IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	FINAL BRIEF ON
Appellee	)	BEHALF OF APPELLEE
	)	
v.	)	
	)	
Major (O-4)	)	Crim. App. Dkt. No. 20170242
JASON A. SCOTT	)	
United States Army,	)	USCA Dkt. No. 19-0365/AR
Appellant	)	

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

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Index of Brief

Granted Issue:

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

Statement of Statutory Jurisdiction.....1

Statement of the Case.....1

Statement of Facts.....4

Summary of Argument.....11

Standard of Review.....12

Law.....12

Argument.....14

Conclusion.....23

Table of Authorities

Supreme Court of the United States

Harrington v. Richter, 562 U.S. 86 (2011) 11
Strickland v. Washington, 466 U.S. 668 (1984) 11
Yarborough v. Gentry, 540 U.S. 1 (2003) 12

Court of Appeals for the Armed Forces & Court of Military Appeals

United States v. Akbar, 74 M.J. 364 (C.A.A.F. 2015) 12
United States v. Brownfield, 52 M.J. 40 (C.A.A.F. 1999) 14
United States v. Green, 68 M.J. 360 (C.A.A.F. 2010) 12
United States v. Rose, 71 M.J. 138, (C.A.A.F. 2012) 12

Service Courts of Criminal Appeals

United States v. Scott, 2018 CCA LEXIS 522, *21 (Army Ct. Crim. App. 2018)..2

Statutes, Regulations, and Other Materials

Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 1
Article 67, UCMJ, 10 U.S.C. § 867 1
Article 92, UCMJ (2016), 10 U.S.C. § 892 1
Article 134, UCMJ (2016), 10 U.S.C. § 934 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	FINAL BRIEF ON
Appellee	)	BEHALF OF APPELLEE
	)	
v.	)	
	)	
Specialist (O-4)	)	Crim. App. Dkt. No. 20170242
JASON A. SCOTT	)	
United States Army,	)	USCA Dkt. No. 19-0365/AR
Appellant	)	

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

Granted Issue

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

Statement of Statutory Jurisdiction

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

Statement of the Case

On April 12, 2017, a military judge sitting alone as a general court-martial convicted appellant, in accordance with his pleas, of one specification of failure to obey a lawful order and one specification of adultery, in violation of Articles 92

and 134, UCMJ, 10 U.S.C. §§ 892 and 934 (2016). (JA 080). The military judge sentenced appellant to thirty days of restriction to Joint Base Lewis-McChord (JBLM), forfeiture of $3,000.00 pay per month for three months, and a dismissal from the service. (JA 080). Pursuant to a pre-trial agreement, the convening authority approved the sentence as adjudged. (JA 021).

On October 30, 2018, the Army Court affirmed the findings of guilty, but was "unable to affirm the sentence . . . without additional fact-finding." *United States v. Scott*, 2018 CCA LEXIS 522, at *21 (Army Ct. Crim. App. 2018). The Army Court subsequently ordered a hearing pursuant to *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 (C.M.R. 1967), to answer three questions[1] pertaining to whether appellant received effective assistance of counsel during the presentencing phase of his trial. *Scott*, 2018 CCA LEXIS 522, at *20–21.

The post-trial *DuBay* hearing took place on January 30, 2019, and the trial court issued its findings and conclusions on February 22, 2019. (JA 383). After considering the entire record, including the *DuBay* hearing's findings and

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1. Did MAJ Scott tell either CPT JH or CPT MD the names of COL (Ret.) [DF], CW5 (Ret.) [RN], and the other three witnesses listed in his affidavit? 2. Did CPT JH or CPT MD contact COL (Ret.) [DF], CW5 (Ret.) [RN], and the three other witnesses listed in the affidavit? 3. If yes to any or all witnesses listed in question (2), was there a strategic or tactical reason not to call the witness(es) to testify during pre-sentencing proceedings? *Scott*, 2018 CCA LEXIS 522, at *20–21.

conclusions, the Army Court affirmed appellant's sentence on March 13, 2019. The Army Court denied appellant's request for reconsideration on May 3, 2019.

