IN THE FIRST JUDICIAL CIRCUIT, U.S. ARMY
MILITARY DISTRICT OF WASHINGTON, WASHINGTON, D.C.

UNITED STATES	)	
	)	**Findings of Fact and**
v.	)	**Conclusions of Law**
	)	**(*DuBay* Hearing)**
	)	
SGT, U.S. Army	)	12 April 2017
ARMY Crim App. No.	)	

BACKGROUND:

1. On 23 November 2016, the Army Court of Criminal Appeals (ACCA) ordered a limited hearing in accordance with *United States v. DuBay* (AE LXVII). The ACCA returned this case to The Judge Advocate General of the Army for such action as is required to conduct a limited hearing to determine the facts surrounding appellant's allegations that his trial defense counsel were ineffective in preparing the appellant to testify, in failing to contact numerous potential witness, and in failing to call certain witnesses at trial as requested by the appellant.

2. On 5 December 2016, The Judge Advocate General designated the General Court-Martial Convening Authority, Military District of Washington, as the convening authority of action for the *DuBay* hearing (AE LXVI).

3. The convening authority did not receive a recommendation from the Staff Judge Advocate to convene this Court to conduct the limited hearing. At the hearing, counsel for both sides agreed the ACCA's order was sufficient.

4. On 1-2 February 2017, I conducted the limited hearing and considered the following documentary evidence:

a. Record of trial, to include the appellant's post-trial submissions (dated 5 December 2014).

b. Submissions and briefs submitted to the Army Court of Criminal Appeals, to include Appellant's assignment of error and brief to the ACCA, affidavits from trial defense counsel, and 1LT memoranda for record.

c. Appellate exhibits attached to the record of the *DuBay* hearing.

I also considered testimony at the hearing from the following witnesses:

a.

b.

c.

APPELLATE EXHIBIT LXXXIII
(83)

d.

j. .

k. The appellant.

ESSENTIAL FINDINGS OF FACT:

5. Before answering the questions posed by the Army Court of Criminal Appeals, I offer the following findings offact regarding credibility of witnesses:

a. After appellant's court-martial, he immediately retained civilian counsel to assist with post-trial submissions to the convening authority. MAJ provided a copy of his file to the new civilian counsel shortly after the court-martial adjourned.

b. At that point, MAJ knew it was likely that the appellant would allege ineffective assistance of counsel. HROT at 337-38. I find that retaining a civilian counsel for post-trial submissions is very unusual and MAJ was on notice that he might have to explain his representation in the future.

c. Despite being on notice of a potential IAC claim, MAJ did not make hard copies of key documents that could have been used to show his representation. By way of example, MAJ stated that, before trial, he sent an email to the appellant and attached questions he intended to ask appellant at trial; MAJ did not print a hard copy of the email or the draft questions. MAJ said he maintained digital copies of these materials. HROT[1] at 339.

d. On the first day of the *DuBay* hearing, MAJ testified that the draft questions were lost. HROT at 111. He stated that in reviewing his case file, a binder was missing; he also said he could not access his military email account because he had retired. *Id.*

e. On the second day of the *DuBay* hearing, MAJ was recalled as a witness. Both sides questioned MAJ . Then I asked MAJ about what efforts he

[1] For clarity, HROT refers to pages in the record of trial from the *DuBay* hearing. ROT refers to pages in the original record of trial.

made to safeguard materials in this case. During that exchange, MAJ said that he had found the missing questions during the evening recess:

> Q. Once you knew he was getting a civilian counsel, did you make any efforts to try to memorialize the work you'd done on the case, now that you at least thought, in the back of your mind, he might allege ineffective assistance of counsel?
>
> A. At the time before I PCS'd, I had everything organized back then.
>
> Q. Let me ask you this. For example, it appears to me that you can't find the questions that you'd prepared to ask him that you provided to him. Did you make any effort, once he said "I'm getting a civilian for my 1105s," to print off those types of documents and save them?
>
> A. The document for the questions – I asked my wife to look through some of my stuff, and it is there. The questions that I emailed him, that is there, but the – I still can't find the rights advisal form. I know I said I couldn't find it, but it is there. I do have that.
>
> Q. So you're now saying you have the questions that you were going to ask him?
>
> A. I do.
>
> Q. Did you mention that to counsel? That seems incredibly important.
>
> A. No, sir, I didn't.
>
> Q. Why didn't you mention that to everyone that you now had discovered these missing questions?
>
> A. I should have. By the time we got here, you guys were already in session.

