IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee v. Major (O-4) **JASON A. SCOTT**, Appellant	BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20170242 USCA Dkt. No. 19-0365/AR

TO THE HONORABLE, THE JUDGES OF
THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

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Issue Presented

WHETHER APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT OF THE CONSTITUTION.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter under Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 [UCMJ]. This Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

On April 12, 2017, a military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of one specification of adultery and one specification of failure to obey a lawful order, in violation of Articles 134 and 92, UCMJ. (JA043). The military judge sentenced appellant to forfeit $3000 pay per month for three months, to be restricted to post for thirty days, and to be dismissed from the service. (JA080). The convening authority approved the findings and the sentence. (JA021).

On October 30, 2018, the Army Court issued a fourteen-page memorandum opinion that affirmed the findings but ordered a hearing pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967), to aid the court in determining whether appellant had received effective assistance of counsel in the presentencing phase of

his trial. (JA004). The *DuBay* hearing was held on January 30, 2019, and that court issued its findings and conclusions on February 22, 2019. (JA383). On March 13, the Army Court affirmed appellant's sentence in a single-page per curiam decision. (JA018). Appellant requested reconsideration, but that motion was denied on May 3, 2019.

Appellant was notified of this decision and appellant's military counsel filed a petition for grant of review on June 8, 2019. After multiple extensions of time, civilian counsel who had represented appellant at the Army Court filed a supplement to the petition (out of time) on September 16, 2019. Civilian counsel represented in the supplement that his admission to this Court was pending, and military counsel was also on the pleading. The Court accepted the pleading and granted appellant's petition for grant of review on November 5, 2019. (JA003). Appellant's civilian counsel filed requests for enlargements of time (which the government opposed) and a motion to appear in the case pro hac vice; on April 6, 2020, the Court denied the motion to appear pro hac vice and ordered that appellant's brief be filed no later than May 7, 2020. On June 10, 2020, this Court vacated the grant of review and denied appellant's petition for grant of review. (JA002).

On June 14, 2020, appellant petitioned for reconsideration of the vacation of the grant of review and the denial of the petition for grant of review. On July 1,

2020, this Court ordered that appellant's petition for reconsideration and motion to attach a declaration were granted, and that the order issued on June 10, 2020 was vacated and the previously granted issue remains before the Court. (JA001).

This corrected brief has been submitted with citations to a Joint Appendix in compliance with Rule 24 of this Court's Rules of Practice and Procedure.

Statement of Facts

Appellant, a native of West Virginia who enlisted in the U.S. Army in 1992 and was commissioned in 2001 through ROTC at West Virginia State University, was trained as an Apache pilot and sent to the 82nd Combat Aviation Brigade at Fort Bragg. (JA081-084). He deployed to Iraq from June 2006 to September 2007. (JA265). As a pilot flying close air support for troops in contact, he "personally saved the lives of countless Americans in combat," according to his battalion commander at the time. (JA265). As "an example" of the "hundreds of battles" appellant fought in, his battalion commander remembered a nine-hour engagement near Baqabah in which appellant repeatedly flew into the action "200 feet off the ground, killing countless insurgents" while "taking fire the entire time." (JA265). In November 2006, an Apache in his company was shot down, with the loss of both pilots. (JA273, 278). Another Soldier in the company was killed by a land mine while patrolling the perimeter of the post. (JA278).

In May 2009, he deployed again, this time to fly combat missions against the Taliban in Afghanistan, where he displayed "tenacity, bravery, and competence in the most horrific and dangerous of conditions." (JA269). "[W]hen the bullets started flying, Major Scott always wanted to be in the front at the tip of the spear." (JA274).

Following these deployments, MAJ Scott was assigned to the CENTCOM Joint Operations Center at McDill Air Force Base, where he worked long hours, regularly briefing senior officers including the CENTCOM Commander (General James Mattis). (JA281).

In September 2014, appellant PCSed to Joint Base Lewis McChord (JBLM), where he was initially the Brigade Aviation Officer for the 2nd Stryker Brigade Combat Team, 2nd Infantry Division, and then was assigned to the G3 Aviation section of the I Corps headquarters. (JA084).

In May 2015, appellant met Ms. HM at JBLM's Wilson Gym, where she was an exercise class instructor. (JA031). Ms. HM, a mother of two children, told appellant that she was single. (JA032, 082). Having no reason to disbelieve Ms. HM, appellant began a romantic relationship with her that intensified through the summer of 2015. (JA032, 082). Regrettably, Ms. HM was in fact married to Sergeant First Class (SFC) AM, an enlisted Special Forces Soldier who had

recently deployed to Afghanistan, where he served in an isolated special warfare unit. (JA082).

Appellant, unaware that Ms. HM was married, saw her both privately and publicly, including at professional functions. (JA060-061). In July 2015, Ms. HM publicly proposed to MAJ Scott at the Seattle-Tacoma Airport, complete with a large sign and a photograph of a wedding band, while Ms. HM's teenaged daughter filmed the occasion. (JA069-070). Appellant accepted, and for a time believed himself to be engaged to Ms. HM. (JA070).

