IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee v. Private First Class (E-3) **JEROME J. FORREST,** United States Army Appellant	SUPPLEMENT TO PETITION FOR GRANT OF REVIEW Crim. App. Dkt. No. 20200715 USCA Dkt. No. 25-0081/AR

Louis S. Steiner
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0668
USCAAF Bar No. 38052

Jonathan F. Potter
Senior Appellate Counsel
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-1140
USCAAF Bar No. 26450

Autumn R. Porter
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division
USCAAF Bar Number 37938

Table of Contents

Table of Authorities

Supreme Court of the United States

United States Court of Appeals for the Armed Forces

United States Army Court of Criminal Appeals

United States Air Force Court of Criminal Appeals

Other Federal Cases

Other Authorities, Rules, and Statutes

Issues Presented

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?

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) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 866 (2022). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867 (a)(3) (2021).

Statement of the Case

On December 16, 2020, a military judge sitting as a general court-martial convicted Appellant, Private First Class (PFC) Jerome J. Forrest, contrary to his plea, of one specification of unpremeditated murder in violation of Article 118,

UCMJ, 10. U.S.C. § 918 (2018).[1] (R. at 1206; Charge Sheet). Later that same day, the military judge sentenced Appellant to a dishonorable discharge and confinement for life. (R. at 1273).

On November 22, 2024, the Army Court of Criminal Appeals rendered its opinion, affirming the findings and sentence. (Appendix A).

Statement of Facts

One week after Appellant suffered a traumatic brain injury (TBI), he killed his wife.

On December 10, 2018, Appellant was seriously injured in a car accident. (App. Ex. III). He was administered level 1 trauma treatment, which is the highest level of treatment available. His Glasgow Coma Scale (GCS)[2] score was 7,

---

[1] The military judge found appellant guilty, except the words "his hands and" Of the excepted words, Not Guilty. Of the Charge, Guilty. The final specification to which appellant was found guilty reads:

> In that Private First Class Jerome J. Forrest, U.S. Army, did, at or near Fort Campbell, Kentucky, on or about 17 December 2018, murder Mrs. D.F., by means of striking her on the face and head with blunt objects.

(R. 1206).

[2] The Glascow Coma Scale measures head trauma, with a score 3-8 indicating severe trauma. Shobhit Jain & Lindsay M. Iverson, *Glascow Coma Scale*, STATPEARLS PUBLISHING, June 12, 2023.

indicating he suffered a severe head injury along with a broken nose. Although Appellant received a computed technology (C.T.) scan, that scan did not reveal any acute intracranial changes and no additional brain scans or tests were conducted on Appellant in the hospital. (Pp. Ex. III). He was released from the Nashville area hospital with a prescription for Tylenol. (App. Ex. III). In the few days following the accident, Appellant complained of body aches resulting from the accident. His medical providers on Fort Campbell prescribed Percocet for the pain. (*DuBay* R. at 348). Instead of being placed on quarters for rest, Appellant was tasked with duty as Charge of Quarters (CQ) and had been awake for over twenty-four hours when he killed his wife. (R. at 1021).

On December 17, 2018, Appellant killed his wife in the kitchen of the family's on-post home at Fort Campbell, Kentucky. (R. at 547). This followed an argument over the cleanliness of a closet in the home. When police arrived, Appellant was sitting in a vehicle in the garage. (R. at 537-38).

According to experts who testified at the *Dubay* hearing, Appellant suffered a severe head injury and, according to the military's expert on TBI, he "[d]efinitely suffered TBI" days before he killed his wife. (*Dubay* R. 225-26; 229-30; 240).

Reason to Grant the Petition

The traumatic brain injury Appellant suffered in the accident and its potential impact on the specific intent crime for which Appellant was convicted, unpremeditated murder, was never presented as evidence before the fact finder for either findings or sentencing. The fact finder was never informed TBI could have affected Appellant's ability to form the requisite intent for the crime.

The reason for this failure? Appellant's trial defense counsel failed to adequately investigate the injury and to determine its extent, failed to inform the sanity board of the extent of that injury, and failed to present evidence of Appellant's head injury in mitigation. Indeed, the trial defense counsel who represented Appellant at trial failed to consult with any experts about the injury and its impact on Appellant's ability to form the requisite intent for the charged offense and its potential for mitigation.

Appellant's trial defense counsel also failed to investigate Appellant's background or interview any childhood friends or military witnesses who would have testified on Appellant's behalf. Instead of presenting information about Appellant's head injury or the testimony of childhood friends and fellow service members, defense counsel presented the testimony of five family members, testimony that covered only twenty-seven pages of transcript in a case where the

government was seeking life without the possibility of parole. (R. 1262). Given the gravity of the charged offense, offering the testimony of TBI and testimony from childhood friends in mitigation may have lessened Appellant's sentence, but counsel failed to do so.

Additionally, the Army Court's handling of Appellant's case was procedurally flawed. The judge who authored the opinion in Appellant's case was effectively retired and working for this Court when the opinion she authored was issued.

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?

The Traumatic Brain Injury

According to experts who testified at the *Dubay* hearing, Appellant suffered a severe head injury and, according to the military's expert on TBI, he "[d]efinitely suffered TBI." (*Dubay* R. 225-26; 229-30; 240). Dr. Lewis French, who directs all the clinical and research programs on TBI at Walter Reed National Military Medical Center, testified Appellant indeed suffered a TBI in the accident a week

before he killed his wife. (*DuBay* R. 229).[3] His review of Appellant's medical records indicated a high-speed vehicle collision and a broken nose caused "a physiological disruption of the brain," as indicated by Appellant's GCS score of 7 on his arrival at the emergency room. (*DuBay* R. at 230).

Dr. French testified Appellant's normal computed technology (C.T.) scan at the hospital did not rule out a TBI. (*DuBay* R. at 231). "[I]t is not uncommon for a person to have a clean head C.T. scan and still have suffered a traumatic brain injury." The purpose of the C.T. scan in emergency care is to determine if the patient has internal bleeding in the brain, not to diagnose a TBI. (*Dubay* R. at 232). Dr. French testified that a magnetic resonance imaging test (MRI) might detect a TBI, but even that level of imaging is unlikely to uncover the subtle brain changes indicating a TBI, especially nine months after the injury. (*Dubay* R. 232). According to Dr. French, Appellant's brain injury was "complete" when he presented to the hospital. (*DuBay* R. at 233).

---

[3] Dr. French is the head of the congressionally mandated Traumatic Brain Injury Center of Excellence at Walter Reed. Traumatic brain injury has been a focus of military health since 1992. https://www.health.mil/Military-Health-Topics/Centers-of-Excellence/Traumatic-Brain-Injury-Center-of-Excellence

Dr. Paul Montalbano, the director of the post-doctoral fellowship program in forensic psychology at Walter Reed, testified the C.T. scans taken of Appellant's brain occurred shortly after the accident, and may not reflect the extent of the damage to Appellant's brain. (*DuBay* R. 212; Defense Appellate Exhibit (D.A.E.) A at 3).[4] "And the brain can continue to swell often 3 to 5 days after a significant head trauma." (*DuBay* R. 212). Dr. Montalbano also believed that even if Appellant did not have TBI he may have suffered from "other types of deficits in brain functioning that are not necessarily, you know, classified as TBI." (*DuBay* R. at 214).

Dr. French noted Appellant's headache had not resolved within three to five days after the accident. (*DuBay* R. at 241). To Dr. French that indicated the

---

[4] Dr. Montalbano and other experts in forensic psychiatry at Walter Reed are available for consultation to all military trial defense counsel. (*DuBay* R. 209).

> We get calls from military attorneys throughout the world about different forensic referral issues are asking, you know, do you think, you know, a forensic psychiatrist or psychologist would be useful in this particular case? How would you evaluate? You know, the accused, you know, or just getting feedback on different forensic issues to see whether an expert is indicated in that particular case.

(*DuBay* R. 209). Appellant's trial defense counsel never contacted Dr. Montalbano or his colleagues. Defense Appellate Exhibit A at 3.

headache was "of sufficient severity that whoever the provider was in the clinic thought . . . it needed to be addressed." (*DuBay* R. 241).

Dr. French also noted prescribing Percocet for a serious head injury was not "the standard of care." (*Dubay* R. 241-42). He testified the standard of care was to prescribe something not containing a narcotic. (*Dubay* R. 242). "Well, I mean, you try to give somebody none-narcotic [sic.] pain medication." (*Dubay* R. 242). Not only can narcotics cause what Dr. French called "rebound headaches." (*DuBay* R. 242). They have a more sinister side-effect. (*DuBay* R. 242). "So people with mood problems potentially, or you know, cognitive dysfunction or other things like that, a narcotic is just going to make those things worse." (*DuBay* R. 242).

> It would make things like the cognitive functioning worse off. If a person's having problems with attention, memory and you dole them with a narcotic, it makes those -- it can make those things worse. If a person has -- is having, you know, more kind of mood problems, irritability, sadness, whatever, which, again, sometimes people have after these injuries, it can affect those things, too. It also artificially changes sleep. So sleep dysfunction is fairly common. Narcotics don't, I mean, they'll make you go to sleep, but they don't induce that kind of sleep that we typically want. So, you know, there are concerns in a number of different areas that you would worry about with pain products.

(*DuBay* R. 243).

Appellant was the subject of a sanity board, per Rule for Courts-Martial 706. Dr. Robert McKenzie, a psychiatrist, was the president of Appellant's sanity board. (*DuBay* R. 178). From what Dr. McKenzie could remember, Appellant's sanity board was not "anything outside of that norm referenced to this case." (*Dubay* R. 179-80). Dr. McKenzie did not receive any documents or have any conversations with Appellant's defense counsel. (*DuBay* R. 180-81).

At the *Dubay* hearing, when shown Appellant's medical records from Skyline Medical Center stating Appellant had suffered a TBI, Dr. McKenzie testified he did not remember reviewing them. (*DuBay* R. 181-8). He also noted those records were not referenced in the R.C.M. 706 report. (*DuBay* R. 181-82). The records referenced on the R.C.M. 706 report were Appellant's medical records from military facilities only. (Dr. McKenzie reviewed "Electronic Medical Records (AHLTA)). The records containing the information about the TBI—the ones Dr. McKenzie did not see prior to the *DuBay*—are from Tristar Skyline Medical Center, a civilian hospital, in Nashville, Tennessee. (*DuBay* R. 59). Dr. McKenzie testified that Appellant mentioned the accident, but Dr. McKenzie was unaware of the extent of the head trauma Appellant suffered. (*DuBay* R. 185, 187, 189). In other words, contrary to the Army Court opinion, Appellant's TBI was not factored into the Board result. (See Appendix A at 16-17).

