IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES Appellee	**SUPPLEMENTAL BRIEF ON BEHALF OF APPELLANT**
v.	Docket No. ARMY 20230238
Specialist (E-4) **JAROD A. KUYKENDALL,** United States Army, Appellant	Tried at Fort Polk, Louisiana, on 5 January 2023; 17 April 2023; 25-28 April 2023, before a general court-martial convened by the Commander, JRTC and Fort Polk, Louisiana, Colonel Maureen A. Kohn (arraignment and trial), Lieutenant Colonel Scott Z. Hughes (motions hearing), military judges, presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Assignment of Error[1]

WHETHER DEFENSE COUNSEL WERE INEFFECTIVE FOR FAILING TO CONTACT AND PRESENT EVIDENCE FROM ESSENTIAL SENTENCING WITNESSES.

[1] Appellant originally raised four (4) assignments of error (AEs) on appeal. Because this court already discussed and resolved three of these AEs in its 16 December 2025 Memorandum Opinion, this supplemental brief only addresses AE IV related to Ineffective Assistance of Counsel, which was the basis for the Article 66(f)(3) *Dubay* hearing. (App. Br.; Mem. Op. 16 Dec. 2025).

Panel No. 4

Statement of the Case

On 28 April 2023, a general court-martial composed of officer and enlisted members convicted appellant, Specialist [SPC] Jarod A. Kuykendall [appellant], contrary to his pleas, of two specifications of sexual assault in violation of Article 120, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 920.[2] (R. at 599). On 28 April 2023, the military judge sentenced appellant to reduction to the grade of E-1, confinement for 4 years, and a dishonorable discharge. (R. at 615; Statement of Trial Results).[3]

On 25 May 2023, the convening authority took no action on the findings and sentence and approved appellant's request for deferment and waiver of automatic forfeitures. (Action). On 26 June 2023, the military judge entered judgment of the court. (Judgment). On 30 May 2024, this court docketed appellant's case. (Referral and Designation of Counsel).

Facts Relevant to Assignment of Error

On 26 March 2025, appellant filed his original brief with this court. (Brief on Behalf of Appellant). On the same day (26 March 2025), appellant also filed a Motion to Attach Defense Appellate Exhibits A-E, which the court granted on 16

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[2] Appellant was found not guilty of one specification of assault consummated by a battery, in violation of Article 128, UCMJ, and one specification of sexual assault, in violation of Article 120, UCMJ.

[3] The military judge adjudged concurrent sentences of confinement (four years for Specification 1 and 3 of Charge I). (R. at 615; Statement of Trial Results).

September 2026.[4] Appellant's Motion to Attach Defense Appellate Exhibits A-E contained five (5) sworn declarations supporting Assignment of Error IV, which related to whether appellant's trial defense counsel were ineffective for the failure to present critical evidence at sentencing.

The government filed its brief on 10 July 2025. (Brief on Behalf of Appellee). On 11 August 2025, this court ordered the government to obtain affidavits from appellant's trial defense counsel, [redacted] (Order, 11 Aug. 2025).

In their affidavits, both trial defense counsel claimed they spoke with members of appellant's family (and his platoon) but made a deliberate, tactical decision not to call them as witnesses. (Gov't App. Ex. 1, 2). This contradicted the sworn declarations submitted by appellant in his Motion to Attach, in which appellant, multiple family members, and [redacted] stated that they were available for trial but were not interviewed by trial defense counsel or asked to provide mitigation testimony at trial. (Def. App. Ex. A-E).

In response to the factual dispute between the affidavits submitted by appellant and the government, the Army Court of Criminal Appeals (ACCA)

[4] Appellant filed his Motion to Attach Defense Appellate Exhibits A-E on 26 March 2025. The Army Court of Criminal Appeals referenced Def. App. Ex. A-E in its Memorandum Opinion issued on 16 December 2025 but did not grant the Motion to Attach until 16 September 2026.

issued a Memorandum Opinion on 16 December 2025. (Mem. Op. 16 Dec. 2025). The court affirmed the findings of guilt but remanded the case for a *Dubay* hearing to determine the facts surrounding appellant's ineffective assistance of counsel claim related to sentencing. (Mem. Op. 16 Dec. 2025, pg. 14). The *Dubay* hearing was held on 18 May 2026. (*Dubay Findings*, pg. 1). The military judge presiding over that hearing issued his "Article 66(f)(3) *DUBAY* COURT'S FINDINGS OF FACT" (*Dubay* Findings) on 2 June 2026. (*Dubay* Findings, pg. 1). The case was then returned to this court, which ordered the parties to submit supplemental briefs to address the findings from the *Dubay* hearing. (Order, 25 Aug. 2026).