HROT at 338. Notably, MAJ did not notify the parties that he had discovered the lost questions. If I had not asked the question, it is unclear if MAJ would have disclosed that he found the missing document.

f. I find that MAJ did not adequately memorialize his efforts in representing the accused. I find that his failure to maintain a complete case file – which would have helped him fully answer questions at the hearing – undercuts his credibility as a witness. I recognize that a trial can be chaotic and it is understandable for case files to be misplaced after trial is complete, particularly for military counsel who regularly move. However, this is not a case in which IAC allegations were raised months or years after trial. If that were the situation, I would understand hazy details from counsel who are attempting to remember reasons for decisions made long ago. In this case, the appellant discharged his military counsel immediately after trial and retained civilian counsel. Military counsel suspected (and probably believed) that the appellant would question their representation.

g. Regarding the appellant, I found him to be credible. Of particular significance, appellant has been consistent regarding his claims of ineffective assistance of counsel. In his post-trial submissions, appellant wrote that his counsel had discussed their strategy for trial. The counsel planned to "bring up the threats made by (including "he won't get away with divorcing me") and the memoranda kept by 1LT The appellant further

wrote that his counsel were going to call Mr. (ex-husband) about similar false allegations [2] had made. Memorandum from Subject: Assertion of Legal Error and Request for Clemency, Attachment 1, at 2 (5 Dec 14). Counsel's post-trial submission memorandum also discusses the trial defense counsel's alleged failure to prepare the appellant to testify at for trial. *Id.* at 2-3.

h. I recognize that any appellant has a motive to present evidence in a favorable light. However, in this case, the appellant has been consistent in his allegations of ineffective assistance of counsel. He discharged his military counsel immediately after trial and retained civilian counsel. At each post-trial stage – from post-trial submissions to appellate filings to testimony at the *DuBay* hearing – the appellant has been unwavering about his claims. This consistency causes me to believe his testimony is more credible. Additionally, I found the appellant to be candid and thoughtful during his testimony at the hearing.

i. Though not part of the *DuBay* order, I found the defense counsel were deficient in failing to investigate a prior allegation made by at Fort Bragg, North Carolina. On 18 October 2010, testified at an Article 32 pretrial investigation in an unrelated case. AE LXXVIII. The accused in that case was charged with abusive sexual contact and wrongful sexual contact, and was the named victim for both offenses. She testified at the Article 32 hearing and the investigating officer ultimately determined there were not "reasonable grounds" to believe the accused committed the offenses. AE LXXVII. MAJ testified that he did not contact the defense counsel in that case to find out if they had information about Tabatha that might helpful in this case. HROT at 322-23. As noted at the hearing, at this point, the charges in the Fort Bragg case had been dismissed following the Article 32, so the Fort Bragg defense counsel would have been able to freely discuss the case. This oversight is significant. A Government witness (and mother of the three alleged victims) had made allegations that were insufficient to support a prosecution. In the Article 32 hearing, she testified and was subject to cross-examination, and defense counsel in that case likely had theories for impeaching Tabatha at trial. If they had made a phone call, defense counsel could have discovered a windfall of potential areas for further investigation. The defense counsel failed to pursue this area of inquiry.

Questions from paragraph 2(a) of AE LXVII:

What was the substance of the discussions between appellant and MAJ regarding appellant testifying at trial? How often did appellant meet with his attorneys to prepare to testify? What were the contents of those meetings? Did appellant actively participate in these discussions? Who made the ultimate decision for appellant to testify?

6. At an early meeting, MAJ used a standard Trial Defense Service (TDS) worksheet to explain the appellant's personal rights. Using the worksheet, MAJ

[2] For the sake of clarity, " will be used in the document to refer to the appellant's former wife. I note that her last name changed during the course of these proceedings and her first name was spelled differently in some documents.

explained to the appellant that there are certain choices a criminal accused personally makes. The appellant was told that it was his personal decision to select forum, to make a plea of guilty or not guilty, and whether to testify at trial.