Dr. McKenzie testified, had he been aware of the TBI in conjunction with the Percocet usage, he would have added additional steps to the sanity board inquiry. (*DuBay* R. 185-87). In other words, he would have conducted a modified analysis on Appellant's mental health. He would have examined the discharge diagnosis to determine what impact the GSI of 7 would have on his evaluation and would have noted that in the 706 form. (*Dubay* R. 186). Dr. McKenzie would have also consulted with a psychologist doing the psychometric testing to make sure the TBI was included in the testing. (*DuBay* R. 186). This would have been significant to "expand or contract the panel of tools" that the psychologists would use. (*DuBay* R. 186).

Furthermore, had he known of the TBI, Dr. McKenzie would have consulted with the psychologist to determine whether the Board needed to do anything "outside of mainstream diagnostic clarification." (*DuBay* R. 186). Dr. McKenzie would also have visited the clinic where Appellant was treated to review the records with the treating clinicians. (*DuBay* R. 186-87). Additionally, Dr. McKenzie would have discussed the case with Appellant's behavioral health provider to establish Appellant's mental condition before and after the accident. (*DuBay* R. 187). "[W]as there a significant difference in his baseline presentation

from the six or seven groups [Appellant attended] prior to the one a few days, you know, between the accident and the incidents?" (*DuBay* R. 187).

How did the sanity board fail to consider TBI? The short answer is that Appellant's defense counsel never brought TBI to the board's attention. Indeed, the three lawyers representing Appellant never talked to the board about TBI or anything else. (*DuBay* R. 38; 77; 95). Nor did counsel otherwise make the board aware of any concern about Appellant's TBI. (*DuBay* R. 180).

As also established at the *DuBay* hearing, trial defense counsel who argued the motion never talked to Dr. Galusha, the proffered defense expert. (*Dubay* R. 203; 310-312). But then again Appellant's trial defense counsel never talked to any medical professional. (*DuBay* R. 14, 15, 18, 57, 72-73, 77, 310-12, 317, 324, 326). On September 17, 2019, the trial counsel emailed the defense counsel and asked if Appellant requested TBI screening, but Appellant's counsel told the government Appellant did not need the screening. (App. Ex. XV). On October 25, 2019, the military judge denied the defense's motion, citing, among other reasons, that "the government offered to do additional TBI screening of the accused and defense declined additional TBI testing." (R. at 185).

What did counsel do? Captain (CPT) Mark Jensen reviewed Appellant's medical records and requested a neuropsychologist be assigned to the defense

team. (*DuBay* R. 13). But CPT Jensen never gave Appellant's Skyline medical report to any doctor to review. (*DuBay* R. 14). He claimed that Dr. McKenzie had a copy of the medical record (*Dubay* R. 14), but that was refuted by Dr. McKenzie. (*DuBay* R. 181-82; 185-87). And, as previously noted, CPT Jensen never talked to Dr. McKenzie. (*DuBay* R. 18). In fact, CPT Jensen never talked to any of the physicians who treated Appellant for TBI, nor did he discuss the accident with police or insurance companies. (*DuBay* R. 15). He never even saw a photograph of Appellant's totaled car. (*DuBay* R. 15).

Although CPT Jensen had concern about Appellant taking Percocet at the time of the killing, he assumed it would not change the result of the trial. (*DuBay* R. 24 and 187). "I assumed at the time the result would be the same." (*DuBay* R. 24). But it would not have been the same. Colonel McKenzie testified the 706 board would have factored Appellant's fatigued and Percocet sedated state into its analysis had it been aware of TBI. (*DuBay* R. at 187).

Captain Jensen testified he received Dr. Galusha's name from another counsel who had recently defended a murder case. (*DuBay* R. 33). Captain Jensen claimed he called Dr. Galusha, but he could not recall the conversation. (*DuBay* R. 33.) However, CPT Jensen was at the very least curious about Appellant's TBI. The two other defense counsel who tried his case were not.

On July 24, 2019, the Convening Authority denied Appellant's request to appoint Dr. Galusha to the defense team as an expert consultant in the field of Forensic Psychology and Neuropsychology. (App. Ex. X). Captain Jensen filed the motion to compel Dr. Galusha's appointment. (App. Ex. III). He requested Dr. Galusha for two reasons:

> (1) As a neuropsychologist to examine the accused and determine if he suffered from a traumatic brain, concussion, or other injury the week prior to the death of his wife that might have affected his cognition, judgment, or impulse control. Additionally, she would help the defense team understand whether the condition of appellant's brain could provide extenuating or mitigating evidence.
>
> (2) As a forensic psychologist to assist the defense in presenting a robust mitigation case based on the historical psychological background of appellant. She would do this by helping the defense team obtain and review information from appellant's past, help them conduct mitigation interview's regarding appellant's upbringing and other factual circumstances, and lend her training and expertise in helping them compile a mitigation case to argue to the trier-of-fact.

(App. Ex. III). Captain Jensen withdrew from Appellant's case before the argument on the motion.

At an Article 39(a) hearing, which included Appellant's newly appointed counsel, the parties argued the motion to compel Dr. Galusha's appointment. (R. at 107). Regarding the first stated reason for Dr. Galusha's appointment, the

military judge asked the parties whether Appellant had been specifically evaluated for a traumatic brain injury (TBI), and whether anything would prevent that evaluation from taking place. (R. at 107). Defense counsel stated no additional TBI testing had been done, but it was their understanding additional testing, beyond the C.T. scan performed immediately after the accident, was necessary to determine the extent of Appellant's head injury, and that Dr. Galusha's appointment would help them understand what additional testing could and should be done. (R. at 107-108, 112). The military judge deferred her ruling, indicating that, prior to her granting the defense's requested expert, Appellant needed to be "evaluated to determine whether he does have TBI." (R. at 120).

But Dr. Galusha, who is a neuropsychologist with a specialty in forensic psychology, testified that she never discussed Appellant's case with any of his attorneys. Mr. Lawrence Willard, another of Appellant's trial defense counsel, testified that he did not have any medical professional review Appellant's medical records. (*DuBay* R. 57). Mr. Willard was aware that the medical records involving Appellant's accident were from a civilian provider "off-post." (*DuBay* R. 59). Mr. Willard testified that his review of the records did not show a brain injury. (*DuBay* R. 68). In his affidavit, Mr. Willard claimed that Dr. Galusha "would have conceded there was no evidence of a head injury," but Mr. Willard

never talked to Dr. Galusha, and thus had no idea what she would say about the head injury or anything else. (*DuBay* R. 72-73). Mr. Willard also testified that he and Major (MAJ) Dan Hill, Appellant's other counsel, told Appellant there was no evidence of TBI. (*DuBay* R. 75). "We told him that, looking at the documents, we did not believe there was [TBI]." *DuBay* R. 75). Mr. Willard admitted that he never talked to Dr. McKenzie and never provided Appellant's medical records to Dr. McKenzie. (*DuBay* R. 77).

MAJ Daniel Hill also never talked to Dr. Galusha about Appellant's case. (*DuBay* R. 310.) When asked if he ever had any medical expert look at Appellant's medical records, MAJ Hill admitted he did not. (*DuBay* R. 310.) He also never talked to Dr. Galusha to prepare to argue the motion for her services. (*DuBay* R. 310, 324, 326). MAJ Hill testified he "typically" does not call witnesses in support of his motions. (*DuBay* R. 311, 312). When asked why he believed no evidence of brain trauma existed even though Appellant's medical records indicated he had a TBI, MAJ Hill again admitted he did not ask any experts to look at Appellant's records. (*DuBay* R. 311, 324, 326). MAJ Hill testified he "never tried to reach to speak to an MD to understand . . . [or] attempted to have the records reviewed. . . ." (*DuBay* R. 317).

Both Mr. Willard and MAJ Hill testified that, when presented with the opportunity for more testing, Appellant refrained from it. (*Dubay* R. 73-74, 329-30). But both counsel were convinced from their uninformed review of the records that Appellant did not suffer from TBI. (*DuBay* R. 67-68, 322-23). Mr. Willard testified counsel never planned to present TBI evidence. (*Dubay* R. 67-68). He said the evidence would never rise to the level of an affirmative defense, so it was not relevant to findings. (*DuBay* R. 67-8).

Appellant was charged with murdering his wife. (Charge Sheet). Once convicted, he was facing a sentence of life in confinement without the possibility of parole. *Manual for Courts-Martial, United States* (2016 ed.), pt. IV ¶ 56.d.(2). During the merits portion of the trial, the government presented extensive evidence in its efforts to prove Appellant's guilt. That evidence included the testimony of the victim's children, who were present at the house when the murder took place (R. at 316, 391); two admissions made by Appellant--one to a medical provider and another in the presence of a prison guard (R. at 1017-19, 1028); DNA evidence showing Appellant was covered in his wife's blood (R. at 718); expert witness testimony about blood spatter and the volume of blood found at the scene (R. at 923); and other physical evidence presented by numerous members of law enforcement.

The government's merits case lasted five days and involved the testimony of over twenty-five witnesses. (R. at 245, 1031). Appellant was found guilty of murder with the intent to kill. (R. at 1206). The defense, however, presented no evidence Appellant suffered a TBI days before the killing.

A. The Case on the Merits

As stated above, the government offered an extensive case on the merits, yet defense failed to assert any case on the merits, let alone one focusing on TBI. (R. at 245, 1031). Counsel should have explained how the TBI could have resulted in a diminished *mens* rea for the charged offense. (*DuBay* R. at 512-15).

The defense counsel's failure to reasonably investigate Appellant's TBI also resulted in a less than fully informed sanity board. (*DuBay* R. at 181-182;185-187). It left the defense unable to present evidence Appellant lacked the ability to form the requisite intent to kill required for murder per Article 118(2), UCMJ. A fact finder, presented with a fully informed sanity board result, may have found Appellant committed manslaughter, not murder. With a reasonable investigation, the entire tenor of the defense case would have changed to focus on the requisite *mens rea* for the charged offense. With the focus on Appellant's diminished mental state, he may have been convicted of the lesser included offense of

manslaughter, with fifteen years, not life without parole, as the maximum punishment.

B. The Presentencing Case

The defense's presentencing case stood in stark juxtaposition to the government's case. The military judge reopened the court to announce findings at a little after 1300 on December 16, 2020. (R. at 1206). The entire presentencing case, both government and defense, was completed by a little after 1500, just over two hours later. (R. at 1272). The defense began its presentencing case on page 1229 of the transcript, and rested twenty-seven pages later, on page 1257. In total the defense called four witnesses: Appellant's mother, father, sister, and brother. (R. at 1229-1257). The "lengthiest" witness testimony, that of Appellant's sister, covered less than eight pages of transcript. (R. at 1248-1255).

