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	REPLY 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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Pursuant to Rules 24 and 25 of this Court's Rules of Practice and Procedure, Appellant hereby replies to the Government's Answer, filed on 30 July 2020.

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(c), Uniform Code of Military Justice, 10 U.S.C. § 866(c) [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's military counsel filed a petition for grant of review on June 8, 2019. The petition for grant of review was granted on November 5, 2019 (JA 003), vacated on June 10, 2020 (JA 002), and ultimately reinstated on July 1, 2020 (JA 001).

Statement of the Facts

The facts necessary for the resolution of this issue can be found in the argument below, and in Appellant's opening Brief.

Summary of the Argument

Appellant was dismissed as a result of misconduct, including adultery and failure to follow a lawful no-contact order. Appellant was prejudiced by the failure of his defense counsel to adequately investigate for potential mitigating evidence. The trial defense team did not contact any of the officers with whom Appellant served in combat, and presented no evidence of Appellant's acts of bravery, and presented no evidence related to Appellant's combat record. This failure amounted to ineffective assistance of counsel guaranteed by the Sixth Amendment. There was no strategic or tactical reason for the failure to investigate and present the evidence; rather, the failure stemmed from the defense counsel's erroneous belief that the "going rate" for adultery and failure to obey a lawful order did not include a dismissal.

Argument

A. Appellant was prejudiced by the failure of his counsel to investigate his military record and present an effective sentencing case.

The government argues that Appellant "did not suffer prejudice because the testimony of the five additional witnesses would not have changed the result due to the egregious nature of his offenses." (Gov't Br. at 14). The government goes on

to describe Appellant's conduct, and quotes the Army Court's observation that "one must think hard to conjure a worse case of adultery than when a field grade officer knowingly has a long term relationship with the spouse of an enlisted soldier who is deployed in combat, and then egregiously disobeys direct orders to end the relationship." (Gov't Br. at 15-16; *United States v. Scott*, 2018 CCA LEXIS 522, *7 (A.Ct.Crim.App. 30 Oct. 2018)).

It is precisely *because* this conduct was so egregious that the failure to investigate and present these witnesses amounted to ineffective assistance. The defense clearly miscalculated the seriousness of these offenses and the likelihood that the conduct would result in dismissal. As the Army Court noted, from the affidavits of defense counsel, "one cannot help but conclude that counsel prepared for the court-martial under the grossly mistaken belief that a dismissal was not a plausible outcome." *Scott*, 2018 CCA LEXIS 522, at *7. That assessment is amply supported by the findings of the military judge after the *DuBay* hearing where she notes that CPT MD "had assessed that a dismissal was a remote possibility given the charges involved" (JA 387), and "CPT MD also admitted that he viewed dismissal a very remote possibility which factored into his handling of this case after preferral of charges, to include the presentencing case and decisions related to presentation of evidence." (JA 338).

The government's argument implies that there isn't *anything* the defense could have presented to mitigate the misconduct, and that simply is not so. Appellant had served in the Army for over 24 years, and these five witnesses could have provided the military judge with the information necessary to accurately assess Appellant's rehabilitative potential. Unlike the witnesses who testified at trial, all of these witnesses knew Appellant before he committed the misconduct. They all would have testified to Appellant's rehabilitative potential in superlative terms. Four of the five served with Appellant in combat, and would have testified to Appellant's bravery in the face of enemy fire.

The following is a brief exposition of what these witnesses actually would have said had they been called by the defense to testify.

1. COL DF, Appellant's Battalion Commander in Iraq

COL DF described Appellant as "loyal to a fault and a fearless warrior who personally saved the lives of countless Americans in combat." (JA 265). COL DF stated that Appellant fought in "hundreds of battles" over the course of a fifteen-month deployment in Iraq, and described one battle in particular, stating,

> Jason was personally involved in a battle South of Baqabah where he risked his life on multiple occasions. His team fought insurgents at less than 250 meters, underneath a cloud cover of only 200 feet off the ground, killing countless insurgence [sic]. Over the nine hours, Jason and his team had to fly down to the enemy trenches shooting targets until their aircraft disappeared into the fog. They would enter an emergency climb out of the clouds; find local radio antennas; hover back through the clouds; and attack the enemy again and again taking

> fire the entire time. Jason fought this battle, and battles just like it on numerous occasions. The Battalion Commander of the unit personally thanked Jason's team for saving his Soldiers. That Commander lost two young Captains and five soldiers in the battle.

(JA 265).