On July 1, 2019, appellate defense counsel petitioned this Court, on behalf of appellant, for a grant of review. Following multiple extension requests and approvals[2], this Court, on 5 November 2019, granted appellant's petition for review and ordered appellant to file a brief on the following issue:

> WHETHER APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT OF THE CONSTITUTION.[3]

This Court's order required appellant to file a brief no later than December 2019.

After multiple requests by appellant for enlargements of time to file a brief and subsequent approvals,[4] the United States filed a motion with this Court on March 17, 2020, seeking to dismiss the granted petition and opposing further enlargements of time. On April 6, 2020, this Court denied civilian defense counsel's request for admission pro hac vice.[5] On that same date, this Court granted another enlargement of time and ordered appellant's brief to be filed no

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[2] *United States v. Scott*, 79 M.J. 180 (C.A.A.F. July 2, 2019); 79 M.J. 200 (C.A.A.F. July 22, 2019); 79 M.J. 217 (C.A.A.F. Aug. 7, 2019); 79 M.J. 232 (C.A.A.F. Aug. 19, 2019).
[3] *Scott*, 79 M.J. 308 (C.A.A.F. Nov. 5, 2019) (Order Granting Review).
[4] *Scott*, 79 M.J. 340 (C.A.A.F. Dec. 5, 2019); 79 M.J. 349 (C.A.A.F. Dec. 17, 2019); 79 M.J. 425 (C.A.A.F. Jan. 17, 2020).
[5] *Scott*, 2020 CAAF LEXIS 190 (C.A.A.F. Apr. 6, 2020).

later than May 7, 2020.[6] Appellant did not meet the court-imposed May 7, 2020 deadline. Accordingly, the United States filed its second motion to dismiss the granted petition on May 15, 2020.

On June 10, 2020, this Court vacated its previous grant of review and denied appellant's initial petition for grant of review.[7] On June 15, 2020, appellate defense counsel petitioned this Court to reconsider its June 10, 2020 decision and filed a motion for leave to attach appellant's declaration. On July 1, 2020, this Court granted appellant's petition for reconsideration, vacated its June 10, 2020 Order, and instructed the United States to file a brief no later than July 31, 2020.[8]

Statement of Facts

1. Underlying Bases for Appellant's Charges

Appellant and Mrs. HM met at a gym on Joint Base Lewis-McChord (JBLM) in the spring of 2015. (JA 031, 082). Appellant participated in spin classes where Mrs. HM served as an instructor. (JA 082). Appellant and Mrs. HM began a sexual relationship in the summer of 2015; appellant was not aware that

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[6] *Scott*, 2020 CAAF LEXIS 192 (C.A.A.F. Apr. 6, 2020). On this date, the court also denied the United States' opposition to further enlargements of time and motion to dismiss the granted petition. *See Scott*, 2020 CAAF LEXIS 191 (C.A.A.F. Apr. 6, 2020); *Scott*, 2020 LEXIS 193 (C.A.A.F. Apr. 6, 2020).
[7] *Scott*, 2020 CAAF LEXIS 332 (C.A.A.F. Jun. 10, 2020). This Court further denied the United States' second motion to dismiss the granted petition as moot. *Id.*
[8] On July 1, 2020, this Court also granted appellate defense counsel's motion to attach appellant's declaration.

she was married at the beginning of the relationship. (JA 032, 082). Several months into the dating relationship, appellant learned that Mrs. HM was married to Sergeant First Class (SFC) AM. (JA 032, 082). SFC AM, a Special Forces soldier, was deployed to a remote combat zone in Afghanistan. (JA 082). Appellant also discovered that Mrs. HM and SFC AM had two children. (JA 082).

While dating SFC AM's wife, appellant made disparaging remarks to her about her deployed husband. (JA 082, 103–04, 131, 162). Appellant also repeatedly told Mrs. HM that he wanted her to divorce SFC AM. (JA 134, 139, 143, 147, 151). On one occasion, appellant even sent Mrs. HM a report of a Special Operations soldier who was killed in Afghanistan and asked if SFC AM had died. (JA 129, 163).

In the fall of 2015, appellant introduced Mrs. HM as his girlfriend to his colleagues and his supervisor, Colonel (COL) MH.[9] (JA 082). On October 29, 2015, after learning that Mrs. HM was married, COL MH ordered appellant to "cease and desist all contact with" Mrs. HM. (JA 085). Appellant acknowledged receipt of COL MH's directive and signed the order instructing him to end his inappropriate relationship with Mrs. HM. (JA 028, 085).