Standard of Review

This court reviews claims of ineffective assistance of counsel de novo. *United States v. Captain*, 75 M.J. 99, 102 (C.A.A.F. 2016). The Sixth Amendment entitles criminal defendants to representation that does not fall "below an objective standard of reasonableness" in light of "prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). An appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice. *Id*. at 687.

Law & Argument

The appellant adopts the entirety of the facts, law, and argument from his original brief before this court. (Brief on Behalf of Appellant). Per this court's

25 August 2026 Order, appellant supplements his original brief with additional argument based on the military judge's *Dubay* findings. Those findings provide concrete evidence supporting appellant's argument that his counsel were ineffective. (*Dubay* Findings).

I. The *Dubay* Findings of Fact Establish that Trial Defense Counsel's Performance was Ineffective.

Trial defense counsel had a fundamental duty to conduct a reasonable investigation for mitigating evidence before making any strategic decision. A decision not to investigate "must be a reasonable one" rather than one due to "inattention." *Wiggins v. Smith*, 539 U.S. 510, 526 (2003). In this case, the *Dubay* military judge found that appellant's trial defense counsel's investigation was woefully inadequate. (*Dubay* Findings, ¶ 6, 29).

The military judge found appellant's trial defense counsel failed to interview or call any sentencing witnesses, provided little to no assistance to appellant on his unsworn statement, and failed to seek out basic documentary evidence (such as SPC Kuykendall's unit file or counseling history). (*Dubay* Findings, ¶ 31, 35, 44). Trial defense counsel's error in failing to interview essential witnesses was compounded by their speculative assumptions about how those individuals would testify and how the judge would weigh their testimony. (*Dubay* Findings, ¶ 28(b)-(c)).

Contrary to the assertions trial defense counsel made in their respective affidavits (Gov't App. Ex. 1, 2), the military judge found counsel did not conduct formal interviews with Appellant's family members. (*Dubay* Findings, ¶ 6, 14). Trial defense counsel had, at most, surface level conversations with appellant's command team. (*Dubay* Findings, ¶ 30). Defense did not interview members of appellant's unit. (*Dubay* Findings, ¶ 21). Furthermore, there is no evidence that defense counsel made any efforts to travel to appellant's unit, interview specific individuals, or canvas the organization for potential witnesses. (*Dubay* Findings, ¶ 24). They made "tactical" decisions based on assumptions that were false, and which they could have corrected easily by conducting a cursory level of investigation. (*Dubay* Findings, ¶ 25(a)).

The military judge found counsel did no independent investigation into appellant's "academic achievements, volunteer efforts, . . . childhood circumstances" nor information regarding appellant's good military character or service. (*Dubay* Findings of Fact, ¶ 29-30). Furthermore, the defense team provided SPC Kuykendall with no (or limited) assistance with his "unremarkable" unsworn statement, which appellant estimated he wrote in "20 minutes or so" *after* the case on the merits concluded. (*Dubay* Findings, ¶ 35-37).

II. Appellant's Trial Defense Counsel Conducted No Meaningful Investigation to Prepare for Sentencing.

A. Trial Defense Counsel Failed to Interview Appellant's Family Members.

Appellant provided his defense counsel with the names and contact information for multiple potential sentencing witnesses (family members) and successfully arranged for their presence at trial. (*Dubay* Findings, ¶ 7(a)-(b)). All of those individuals appeared to hold a positive view of appellant. (*Dubay* Findings, ¶ 7(a)). Nevertheless, it appeared that trial defense counsel had, at most, brief, surface-level conversations with two family members. (*Dubay* Findings, ¶ 42). Members of the defense team spoke to SPC Kuykendall's father but it was not clear whether they discussed appellant's sentencing case. (*Dubay* Findings, ¶ 13). Additionally, there was insufficient evidence to credit trial defense counsel's assertion that he interviewed other key members of appellant's family: [redacted] his mother); or [redacted] (his father). (*Dubay* Findings, ¶ 14).[5] All of appellant's family members denied being interviewed, and two witnesses (appellant's father and his wife) said that the only person with whom they discussed providing sentencing testimony was appellant. (*Dubay* Findings, ¶ 15-16).

[5] This was one of many examples in which the *Dubay* judge did not credit assertions made by both trial defense counsel to justify their decision-making and inaction. (Dubay Findings, ¶ 14, 20, 23, 25(c), 39).