C. Defense Preparation of Sentencing Witnesses

Appellant's counsel did very little to prepare Appellant's sentencing case. According to Mr. Willard, counsel prepared each one of the family members "for 45 minutes to an hour" for their testimony. (*DuBay* R. 164). And counsel admitted they did not talk with any of the potential military witnesses or childhood friends. (*DuBay* R. 276, 281, 346, 398, 406). The defense did not present a single

military sentencing witness despite the fact there were service members willing to present character evidence on Appellant's behalf.

Sergeant (SGT) John Russino served in the same platoon as Appellant and remembers serving on charge of quarters (CQ) at the time the alleged crime took place. Despite learning about what happened, SGT Russino still had positive things to say about Appellant as a Soldier and a person. (*DuBay* R. 268).

> And as for what I could see as this young team leader at the time, he was -- he was a good overall soldier and he did everything he was supposed to do. Every time you asked him to do something, he was right there. He was the first one volunteer to do it. And you never had to tell him to come in on his days off. If you needed him to, he was the one volunteering to do it instead of being told to do it.

(*DuBay* R. 268). Staff Sergeant (SSG) Abrien Bouie testified he too would have testified on Appellant's behalf. (*DuBay* R. 261). SSG Bouie remembered Appellant as a "great guy" and was surprised of the crime because Appellant was non-violent. (*DuBay* R. 261).

A childhood friend of Appellant, Mr. Alexander Junior, would have testified for Appellant. (*DuBay* R. 264-65).

> He's very knowledgeable. He is friendly and he is – when he and me, we're like, you know, always best friends, always seeing each other. He's, you know, supportive. And that's about it. You know, he was creative and, you know, he -- he always had, like, an idea of life or some sort.

(*DuBay* R. 265).

Standard of Review

Allegations of ineffective assistance of counsel are reviewed *de novo*. *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012); *Strickland v. Washington*, 466 U.S. 668, 690 (1984).

Law

The Sixth Amendment guarantees an accused the right to the "effective assistance of counsel." *United States v. Cronic*, 466 U.S. 648, 653-656 (1984).

A. Ineffective Assistance Generally.

To prevail on a claim of ineffective assistance of counsel, the appellant must show both deficient performance and prejudice. *Strickland*, 466 U.S. at 687. Applying this standard "begin[s] with the presumption of competence announced in [*Cronic*]." *United States v. Gooch*, 69 M.J. 353, 361 (C.A.A.F. 2011). Then:

> This Court applies a three-part test to determine whether the presumption of competence has been overcome:
>
> 1. Are the allegations true, and, if so, is there any reasonable explanation for counsel's actions?
>
> 2. If the allegations are true, did counsel's performance fall measurably below expected standards?
>
> 3. Is there a reasonable probability that, absent the errors, there would have been a different outcome?

Gooch, 69 M.J. at 362 (citing *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991)).

Appellant need not "make an 'outcome-determinative' showing that 'counsel's deficient conduct more likely than not altered the outcome in the case.'" *United States v. Howard*, 47 M.J. 104, 106 n.1 (C.A.A.F. 1997) (quoting *Strickland*, 466 U.S. at 693). "[T]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Strickland*, 466 U.S. at 694.

Strategic, tactical, or other deliberate decisions of counsel must be objectively reasonable, based on counsel's perspective at the time of the conduct in question. *United States v. Dewrell*, 55 M.J. 131, 133 (C.A.A.F. 2001) (*citing Strickland*, 466 U.S. at 688; *United States v. Marshall*, 45 M.J. 268, 270 (C.A.A.F. 1996)). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009) (quoting *Strickland*, 466 U.S. at 686).

B. Ineffective Assistance in Investigation.

One of the ways in which defense counsel's performance may be deficient is when defense counsel fails to investigate the facts of the case adequately. *United States v. Scott*, 1987 CMA LEXIS 2557, *19 (C.M.A. 1987) ("A defense counsel

has the duty . . . to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. . . . In many cases, pretrial investigation is the most critical stage of a lawyer's preparation.") (internal citations omitted). In preparing a defense, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland,* 466 U.S. at 691; *see also United States v. Sales*, 56 M.J. 255, 258 (C.A.A.F. 2002). Failure to investigate a case includes the failure to obtain necessary expert assistance. *See United States v. Wean*, 45 M.J. 461, 463 (C.A.A.F. 1997). A counsel's failure to conduct sufficient investigation may violate the appellant's Sixth Amendment rights. *Sears v. Upton*, 561 U.S. 945, 949-50 (2010) (counsel were ineffective in investigating and failed to discover Sears had psychological impairment); *United States v. Scott*, 24 M.J. 186, 192-93 (C.M.A. 1987) (failure to investigate alibi defense and prepare for trial was ineffective); *Holsomback v. White*, 133 F.3d 1382, 1387-89 (11th Cir. 1998) (holding that failure to conduct adequate investigation into medical evidence of sexual abuse was ineffective).

Unlike cases involving tactical decisions made in the course of a trial, courts apply closer scrutiny when claims of ineffective assistance are based on a

counsel's failure to investigate. *United States v. Clark*, 55 M.J. 555, 560 (Army Ct. Crim. App. 2001). This is because "'investigation is an essential component of the adversary process,' . . . that testing process generally will not function properly unless defense counsel has done some investigation." *Scott,* 24 M.J. 188 (quoting *Wade v. Armontrout*, 798 F.2d 304, 307 (8th Cir. 1986)).

In *United States v. Witt*, 72 M.J. 727 (Air Force Ct. Crim. App. 2013), a case very similar to Appellant's, Witt was injured in a motorcycle accident four months before he murdered. 72 M.J. at 758. Witt's counsel consulted with a psychologist, who downplayed the accident. *Id.* at 759. Post-trial investigation revealed Witt may have suffered a TBI. *Id.* at 758.

The Air Force Court found Witt's counsel's performance deficient because their decision to not investigate the head trauma was unreasonable. *Id.* "[C]ompetent counsel must undertake a certain threshold of investigation by being reasonably diligent prior to making the strategic decision to 'draw [the] line.'" *Id.*, citing *Wiggins v. Smith*, 539 U.S. 510, 525 (2003). *See also Rompilla v. Beard,* 545 U.S. 374, 382 (2005).

1. Sentencing Preparation.

Multiple military appellate court cases have addressed situations where counsel failed to adequately investigate in preparation for sentencing. In *United*

States v. Boone, 42 M.J. 308 (C.A.A.F. 1995), the sentencing case consisted solely of the appellant's unsworn statement submitted through counsel. In remanding the case, this Court stated, "We find no explanation and can discern no tactical reason from the record for the meager defense presentation," and specifically noted the appellant's honorable service in Saudi Arabia, lack of disciplinary actions in his personnel record, and the fact that no one from his chain of command or fellow soldiers testified to personal qualities or soldierly performance. *Id*. at 314.

On remand, the Army Court held that "appellant has sufficiently met his burden of showing ineffective assistance of counsel and prejudice so that he is entitled to remedial action by this court." *United States v. Boone*, 44 M.J. 742, 743 (Army Ct. Crim. App. 1996)*, rev'd on other grounds*, 49 M.J. 187 (C.A.A.F. 1998).

The record in *Boone* identified three potential sentencing witnesses in addition to the Boone's uncle. *Id*. at 744. The Army Court found that although the three potential sentencing witnesses would not have described the appellant as an outstanding soldier, they would have added some value for rehabilitation. *Id*. at 746. Furthermore, the Army Court found appellant's uncle, who was "ready, willing, and able to testify on appellant's behalf," would have testified about knowing him from birth and described such details as "family background,

upbringing, attitude toward the Army, and the appellant's normally peaceful nature." *Id*. The Army Court ultimately determined that there was "a reasonable probability that the sentence would have been different but for counsel's performance, and that probability is sufficient for us to question the reliability of and to undermine our confidence in the sentencing proceeding." *Id*. See also *United States v. Weathersby*, 48 M.J. 668 (Army Ct. Crim. App. 1998).

Counsel also failed to investigate in *United States v. Saintaude*, 56 M.J. 888 (Army Ct. Crim. App. 2002). The defense sentencing case in *Saintaude* consisted of a stipulation of expected testimony from the appellant's mother, a short unsworn statement, and the appellant's Personnel Qualification Record. *Id*. at 896-97. Saintaude's counsel, civilian defense counsel, submitted thirteen letters post-trial describing the appellant prior to and following his military career. Additionally, Saintaude's wife was present and willing to testify but was never called. *Id*. at 897. The Army Court found that "appellant's defense team erred during the sentencing phase by their failure to investigate appellant's background for potential mitigation evidence and, thereafter, by their failure to present available mitigation evidence." *Id*. The Army Court set aside the sentence.

2. Expert Assistance.

A counsel's failure to seek out expert assistance is treated as a failure to investigate. *Wean*, 45 M.J. 461, 463-64 (C.A.A.F. 1997); *United States v. Clark*, 55 M.J. 555, 560-61 (Army Ct. Crim. App. 2001). Additionally, even when counsel does investigate the case, failure to present expert testimony itself can constitute ineffective assistance. *See United States v. Clark*, 49 M.J. 98 (C.A.A.F. 1998) (failure to call accident-reconstruction expert was ineffective representation); *United States v. Grigoruk*, 52 M.J. 312 (C.A.A.F. 2000) (failure to call a child psychologist met the threshold for a *prima facie* showing of ineffective representation).

Appellant is not barred from presenting evidence in support of his claim that he lacked specific intent to kill at the time of his offense. *Ellis v. Jacob*, 26 M.J. 90, 93 (C.M.A. 1988). 'We have no doubt whatever that a psychiatrist is within his realm of expertise in describing the effects of sleep deprivation, et al., on the human mind.' *Id*. at 94. The use of expert testimony to show a mental disease or defect is entirely distinct from the use of such testimony to relieve a defendant of criminal responsibility based on the insanity defense or one of its variants, such as diminished capacity. *United States v. Pohlot*, 827 F.2d 889, 890 (3d Cir. 1987). Even when the accused interposes the affirmative defense of lack of mental

responsibility, the prosecution must still sustain its initial burden of establishing, beyond a reasonable doubt, every element of the offense, including *mens rea*. *United States v. Berri*, 33 M.J. 337, 338 (C.A.A.F. 1991). The burden of disproving elements of the offense never shifts to the defense. *Id*. In *Berri*, the court ordered a rehearing and held that the extensive expert testimony regarding the accused's mental dysfunction was sufficient to call into question his ability to form an intent, thus relevant to specific intent element of the offense. *Id*. at 344.