COL DF acknowledged Appellant's misconduct, but nevertheless believed that Appellant had "extraordinary rehabilitative potential," and Appellant's "brave and selfless duty performance under my command in the harshest and most dangerous environment you can possibly imagine was excellent." (JA 265). COL DF said he would serve with Appellant again "without reservation," especially if he were to serve in combat, and knowing that Appellant committed adultery and violated the order "does not affect these opinions of him in the slightest." (JA 265-66). COL DF concluded,

> As MAJ Scott's Battalion Commander for over two years to include 15 months in combat, I can personally attest to MAJ Scott's extraordinary service to his Nation. Jason served 24 years with honor, love of country and complete selfless service to others. For a few months he did wrong; he knew it; but he deserves and has earned the honor of this nation for the years he served selflessly for his Soldiers, his units and his Nation.

(JA 266).

> *2. LTC AS, Appellant's long-time friend and Company Commander in Afghanistan*

LTC AS stated in his affidavit that he has known Appellant since October of 2001, having served together from flight school through numerous subsequent assignments and deployments. (JA 268). During those deployments to Iraq and

Afghanistan they flew more than a thousand hours and "engaged insurgents together on multiple occasions." (JA 268). LTC AS specifically chose Appellant to fly on his Attack Weapons Teams in Afghanistan "due to his professionalism and technical acumen [with] the aircraft." (JA 268). According to LTC AS, Appellant "was always dependable and an exceptional pilot [he] could trust on any of [the] High Value Target missions in support of US and AUS SOF customer units." (JA 268).

It is obvious that LTC AS knew Appellant well, and was in a position to assess Appellant's potential, both as a pilot and an officer in the Army. LTC AS states,

> As a result of spending so much time around each other, I have grown to know Jason exceptionally well. I perhaps know him better than any other person in his life. He and I literally spent almost every day together for over 10 years and we deployed twice together in combat during the most kinetic of times. I have a very high opinion of Jason Scott as an Army Officer, as an Apache pilot, and as a man. I believe Jason Scott to be an extraordinarily brave and competent pilot, an officer of the highest morals, and a trustworthy and honest man. I have always trusted Jason. He is the type of person of whom I can always call, for anything, at anytime for help.

(JA 268-69).

LTC AS acknowledged Appellant's misconduct, but stated that the misconduct "In no way changes my opinions of Jason or my opinion that Jason has incredible potential to be fully rehabilitated." (JA 269). LTC AS stated, "I can say with complete conviction that Jason Scott is a person who has served his country

with incredible tenacity, bravery and competence in the most horrific and dangerous of conditions. Despite his misconduct, I would still choose to fly with Jason in combat over any other pilot I have ever flown with." (JA 269).

3. CW5 RN, Battalion Standardization Officer

In his Affidavit, CW5 RN said that he served with Appellant for five years, from April 2005 through June of 2010, deploying once to Iraq and once to Afghanistan. (JA 271). CW5 RN explained in detail the complexities involved in qualifying to fly the Apache helicopter. (JA 271-72). He described the organizational structure of the Apache Battalion, and described the configuration of the aircraft itself, to include additional training necessary because of the acquisition of a new version of the aircraft. (JA 272). CW5 RN then described the typical Apache mission in Iraq, and stated, "In my entire Army career, I have never seen any unit fly at the operational tempo that was flown by our battalion during Operation Iraqi Freedom." (JA 271-73).

CW5 RN described the operational tempo of the unit, stating,

> During the rotation the battalion averaged 1,000 combat flight hours per pilot. To put this in perspective, a couple of years before this rotation the Army Aviator of the Year flew 1,000 combat hours during his deployment, which was the first time that feat had ever been accomplished. Two years later during our deployment every pilot including the staff personnel like Major Scott flew more than 1,000 combat hours. During our deployment to Iraq, our 79 pilots logged a combined total of 32,000 flight hours.

(JA 273).

CW5 RN noted that during the deployment the helicopters "were shot at all the time," and each team "averaged three to four engagements every day." (JA 273). The Apache pilots "fired more than 800 Hellfire missiles" during the deployment. (JA 273). CW5 RN stated, "Bluntly, our pilots, including Major Scott killed the enemy every day. This was made all the more stressful, because every time an Apache fired its weapons, the gun tape was reviewed by instructor pilots and Judge Advocates. There was constant pressure to engage the enemy effectively without causing collateral damage." (JA 273).