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[9] During the relevant timeframe, COL MH served as appellant's immediate supervisor and the I Corps G3, Director of Aviation Operations at JBLM. (JA 055–56).

On divers occasions between October 30, 2015, and January 25, 2016, appellant willfully disobeyed COL MH's order and engaged in a prohibited sexual relationship with Mrs. HM. (JA 030, 082). Appellant and Mrs. HM traveled to New York together in November 2015. (JA 082). Notwithstanding his knowledge of Mrs. HM's marital status and an order from his supervisor, appellant spent the Christmas 2015 holiday at his on-post residence with Mrs. HM and her daughter. (JA 082). Appellant continued his illicit sexual relationship with Mrs. HM, while her husband was deployed to a remote area of Afghanistan, until sometime in February 2016. (JA 32–33, 082).

2. Appellant's Guilty Plea

On March 30, 2017, appellant offered to plead guilty to the crimes of which he was later convicted. (JA 154–56, 158). On March 31, 2017, the convening authority accepted appellant's offer to plead guilty. (JA 157, 159). Appellant's plea inquiry commenced on April 12, 2017, and prior to accepting appellant's guilty plea, the military judge informed appellant that his plea would not be accepted until he understood its full meaning and effect. (JA 026). The military judge confirmed that appellant understood the maximum punishment for the offenses to which he was pleading guilty included dismissal and confirmed appellant had no questions. (JA 035–036). The military judge then began a lengthy colloquy regarding the terms and conditions of the pretrial agreement

appellant had entered into with the convening authority. (JA 037–043). The first condition the military judge discussed with appellant concerned his "waiver of government production of witnesses beyond 50 miles," but that "it doesn't mean you can't have witnesses come beyond 50 miles. It just means on their own dime." (JA 037–038; 155). Appellant confirmed that he understood this provision and did not have any questions. (JA 038). In response to the military judge's question as to whether he was satisfied with his lawyer's advice regarding the pretrial agreement, appellant responded "[y]es, sir." (JA 039). Appellant also responded, "[n]o, sir" when asked if he had any remaining questions about his pretrial agreement. (JA 039). Further, appellant answered affirmatively when the military judge asked if he understood all of his pretrial agreement's terms and how those terms affected his case. (JA 040). Before finally accepting appellant's guilty plea, the military judge offered appellant additional time to discuss any lingering questions or concerns. (JA 042). After taking additional time to consult with his attorneys, appellant told the military judge, "I understand everything, sir. I'm ready to continue to move forward." (JA 042).

Appellant's counsel called multiple witnesses to testify during presentencing. Counsel called COL MH[10] first. (JA 055). COL MH provided

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[10] Colonel MH was appellant's immediate supervisor who ordered appellant to cease and desist all contact with Mrs. HM. (JA 055, 077–078)).

favorable character evidence despite the fact that appellant had disobeyed his order, calling appellant "my go to guy." (JA 056–057). Colonel MH further testified, "he will definitely provide good, quality, high performing work in his effort and due diligence to do the right thing. I believe this event has taught him a significant lesson." (JA 057–058). Next, defense counsel called Lieutenant Colonel (LTC) SH who testified that appellant was "highly rehabilitative." (JA 063). The third witness to speak on appellant's behalf, Chief Warrant Officer Five (CW5) JI, testified that he was still willing to deploy with and work with appellant in the future, despite his crimes. (JA 067).

After CW5 JI testified, appellant provided an unsworn statement. (JA 068–076). While addressing the court, appellant recounted his combat tours in Iraq and Afghanistan and apologized directly to SFC AM. (JA 073–075).

After completion of the presentencing testimony, appellant's Officer Record Brief (ORB) was admitted into evidence. (JA 084). A stipulation of fact was also entered into evidence and included a preamble that detailed appellant's time in service.[11] (JA 081).

3. The Army Court's Appellate Review

Prior to rendering its opinion regarding appellant's case, the Army Court considered the affidavits it received from each trial defense counsel. *Scott*, 2018

[11] Appellant initially enlisted in the Army on April 21, 1992. (JA 081).