C. Ineffective Assistance in Motions Practice.

Finally, a defense counsel's failure in litigating motions can satisfy *Strickland*'s deficient performance prong. *See United States v. Harpole,* 77 M.J. 231, 236 (C.A.A.F. 2018). "When a claim of ineffective assistance of counsel is premised on counsel's failure to make a motion . . . an appellant must show that there is a reasonable probability that such a motion would have been meritorious." *Harpole,* 77 M.J. at 236 (quoting *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001)).

Argument

Based on the facts of Appellant's case, he was going to be convicted of killing his wife. The issue for the factfinder and sentencing authority, in this case a military judge, was whether Appellant would be convicted of a lesser charge than

murder and what the appropriate sentence was for his crime. Thus, a reasonable counsel would be seeking to minimize Appellant's culpability and present evidence to humanize him and thus mitigate his sentence.

The defense had the ability to present a compelling case that TBI played a substantial role in his murder of his wife. As Dr. French testified, the TBI was "complete" at the time of the accident. Both Dr. French and Dr. Montalbano would have testified how TBI could have impacted Appellant's mental state. Dr. French testified Appellant's capacity to control his behavior, especially when prescribed a narcotic for a head injury, was severely diminished. (*DuBay* R. 203). Dr. Montalbano believed TBI caused "deficits in Appellant's executive functioning." (Def. App. A at 3). *See Witt*, 72 M.J. at 758.

But Appellant's trial defense counsel, as all three counsel admitted, failed to even talk to any medical expert, let alone an expert about TBI. (*DuBay* R. 14, 15, 57, 72-73, 310-11, 317). No counsel even talked to the expert, Dr. Galusha, they proffered to be their defense expert witness.

Additionally, no counsel asked the sanity board to consider the potential for TBI. (*DuBay* R. 13, 18, 181-82, 185-87). Dr. McKenzie testified he was unaware of the head trauma that Appellant suffered in the accident. (*Dubay* R. 185, 187, 189).

And Dr. McKenzie would have conducted the sanity board differently if he had known of the extensive TBI Appellant suffered. (*DuBay* R. 185-87).[5] He testified to the additional tests and protocols he would have followed had he known of the TBI. (*DuBay* R. 185-87). Significantly, these additional steps correspond with Dr. Montalbano's criticisms of the Appellant's case board. D.A.E. A. at 3.[6]

Other than the fact Appellant sat in court wearing a uniform, there was almost no indication that he served his country. In *Boone*, this Court recognized that even soldiers unwilling to portray an accused as "an outstanding soldier" still

---

[5] The Army Court's reading of the *DuBay* hearing is clearly wrong. It found Appellant suffered no prejudice by trial defense counsel's failure to present evidence of TBI because the sanity board considered TBI. But Dr. McKenzie, the president of Appellant's sanity board, demonstrates that claim to be false. He testified he did not review the Skyline records, and he testified he would have conducted the sanity board differently if he had. (*DuBay* R. 185-87).

[6] The Army Court found that Appellant's declination to undergo further testing was decisive to his ineffective assistance claim. Memorandum Opinion at 17. But by the time Appellant declined further testing, the die was cast. The sanity board had already reached its findings, failing to factor in TBI because Appellant's counsel failed to ask the board to consider TBI. And as every expert testified, it most likely would not have mattered because TBI would have been very difficult to more fully diagnose so long after the accident and crime. Finally, trial defense counsel did not believe Appellant had TBI because they failed to consult with any expert. In *Rompilla*, the accused was actively obstructive to his counsel. 545 U.S. at 381. The Court found Rompilla's behavior did not diminish defense counsel's responsibility to investigate Rompilla's case. *Id.* Every expert at Appellant's *DuBay* hearing believed Appellant had a TBI.

would have provided *some* value for rehabilitation and their absence from the trial satisfied the second *Strickland* prong. 44 M.J. at 746. The military witnesses in the immediate case would have gone beyond what was missing in *Boone*, and may have shown the fact finder how Appellant was dedicated to friends and family and his duty as a soldier.

Just as in *Boone*, there was available evidence to demonstrate that Appellant's crime was out of his character. 44 M.J. at 746 (discussing how the potential sentencing witnesses would address "the appellant's normally peaceful nature."). The defense did nothing to humanize Appellant. SGT Russino, SSG Bouie, and Mr. Alexander would have testified favorably on behalf of Appellant. (*DuBay* R. 268, 261, 264-65).

The trial defense counsel unreasonably investigated and presented Appellant's case. Counsel's performance was deficient, and Appellant was prejudiced by that deficient performance.

II.

THE JUDGE WHO AUTHORED THE OPINION IN APPELLANT'S CASE HAD RETIRED FROM THE BENCH WHEN THE OPINION WAS EFFECTIVE.

Standard of Review

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

Law

A. The law requires a sitting judge to be in "regular active service."

Congress has mandated that the service courts have uniform rules. "The Judge Advocates General shall prescribe uniform rules of procedure for Courts of Criminal Appeals." Article 66(h), UCMJ, 10 U.S.C. § 866 (2022). "When sitting in panel, a majority of the judges assigned to that panel shall constitute a quorum." Army Ct. Crim. App. R. 7(a). A judge is in "regular active service" when the judge is assigned to a service court and is:

> (1) in the active component of the armed forces; (2) in the reserve component of the armed forces and serving on active duty with the Court for a period of more than 30 consecutive days; or (3) a civilian judge who is a full-time employee of the agency from which appointed . . . [or] when a reserve component military judge who does not meet the above criteria is duly assigned to a matter.

Army Ct. Crim. App. R. 7(c).

In *United States v. American-Foreign S.S. Corp*, the Supreme Court vacated a Second Circuit decision after it determined "a circuit judge who has retired [was not] eligible under [28 U.S.C. § 46(c)] to participate in the decision of a case on

rehearing *en banc*." 363 U.S. 685, 685-86 (1960) ("The sole issue presented is whether a circuit judge who has retired is eligible under this statute to participate in the decision of a case on rehearing *en banc*. We have concluded that he is not. . . . [Accordingly the] judgment must be set aside."). The Court said that "[a]n 'active' judge is a judge who has not retired 'from regular active service' [and that a] case or controversy is 'determined' when it is decided." *Id.* at 688 (citing 28 U. S. C. § 371(b) (1954)).

"[A] case or controversy is 'determined' when it is decided." *Yovino v. Rizo*, 586 U.S. 181, 185 (2019) (per curiam) (citing *Am.-Foreign S.S. Corp*, 363 U.S. at 688). When a circuit judge is neither in active service (e.g., due to being deceased or retired) nor in senior status, the judge is "without power to participate in the *en banc* court's decision at the time was rendered." *Id.*

In *Yovino*, the circuit judge who authored the majority opinion died prior to the decision's publication. *Id.* at 182. Because the Ninth Circuit "deemed [the deceased judge's] opinion to be a majority opinion, . . . it [would constitute] a precedent that all future . . . panels must follow." *Id.* at 183. The Supreme Court was not aware of "any rule or decision of the Ninth Circuit that renders judges' votes and opinions immutable at some point in time prior to their public release[, and] it is generally understood that a judge may change his or her position up to the

very moment when a decision is released." *Id.* at 184. The Court found the Ninth Circuit's actions in *Yovino* were unlawful because of the statute that applied to that court, 10 U.S.C. § 46(d), defined a "quorum" as "[a] majority of the number of judges authorized to constitute a court or panel thereof," and the Court was "aware of no cases in which a court of appeals panel has purported to issue a binding decision that was joined at the time of release by less than a quorum of the judges who were alive at that time." *Id.* at 186.

Similarly, Army Ct. Crim. App. R. 7(c) by implication requires that a judge be on active duty and be able to participate in the case at the time of the opinion's publication.

B. Three-Factor Test from *United States v. Uribe*

Appellate courts consider three factors to determine whether a disqualification error warrants a remedy: (1) the specific injustice to the appellant; (2) encouragement to judges and litigants to examine possible grounds for disqualification more carefully and disclose them more promptly; and (3) the risk of undermining public confidence in the military justice system. *United States v. Uribe*, 80 M.J. 442, 449 (concerning the recusal of a trial judge).

Argument

Public perception is essential to the military justice system. Senior Judge Walker should have recused herself from *United States v. Forrest*, given her retirement and follow-on employment at this Court. Drafting an opinion and perhaps revoting on a case, all while on terminal leave prior to retirement and working for the next higher court, undermines the public perception of impartiality in this case.

A. Senior Judge Walker was not in regular active service when the Army Court issued the opinion.

Only members of the Army Court who are in regular active service may be counted towards a quorum when sitting in panel. Army Ct. Crim. App. R. 7(a). A judge is in regular active service when assigned to a service court and meets the criteria listed above in Army Ct. Crim. App. R. 7(c). At publication, Senior Judge Walker was not a judge assigned to the Army Court. The Panel Composition Memorandum contained in Appendix B demonstrates that Senior Judge Walker was not assigned to the Army Court at the time of the opinion's publication; indeed, she left at least several days prior, had her retirement ceremony, and was

employed by this Court. (Appendix B). Accordingly, Senior Judge Walker was not in regular active service when the Army Court published its opinion.

B. A case or controversy is determined when it is decided; Senior Judge Walker could not participate in the Army Court's decision at the time of its publication.

Unlike Article III appellate courts, service court judges cannot take senior status. *See* 28 U.S.C. § 46 (1996). To be sure, the Army Court's opinion notes that Senior Judge Walker took final action on this case prior to her retirement. *United States v. Forrest*, No. ARMY 20200715, 2024 CCA LEXIS 504 (Army Ct. Crim. App. Nov. 22, 2024). But the notion that "the votes and opinions in the case were inalterably fixed [at that time and] prior to the date on which the decision was 'filed,' entered on the docket, and released to the public . . . is inconsistent with well-established judicial practice, federal statutory law, and judicial precedent." *See Yovino*, 586 U.S. at 184 . Moreover, because "a judge may change his or her position up to the very moment when a decision is released," nothing "renders judges' votes and opinions immutable at some point in time prior to their public release." *Id.* Accordingly, because Senior Judge Walker was not on the Army

Court when the decision was released, she did not have the power to participate in the Army Court's determination.

C. Senior Judge Walker's participation during the proceedings as both the author of the majority opinion and her capacity as senior judge cannot be uncoupled from the unfavorable result for Appellant.