7. The appellant understood that is was his personal decision and his personal right to testify or to remain silent at trial. I recognize that the appellant's decision may have been impacted by a lack of preparation for testifying, but that does not undercut the conclusion that he personally made the decision to testify.

8. Based on the evidence presented, I find that defense counsel did not adequately prepare the appellant to testify. MAJ testified at the *DuBay* hearing and was asked very specific questions about when he and appellant began serious discussions about whether to testify. These questions were separate from the general advisement of the personal rights of the accused. MAJ provided a series of difficult-to-follow responses:

> Q: At what point in time did you have a serious discussion with Sergeant about whether or not he should or should not testify? What I want to try to do is to back it up as far away from trial as you can possibly remember.
>
> A: To me, I considered every conversation I had with Sergeant to be serious. From the very beginning, when I advised him of his pretrial rights, court-martial rights, one of the six things we talked about was the right to testify.

HROT at 110. Following this non-responsive answer – that "every conversation" with appellant was a serious one – counsel attempted to clarify:

> Q: There's the right to testify, and then there's whether you want to do it or not, right?
>
> A: Yes. From the very beginning, when I told Sergeant that in cases like this, it comes down to the credibility of the witnesses. I told him that my recommendation is that he testifies, but he didn't have to decide right then. He could change his mind all the way up to the point of right before he got on the stand. What I said then was, "Let's prepare as if you're going to testify, but remember, this is my recommendation, but ultimately, the decision is yours."
>
> Q: When did you begin preparation to testify?
>
> A: The way that I did it generally is I prepared, and I did the same thing with Sergeant Jones – prepare a person who was accused to testify. I never say to the person, "Now, we're going to prepare you to testify." What I'd do is, over the course of our relationship, ask the type of questions to them how I'd ask them while they were on the stand, and then get their response; have a dialog a little bit about some of the ways that I think the answer could be refined or shortened, or some of the things should be emphasized or deemphasized. We did that all the way throughout the process up until the last 4-8 weeks before trial, culminating at the point where I sat Sergeant down, and his wife – I believe his wife, was present– we had a question-answer session where I went through all the questions I would ask him. Then after that session, I emailed Sergeant a copy of the questions that I was going to ask him.

HROT at 110-11. Upon questioning by Government counsel at the hearing, MAJ described preparing the appellant to testify:

> A: In the beginning, from the time that the charges were preferred to the time that the charges were referred, we probably didn't meet often. But after the charges were referred, we would meet regularly, at least once maybe every 10 days or so. Within the 8 weeks leading up to the trial, I would attempt to meet with him maybe once a week, and I would often reserve Saturdays to talk to him.
>
> Q: So when you'd meet with him to prepare him, would you remind him of his right to testify?
>
> A: Not only remind him – well, we talked about his right to testify, but I'd talk to him about "you have the option, but we're going prepare." As I said before, I never said "I'm preparing you to testify right now," but what I would do is engage him in question dialogue, as I said before.

HROT at 117.

9. I find that MAJ was conflating routine discussions with the appellant (which occurred) with preparing the appellant to testify (which did not occur). MAJ stated that he asked the accused questions in an informal manner in his office. HROT at 133. It appears there was no formal practice of the appellant's testimony until a break in the midst of trial.

10. I find it to be implausible that MAJ recommended the appellant testify as early in the process as he claims. MAJ testified that before the Article 32 investigation, he recommended the appellant testify at trial. HROT at 133. It is hard to believe that at this early stage, any defense counsel would be able to make an informed recommendation about whether an accused should testify. MAJ claim is also undercut by his testimony that he intended to use the Article investigation for "discovery purposes." HROT at 80.

11. This inconsistency with MAJ testimony, coupled with his failure to maintain a hardcopy of the proposed questions, causes me to accept the appellant's testimony that defense counsel only recommended testifying in the middle of trial. I find that defense counsel's recommendation was largely based on a belief that the appellant had to rebut evidence that the appellant made a pretrial statement to the effect of, "I know is 16, but rape?"