CCA LEXIS 522, at *7. While deciding appellant's case, the Army Court could not "avoid the factual dispute contained in the conflicting affidavits" and subsequently ordered a *DuBay* hearing to address three questions regarding defense counsel's presentencing strategy.[12]

4. The *DuBay* Hearing[13] and Defense Counsel's Affidavits

The *DuBay* hearing revealed that CPT MD, lead defense counsel, informed appellant on multiple occasions of the need to "prepare for court-martial and explored potential witnesses we may call, among several other topics relating to [appellant's] case." (JA 371). In response, appellant provided his defense counsel with seven names of soldiers that he currently or had previously served with.[14] (JA 371, 375–76). Appellant's defense counsel interviewed all seven witnesses. (*See* JA 371, 379). Captain MD testified that while it was possible appellant provided him additional names, he could not remember if appellant specifically provided him with the five specific additional names that are now the subject of appellant's IAC claim.[15] (JA 305–306, 371). Captain JH, assistant defense counsel, also did not recall appellant providing the aforementioned additional five names. (JA 370).

[12] *See supra* note 1.
[13] Captain MD testified at the *DuBay* hearing. (JA 286).
[14] Captain MD remembered that appellant listed COL SH, LTC TC, CW5 JI, Chief Warrant Officer (CWO) JK, CWO AP, SFC YR, and Staff Sergeant (SSG) JF as "7 Soldiers [appellant] either currently or previously served with." (*See* JA 371).
[15] Colonel (Ret.) DF, LTC AS, CW5 (Ret.) RN, Chief Warrant Officer 4 (CW4) (Ret.) EM, and Mr. JR. (JA 262).

In his post-trial affidavit, appellant now claims he told CPT MD that he wanted COL (Ret.) DF, LTC AS, CW5 (Ret.) RN, CW4 (Ret.) EM and Mr. JR to testify on his behalf. (JA 262). Additionally, appellant also averred CPT MD never advised him that his presentencing witnesses could either testify telephonically or submit stipulations of expected testimony. (JA 262).

5. *DuBay* Hearing Findings and Conclusions

After the *DuBay* hearing, the military judge made findings of fact. Concerning the disputed presentencing witnesses, the military judge concluded that while appellant mentioned the names of COL (Ret.) DF, LTC AS, CW5 (Ret.) RN, CW4 (Ret.) EN, and Mr. JR to CPT MD at some point during their 20-month attorney-client relationship, appellant did not request the witnesses be contacted as presentencing witnesses. (JA 392–93). The military judge also determined CPTs MD and JH would have contacted the aforementioned five presentencing witnesses if appellant specifically told his defense counsel to do so. (JA 394).

The *DuBay* court's findings and conclusions also included a determination that CPT MD was a credible witness and noted civilian defense counsel's praise of CPT MD's efforts to prevent rape or sexual assault charges from being preferred against appellant. (JA 388). After receiving the *DuBay* court's findings and conclusion, the Army Court determined the findings of guilt and sentence were

correct in law and fact. (JA 018). The Army Court affirmed the findings of guilty and the sentence. (JA 018).

Summary of Argument

Captains MD and JH were not deficient in their representation of Appellant, and he fails his high burden to prove otherwise. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Even if appellant could demonstrate deficiency, he cannot establish prejudice because his misconduct was particularly and acutely egregious. *Strickland*, 466 U.S. at 687. Captains MD and JH put forth mitigating evidence in the form of testimony from three senior officers[16] who worked alongside appellant, including the officer whose order appellant disobeyed.[17] Coupled with the introduction of appellant's unsworn statement regarding his bravery in combat as corroborated by his ORB, CPTs MD and JH actions were within the standard of "reasonableness" given the circumstances. *Strickland*, 466 U.S. at 688.

Regarding prejudice, in light of the egregious nature of his actions, appellant has failed to demonstrate that calling the additional five additional witnesses to attest to his already established character for bravery would have brought about a substantially different result. *See Harrington v. Richter*, 562 U.S. 86, 109 (2011); *Strickland*, 466 U.S. at 687.