B. Trial Defense Counsel Failed to Interview Appellant's Leadership or Other Members of His Unit; Their "Strategy" Was Based on a Critical Mistake that Could Have Been Corrected by Doing So.

The Sixth Amendment ensures that defense counsel's performance does not fall below objectively reasonable professional standards. *Strickland v. Washington*, 466 U.S. 668, 688. In this case there was "no indication that any other member[s] of the dozen-or-so Soldiers in SPC Kuykendall's platoon were contacted by or spoke with the defense team at any time." (*Dubay* Findings, ¶ 20).

Defense justified the decision not to interview any of appellant's platoon members based on a "mistaken impression" that the victim was both appellant's subordinate and a member of appellant's unit. (*Dubay* Findings, ¶ 25(a)). However, the *Dubay* judge found that "[i]ronically, interviews with members of the unit would have corrected both assumptions." (*Dubay* Findings, ¶ 25(a)).

The military judge found defense counsel also did not speak to appellant's leadership beyond "cursory conversations," which they justified based on the fact that SPC Kuykendall "never said anyone in his chain of command was going to be particularly supportive." (*Dubay* Findings, ¶ 19, 30). Defense counsel conducted "no independent inquiry into the value of these witnesses." (*Dubay* Findings, ¶ 19).

Defense counsel cannot claim that there was a strategic reason not to interview appellant's leadership and members of appellant's unit when their decision was based on a mistaken assumption that would have been easily

corrected through proper investigation. The failure to interview anyone from appellant's unit fundamentally falls below an objective standard and professional norms, as articulated in *Strickland*. 466 U.S. at 688. Much like the defense counsel in *Wiggins*, appellant's counsel conducted an inadequate investigation and presented a "halfhearted" mitigation case. 539 U.S. at 514.

Any reasonable defense counsel would have conducted at least some interviews with members of appellant's unit. A conversation with anyone from appellant's unit would have corrected counsel's grave error in believing that the victim in the case was a subordinate or a member of appellant's unit, a fact they could have also discovered with a cursory reading of the evidence packet or a conversation with appellant. Defense counsel were ineffective.

C. Appellant Was Substantially Prejudiced by Trial Defense Counsel's Deficient Performance.

To prevail on an ineffective assistance of counsel claim, an appellant must establish prejudice by showing "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 (citations and quotations omitted). This does not mean appellant is "required to show that counsel's deficient conduct more likely than not altered the outcome . . . but rather . . . established a probability sufficient to undermine confidence in [that] outcome." *United States v. Akbar*, 74 M.J. 364, 436 (C.A.A.F. 2015) (citing *Porter v. McCollum*, 558 U.S. 30, 44 (2009)). "The 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.

The transcript from the defense's pre-sentencing case is only two pages long. (R. 606-607). The *Dubay* judge noted appellant's unsworn statement was "eight sentences long" and "unremarkable." (*Dubay* Findings ¶ 36). Because of counsel's subpar investigation and inadequate preparation, the trial judge never heard important mitigation and extenuation evidence. For example, the judge did not hear testimony from appellant's platoon sergeant, [redacted], who would have testified appellant had rehabilitative potential and a promising future as a non-commissioned officer. (Def. App. Ex. B). The trial judge did not hear from appellant's father who would have testified about appellant's character and history of protecting others. (Def. App. Ex. C). The military judge never heard about appellant's wife and appellant's role as a new father. (Def. App. Ex. D). Counsel's deficient performance denied appellant the opportunity to present important humanizing evidence from witnesses who knew appellant the best.

Thus, appellant's sentencing case was his unsworn statement, which the *DuBay* judge found was "prepared as an afterthought" and took "about 20 minutes to write" after the guilty verdict was announced. (*DuBay* Findings ¶ 37, 45). It consisted of eight "unremarkable" hand-written sentences that appellant wrote with

little to no help from defense counsel. (*DuBay* Findings ¶ 35-36). Appellant did not mention his family or newborn son. (R. 606-607).

Defense counsel did not independently investigate appellant's academic achievements, volunteer efforts, or childhood circumstances. (*DuBay* Findings ¶ 29). They did not even present basic facts regarding appellant's test scores, achievements, qualifications, or length of service based on his Army Military Human Resource Record. (*DuBay* Findings ¶ 31-32). This further deprived the military judge from hearing key mitigation and rehabilitative potential evidence, such as additional awards, military education, good military character, civic/volunteer engagement, etc. (*DuBay* Findings ¶ 31-32).