Senior Judge Walker's participation undeniably "made a difference" or was of "great significance" in the outcome here; it would be inappropriately speculative to assume the result would have been the same in her absence. Did she participate in internal deliberations and circulation and editing of the opinion following her leaving the Army Court? Additionally, Senior Judge Walker participated as both the author of the majority Army Court's opinion and as a senior judge. In other words, her participation of the senior judge and authoring the opinion—not just her vote—made a difference.

D. Application of the Three-Factor Test from *United States v. Uribe*.

Appellate courts consider three factors to determine whether a disqualification error warrants a remedy: (1) specific injustice to the appellant; (2) encouragement to judges and litigants to examine possible grounds for disqualification more carefully and disclose them more promptly; and (3) risk of undermining public confidence in the military justice system. *Uribe* at 449. In this case, Senior Judge Walker's decision to participate in the proceedings and author

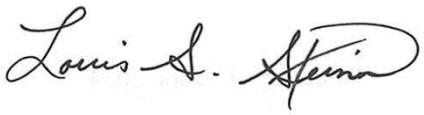
the opinion cannot be uncoupled from the outcome of the case, directly creating a "specific injustice to the appellant." The coupling of her actions after leaving the bench and her follow-on employment, were too intertwined, and would reasonably raise doubts in the eyes of the public.

Additionally, the Army Court should have examined the possible grounds for disqualification more carefully and disclosed them more promptly by not permitting the Senior Judge to vote and draft the opinion for this case. Even though retired and working in her follow-on position at the next higher court, she had the ability to change her mind up until publication of the opinion. Senior Judge Walker, as senior judge, should not have been able to influence the panel, let alone be the author of the opinion.

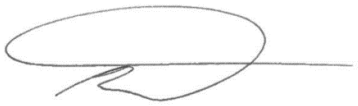
Lastly, the very fact that the Army Court had to footnote Senior Judge Walker "took action in this case prior to her retirement" shows a risk of undermining public confidence in the Army court, as well as the military justice system. When Senior Judge Walker began her terminal leave and working for this Court but could still influence an opinion being drafted by a subservient court, a reasonable member of the public, with knowledge based on the information and belief at that time, could believe the system lacks impartiality.

Conclusion

For the foregoing reasons, Appellant respectfully requests this Court vacate the Army Court's decision and order a re-hearing on both findings and sentence for Issue I, or, alternatively, order a new appellate review.



Louis S. Steiner
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0668
USCAAF Bar No. 38052



Jonathan F. Potter
Senior Appellate Counsel
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-1140
USCAAF Bar No. 26450

Autumn R. Porter
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division
USCAAF Bar Number 37938

Appendix A: United States Army Court of Criminal Appeals Opinion of the Court in United States v. Forrest, Army Case No. 20200715

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
WALKER,[1] EWING,[2] and PARKER
Appellate Military Judges

UNITED STATES, Appellee
v.
Private First Class E3 JEROME J. FORREST
United States Army, Appellant

ARMY 20200715

Headquarters, Fort Campbell (trial)
Headquarters, Combined Arms Center and Fort Leavenworth (*DuBay*)
Matthew Calarco, Military Judge (arraignment)
Jacqueline Tubbs, Military Judge (trial)
Steven C. Henricks, Military Judge (*DuBay*)
Colonel Laura J. Calese, Staff Judge Advocate (trial)
Colonel Robert L. Manley, Staff Judge Advocate (*DuBay*)

For Appellant: Captain Ian P. Smith, JA (argued); Colonel Michael C. Friess, JA; Lieutenant Colonel Dale C. McFeatters, JA; Captain Lauren M. Teel, JA; Captain Ian P. Smith, JA; Captain Nandor F.R. Kiss, JA (on brief).

For Appellee: Captain Timothy R. Emmons, JA (argued); Colonel Christopher B. Burgess, JA; Lieutenant Colonel Craig J. Schapira, JA; Major Mark T. Robinson, JA; Captain Timothy R. Emmons, JA (on brief).

22 November 2024

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

WALKER, Senior Judge:

---

[1] Senior Judge WALKER took final action in this case prior to her retirement.

[2] Judge EWING decided this case while on active duty.

Appellant was convicted of the unpremeditated murder of his wife by means of bludgeoning her to death while her two juvenile sons locked themselves in their upstairs bedroom and her baby granddaughter slept on a couch nearby. A military judge sentenced appellant to confinement for life with the possibility of parole. Before this court, appellant asserts that his trial defense counsel were ineffective by: (1) failing to properly prepare appellant's family members for their pre-sentencing testimony; (2) failing to investigate in preparation for pre-sentencing; and (3) failing to properly investigate appellant's head injury to provide a sufficient justification supporting appellant's motion to compel an expert in forensic psychology and neuropsychology. We disagree and find appellant has failed to show his trial defense counsel rendered deficient performance, and even if appellant could show this, he nonetheless has not shown prejudice.

BACKGROUND

A. Circumstances of the Victim's Murder

On 9 December 2018, appellant was involved in a high-speed car accident resulting in his loss of consciousness and requiring intubation. Appellant received level 1 trauma treatment, the highest level of medical treatment. According to medical records, appellant's Glascow Coma Scale score of 7[3] indicated a severe head injury. Medical personnel conducted Computerized Tomography (CT) scans of appellant's face, mouth, and jaws; chest, abdomen and pelvis; cervical spine; and head. There were no acute cranial bone fractures and there was no evidence of intracranial changes. The only injury noted was a fracture to the left nasal bone and possible sinus damage. Appellant's medical records do not show that he was diagnosed with traumatic brain injury (TBI) during his medical treatment for this incident. Appellant was discharged from the hospital the following day and prescribed Tylenol. Over the course of the next few days, appellant sought treatment from medical facilities on Fort Campbell complaining of body aches. He was prescribed Percocet for his pain.

---

[3] "The Glasgow Coma Scale (GCS) is used to objectively describe the extent of impaired consciousness in all types of acute medical and trauma patients. The scale assesses patients according to three aspects of responsiveness: eye-opening, motor, and verbal responses . . . . The Glasgow Coma Scale and its total score have since been incorporated in numerous clinical guidelines and scoring systems for victims of trauma or critical illness." Shobhit Jain & Lindsay M. Iverson, *Glasgow Coma Scale,* STATPEARLS PUBLISHING, June 12, 2023. A score of 3 to 8 on the GCS indicates severe trauma, a score of 9 to 12 indicates moderate trauma, and a score of 13 to 15 indicates mild trauma. *Id.*

On 17 December 2018, appellant and the victim argued over the condition of appellant's closet, located in a hallway near the kitchen. The argument continued to escalate as appellant and the victim moved into the kitchen. One of the victim's sons, CH, who was eating dinner in a room adjacent to the kitchen, witnessed appellant jump on top of the victim. Appellant held the victim down onto the floor by restraining her arms. The victim screamed for CH to call the police. After CH did so, appellant took CH's cellphone from him. The victim told CH to go upstairs and he complied. Upon hearing a loud "thump," CH locked himself in his bedroom and began texting and audio messaging his older brother (not present in the house) on a gaming system asking for help. Meanwhile, CH heard appellant walking up and down the stairs. Appellant banged on CH's bedroom door and demanded entry, which CH ignored. After appellant went back downstairs, CH got his younger brother from the upstairs bathroom and locked them both inside his bedroom. CH testified he then heard glass breaking and someone hitting something. When CH called out for his mother, she did not respond. Via messages transmitted through CH's gaming system, CH's older brother convinced CH to go downstairs and check on their mother. As CH descended the stairs, he saw appellant in a first floor bathroom. When appellant noticed CH on the stairs, he told CH "I suggest you go back upstairs." CH testified he observed blood in the bathroom sink.

A short time later, the victim's daughter, KK, arrived at appellant's residence with her husband. KK had been informed by her brother, whom CH was messaging, that CH was concerned about the victim. When KK and her husband arrived at the home, CH was yelling for help from his second floor bedroom window. Upon his sister's request, CH came downstairs and opened the front door to the residence. As the door opened, appellant slammed it shut. At that point, KK proceeded to the back of the house. As KK approached the kitchen window, she noticed the blinds in disarray and a red substance on the window. After pausing for a moment to catch her breath, KK walked closer to the back door and bent down to look through the window. She observed her mother lying on the floor in front of the refrigerator. Her mother's arms and legs were spread out and her face was "bashed in." She also noticed debris scattered everywhere. When KK knocked on the window, she noticed appellant standing in the kitchen looking at her. She then ran to the front of the house screaming and informed her husband that her mother was dead. KK's husband called 911 and military police arrived at the scene a short time later.

Upon arrival at the scene, military police entered appellant's home. Two military police went immediately upstairs and retrieved the two young boys. One of the military police officers, Staff Sergeant (SSG) Peter Garcia, then proceeded to clear the downstairs while the other officer removed the two boys from the residence. Staff Sergeant Garcia went through the living room to the kitchen area. He observed the victim lying in the kitchen area with "extensive damage to the face." Staff Sergeant Garcia testified that he observed broken furniture, a china cabinet overturned, shattered glass on the floor, and an extensive amount of blood in

the area. There was blood spatter on the kitchen walls, the dining room walls, the ceiling, the walls of adjacent rooms, the refrigerator, and on various objects in the vicinity of the victim's body. There was a dining room chair broken into pieces near the victim's body. Observing the condition of the victim and the scene, SSG Garcia called for paramedics. He did not locate appellant upon his first sweep of the home. After securing the crime scene, SSG Garcia conducted a second sweep of appellant's residence to ensure no one else was in the home. Staff Sergeant Garcia discovered appellant sitting in a vehicle inside the garage. When appellant refused commands to exit the vehicle, SSG Garcia broke the glass on the driver's side door, unlocked the car door, and apprehended appellant. A piece of wood was sitting on the passenger seat along with a paper towel with a red substance on it. The paramedic who evaluated the victim on the scene testified she was not breathing, had no detectible pulse, and had no activity registered on an EKG.

Agents from the Criminal Investigation Command (CID) took appellant to their office to interview him and collected evidence from his person. Paramedics were called to the office because appellant complained that his hand hurt. The responding paramedic inquired about the source of appellant's hand injury and appellant explained he had been in a motorcycle accident the previous week. When the paramedic inquired why appellant's hand still required medical attention, appellant responded that he "hit something." Appellant was taken to the Fort Campbell hospital the following day where he was evaluated in the emergency room. A nurse conducting triage on appellant asked whether appellant experienced any homicidal ideations to which appellant replied, "[t]hat was last night."

B. Defense Request for Experts

On 11 January 2019, the government charged appellant with one specification of unpremeditated murder. The convening authority referred the charge to a general court-martial on 17 April 2019.