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[16] COL MH, LTC SH, and CW5 JI.
[17] COL MH.

Standard of Review

Claims of [IAC] 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 [IAC]. *United States v. Rose*, 71 M.J. 138, 143 (C.A.A.F. 2012). To prevail on a claim of [IAC], appellant must demonstrate deficient performance by his counsel 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*, 466 U.S. at 687).

The deficiency prong requires appellant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Strickland*, 466 U.S. at 687. The Sixth Amendment is not a mechanism "to improve the quality of legal representation . . . the purpose is simply to ensure that criminal defendants receive a fair trial." *Id*. at 689. Accordingly, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Id*. In assessing an ineffectiveness claim, a court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id*. at 690. In reviewing counsel's actions, courts must avoid the "distorting effects of hindsight" while analyzing counsel's actions. *Id*.; *see also Yarborough v. Gentry*, 540 U.S. 1, 8 (2003).

With regard to defining what constitutes deficiency in a claim of ineffective assistance of counsel, the Supreme Court has stated a "defendant must show that counsels' representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The "reasonableness of counsel's actions may be determined or substantially influenced by defendant's own statements or actions." *Id*. at 691. It is also worth noting, "[a]fter an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome." *Richter*, 562 U.S. at 109.

Even where counsel has committed an error deemed unreasonable, it "does not warrant setting aside the judgement of a criminal proceeding if the error had no effect on the judgement." *Strickland,* 466 U.S. at 691. Appellant must "affirmatively prove prejudice." *Id*. at 692. This means appellant "must show 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." *Id*. at 694. In other words "[t]he likelihood of a different result must be *substantial*, not just conceivable." *Richter*, 562 U.S. at 112 (emphasis added). This requires consideration of "the totality of the evidence before the judge or jury." *Strickland,* 466 U.S. at 695. An appellate court "need not determine whether counsel's performance was deficient before examining the

prejudice suffered by defendant as a result of the alleged deficiencies . . . if it is easier to dispose of an [IAC] claim on the ground of lack of sufficient prejudice, *which we expect will often be so*, that course should be followed. *Strickland*, 466 U.S. at 697 (emphasis added).

Where an ineffective assistance claim is alleged and a *DuBay* hearing ordered, "[the Court] accept[s] the factual findings of the *DuBay* military judge unless clearly erroneous." *United States v. Brownfield*, 52 M.J. 40, 44 (C.A.A.F. 1999).

Argument

1. 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.

This Court can appropriately dispense with Appellant's claim through a finding of lack of prejudice. Accordingly, Appellee addresses the second prong of *Strickland* first. Appellant cannot demonstrate prejudice such that "the result of the proceeding would have been different," due to the extremely aggravating nature of his conduct. *Strickland*, 466 U.S. at 694. On appeal, appellant contends that CPTs MD and JH should have called five additional witnesses[18] to attest to his bravery in combat as mitigation evidence, and that such evidence would have

[18] Appellant claims his counsel should have also called COL (Ret.) DF, LTC AS, CW5 (Ret.) RN, CW4 (Ret.) EM, and Mr. JR. (JA 262).

brought about a different result. (Appellant's Br. 11–13). Appellant's speculative and self-serving claim is untenable in light of the aggravation evidence introduced during his court-martial and considered by the military judge before announcing the sentence. Appellant, a commissioned officer in the United States Army, explicitly attempted to break apart the marriage of an enlisted soldier as the betrayed cuckold was deployed to the battlefields of Afghanistan. A more aggravating crime of adultery is hard to imagine. *See Scott*, 2018 CCA LEXIS 522, at *7. Throughout the course of his relationship with Mrs. HM, appellant repeatedly encouraged her to divorce SFC AM. (JA 134, 139, 143, 147, 151). But appellant's deplorable conduct did not stop at merely pressuring Mrs. HM to divorce SFC AM.

