons" for not presenting information as to appellant's military service. *Forrest*, 2024 CCA LEXIS 503, at *32 ("Thus, appellant did not possess an extensive military service record. The investigation defense conducted on appellant's military service reflected that appellant's service was less than stellar. Any military witness who testified as to appellant's good duty performance would have likely been rebutted by negative testimony from appellant's leadership.").

[1] Additionally, the statement that appellant "[led] the way when it came to physical fitness" is disproved by appellant's enlisted record brief showing his height, weight, and Army Physical Fitness Test score. (Pros. Ex. 48).

B. Appellant's character.

Appellant's additional argument that his defense counsel failed to demonstrate that his crime was "out of character" is similarly without merit. (Appellant's Supp. Pet. 30). First, the Army Court's finding expressly contradicted this argument:

> [t]his decision limited the information about appellant's rehabilitative potential and appellant's overall good character to prevent the admission of information about appellant's prior domestic violence incidents with the victim and numerous incidents of misconduct and rules violations while in pretrial confinement. The government also provided the defense with a copy of a police report in which appellant had physically assaulted his sister prior to murdering his wife. To prevent admission of this information, defense counsel strictly limited appellant's pre-sentencing case to just his immediate family and limited their testimony so that no other incidents of misconduct could be admitted in pre-sentencing. In light of appellant's prior domestic violence issues, poor military service, and multiple incidents of misconduct in pretrial confinement, we find that the defense strategic approach to presenting a focused pre-sentencing case was well-reasoned, informed, and objectively reasonable.

Forrest, 2024 CCA LEXIS 504, at *33–34.

Second, it is clear that defense counsel sought to demonstrate to the court "the type of person [appellant] is, the man he has become, and the man . . . he will be in the future." (R. at 1264–65). To do this, they elicited testimony from his family that he was, *inter alia*, "a kind, loving, generous child," (R. at 1232); a "[com]passionate young man," (R. at 1240); "[v]ery good" with children, (R. at 1246); and "all about loving those around him and protecting those around him,"

(R. at 1253). Even though they did not use the words, "out of character," defense counsel explicitly asked the court to recognize "that this one event should not define this man"—what appellant now argues they failed to do. (Appellant's Supp. Pet. 30).

Although appellant's family regretted not having more time to prepare prior to testifying, the proffered testimony in the affidavits submitted with appellant's brief is substantially the same as the testimony elicited during presentencing. (Def. App. Exs. C, D, E). Interviewing the presentencing witnesses prior to trial would have perhaps relieved some of the concerns appellant's family members raised, but—at least in this case—not doing so was not constitutional error.

C. The car accident.

Finally, appellant's argument that his defense counsel "had the ability to present a compelling case that TBI played a substantial role in his murder of his wife" is speculative, at best. (Appellant's Supp. Pet. 28). First, there is no evidence that appellant's car accident played any role in the murder whatsoever,[2] so there was no reason defense counsel would have presented any evidence about it. Defense counsel did, however, attempt to provide some explanation for appellant's crime. Defense counsel repeatedly sought to admit evidence of two

[2] To the contrary, as discussed *infra*, pp. 16–17, evidence of appellant's prior incidents of violence and lack of behavioral change cuts against the suggestion that appellant's misconduct was a result of some injury he suffered in the car accident.

different theories why appellant may have killed his wife: (1) self-defense; and (2) heat of passion in response to viewing text messages that proved his wife's infidelity. (R. at 299, 310–13, 531, 617). Defense counsel even explicitly argued those theories in closing argument on the merits and in presentencing. (R. at 1192–96; 1268–69).

It is clear that defense counsel had a presentencing strategy and they executed that strategy. That now, after receiving a lengthy sentence, appellant disagrees it was the best strategy does not mean his counsel were deficient. "It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence," *Strickland*, 466 U.S. at 689, and that is precisely what appellant is doing in the present case. In showing the appropriate deference to his counsel's performance, however, it is clear that it was well "within the wide range of reasonable professional assistance . . . ." *Id.* at 689; *see United States v. Grigoruk*, 52 M.J. 312 (C.A.A.F. 2000) ("Our Court will not second-guess the strategic or tactical decisions mate at trial by defense counsel." (internal quotations omitted)).