Appellant's original detailed military defense counsel, Captain (CPT) MJ, filed numerous pretrial motions, including a motion to appoint expert consultants in forensic psychology and neuropsychology, crime scene investigation and blood pattern analysis, and fact investigation. The defense requested the appointment of a specific expert, Doctor (Dr.) JG, in the area of forensic psychology and neuropsychology. One justification for this expert consultant related to the head injury appellant sustained in the motor vehicle accident the week prior to his wife's murder. In the defense motion to compel the production of Dr. JG, defense counsel asserted:

> [T]he Defense requires a neuropsychiatrist to examine the accused and determine if he suffered from a traumatic brain, concussion, or other injury the week prior to the death of his wife that might have affected

> his cognition, judgment, or impulse control and explain it to the Defense team. The condition of PFC Forrest's brain at the time of the alleged murder could prove to be extenuating, mitigating, or disprove the intent element of the charged offense.

The defense also asserted the necessity of a forensic psychologist, the same Dr. JG, to assist in conducting mitigation interviews relating to appellant's childhood and "other factual circumstances in order to present a robust mitigation case." Given appellant was facing a potential sentence of life without the possibility of parole, the defense argued that Dr. JG possessed specialized training as a forensic psychologist that would be "beneficial to conducting a proper mitigation assessment as well as training in assisting the defense in the presentation of a historical psychological background of [appellant]."

Just prior to the motions hearing, appellant released CPT MJ from further representation, resulting in a continuance. A few months later, newly detailed military defense counsel, Major (MAJ) DH and then CPT LW (a CPT at the time of trial), litigated defense motions. The new defense team relied upon the motion for expert consultants as filed by the previous military defense counsel. There were several enclosures to the motion including medical records from appellant's hospital treatment right after his vehicular accident. In litigating the request for a forensic psychologist, the military judge inquired whether there were additional tests or examinations that could be conducted to determine whether appellant suffered from a TBI as it was not evident from the medical records that appellant suffered a TBI from the motor vehicle accident. In response, MAJ DH highlighted that the CT scan conducted immediately after appellant's accident may not show whether there was a TBI. MAJ DH explained additional tests existed that could determine whether appellant suffered a TBI, and defense requested the appointment of a neuropsychologist to assist in those additional evaluations and tests. In litigating the defense justification for requesting Dr. JG to also serve as a mitigation expert, the military judge inquired as to the authority for allowing a mitigation expert in a non-capital case. The defense responded that it had no authority readily available to provide the court. Before the military judge ruled on the defense motion to compel a forensic psychologist and neurologist, the government contacted defense counsel and inquired as to whether appellant "requested medical treatment in the form of a TBI screening" given the military judge's reference to TBI screening being the next potential step pertaining to the defense's expert request. Approximately a week later, the defense emailed the government and stated appellant "does not request TBI testing."

Before the military judge announced her ruling on the expert requests, the government approved the defense requests for a crime scene investigator and a fact investigator. The military judge issued her ruling on the record denying the defense motion to compel a forensic psychologist and neurologist. She found that the

defense failed to satisfy its burden to demonstrate what assistance Dr. JG would provide. The military judge held that there was no evidence before the court that appellant suffered from a TBI. She also noted that the defense declined additional TBI testing. Regarding Dr. JG serving as a mitigation expert, the military judge held that the defense failed to provide evidence that the defense team was unable to compile and present information about appellant's past and background for potential rehabilitation during a pre-sentencing hearing. On this basis, the military judge also noted that the defense had failed to establish why a mitigation expert was necessary in a non-capital case.

C. The Trial Evidence

The government presented multiple types of forensic evidence at trial, including blood evidence, DNA analysis, and expert testimony from a bloodstain pattern expert.

During the investigation into the victim's death, law enforcement collected appellant's clothing and swabbed several areas of his body where there appeared to be the presence of blood. Law enforcement also swabbed blood stains from the dining room walls of the home, an overturned china cabinet near the victim's body, the refrigerator door, the piece of wood from the passenger seat of the car in which appellant was sitting when apprehended, and other areas of the home. Law enforcement submitted this physical evidence to a lab for analysis. A forensic biologist examined and tested multiple items for the presence of blood. The forensic biologist testified at trial that she detected blood on twenty-two separate items, which included: all four dining room walls; the refrigerator door; a soap dispenser in the downstairs bathroom; the piece of wood located on the passenger seat of appellant's car; appellants left hand and forearm; appellant's shins; the top of appellant's head; and, appellant's shirt, shorts, sandals, and the bottom of appellant's socks. The forensic biologist testified that the victim's DNA was detected on all the stains that tested positive for the presence of blood. Only the victim's DNA was detected in the blood stains from appellant's shirt, shorts, socks, appellant's right shin, the dining room walls, china cabinet, refrigerator door, front passenger seat of the car, and the soap dispenser. The forensic biologist detected a mixture of the victim's DNA and appellant's DNA on the swab from appellant's left hand and right palm.

At trial, the government also presented testimony from an expert in blood stain pattern analysis and crime scene reconstruction. He testified that blood stains found on the walls of the dining room, where there was blood flow from the stain itself, indicated there was a large volume of blood present in the stain. The expert also testified that there were blood stains, blood spatter, and transfer stains on multiple surfaces of the china cabinet located near the victim's body. Given the multiple locations of the blood stains on the cabinet, he opined it was indicative of

the cabinet being moved during the overall assault. He testified that blood spatter on the ceiling throughout the living room and dining room could be caused from castoff, the physical swinging of an object with blood on it, or from when the victim was being impacted while lying on the floor and the blood spatter hitting the ceiling. He explained that the linear nature of some of the blood stains near the victim's head were also the result of castoff. The expert testified there was blood spatter on several dishes that had fallen from the overturned china cabinet indicating that at least a portion of the blood spatter producing events, impacts to the victim, occurred after the contents of the china cabinet had fallen to the floor. The large impact pattern on the refrigerator door and adjacent to it was consistent with multiple impacts occurring. The expert explained that the blood stains on appellant's shirt, collected when he was apprehended, indicated appellant was in close proximity to the victim when the spatter producing event occurred. He opined that he was not surprised by the minimal amount of blood observed on appellant's person and clothing because blood spatter does not always come back towards the force of the impact or the person swinging the object as much as it would radiate away from the blood source and contact the surrounding areas. The expert also testified that the blood stains visible on the bottom of appellant's socks were transfer stains indicative of appellant walking in fluid blood prior to putting on his sandals.

A pathologist conducted an autopsy on the victim. He testified at trial that there was a minimum of four blunt force injuries to the victim's face but likely many more given the constellation of lacerations, abrasions, and bruising to the face. These injuries could have been caused by impact with a moving object such as a fist, crowbar, tire iron, or some type of similar weapon or by impact with a stationary object such as a windshield or stairs during a fall. There were also sharp force injuries to the victim's face that could be caused by a cut in the skin from a sharp object such as a knife, broken glass, or other sharp object. The forensic pathologist testified that most of the injuries he observed were on the left side of the victim's face. Some of the lacerations were severe enough to expose the fat and deeper tissues requiring more force than surface level skin lacerations. The forensic pathologist testified about multiple additional injuries he observed. The victim had a fractured jaw, and a section of the jawbone was missing. She also had a laceration on her tongue indicating she bit her tongue at some point. The victim suffered a fracture to her left cheek bone which the forensic pathologist noted was a difficult bone to fracture. He explained that a fist alone would not cause such an injury but rather, an object would be required to inflict this type of injury. The victim's left eye was ruptured, and he found blood in her sinuses. The victim had inhaled blood into her lungs, and a tooth, bone shards, and blood were found in the stomach, indicating the victim swallowed these objects. He also found a tooth in the victim's esophagus. The forensic pathologist opined that there were at least four blunt force injuries to the victim's head that caused bleeding between the victim's scalp and skull, subarachnoid hemorrhages, and brain swelling. He testified that the victim's injuries were survivable if she had received medical assistance within minutes and

airway management. The forensic pathologist opined that the cause of the victim's death was blunt force head trauma due to bludgeoning.

D. Pre-sentencing Hearing

On 16 December 2020, a military judge, sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of unpremeditated murder in violation of Article 118, Uniform Code of Military Justice, 10 U.S.C. § 918 [UCMJ]. After the military judge entered the finding of guilty, each of the parties presented evidence for the judge's consideration in determining appellant's sentence.

During appellant's pre-sentencing proceedings, the government presented the testimony of several of the victim's family members. The government presented information about the victim's life and the impact her death had on each of them. The victim's sister testified that she had to seek medical attention when she learned of the victim's death. She explained that her work performance declined, she sought counseling, and was taking medication for depression, anxiety, and insomnia. One of the victim's daughters testified she suffered from anxiety and insomnia, does not eat, and has tried to suppress her pain and fear. KK, the victim's daughter who responded to the home on the night of the murder, testified she is fearful to be in small areas with people, experiences nightmares, and suffers from anxiety. KK also explained that her mother's murder has impacted how she deals with her children and testified that she is afraid to let them go out and play. The victim's older son, who CH contacted for help on the night of the murder, now lives with KK and feels he could have done more that night and has had difficulty getting a job. CH, the victim's son who was in the home when the murder occurred, testified that it is hard for him to talk to people and that he has difficulty sleeping. He also testified that he has nightmares and feels guilty as he wishes he could have done more. CH testified that his younger brother who was with him that night rarely speaks to him and screams in his sleep.

Appellant's trial defense counsel presented evidence in both mitigation and extenuation for the military judge's consideration on an appropriate sentence. Appellant's mother and father both testified. They described appellant as a normal, joyful child who was very kind and caring. Appellant's mother testified that when they first moved to the United States from Jamaica, appellant experienced being bullied in public school so she sent him to a private school. Once in private school, appellant did well, loved math and art and was involved in Junior Reserve Officer Training (JROTC). Both of appellant's parents testified that appellant was very good with his younger sister and was protective of her. Appellant's older brother described appellant as a caring, loving, and generous child. He also testified that appellant got along with everyone with whom he came into contact and described him as a loving person. Appellant's sister testified that appellant was caring and

very protective of her when she was younger and would help her with her homework. She also testified that appellant loved children and was very good with her daughter. All of appellant's family members testified that they would continue to support appellant. Lastly, appellant provided a brief unsworn statement in which he thanked his family for their support and that while he humbly disagreed with the court's decision, he respected the decision. He explained that it had been an honor to serve in the United State Army and as an infantryman. Appellant also requested that the court consider that he had served two years in pretrial confinement. Lastly appellant requested that the military judge consider the testimony of his family members and the circumstances surrounding the case in determining an appropriate sentence.