Appellant disparaged SFC AM to his wife, stating "[g]uys who don't ride are pussies. End of story. (Andrew)." (JA 162). Further, appellant belittled SFC AM's enlisted status by highlighting that he, as an officer, made more money when he texted, "[h]e makes those little paychecks. But he can wash [my Harley Davidson] on Saturday to make a few bucks." (JA 162). Appellant even went so far as to mock the potential death in combat of SFC AM , sending Mrs. HM a link to a news story about a Special Forces soldier killed in Afghanistan with a single question "[i]s [SFC AM] dead?" (JA 163). Even when his mistress told appellant that she had received word her husband's unit was trapped and surrounded in

Afghanistan, appellant continued mocking SFC AM's potential death, telling Mrs. HM "maybe you'll get lucky." (JA 163).

Appellant's crimes not only fall far below the expectations of an officer in the United States Army - let alone human decency, but they strike at the very heart of the relationship between officers and their subordinates. SFC AM testified during the presentencing hearing, "I have been betrayed by someone holding the same rank as my company commander." (JA 050). Indeed, appellant's actions caused SFC AM to "pull [his] request to [return] to active duty," following his redeployment because "how could I possibly have trust in the officer corps?" (JA 050–051). As the Army Court aptly concluded after reviewing the evidence, "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." *Scott*, 2018 CCA LEXIS 522, at *7.

Further, appellant brazenly, without regard, and on multiple occasions, disobeyed the order from *his* superior commissioned officer to cease and desist engaging in an adulterous relationship. (JA 028, 030, 032–033, 082, 085–086). Even after receiving his supervisor's directive and learning that Mrs. HM was in fact married to a noncommissioned officer who was deployed to a combat zone,

appellant defiantly continued the sexual relationship with a fellow, lower-ranking soldier's wife. (JA 082).

Appellant's malfeasance certainly deserved a punishment that included a dismissal. Due to the egregious nature of his offenses, appellant cannot "show that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Given the aggravating evidence presented during appellant's court-martial, this Court can "easi[ly] . . . dispose of [the IAC] claim on the ground of lack of sufficient prejudice." *Strickland*, 466 U.S. at 697. It is hardly "conceivable" let alone "substantial" that calling any of the five additional presentencing witnesses would have changed the outcome of appellant's sentence, especially where the military judge noted his combat experience. (*See* JA 068–076, 084, 077–079). Thus, he is not entitled to relief. *See Richter*, 562 U.S. at 112. Appellant does not meet his high burden, especially taking into account that such high praise would likely be tempered on cross-examination by the extremely disturbing details of appellant's conduct. Accordingly, appellant cannot "affirmatively prove prejudice," and this Court "need not determine whether counsel's performance was deficient" to affirm the judgment below. *Strickland*, 466 U.S. at 692, 697

2. Defense counsel's performance was not deficient.

a. Defense counsel presented evidence in extenuation and mitigation during appellant's presentencing.

Assuming this Court examines *Strickland's* "deficient performance" prong, appellant's IAC claim should nevertheless fail because CPTs MD and JH competently represented Appellant and introduced extenuating and mitigating evidence on his behalf during presentencing. *See Strickland*, 466 U.S. at 689; (JA 057, 063, 067, 068–076, 081, 084).

Far from making "errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment," CPT MD elicited mitigating testimony regarding appellant's character from three high-ranking witnesses,[19] including positive testimony from his superior officer whose order appellant blatantly disobeyed.[20] (JA 057, 063, 067). Appellant accounted for his achievements while deployed when rendering his unsworn statement, which provided an account of his bravery during combat. (JA 068–076). The admission of appellant's ORB supported his unsworn statement by corroborating his combat assignments. (JA 084). The trial court recognized this relevant and important evidence in mitigation, as demonstrated by the military judge who stated, "the fact that you may suffer from some mental condition as a result of your combat tours,

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[19] COL MH, LTC SH, and CW5 JI.

[20] COL MH.

or frankly any mental condition you described. I believe you did use the term 'PTSD,' but even without a formal diagnosis, the court will consider your unsworn statement in that regard." (JA 077).

Appellant's claims that the entirety of his military career was not put before the military judge are simply wrong. The military judge went on to state "[t]he court will 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." (JA 078). Before recessing to determine an appropriate sentence, the court 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." (JA 079).

The evidence CPTs MD and JH put forth on appellant's behalf during presentencing more than demonstrates that they provided "reasonable competence" as guaranteed by the Sixth Amendment of the Constitution. *See Gentry*, 540 U.S. at 8; *Strickland*, 466 U.S. at 690. In sum, because his defense counsel were not "deficient" in their representation, appellant is not entitled to relief. *See id*.