On October 29, 2015, appellant's supervisor called him into his office and told appellant that he had just received credible information that Ms. HM was married to a deployed Soldier. (JA082). Appellant "broke down" upon hearing this information from his supervisor, COL Harvey. (JA058). Colonel Harvey then gave appellant a written counseling that forbade him from having any further contact with Mrs. HM, other than to break off the relationship. (JA082, 085). The senior aviation warrant officer for I Corps saw MAJ Scott walk out of COL Harvey's office "giving the appearance that some close family member had died." (JA066).

A week later, appellant told COL Harvey that he had broken off his relationship with Ms. HM, which was true at the time he said it – but within a short

time later, he renewed the relationship, even though he had been ordered not to, and even though he now knew she was married. (JA033, 082).

In December 2015, Ms. HM grew increasingly distant from and paid less attention to appellant as her husband's return grew nearer, and appellant lashed out in a series of angry, offensive, and hurtful text messages. (JA087-153). On February 15, 2016, in his last message to Ms. HM, appellant reminded her that their relationship began with her lie. (JA153). Perhaps insinuating that he would make sure her husband found out, appellant stated he would not allow her to get away with what she had done. (JA153).

Seven days later, on February 22, 2016, Ms. HM countered by falsely accusing appellant of having sexually assaulted her, which of course led to a months-long investigation. (JA289-290). Beginning in February 2016, appellant was represented by the JBLM office of the Trial Defense Service (TDS), with CPT MD taking over as his lead counsel in June 2016. (JA286-288).

On February 13, 2017, appellant was charged with (only) adultery and disobeying a lawful command from a superior commissioned officer. (JA022). On March 30, 2017, on advice from his trial defense counsel, appellant submitted an offer to plead guilty to adultery and the lesser included charge of violating a lawful order. (JA154-156). The quantum portion of the offer to plead

contained a provision limiting confinement to no more than one hundred nineteen days. (JA158). There were no other sentence limitations in the quantum portion. On March 31, 2017, the convening authority accepted the offer. (JA157).

As appellant's trial defense counsel later admitted, they prepared almost no presentencing case "[b]ased on [their] experience and what [they] understood the going rate was for this type of offense, and other things going on in the office." (JA303). Having successfully fended off Ms. HM's fictitious accusations, appellant's trial defense counsel felt that the remaining charges were not sufficiently serious for a sentence of dismissal to be a possibility, and prepared (or rather, failed to prepare) accordingly:

> I did not think that it was going to be a requirement to find every officer that Major Scott had ever served with, to go back and find people that he had gone down range with, to make sure that he did not get dismissed in this case.

(JA302).

"The government, in stark contrast, came to trial loaded for bear." *United States v. Scott*, mem. op. at *7 (Oct. 30, 2018). The prosecution in presentencing called SFC AM, who made an unsworn statement that cast appellant's relationship with his lying spouse as entirely the fault of "people like" appellant, who according to this diatribe, "wait for these exact opportunities to take advantage of women." (JA046-047). The prosecution also admitted appellant's Officer Record Brief (ORB), the counseling form dated October 29, 2015 memorializing the order to

appellant to end his relationship with Ms. HM, and, most importantly, sixty-seven pages of unedifying and inflammatory text messages between appellant and Ms. HM. (JA084-153). The three-page stipulation of fact, (JA081-083), contained the requisite admissions of guilt and a paragraph of "Aggravation" facts, but no content in extenuation or mitigation, and minimal biographical or career information. (JA081-083). It also acceded to the admission of the counseling statement, (JA085-086), and the text messages, (JA087-153). (JA083).

While the pretrial agreement removed the government's obligation to produce defense witnesses from beyond a fifty-mile radius, the defense was free to present evidence of appellant's prior service by other means. (JA155). Not one witness was called telephonically, not one stipulation of expected testimony was presented, not one fitness report was introduced, no calculation of retirement benefits was admitted. The only evidence of appellant's awards and decorations was the list of abbreviations in the ORB introduced by the government. (JA084). The defense presentencing case included no "good soldier book," no calculation of retirement benefits, and only three local witnesses, none of whom had known him for more than a few months.

Having heard all about appellant's misconduct and nothing about his career, the military judge sentenced appellant to forfeit $3000 pay per month for three months, to be restricted to post for thirty days, and to be dismissed. (JA080). On

appeal to the Army Court, appellant submitted documentation of what his sentencing case could easily have been. (JA165-282).

Summary of Argument

Trial defense counsel's performance in the presentencing phase was deficient, and it prejudiced appellant by effectively denying him individualized sentencing. Appellant's counsel had a duty to present evidence in extenuation and mitigation, and the post-trial record indicates that a tremendous presentencing case could easily have been brought to court. Appellant's counsel neglected to present even a basic presentencing case, and not as a tactical decision to avoid "opening the door" to anything unfavorable, but because they had prejudged (and grossly misjudged) "the going rate" for "this kind of offense." Thus appellant's own counsel ensured that he was sentenced for "this kind of offense," as augmented by the government case in aggravation. But for counsel's error, appellant would have been sentenced with due consideration of the substantial evidence in extenuation and mitigation, making his dismissal from the service an unlikely result.