The military judge sentenced appellant to a dishonorable discharge, confinement for life with the eligibility for parole, and to be reduced to the grade of E-1. The military judge credited appellant with 728 days of pretrial confinement credit. On 3 February 2021, the convening authority approved the findings and sentence.

LAW AND DISCUSSION

A. Ineffective Assistance of Counsel

Appellant alleges that his trial defense counsel rendered constitutionally ineffective assistance by: (1) failing to properly prepare appellant's family members for their pre-sentencing testimony; (2) failing to investigate in preparation for pre-sentencing; and, (3) failing to properly investigate appellant's head injury and provide a sufficient justification to support the motion to compel an expert in forensic psychology and neuropsychology.

In support of appellant's assertion of ineffective assistance of counsel, he submitted affidavits from family members who testified in pre-sentencing; military personnel who served with appellant and were willing to testify on his behalf in pre-sentencing; friends from appellant's childhood willing to testify in pre-sentencing; a forensic psychiatrist outlining deficiencies in appellant's pretrial sanity board evaluation; and a forensic psychologist providing information on the evaluation and testing that could have been conducted to evaluate appellant for TBI and a violence risk assessment. Given the conflicting information provided in the affidavits submitted by appellant and those ordered by this court, we ordered a fact-finding hearing in accordance with *United States v. Dubay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967).

Allegations of ineffective assistance of counsel are reviewed de novo. *United States v. Cueto*, 82 M.J. 323, 327 (C.A.A.F. 2022) (citing *United States v. Gooch*, 69 M.J. 353, 362 (C.A.A.F. 2011)) (citation omitted). "To prevail on an ineffective assistance claim, the appellant bears the burden of proving that the performance of

defense counsel was deficient and that the appellant was prejudiced by the error." *United States v. Captain*, 75 M.J. 99, 103 (C.A.A.F. 2016) (citing *Strickland v. Washington*, 466 U.S. 668, 698 (1984)).

To establish his counsel's deficiency, appellant must show "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. In evaluating performance, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. . . ." *Id.* at 689. This presumption can be rebutted by "showing specific errors [made by defense counsel] that were unreasonable under prevailing professional norms." *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001) (cleaned up).

Prejudice is established by "showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. Appellant must show "'a reasonable probability that, but for counsel's [deficient performance] the result of the proceeding would have been different.'" *Captain*, 75 M.J. at 103 (citing *Strickland*, 466 U.S. at 694). In other words, "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011) (citation omitted). Further, in assessing an ineffective assistance claim, we can analyze *Strickland's* performance and prejudice prongs independently, and if appellant fails either prong, his claim must fail. *Strickland*, 466 U.S. at 687. Thus, an appellate 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 [IAC] claim on the ground of lack of sufficient prejudice, which *we expect will often be so*, that course should be followed.

Id. at 697 (emphasis added).

The Court of Appeals for the Armed Forces (CAAF) recently explained how ineffective assistance of counsel may occur at the court-martial sentencing phase when defense 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. Scott*, 81 M.J. 79, 84 (C.A.A.F. 2021) (internal quotation marks and citations omitted). Even where defense counsel presents several character witnesses, prejudice may still occur at sentencing if there is a "reasonable probability that there would have been a different result if all available mitigating evidence had been exploited by the defense." *Id.* at 84-85 (internal quotation marks and citations omitted).

B. Failing to Prepare Family Members for Pre-Sentencing Testimony

Appellant asserts that his defense counsel were ineffective for failing to properly prepare his family members for their pre-sentencing testimony. Specifically, the family members who testified on behalf of appellant in pre-sentencing assert that defense counsel only met with them for approximately fifteen minutes, while trial was on-going, in preparing them for their testimony and that there was more information they wanted to provide during their testimony.

We need not determine whether appellant's defense counsel rendered deficient performance in preparing appellant's family members for their pre-sentencing testimony, because we find that appellant failed to satisfy his burden of establishing prejudice. Appellant's mother, father, sister, and older brother testified on his behalf during the pre-sentencing hearing. They testified about his childhood in Jamaica and the family moving here to the United States for a better life. Appellant's parents testified that he was a joyful child growing up, that he performed well in school, and was an artist. They explained that appellant was a passionate young man who was close with his younger sister and that he liked children. Appellant's mother testified that appellant experienced bullying in school when they first moved to the United States, so she moved the children to a private school where appellant was more himself and did well in school. His mother also testified that appellant was a good child, that she never had any issues with him, and that she would continue to support him. Appellant's older brother testified that appellant was a loving and generous child and that he is still a loving person who gets along with everyone with whom he comes in contact. Appellant's sister testified that appellant was caring and very protective of her when they were young. And, appellant would take the time to assist her with her homework. She also explained that appellant loved his niece and was very caring with his niece. There was no additional mitigation or extenuation evidence provided by appellant's family members during the *Dubay* hearing that they could have provided at trial. Rather, the information provided by family members during the *Dubay* hearing was substantially the same as their trial testimony.

Based upon the lack of additional mitigation evidence appellant's family members would have presented during the pre-sentencing hearing, we find that appellant has failed to establish that he was prejudiced by defense counsel's preparation of the family member's pre-sentencing testimony. There is no reasonable probability that appellant would have received a different sentence even with additional preparation of family members.

C. Failing to Investigate in Preparation for Pre-Sentencing

Appellant asserts his defense counsel failed to investigate in preparation for pre-sentencing. Appellant argues that defense counsel neither investigated

information about his military service, nor did defense counsel investigate information that the crime of which appellant was convicted was out of character for him, or that he possessed rehabilitative potential. Appellant asserts that a more thorough investigation by defense counsel would have provided proper context for the crime of which he was convicted and provided the fact-finder with evidence about his overall character. Appellant requests this court set aside his sentence and order a sentencing rehearing. We find that defense counsel were not deficient in investigating appellant's pre-sentencing case and, at any rate, appellant has failed to demonstrate prejudice.

Appellant provided evidence during the *Dubay* hearing in support of his failure-to-investigate claim. Specifically, appellant provided favorable information through testimony or affidavits from two military witness and five childhood friends. All witnesses confirmed they had not been contacted by appellant's defense counsel in preparation for his trial, and all of them indicated they were willing to testify on appellant's behalf if requested. Defense counsel agreed they did not contact any of these witnesses in preparation for appellant's trial. Sergeant (SGT) JR explained that he served with appellant in the same unit from 2015-2017 and appellant was somewhat mistreated by his leadership at that time, but he was a good overall soldier and did everything required of him. He also testified that appellant often volunteered for duties and would even come in on his days off. Staff Sergeant AB was a long-time friend of appellant who would have testified about his knowledge of appellant's character and that the offense of which he was convicted was out of character for appellant. There were four childhood friends who would have provided information about appellant's helpful nature; his creative and artistic abilities; his support of family and friends in aiding them when needed; his dependability; and his good rehabilitative potential. They also would have testified that the crime of which he was convicted was out of character of what they knew of appellant. One additional friend would have also testified that when appellant was younger, he was frequently assaulted by others, but appellant always remained calm and that it took a lot for him to be provoked.

Defense counsel provided information about their investigative efforts as to appellant's childhood and military service in preparing for appellant's pre-sentencing hearing. Defense counsel testified that they reviewed the investigative file for information in mitigation and extenuation including identifying individuals who might provide relevant testimony during pre-sentencing. Defense also requested appellant provide the names and contact information of family members who could testify in pre-sentencing. In speaking with appellant's family members, defense counsel learned that appellant's family members strongly believed in appellant's innocence and were resistant in discussing sentencing proceedings. Additionally, appellant was communicating with family members on a consistent basis telephonically and through letters from pre-trial confinement. In these communications, appellant provided details of the investigation and varying

accounts of what occurred the night of his wife's murder. The government intercepted recordings of these phone calls and had placed a few of appellant's family members on its witness list. Thus, at some point, defense counsel made their fact investigator the primary point of contact for the family members so there was consistency in information provided to the family and to limit information provided to the family, given a few of them were now on the government's witness list. However, the defense counsel remained in contact with appellant's sister as the conduit for information to the family. As for appellant's military service, the defense counsel interviewed both of appellant's commanders, his First Sergeant and at least two other [noncommissioned] officers from his unit. These individuals did not provide favorable information about appellant's duty performance. During the government's interviews of these witnesses, the commander stated appellant "wasn't a very competent soldier" and he had "a lot of disciplinary issues." The commander also expressed that he felt it was a "hazard to take PFC Forrest" on deployment. Appellant's First Sergeant stated he was a "chronic underperformer" with "a wide-ranging lack of performance issues." Upon request from appellant, defense also interviewed SGT CA who had served with appellant who provided some favorable information. Defense counsel also interviewed two additional witnesses for pre-sentencing upon appellant's request. One witness was a chaplain who had provided counseling to appellant and his wife and informed defense counsel he would not provide favorable information in pre-sentencing. The other witness was a female who only provided general information about appellant based upon her brief and limited contact with appellant.

Defense counsel did not investigate appellant's background or history prior to his military service other than interviewing his family members. Rather, defense counsel explained that they relied upon their appointed fact investigator to develop potential information in mitigation. Thus, defense counsel agree that they did not contact the military witnesses or the five childhood friends who would have testified on appellant's behalf. Defense counsel explained that they believed the fact investigator interviewed appellant's family members and inquired as to whether there were additional friends and family who could provide favorable information on appellant's behalf. The fact investigator did not testify at the *Dubay* hearing, but all of the potential witnesses stated that no one had contacted them prior to appellant's trial. Appellant's family members were not asked by the investigator about other potential witnesses but did confirm they were aware of at least three of appellant's childhood friends who were willing to testify on his behalf and would have provided the names of those witnesses if asked.

We find that appellant's defense counsel were not deficient in investigating appellant's presentencing case. Appellant's defense counsel testified at the *Dubay* hearing that there were strategic reasons they presented limited information during appellant's pre-sentencing hearing despite the potential severity of appellant's sentence. In presenting information as to appellant's military service, the defense

counsel recognized that appellant had only served just under two years in the Army at the time of his wife's murder. Appellant did not have a significant service record after his wife's murder because he was placed in pretrial confinement while pending court-martial. 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.

Any good soldier evidence could have also been rebutted by information about prior domestic violence incidents with the victim resulting in a military protective order issued against appellant by his commander. Defense counsel had successfully litigated a motion restricting the government from presenting that information unless the defense presented evidence rendering that misconduct relevant in rebuttal. Defense counsel were also aware of non-judicial punishment appellant received and did not want to give the government a reason to uncover that information or use it in rebuttal to good soldier evidence. Therefore, defense counsel presented limited information about appellant's service though his unsworn statement. Additionally, the government admitted appellant's enlisted record brief that provided information about his service and awards.