<u>b. Defense counsel's presentencing case was influenced by appellant's actions.</u>

While no one would argue it is the client's obligation to perform the functions of an attorney, as appellant appears to insinuate, "the reasonableness of

counsel's actions may be determined or substantially influenced by defendant's own statements or actions." (Appellant's Br. 13). *See Strickland*, 466 U.S. at 691.

In response to his counsel's request for a list of presentencing witnesses on multiple occasions, appellant provided the names of seven soldiers. (JA 371, 375–376, 379). While appellant now avers that he mentioned an additional five witnesses, the *DuBay* judge determined appellant did not provide these specific names when his counsel asked who appellant wanted to testify on his behalf during presentencing. (JA 392–93).

The interactions between appellant and his counsel inform the "reasonableness" of CPT MD and CPT JH's actions during their presentencing preparation. *Strickland*, 466 U.S. at 691. Evidence of defense counsel's wholly reasonable and competent interactions with appellant also undercut appellant's incredible allegation that his counsel inexplicably followed his request to call seven presentencing witness, yet somehow ignored his request to call an additional five witnesses. Thereby, appellant's claim that his counsel were ineffective for not calling the additional five witnesses does not hold weight.

c. Appellant understood his pretrial agreement because his defense counsel thoroughly and adequately explained it to him.

This Court should be unpersuaded by appellant's new-found confusion regarding the term in his pretrial agreement that concerned his options for presenting presentencing witness testimony. (JA 304, 262–63; Appellant's Br. 10).

During his guilty plea colloquy with the military judge, appellant offered absolutely no indication of such confusion regarding this term in his pretrial agreement. (JA 037–042). Far from confusion or bewilderment, appellant affirmatively acknowledged that he understood his pretrial agreement provisions that related to witness production and testimony presentation. (JA 037–038). Appellant also informed the military judge that he understood "everything" regarding the proceedings. (JA 042). Appellant understood "everything" not only because the military judge explained it, but also, because CPTs MD and JH spent extensive time explaining the process before trial. (JA 371–373, 379).

Appellant's post-trial confusion regarding his options for presenting presentencing witness testimony even flummoxed the military judge at the *DuBay* hearing:

> I guess what I am struggling with, [appellant], understanding on some level is a given what you do for a living and how complex that must be, that there is a sentence in your pretrial agreement that outlines the fact that you can call witnesses through other means; and your testimony is that you didn't understand it. I'm trying to square those two things.

(JA 357). It is all too convenient that only after appellant received a sentence he deemed unfavorable did he become confused and therefore claim that "he was given no guidance whatsoever" regarding matters such as witnesses. (JA 326). His self-serving claim contradicts his clearly articulated understanding of his rights

at trial. Appellant's claims are without merit and this Court should deny his request for relief.

Ultimately, Captains MD and JH were not deficient in their representation of appellant during presentencing because their actions were objectively "reasonable" in light of all the facts and circumstances. *Strickland,* 466 U.S. at 690. The "reasonableness" of their actions was informed by "[appellant's] own statements [and] actions." *Id*. at 691. They contacted and assessed all the witnesses appellant requested during their meeting about whom appellant wanted to call during presentencing. (JA 371). At trial, CPT MD called three high ranking witnesses who delivered live testimony in mitigation and extenuation. (JA 056–057, 063, 067). This included calling the officer whose order appellant was convicted of violating to testify on his behalf. (JA 055). Appellant's service history and accomplishments were also introduced and considered by the military judge. (JA 068–076, 084, 077–079). Captains MD and JH did not contact the additional five witnesses appellant mentions now on appeal because appellant did not request they be called as presentencing witnesses. (JA 392–93). Accordingly, counsel were not deficient and appellant is not entitled to relief.

Conclusion

Wherefore, the United States respectfully requests this Honorable Court affirm the findings and sentence.

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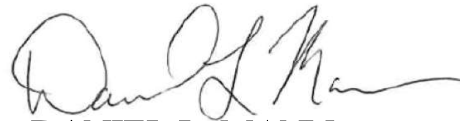
I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel on July 30, 2020. .



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