2. Failure to investigate Appellant's head injury.

Appellant argues that his defense counsel were deficient by 1) failing in their efforts to sufficiently investigate Appellant's head injury by speaking with Dr. JG; or 2) asking the sanity board to consider Appellant's head injury. (Appellant's

Supp. Pet. 28). The Army Court addressed this argument in its opinion, finding: "[b]ased upon all available evidence before the defense counsel at the time they filed the motion for an expert consultant in forensic psychology, they properly investigated appellant's head injury and provided the military judge all available evidence before them in requesting the expert." *Forrest*, 2024 CCA LEXIS 504, at *38–39.

The Army Court relied on defense counsel's explanation at the *Dubay* hearing: "they had reviewed appellant's medical records from his accident and did not believe appellant had suffered a TBI." This assumption was supported by the findings at Appellant's *Dubay* hearing, where the military judge found that although Appellant's medical records reference the term TBI, the "records do not reflect the appellant was ever diagnosed with TBI during his Skyline stay." They explained that they believed appellant's original defense counsel had misinterpreted the severity of appellant's head injury from the accident given the results of appellant's CT scan and discharge the following day." *Id.* This was a reasonable assumption given "Appellant's medical records indicated he had suffered a head injury, but a CT scan revealed there were no intracranial injuries." *Id.* at *39. Despite this assumption, defense counsel pursued "the motion for a forensic psychologist and provided the justification they could, based upon the limited information they possessed, which were the medical records from

appellant's treatment because of the motor vehicle accident." *Id.* In other words, defense counsel were not deficient based on the evidence and circumstances before them. "[R]easonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." *Rompilla v. Beard*, 545 U.S. 374, 383 (2005).

Appellant's medical records were not the only evidence discouraging defense from pursuing this theory. As the Army Court found, "appellant's sanity board results and various statements he made about the events the night of his wife's murder resulted in [defense counsel] deciding not to pursue the admission of any possible head injury during the merits portion of appellant's court-martial even if the military judge granted [a] forensic psychologist." In other words, this was a reasonable strategic decision based on the evidence that was to be presented at Appellant's trial.

Appellant wholly ignores his role in preventing the trial judge from considering further evidence of an alleged TBI. As the findings of Appellant's *Dubay* hearing indicate, the military judge, [i]nstead of denying outright the defense motion to compel an expert consultant . . . suggested TBI testing for the appellant." (*Dubay*, Findings, p. 2). The government then prepared to arrange TBI testing, but Appellant told his defense counsel he would not consent to such testing because 'he was straight' and he did not want to be seen as a 'wall-licker[.]'"

(*Dubay*, Findings, p. 3). Based on this, the Army Court concluded "Appellant himself played a role in preventing his defense counsel from presenting additional information to the military judge . . . . Appellant refused to participate in any TBI testing and expressed he wanted no mental health defense used in the case." *Forrest*, 2024 CCA LEXIS 504, *40–41.

Appellant's argument that the sanity board did not consider his head injury is misleading. Appellant completed the sanity board evaluation, which included the medical records from his accident, and he discussed the accident during the evaluation. *Forrest*, 2024 CCA LEXIS 504 at *39. Appellant's head injury was therefore considered during that evaluation, though there was no conclusive evidence of TBI. *Id.*

However, even if appellant somehow overcame the aforementioned hurdles to show his counsel was deficient, he also failed to show prejudice under *Strickland*. The Army Court conclusively found that "[Appellant] has failed to present sufficient information on appeal to demonstrate a reasonable probability that, had the military judge considered the information he presented at the *Dubay* hearing, the military judge would have ruled differently, and that such a ruling would have caused a different result at his trial." *Id.* at *42.