CW5 RN stated that although the battalion "inflicted thousands of casualties upon the enemy over the course of the deployment," it was not without its own casualties. (JA 273). He described the loss of an Apache and its pilots, and stated that Appellant had flown many hours with one of the pilots, and their deaths "was felt very hard in the battalion." (JA 273). The battalion also lost an enlisted member who had volunteered for a security detail outside the FOB and ran over a landmine. (JA 273).

According to CW5 RN, the battalion was set to deploy to Afghanistan "a mere eighteen months after returning to Fort Bragg," and while they were at the National Training Center preparing for that deployment, they learned that they would deploy seven months earlier than had been planned. (JA 273-74). Half of

the experienced pilots PCS'd and were replaced by new pilots. (JA 274).

According to CW5 RN,

> The battalion went from a very strong and experienced attack helicopter battalion in Iraq to a very young and very inexperienced battalion in Afghanistan. The experienced pilots, like Major Scott, became even more critical to the mission. Though Major Scott was the HHC Commander, hew flew as many or more combat missions than the other pilots who were not in command. Again, overall there was slightly less flying time in Afghanistan, but the flying was far more complex, and our living conditions in Afghanistan were far more austere.

(JA 273).

CW5 RN stated that although he did not socialize with Appellant, over the period of five years and two combat deployments, he came to know Appellant very well. (JA 274). CW5 RN stated,

> I flew with Major Scott many, many times during our deployments. I have a very high opinion of Major Scott as an above average Apache pilot. During the deployments to Iraq and Afghanistan I flew with every pilot. Many pilots would require a lot of attention but Major Scott was not one of those pilots. I never had any reason to question Major Scott's flying abilities. In one regard Major Scott distinguished himself as an Apache pilot: when the bullets started flying, Major Scott always wanted to be in the front at the tip of the spear.

(JA 274).

CW5 RN added that in his opinion Appellant "was a terrific officer and an outstanding Company Commander who was revered and respected amongst his peers and subordinates alike." (JA 274). CW5 RN believes that Appellant "has tremendous rehabilitative potential," and "is an exceptional warrior who

possess[es] exceptional military character." (JA 275). CW5 RN said he "would go back to combat with him in a second," and described Appellant as "the consummate war fighter who was 'all in' and never did anything half way." (JA 275).

4. CW4 EM, Battalion Quality Control Officer

In his Affidavit, CW4 EM stated that Appellant was initially his Platoon Leader in the Armament Platoon, but Appellant later became the Echo Company Commander and CW4 EM was re-assigned as the Quality Control Officer for the battalion. (JA 277). CW4 EM said that Appellant frequently approached him for guidance on technical matters throughout the deployment. According to CW4 ER, he and Appellant grew very close over the course of the deployment. (JA 277). CW4 EM stated,

> Despite the challenges of the deployment, I can honestly say I never saw Major Scott get angry or appear overwhelmed. They say that when the going gets tough, the tough get going, and that was never truer with any person more than Major Scott. Under the harsh conditions of our deployment, Major Scott was at home, and in his element. The harder the mission got, the harder Major Scott would get. Over the entire time I knew and worked with Major Scott, there were only two occasions I ever witnessed him become outwardly overwhelmed by emotion. The first was the day SPC Timothy Fulkerson, a member of his former platoon, was killed when the vehicle he was in drove over a landmine. The other occasion was when two of our pilots were killed in their Apache aircraft.

(JA 277-78).

According to CW4 EM, Appellant was "an extremely competent officer," who was "a highly respected leader in the battalion" "known for being approachable, being intense, and being excited about being a Soldier and an Officer." (JA 278). CW4 EM stated, "Honestly, Major Scott was excited about life in general. He motivated everyone in the company to be the best that they could be. I honestly believe Major Scott viewed leadership as an honor and a privilege and it was clear that he genuinely loved the Army and his subordinates." (JA 278). CW4 EM said of Appellant, "He never forgot what it was like to be an enlisted member of the Army, and he treated his subordinates with the same love and respect that he demonstrated to his superiors. Major Scott genuinely loved Soldiers and being a Soldier." (JA 278).

CW4 EM concluded by stating that, although he never served with Appellant after he left the 82d Airborne Division, they have stayed in very close contact and he considered Appellant a dear friend. (JA 278). CW4 EM stated that in his opinion, Appellant "demonstrated the highest level of military character, and his duty performance as the Maintenance Platoon leader was exceptional." (JA 278). CW4 EM acknowledged that Appellant committed the misconduct, but stated, "These offenses do not change my opinion of Major Scott as a man or as an officer. If I were required to go back to combat, I would want Major Scott to be next to me when the bullets started flying." (JA 278).