This case is distinct from *United States v. Scott*, where the Court of Appeals for the Armed Forces (CAAF) determined that trial defense counsel was deficient at sentencing but found Scott suffered no prejudice as a result. *United States v. Scott*, 81 M.J. 79, 87 (C.A.A.F. 2021). In contrast to appellant's case, in *Scott*, even though trial defense counsel's performance was deficient, they did present a robust sentencing case. For example, the defense counsel presented evidence that appellant had a long and distinguished military record as a helicopter pilot, which spanned more than 20 years and had won numerous awards. (*Id.*). The appellant in *Scott* also gave a substantive unsworn statement, in which appellant spoke about his combat record, emotional/physical combat-related injuries, and apologized and

showed remorse. (*Scott* at *83). Furthermore, trial defense counsel called three sentencing witnesses who had recently served with appellant and provided testimony about appellant's positive work performance, rehabilitative potential, and stated that appellant had shown remorse for his actions. (*Scott* at *83). In conclusion, CAAF determined that there was "no reasonable probability that this additional extenuating and mitigating evidence [that trial defense counsel failed to present at trial] was so transformative that it would have changed the result [at sentencing]." (*Scott* at *87).

During sentencing in SPC Kuykendall's case, the military judge heard aggravating evidence from both the victim and the government. During her victim impact statement, [redacted] stated that after the sexual assault by appellant, she had difficulty trusting people and maintaining romantic relationships; she also stated that she felt isolated, needed medication, and required ongoing behavioral health treatment due to having anxiety to the point of being "physically sick." (R. 605-606). During its sentencing argument, the government reiterated the negative impact on the victim:

> And then we heard from [redacted] the damage damage [sic] that's caused. It's one weekend, 24-hour period that she's going to have to deal with now, for at least a while. Likely the rest of her life. And I want to talk about the nature of the offenses and specifically the act itself of a sexual assault, a penetrative sexual assault on a young woman. It's the most intimate, invasive thing that you can imagine. Taking her clothes off her when she's in this vulnerable state, ripping them off of her and

> penetrating her, violating every ounce of autonomy, of personal security, and this is someone she's supposed to be able to trust. This is someone she's supposed to be able to go with for help at work, in the Army. And he violates her in the most terrible way you can imagine. And not just once, not just once, two times over 24 hours.

(R. 607-608).

After the military judge heard about the severity of the offense and many negative impacts on the victim, SPC Kuykendall's defense counsel barely presented any sentencing case at all. Trial defense counsel neither interviewed nor called a single witness at trial. (*DuBay* Findings ¶ 44).

Therefore, the military judge heard no evidence from the people who knew SPC Kuykendall best—about how appellant is an "amazing friend" and how "his family and friends mean the world to him." (Def. App. Ex. D). The military judge did not hear about his rehabilitative potential from either his grandmother ([redacted]) or work supervisor [redacted])–that he "is a young man of integrity who has the potential to contribute positively to society," (Def. App. Ex. E), who has "leadership potential," and the capability to become "an influential NCO." (Def. App. Ex. B).

In determining the length of his confinement, it would have been particularly compelling for the military judge to hear from appellant's wife[redacted] and father[redacted] Both could have presented evidence as to appellant's commitment to his family, efforts to remain in contact with his son

while in confinement (who was 4 months old at the time of trial), impact of the length of appellant's confinement on his family (particularly his wife and son), and also how he would miss critical milestones in his young son's life. (Def. App. Ex. C, D). Neither appellant (in his unsworn) nor trial defense counsel (in their sentencing argument) ever mentioned appellant's wife and son. (R. 606-607; 611-614). Therefore, it is not clear the military judge was even aware that appellant and his wife had a newborn son at the time of trial. There was also no "Good Soldier Book" prepared as a Defense Exhibit for the military judge.

In this case, appellant was prejudiced. As a result of his counsel's deficient performance appellant received a weighty sentence. Appellant was sentenced to be reduced to E-1, four years of confinement, and a dishonorable discharge. Counsel's deficient performance calls into question that sentence, and suggests that the military judge would have given him a more lenient sentence if counsel presented a sentencing case. In particular, testimony about appellant's positive character, the impact of the length of confinement on his wife and son, and appellant's high rehabilitative potential would have provided reasons for the military judge to adjudge a lesser term of confinement.

Appellant's trial defense counsel's actions not only fell well below prevailing professional norms, but also led to an unfair trial, which caused prejudice to appellant. Both prongs of *Strickland* are clearly met in this case.

Conclusion

Appellant respectfully requests this court set aside appellant's sentence in and remand for a re-hearing to reconsider his sentence.

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to the Army Court of Criminal Appeals and the Government Appellate Division on **17 September 2026**.



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