Standard of Review

This court reviews claims of ineffective assistance of counsel de novo. *United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001).

To establish ineffective assistance of counsel, an appellant must demonstrate both "(1) that his counsel's performance was deficient, and (2) that this deficiency

resulted in prejudice." *United States v. McIntosh*, 74 M.J. 294, 295 (C.A.A.F. 2015).

When there is an allegation that counsel was ineffective in the sentencing phase of the court-martial, this Court looks to see whether there is a reasonable probability that, but for counsel's error, there would have been a different result." *United States v. Quick*, 59 M.J. 383, 386-87 (C.A.A.F. 2004).

Law and Argument

The United States, a nation characterized by a "can-do" and "do it yourself" ethos, has yet recognized that our criminal justice system is too complicated for a layperson to navigate without a professional guide. It is for *the lawyer*, not the client, to marshal the available resources. Anyone can read the *Manual for Courts-Martial* or a pretrial agreement, just as anyone can read the "Terms of Service" for an electronic device or a web application. Knowing each of the words is not the same as understanding what a document means.

> Even the intelligent and educated layman ... lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel *at every step in the proceedings against him*.

Gideon v. Wainwright, 372 U.S. 335, 345 (1963), quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) (emphasis added).

In the present case, no one was asked to make bricks without straw. In *United States v. Captain*, 75 M.J. 99 (2016), the unfortunate trial defense counsel

had nothing to work with: "all the potential sentencing witnesses identified by [that client] had 'anemic prospective value.' None of the witnesses identified by [that client] had served in combat with him or even knew him prior to the initiation of the criminal proceedings." *Id*. at 103.

In vivid contrast, MAJ Scott's presentencing case was an Army defense counsel's dream. Perhaps two seasoned pilots via telephone, chosen for charisma, and a few more heard from the printed page in stipulations of expected testimony. Enabled by Rule for Courts-Martial 1001(c)(1)(B), trial defense counsel had free rein to introduce specific acts of bravery as mitigating evidence, and the pretrial agreement was no obstacle to telephonic testimony or stipulations of expected testimony. "In questions of means, the lawyer should assume responsibility for technical, legal, and tactical matters, such as which witnesses to call...." Army Regulation 27-26, Rules of Professional Conduct for Lawyers (May 1, 1992), Comment on Rule 1.2.

In the division of labor between attorney and client, it is not the client's job to decide whom to call, be it in person, on the telephone, or on paper. Testimony from the five key disputed witnesses could have been obtained via telephone or by stipulation, and it would have vivified the documentary evidence. There is no real value in the Army Court's analysis of certain arbitrarily cabined documentary

evidence. *United States v. Scott*, mem. op. at *10-12. The question is not whether a "good soldier book" would have sufficed, as there was none.

In effect, the court below severed certain documentary evidence and opined that it was not very compelling, and then directed the *DuBay* judge to focus narrowly on whether appellant asked his counsel to call certain people as witnesses on presentencing. (JA316, 393). This bickering over whether on a certain day (March 30, 2017) appellant specifically asked his counsel to use certain people as presentencing witnesses is absurd in light of counsel's duty to investigate.

> Ineffective assistance of counsel at the sentencing process can occur in several different ways. Perhaps the most frequently encountered situation is when counsel either fails to investigate adequately the possibility of evidence that would be of value to the accused in presenting a case in extenuation and mitigation or, having discovered such evidence, neglects to introduce that evidence before the court-martial.

United States v. Boone, 49 M.J. 187, 196 (C.A.A.F. 1998).

A client has fulfilled his duty if he has made his attorneys aware that there are officers who can describe the higher points of his career. The *DuBay* judge concluded that appellant did that. (JA392-393). Appellant made light work for his counsel to fulfill *their* duty to "take adequate steps to identify potential matter in mitigation or to evaluate adequately information that had been brought to their attention." *United States v. Weathersby*, 48 M.J. 668, 672 (A. Ct. Crim. App. 1998).

The means of introducing evidence is for attorneys to decide, and had appellant's trial attorneys used *any* means to do so, appellant would not have been sentenced based only on his misconduct and the unmitigated evidence in aggravation. Appellant's trial team failed even to provide sufficient context for the sentencing court to understand the intensity of MAJ Scott's behavior towards Ms. HM, and if the court had heard a venerable veteran colonel describe MAJ Scott as "loyal to a fault and a fearless warrior," (JA265), that understanding would have contextualized MAJ Scott's passion as the "flash and outbreak of a fiery mind," (*Hamlet*, Act II, Scene I). Instead, the government vilified him as a rear-echelon seducer of better men's wives.

Conclusion

WHEREFORE, appellant respectfully requests this Honorable Court find he was denied effective assistance of counsel with regard to presentencing, and remand his case for remedial action.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Scott, Crim. App. Dkt. No. 20170242, USCA Dkt. No. 19-0365/AR, was electronically filed with the Court and Government Appellate Division on July 29, 2020.

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