The military judge made thorough findings on the record discussing why she denied the motion. (R. at 184–90). Nothing Appellant presents on appeal is

sufficient to demonstrate a reasonable probability that, had she considered it, the military judge would have ruled differently. In addition to failing to establish definitively that appellant ever suffered from a TBI, he has *still* provided no evidence that the car accident actually affected his behavior at all, thus necessitating Dr. JG's assistance. *Contra United States v. Witt*, 72 M.J. 727, 759 (A.F. Ct. Crim. App. 2013) ("[A]ppellant's roommate's [observed] a change in the appellant's behavior following the motorcycle accident. He described these changes as being more outspoken, not putting up with anything anymore, and observing the appellant in a fight for the first time after the motorcycle accident.").

In fact, the evidence in this case suggests the opposite. Appellant was released from the hospital less than twenty-four hours after being admitted, was described as "awake alert and oriented," and was not given instructions to follow-up or seek additional screening from any head or brain injury specialists. (App. Ex. III, p. 69). Additionally, not a single witness either at trial or on appeal has described any change of behavior or other adverse effects from his accident, and Appellant's sister even testified that he is "the same boy I knew growing up." (R. at 1253). Finally, there is evidence that appellant and the victim had a history of domestic violence that predated the car accident. (App. Ex. XLI, p. 18). Appellant's arguments suffer from the same shortcomings on appeal as they did at trial: there is insufficient evidence to prevail based on the available evidence and

Appellant's own refusal to pursue a theory he now claims was necessary for a fair trial.

Appellant has failed to carry his burden to show that any of his counsel's errors were so serious that they amounted to a lack of the "counsel" guaranteed by the Sixth Amendment. Accordingly, his claim of ineffective assistance of counsel fails. *Strickland*, 466 U.S. at 687.

Issue II

WHETHER THE APPELLATE JUDGE WHO AUTHORED THE OPINION IN APPELLANT'S CASE WAS PRECLUDED FROM DOING SO BECAUSE SHE HAD RETIRED FROM THE BENCH WHEN THE OPINION WAS EFFECTIVE AND HELD A POSITION PRESENTING A CONFLICT?

Additional Facts

The Army Court issued its opinion on November 22, 2024. At the time this opinion was issued, Former-Senior Judge Walker was on terminal leave. (Affidavit dated April 17, 2025). Her terminal leave began on October 10, 2024 and continued until she retired on November 30, 2024. (Affidavit dated April 21, 2025).

Standard of Review

A Court of Criminal Appeals' actions under Article 66, UCMJ, are reviewed for an abuse of discretion. *United States v. Guin*, 81 M.J. 195, 199 (C.A.A.F.

2021). Questions of law are reviewed *de novo*. *United States v. Mays*, 83 M.J. 277, 279 (C.A.A.F. 2023).

Law and Argument

A. The Army Court correctly followed the statute, the Joint Rules for Appellate Procedure, and its internal rules; Senior Judge Walker's retirement did not violate those rules.

Senior Judge Walker was in "regular active service" at the time of the decision in *United States v. Forrest*. Relevant to these proceedings, a judge is in regular active serve if: (1) they are assigned to the court; and (2) they are in the active component of the armed forces, unless defined differently pursuant to J.R.A.P. R. 7(d). J.R.A.P. R. 7(c). "Each service may establish its own definition of "regular active service" in its service court rules even if inconsistent with Rule 7(c). J.R.A.P. R. 7(d). The Army Court's rules do not further define "regular active service."

A case is decided once an opinion is issued from the court. *United States v. American-Foreign S.S. Corp*, 363 U.S. 685, 687 (1960). Any judge who participates in the opinion must be an active judge in accordance with applicable court rules and statutes. *Id*. at 690–91.[3] The Supreme Court has ruled a judge's

[3] Following this decision Congress modified the statute to provide for judges in a retired status to be able to participate in decisions and provide their opinion in *en banc* proceedings they participated in following their departure from the bench. *Yovino v. Rizo*, 586 U.S. 181, 185 (2019).

vote is unable to be counted if they are deceased prior to publishing the opinion, even when they have fully participated in the case and authored the opinion. *Rizo*, 586 U.S. at 185.