Defense counsel stated they made a strategic decision to only present appellant's immediate family members in providing the military judge information about appellant's character and background prior to joining the military. This decision limited 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.[4] 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

[4] Appellant was cited for at least twelve incidents of misconduct or rules violations spanning a period of just nineteen months of his pretrial confinement. Some of these incidents involved failure to comply with rules by covering vents in his cell on multiple occasions and destruction of property when he punched a kiosk when he became frustrated with another inmate. Appellant was cited for several incidents of disrespect to the confinement guards and staff by saying such things as: "Fuck you;" "I ain't talking to you. Bitch;" "You need to get an attitude adjustment because you would not act this hard in the streets;" "You can kiss my ass;" and referring to a female guard using a very graphic word.

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.

We also find that appellant has failed to establish he was prejudiced even if his defense counsel were deficient in their investigation in preparation for pre-sentencing. Even if defense counsel had conducted a more thorough investigation and uncovered the military witness that provided some favorable information about appellant's service, it is very likely the government would have rebutted that testimony with cross-examination about his disciplinary issues or the negative testimony of his commander and First Sergeant. Testimony from appellant's command would have neutralized any good soldier evidence. The testimony of the five childhood friends would have provided some favorable information about appellant's upbringing, character for being calm and non-violent, and rehabilitative potential. However, the government would have likely rebutted this information with appellant's prior domestic violence incidents, assault on his sister, and his anger-filled outbursts and disrespect while in pretrial confinement. Any reference to these incidents could have been very damaging for the military judge's consideration of appellant's rehabilitative potential. The military judge sentenced appellant to confinement for life with the possibility of parole indicating appellant has some rehabilitative potential. The admission of any of these incidents of misconduct could have resulted in confinement for life without parole.

Even if defense counsel had cautiously presented the testimony of the childhood friends without providing opinions as to rehabilitative potential, we find there is no reasonable probability that appellant would have received a different sentence. Appellant was convicted of bludgeoning his wife while her baby grandaughter slept on the couch nearby and her two young sons were upstairs locked in their bedroom, panicked and worried about their mother. The evidence at trial indicated that the victim suffered a painful death in which she swallowed her own teeth and blood and died over a period of at least several minutes based upon the pathologist's testimony. There was no indication appellant rendered the victim any aid while she suffered a slow death. He attempted to destroy evidence by trying to wash himself in the bathroom and attempted to destroy evidence in damaging the victim's cellphone and that of her son. The cellphones were found in a box in the garage and an expert testified there were indications of significant moisture in one of the cellphones. During the government's pre-sentencing case, it presented the impact of appellant's crime. The victim's sister testified that her work performance had declined, she sought counseling, and was taking medication for depression, anxiety, and insomnia. One of the victim's daughters testified she suffered from anxiety, insomnia, and lost appetite, and that she has tried to suppress her pain and fear. KK, the victim's daughter who responded to the home on the night of the

murder, testified that she is fearful to be in small areas with people, experiences nightmares, suffers from anxiety, and is afraid to let her children go outside and play. The victim's older son testified he feels he could have done more that night and that he has had difficulty getting a job. CH, the victim's son who was in the home when the murder occurred, testified that it is hard for him to talk to people, he has difficulty sleeping, he experiences nightmares, and he feels guilty as he wishes that he could have done more. CH testified that his younger brother who was with him that night rarely speaks to him and screams in his sleep. In appellant's own brief, he admits that the offense of which he was convicted was "undeniably heinous." Based on the gravity of appellant's offense and the impact it had on the victim's children and family members, we find that even with the limited testimony of the five childhood friends, appellant would have received a sentence to confinement for life with parole.

D. Failing to Properly Investigate Appellant's Head Injury and Provide Justification for Expert in Forensic Psychology and Neurology

Appellant asserts that his counsel rendered ineffective assistance when they failed to properly investigate his head injury and provide sufficient justification for the motion to compel an expert in forensic psychology and neuropsychology. We disagree and find both that counsel did not render deficient performance, and even if they had, appellant cannot show *Strickland* prejudice.

Based 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. Defense counsel explained at the *Dubay* hearing that they had reviewed appellant's medical records from his accident and did not believe appellant had suffered a TBI. 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. Appellant's medical records indicated he had suffered a head injury but a CT scan revealed there were no intracranial injuries. However, defense counsel continued forward with 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.

Defense counsel further explained that appellant's sanity board results and various statements he made about the events the night of his wife's murder resulted in their 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 to forensic psychologist. Appellant had completed a sanity board evaluation which included the medical records from appellant's accident and appellant discussed the

accident during the evaluation. Appellant's head injury was considered during that evaluation. The sanity board concluded appellant only met the diagnostic criteria for relationship distress with a spouse or intimate partner. Defense counsel also possessed information that appellant had provided varying accounts of what occurred the night of his wife's murder based upon their conversations with him and statements he made to family members. Specifically, defense counsel noted that appellant's recollection of the events of that night changed, in particular, when confronted with the evidence. For the defense counsel, this indicated appellant recalled what occurred the night of the murder. And defense was aware of incidents of domestic violence against his wife that predated the vehicular accident. In light of all of this information, defense counsel did not intend to present information about any potential TBI during the merits portion of the trial. Rather, defense counsel had concluded if the military judge granted the expert, they would use any potential evidence in mitigation for sentencing.

Appellant himself played a role in preventing his defense counsel from presenting additional information to the military judge in support of the requested expert. When the military judge commented on the record that getting appellant evaluated for TBI might be the next logical step in support of the expert request, the government offered defense the opportunity for appellant to be evaluated for TBI. Defense counsel discussed the benefit of TBI testing with appellant on two separate occasions. Counsel explained that submitting to TBI testing, would assist in providing additional justification for the motion to compel the forensic psychology expert. Specifically, defense counsel explained that he would have to submit to TBI testing if they were going to use that as a potential defense. Appellant refused to participate in any TBI testing and expressed he wanted no mental health defense used in the case. Even when counsel explained that the TBI evaluation could be used merely in mitigation if it impacted his memory or caused a blackout, appellant still refused to submit to any TBI testing. When defense counsel explained that his refusal to obtain TBI testing would likely result in a denial of the expert, appellant acknowledged he understood. Considering the limited medical information defense counsel possessed about appellant's head injury the week prior to the murder, the sanity board results, appellant's shifting account of the events the night of the murder, and appellant's refusal to submit to a TBI evaluation, we find that the defense counsel's performance was not deficient in litigating the motion to compel a forensic psychologist.

Appellant also failed to show *Strickland* prejudice, because he 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. First, appellant argues that his defense counsel omitted a definition from the DSM-V that loss of consciousness is evidence of a TBI. Second, he argues that his counsel failed to understand that a

Glascow Coma Score of 7 constitutes a severe head injury nor did his counsel provide such information to the military judge. Third, appellant provided testimony from Dr. PM and Dr. LF. Dr. PB explained that an MRI as well as neuropsychological testing could be performed on appellant to determine whether there a brain injury occurred and if so, whether it impacted appellant's executive functioning. Dr. LF opined that appellant suffered a mild to moderate TBI as a result of the motor vehicle accident based upon his Glascow Coma Score of 7. He further stated appellant suffered only a mild to moderate TBI and that would not have risen to a level of influencing someone's inclination to commit murder. We do not find this evidence compelling enough that it would have persuaded the military judge to grant the motion for the requested expert.

CONCLUSION

The finding and the sentence are AFFIRMED.

Judge EWING and Judge PARKER concur.

FOR THE COURT:

JAMES W. HERRING, JR.
Clerk of Court

Appendix B: Army Court Panel Composition Memorandum

DEPARTMENT OF THE ARMY
UNITED STATES ARMY LEGAL SERVICES AGENCY
UNITED STATES ARMY COURT OF CRIMINAL APPEALS
9275 GUNSTON ROAD
FORT BELVOIR, VA 22060-5546

JALS-CCZ

22 July 2024

MEMORANDUM FOR CHIEF JUDGE, SENIOR JUDGES, and ASSOCIATE JUDGES

SUBJECT: USACCA Panel Composition

1. Effective 22 July 2024, the U.S. Army Court of Criminal Appeals will be composed of the following panels:

POND, TIFFANY D., COL, JA (Chief Judge)
Chief Commissioner – CPT Alexander P. Vanscoy

a. **Panel 2**

FLEMING, DEIDRA J., LTC, JA (Senior Judge)
PENLAND, ROBERT T., JR., COL, JA
MORRIS, LAJOHNNE A., COL, JA
COOPER, STEPHANIE R., COL, JA
Commissioner – CPT Nicholas W. Masters

b. **Panel 3**

VACANT

c. **Panel 4**

POND, TIFFANY D., COL, JA (Chief Judge)
WALKER, ELIZABETH A., COL, JA (Senior Judge)
JUETTEN, PETER G., COL, JA
PARKER, JENNIFER A., LTC, JA
Commissioner – CPT J. Robert Daniell III

2. The Clerk of Court, on behalf of the Chief Judge, is authorized to assign Reserve Appellate Military Judges Colonel JAMES P. ARGUELLES, Colonel JAMES A. EWING, and Colonel KIRSTEN M. DOWDY to panels as appropriate during periods of active duty.

3. This reorganization affects all case pending except for:

United States v. FORREST, 20200715 [Walker, Ewing, Parker]
United States v. WILSON, 20230233 [Pond, Penland, Morris]
United States v. TORRESJUAREZ, 20220659 [Pond, Fleming, Penland]

SUBJECT: USACCA Panel Composition 22 July 2024

United States v. ESPINAL, 20220152 [Pond, Fleming, Parker]
United States v. SMITH, 20230029 [Penland, Morris, Arguelles]
United States v. BROWN, 20220507 [Pond, Fleming, Penland]
United States v. ALFARO, 20220280 [Pond, Fleming, Morris]
United States v. ANTEPARA, 20220562 [Walker, Morris, Parker]
United States v. ABDULLAH, 20230223 [En Banc]

TIFFANY D. POND
Colonel, JA
Chief Judge

E-DISTRIBUTION:
JALS-CCZ JALS-DA
JALS-CR2,3,4 JALS-GA
JALS-CCO

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of United States v. Forrest, Crim. App. Dkt. No. 20200715, USCA Dkt. No. 25-0081/AR was electronically filed with the Court and Government Appellate Division on March 3, 2025.

MELINDA J. JOHNSON
Paralegal Specialist
Defense Appellate Division
(703) 693-0736