5. Mr. JR, Appellant's co-worker at CENTCOM

Mr. JR worked with Appellant at United States Central Command (CENTCOM) in the Joint Operations Center at McDill Air Force Base. (JA 281). Mr. JR worked closely with Appellant on many projects, and became very good friends after learning they were from neighboring communities in West Virginia. (JA 281). Mr. JR described the operational tempo at CENTCOM at that time as "very intense," and while he was understandably circumspect about the nature of the work due to its classified status, he described a typical work day as comprising of nine to eleven hours, and said they regularly worked 13 and 14 hour days. (JA 281). Mr. JR stated, "It goes without saying that CENTCOM's mission during this period of time was critical to national security of the United States." (JA 281).

According to Mr. JR, Appellant briefed General Mattis on a weekly basis. (JA 281). Mr. JR also "sat in on many other briefings Jason gave to the J3 AND CENTCOM Commander." (JA 281). Mr. JR said of Appellant,

> He was hard working, he was intense, he was honest, he was trustworthy, and he was highly regarded by all those who knew him. Major Scott impressed me, and I am sure he had a similar impact on many others, as one of the smartest and most competent officers I have ever met.

(JA 281). Mr. JR said that in his opinion Appellant's "duty performance at CENTCOM was of the highest quality" and that Appellant has "tremendous rehabilitative potential." (JA 282).

All of these witnesses would have added significantly to the mitigation of the offenses. They would have helped to paint a completely different picture of Appellant, as an officer, as a pilot, and as a person; a picture spanning an entire career, much of it under extraordinarily difficult and dangerous circumstances. But since no evidence was presented to place the misconduct into its proper perspective as it relates to the rest of Appellant's career, the government's damning evidence went entirely unmitigated.

B. Appellant's counsels' failure to investigate and present evidence in mitigation, including evidence of his bravery and combat record amounted to ineffective assistance.

First the government argues that the performance of Appellant's counsel was not deficient because they "introduced extenuating and mitigating evidence on his behalf." (Gov't Br. at 18). In support of this argument, the government cites to the testimony of the defense witnesses. (Gov't Br. at 18). But as the Army Court noted in its original decision in this case, "all [of these witnesses] gave a middling assessment of appellant's performance, and none could testify about MAJ Scott's service that predated his misconduct." *Scott*, at *10.

The government also argues that Appellant "accounted for his achievements while deployed when rendering his unsworn statement, which provided an account of his bravery during combat," and Appellant's "ORB supported his unsworn statement by corroborating his combat assignments." (Gov't Br. at 18).

Respectfully, the ORB doesn't corroborate *anything*. First of all, the ORB was introduced by the government, not the defense. *Scott*, at *11. And while the ORB does list Appellant's duty assignments and duty titles, it says nothing about what Appellant actually did in those assignments. With respect to awards and decorations, the only information contained in the ORB is a "list of award acronyms" (*Scott*, at *11), which Appellant submits can be understood only by reference to AR 600-8-22, *Military Awards*, which was not admitted at trial, and of which no request to take judicial notice was made by the defense.

Of course, these five witnesses could have corroborated Appellant's unsworn statement as it related to his combat assignments, but they were never called. As this Court is undoubtedly aware, "if an accused elects to make an unsworn statement, he is not offering evidence." *United States v. Provost*, 32 M.J. 98, 99 (C.M.A. 1991). The military judge was free to disregard it in its entirety simply *because* it was unsworn. *See United States v. Breese*, 11 M.J. 17, 23 (C.M.A. 1981)(approving an instruction to the members that they could consider that the statement was not under oath). And he would have been significantly more likely to give it weight as it related to Appellant's bravery and combat record if it had been corroborated.

The government argues that Appellant's claim that the entirety of his career was not placed before the military judge "are simply wrong," apparently because

the military judge stated that he would "not mete out additional punishment based on rank, but will consider the rank of the accused, along with his age and experience as possible evidence of either mitigation or aggravation, as it does in every case." (Gov't Br. at 19). The government adds that before recessing to determine the sentence, the military judge noted, "[g]iven the stack of exhibits, and the length of the accused's period of service that's reflected in his enlisted [sic] record brief, I expect that it will take about an hour, at least an hour, for me to conduct my deliberation." (Gov't Br. at 19). None of this means that Appellant's military history was placed in front of the military judge in any meaningful way.