In coming to this conclusion, the Supreme Court highlighted there is no rule "that renders judges' votes and opinions immutable at some point in time prior to their public release." *Id*. at 184. It is generally understood that a judge may change his or her position up to the very moment when a decision is released. *Id*.

B. It is common practice for courts to release opinions after a judge who participated in the decision has left the court.

Although judges are unable to participate in a case or controversy after their death, the law provides different mechanisms to allow judges to continue to vote on a matter when their time in active service on the court has expired, often in the name of judicial efficiency. For example, in civilian federal courts, 28 U.S.C. § 46 states only judges in "regular active service" may sit participate in the decision. "Except that any senior circuit judge of the circuit shall be eligible . . . (2) to continue to participate in the decision of a case or controversy that was heard or reheard by the court in banc at a time when such judge was in regular active service." 28 U.S.C. § 46(c); *see also Duncan v. Bonta*, 2025 U.S. App. LEXIS 6511 at *26-27 (9th Cir. March 20, 2025) (finding original eleven member *en banc* could retain jurisdiction over matter when it returned to the 9th Circuit later and after five of the eleven original judges had taken senior status).

Continued participation promotes the statute's obvious purpose of judicial efficiency and gives the reviewing court the benefit of the knowledge and judgement of all the judges who have worked on the case. *Bonta*, 2025 U.S. App. LEXIS 6511 at *25 (citing *Igartua de la Rosa v. United States*, 407 F.3d 30, 32 (1st Cir. 2005).

Although there is a distinction between a judge appointed to the Court of Appeals for the Armed Forces [CAAF] verses one assigned to the Army Court, this Court has permitted a judge to vote on a matter prior to the expiration of their term of service even when the opinion was published after they were no longer on the bench. *See United States v. Stellato*, 74 M.J. 473, 476 (C.A.A.F. 2015) (noting "former Chief Judge James E. Baker took final action in this case prior to the expiration of his term on July 31, 2015" when the opinion was issued on August 20, 2015).[4]

Similarly, a Lexis search for cases published by military courts of appeals shows over 200 cases in which an opinion post-dates a judge's departure from the court. Each of these cases references a footnote that states words to the effect of: "the judge 'took final action in this case prior to retirement from active duty.'"

[4] This footnote was similarly used in four other cases by this Court in 2015. *United States v. Arness*, 74 M.J. 441, 443 (C.A.A.F. 2015); *United States v. Sullivan*, 74 M.J. 448, 449 (C.A.A.F. 2015); *United States v. Akbar*, 74 M.J. 364, 418 (C.A.A.F. 2015); *United States v. Quick*, 74 M.J. 332, 338 (C.A.A.F. 2015).

E.g., *United States v. Howard*, 9 M.J 873 (N.C.M.R. 1980) (noting the judge retired on June 30, 1980, but the opinion was not issued until July 24, 1980). The reasons listed for departure include retirement, reassignment, transfer, detaching from the court, and permanent change of duty station. Although not codified in the Joint Rules, this history indicates this has become a common practice amongst the courts of criminal appeals across the services.

C. Chief Judge Walker retained her ability to change her vote up until the time the opinion was published.

The determinative factor in *Rizo* was that Judge Reinhardt's vote was not inalterably fixed prior to the issuance of the opinion. 586 U.S. at 183. Appellant does not allege Senior Judge Walker was unable to remove her vote from the decision if she experienced a change of heart prior to the issuance of the opinion.

Additionally, the Supreme Court has repeatedly emphasized the differences between military and civilian societies and justice systems. *See, e.g., Parker v. Levy*, 417 U.S. 733, 743-44 (1974); *Weiss v. United States*, 510 U.S. 163, 174-175 (1994); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17-20 (1955).