That the military judge stated that he would consider what he is *required* to consider – that is, the rank, age, and experience of the accused – is no substitute for evidence. As this Court has held, "[e]ach accused deserves individualized consideration on punishment," and "proper punishment should be determined on the basis of nature and seriousness of the offense and the character of the offender." *United States v. McNutt*, 62 M.J. 16, 19-20 (C.A.A.F 2004). And that "stack of exhibits" included only prosecution exhibits, including the Stipulation of Fact (Pros. Ex. 1); Appellant's ORB (Pros. Ex. 2); the Counseling Statement (Pros. Ex. 3); and the text messages between Appellant and HM (Pros. Ex. 4). Admission of the ORB was done pursuant to R.C.M. 1001(b)(2) and paragraph 5-29.a. of AR 27-10, *Military Justice*. The rest of the documents were offered in aggravation of

the offense. There is nothing in those documents discussing Appellant's bravery or his combat record, despite the fact that those are factors available to the military judge in arriving at an appropriate sentence. *See United States v. Mack*, 56 M.J. 786, 792 (A.Ct.Crim.App. 2002)(citing DA PAM 27-9, *Military Judge's Benchbook*).

Quoting *Strickland v. Washington*, 466 U.S. 668, 691(1984), the government argues, "the reasonableness of counsel's actions may be determined or substantially influenced by defendant's own statements or actions." (Gov't Br. at 19-20). The full quote from *Strickland* reads,

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.

466 U.S. at 691.

This simply isn't a case in which Appellant's actions could have or should have influenced his defense counsel with respect to their obligation to investigate

potential defense witnesses and present a defense sentencing case that is actually calculated to minimize the chance of a dismissal. This isn't a case, for example, in which the defense counsel failed to investigate a potential alibi when the defendant had persistently claimed he acted in self-defense. Nor is this a case in which Appellant gave counsel any reason to believe that contacting any of these witnesses would be fruitless or harmful. In fact, CPT MD testified that if Appellant had told him "I want you to contact this person," he would have done it even if he didn't think it was necessary, "[j]ust to make sure he feels like he's getting a fair representation." (JA 306-307). And Appellant did give CPT MD the Distinguished Flying Cross narrative (JA 381-82), and CPT MD failed to follow up entirely.

The government argues, "While appellant now avers that he mentioned an additional five witnesses, the *DuBay* judge determined appellant did not provide these specific names when his defense counsel asked who appellant wanted to testify on his behalf during presentencing." This comment misstates the findings of the military judge to a degree. The military judge found by a preponderance of the evidence that Appellant *did* give the five names to CPT MD over the course of the representation, but that he did not "request that they be contacted as potential presentencing witnesses." (JA 392-93). But counsel's obligation to investigate

and present an effective sentencing case is not cabined by a specific request of the accused.

The government, in addressing the "reasonableness" of counsel's actions, states, "Evidence of defense counsel's wholly reasonable and competent interactions with appellant also undercut appellant' incredible allegation that his counsel inexplicably followed his request to call seven presentencing witnesses, yet somehow ignored his request to call an additional five witnesses." (Gov't Br. at 20). The reasonableness of counsel's conduct is evaluated "from counsel's perspective at the time." *Strickland*, at 689. Given (1) that the defense sentencing case was entirely predicated upon the belief that a dismissal under these circumstances was not "a realistic possibility" (JA 293); (2) that defense counsel's belief that dismissal was so unlikely that it impacted his decision not to request a retirement calculation because he "didn't think [he] needed it" (JA 297-99); (3) the defense counsel's claim that he was really busy (JA 302); and (4) the defense counsel's claim that he thought he knew "the going rate" for these allegations (JA 302), Appellant is reluctant in the extreme to characterize his defense team's performance in the sentencing case as "wholly reasonable and competent."

Appellant testified that he talked to CPT MD

> about the totality of my career. Back when I was an Engineer, when I was an enlisted guy, at Fort Bragg, all of the way through flight school. That's where I met [LTC AS]. My combat deployments where [CW4 EM] was my weight training partner. [CW5 RN], he was my –he's –

> the Battalion Standardization and Instructor Pilot. He's like god. COL DF was just an icon to everybody.

(JA 324). They talked about his deployments "all of the time." (JA 321). Prior to 30 March, he talked with CPT MD about these five witnesses "All of the time. All of the time." (JA 328). Appellant acknowledged that he never called any of the witnesses to tell them he was going through the court-martial process, but he also said that he never told CPT MD not to contact any of these people. (JA 324-25).

The government appears to rest its entire argument on a claim that CPT MD did not contact any of these witnesses because Appellant never specifically asked him to. To be clear, Appellant claimed that he told CPT MD that he wanted these five people to testify. (JA 327). He further testified that he no longer had any expectation that those witnesses would be called because he waived them. (JA 308). But whether Appellant specifically asked CPT MD to contact these witnesses or not is simply irrelevant. It was *CPT MD's* responsibility, and *not Appellant's*, to make a sufficient investigation and to present an effective sentencing case.

It is clear from CPT MD's testimony that he did not even give Appellant the same consideration he would have given to a client at a field-grade Article 15. As far as he was concerned, the case was won when the sexual assault charge was no longer on the table. Appellant had given CPT MD a copy of a narrative written by COL DF in support of a Distinguished Flying Cross (JA 381-82), and when asked

why he didn't seek out the battalion commander who had written the narrative, CPT MD testified,

> I think that in any line of work, if you are handling a steady flow of business, whatever that line of work is, you are going to have to learn how to triage and prioritize cases; particularly when you are handling appointed cases, whether it is in a court-martial context or an appointed cases list in the civilian sector for civilian crimes. I think that based on the number of cases that I had at the time, the number of Soldiers also facing serious sex assault charges, the number of other things going on and other people I was representing, that sometimes you do, sort of, prioritize cases.
>
> For every field grade Article 15, or for every company grade Article 15, you can go back and find a guy's high school counselor and you can find his church leader. You could find these people to testify and do that. You could pull out all of the stops for all of those cases.
>
> But in a case like this, whenever you go from a sex assault, brutal rape accusation trial, to a case alleging that a man didn't know a woman was married for several months, which the government agreed to in the stipulation of fact with the OTP, that then once he did know, he had some trouble breaking off the relationship, that he was going to explain that to the judge, that his commander--that he violated an order. That his commander whose order he violated was coming to testify on his own behalf already and had already been prepared to testify at the Article 32. With those facts, in that case, with what I believed the going rate was for this allegation, and in the triage and prioritization of work flow we had to do in an office like this that is extremely busy, no. 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.

(JA 301-302).

In other words, in CPT MD's view the case was already won, dismissal was not a realistic possibility, and he had more important work to attend to. There was

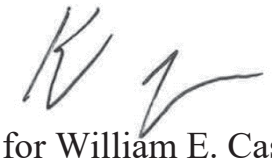
nothing "tactical" or "strategic" about his decision not to present evidence about Appellant's entire 24-year career, or evidence of his bravery or combat history. He was mistaken in his assessment of what the offenses were "worth" in terms of punishment, and apparently unwilling to hedge against being wrong about that, with an officer's career and otherwise-vested pension on the line.

Finally, the government takes issue with Appellant's claims that he was confused about the witness limitation in his pretrial agreement. (Gov't Br. at 21-22). First of all, it should come as no surprise to this Court that a non-lawyer attempting to navigate this process might experience confusion to some degree, and often might have to have things explained to him more than once. And a layperson – even one who is well-educated and extremely accomplished in another field – might grasp a legal principal one day, yet fail to grasp it the next. Thus, even if Appellant's testimony during the plea colloquy, his affidavit to the Army Court, and his testimony at the *DuBay* hearing is inconsistent in some respects as it relates to his understanding about the ability to call witnesses from outside the local area, it doesn't mean he was *lying* in any of those proceedings. But in any event, what Appellant has always been clear about is that he wanted evidence of his bravery and his combat record brought out at his court-martial. That is why he sent CPT MD the Distinguished Flying Cross narrative.

This Court should not mistake confusion over the meaning and effect of a term in a pretrial agreement rendering the plea improvident (which Appellant has not and does not now argue) with confusion over whose responsibility it was to marshal evidence in this case. That responsibility fell squarely on the shoulders of Appellant's trial defense team, and they failed him.

Conclusion

Because Appellant was denied the effective assistance of counsel guaranteed by the Sixth Amendment to the Constitution, the sentence in this case should be set aside. WHEREFORE Appellant so prays.



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USCAAF Bar No. 36867

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(d) because it contains 5,684 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a proportional typeface using Microsoft Word Version 2016 with Times New Roman 14-point typeface.

Date: August 5, 2020

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was mailed to the Court and delivered to opposing counsel on August 5, 2020.

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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 August 5, 2020.

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