Due to the nature of military assignments, the Army Court's judges do not possess the same control of their dockets that a civilian appellate judge may possess. Military appellate judges must continue to draft opinions, attend oral argument, and discuss cases with other judges while knowing they serve for a

finite period of time.[5] This Court should not align its practice with federal court rules where judges are appointed for life and often serve decades before retiring or even dying while they are still on the bench. Military appellate courts must retain the ability to vote on cases and author opinions that may post-date one or more judges' departure from the bench. Not only has this exception existed as a practice of the service courts for over 40 years, but a similar exception is codified for civilian appellate courts. 28 U.S.C. § 46(c).

The reason for such an exception is to provide the benefit of the knowledge and judgement of all the judges who worked on the case, and to adequately value the time and experience of those who researched, deliberated, and initially decided to take the case in the first place. *See United States v. Hudspeth*, 42 F.3d 1013, 1015 (7th Cir. 1994); *see also Allen v. Johnson*, 391 F.2d 527, 529–30 (5th Cir. 1968).

At the time the Army Court issued its opinion, former Senior Judge Walker was on transition leave but had not yet retired. She remained in the active component of the armed forces and assigned to the Army Court until the date of her retirement on November 30, 2025. Senior Judge Walker remained in "regular

[5] Judge Advocates "are assigned as appellate military judges for a minimum of three years, except under circumstances described in paragraph 12-15, AR 27-10." Judge Advocate Legal Services Publication 1-1, Personnel Policies (January 2025).

active service" of the court and was therefore able to participate in the opinion issued by the Army Court.

D. Appellant was not prejudiced.

It is well-established that two judges of a panel may hear and decide any case properly referred to it. *United States v. Lee*, 54 M.J. 285 (C.A.A.F. 2000) (citing *United States v. Petroff-Tachomakoff*, 5 U.S.C.M.A. 824, 19 C.M.R. 120 (1955)). If this Court finds Senior Judge Walker was precluded from participation in this case, Appellant is unable to show material prejudice to his substantial rights. *See* Article 59(a), UCMJ. Although Senior Judge Walker wrote the opinion, she was joined by Judges Ewing and Parker. Because the panel was comprised of three military judges, and (even without Judge Walker's vote) a majority concurred with the opinion, Appellant can point to no prejudice. *See United States v. Lee*, 54 M.J. 285 (C.A.A.F. 2000) (relying on 10 USC § 866(a)(f), precedent, and the prescribed uniform rules of procedure to find that "a majority of the judges assigned to that panel constitutes a quorum for the purpose of hearing or determining any matter referred to the panel"). Removing Judge Walker from the opinion does not change the result from the court. *Cf. Rizo*, 586 U.S. at 183, 187 (remanding the case because the deceased judge's vote was decisive to create a majority).

Appellant claims that Judge Walker may have influenced the independent

judgments of the other appellate judges. (Appellant's Supp. Pet. 36). Appellant supports this assertion with conjecture and a question: "Did she participate in internal deliberations and circulation and editing of the opinion following her leaving the Army Court?" (Appellant's Supp. Pet. 36). Appellant's argument hinges on this speculation, because without it there is no prejudice to his case.

However, Appellant's argument is based on a faulty premise—military appellate judges are not using their own judgment to come to the right conclusion supported by the law and the facts. This presumption of influence is not supported by the law, in fact, this Court's precedent directly contradicts it. "It is undisputed that military judges are presumed to know the law and to follow it, absent clear evidence to the contrary. Certainly, appellate judges of the Courts of Criminal Appeals are deserving of no less a presumption." *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997). Not only is this claim unsupported by evidence or authority, it asks this Court to delve into the deliberative process of the Army Court all while assuming the worst.

Conclusion

The United States respectfully request this Court deny Appellant's Petition for Grant of Review.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c)(1) because this brief contains **6, 636** words.

2. This brief complies with the typeface and type style requirements of Rule 37. It has been typewritten in 14-point font with proportional, Times New Roman typeface, with one-inch margins.

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on April 28, 2025.

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