12. As an initial matter, it is unclear why defense counsel believed this alleged statement should have impacted the appellant's decision to testify. As set forth in the original trial transcript, SA agreed with trial counsel's question that the appellant said, "I know is 16 but rape?" ROT at 479. The military judge, on his own accord, stated he would "not consider the testimony from this witness involving the accused and invocation of counsel for any reason." ROT at 479-80. I recognize that at the *DuBay* hearing, MAJ testified that he did not recall the military judge saying he would disregard the statement (HROT at 103) and the military judge's statement could potentially be read to

mean that any comment about the accused invoking would disregarded, though the military judge might consider the spontaneous statement. In considering this factual dispute, I conclude that at trial MAJ believed the military judge intended to disregard the appellant's spontaneous statement. In reaching this conclusion, I noted that MAJ cross-examined SA and did ask about the statement in any way. ROT at 480-82. Given the potential importance of that statement, I believe MAJ would have attempted to explain it during cross-examination if he believed the statement was properly before the court.

13. Based on the evidence presented, it appears trial defense counsel were confused about whether the spontaneous statement had been admitted. Rather than seeking clarification from the military judge, they advised the accused to testify. According to MAJ "the spontaneous statement was the motivating reason why I recommended he testify." HROT at 325. During the appellant's testimony, defense counsel asked about the spontaneous statement and the appellant discussed it some detail. ROT at 570-75.

14. In reviewing the record, I conclude the appellant's testimony did not negatively impact the Defense case. The appellant's testimony was relatively brief. The direct examination was only 34 pages (ROT at 543-76), and some of those pages included several lines of objections and discussion of objections. During direct examination, the appellant denied the allegations in a straightforward manner. The cross-examination was less than 9 pages[3] (ROT at 578-86) and did not impeach the appellant or otherwise undermine his testimony. Notably, the appellant's testimony did not open the door for other evidence to be admitted. While the Government presented rebuttal evidence after the Defense rested, it was limited to clarifying seemingly-collateral issues (to include where the appellant resided during certain offenses and how law enforcement advised the accused of his Article 31 rights).

Question from paragraph 2(b) of AE LXVII:

Why was Father not called as a telephonic witness or afforded a stipulation of expected testimony in the defense case?

15. Defense counsel made a sound tactical decision regarding Father . While this witness had favorable testimony about the appellant's duty performance, he also would have testified that the appellant had borrowed money from the witness. HROT at 123.

16. I find it to be a reasonable decision by counsel to forego calling this witness or entering a stipulation of expected testimony. While this witness had somewhat favorable testimony, it was reasonable for counsel to determine that the favorable testimony would have been outweighed by the testimony that the appellant had borrowed money from a member of the clergy.

[3] On pages 576 to 577 in the record of trial, the military judge discussed an evidentiary issue. Trial counsel did not begin cross-examination until page 578.

Question from paragraph 2(c) of AE LXVII:

submitted an affidavit that he was the ex-husband of , and she and her daughter, AF [ ], made similar claims of abuse against Mr. , who stated those claims were investigated by Department of Social Services (DSS) and were unfounded. According to Mr. , DSS found that Ms. was coaching AF to make false allegations. Why did the defense team not present the testimony from Mr. ?

17. Regarding the specific question from the *DuBay* order, I find defense counsel made a reasonable tactical decision to not offer testimony from Mr. about possible coaching. Mr. testified at the hearing that Tabatha had made a report to social services and Mr. chain of command that he had assaulted and abused . HROT at 159. At that time, Mr. said was three of four years old.

18. A social worker questioned Mr. about the allegations. Two or three weeks later, Mr. called social services and asked about the status of the case. He said he was told the case was closed. He further stated, "What they said over the phone, the lady told me that it seemed like she was being coached; 'she,' being , was being coached to say what she was saying." HROT at 159.

19. Based on his testimony, I find defense counsel had good reasons not to call this witness to testify about the alleged coaching. First, the prior incident occurred more than 10 years before trial. Second, the only evidence of coaching would have been the hearsay statement made to Mr. by a "lady" at social services. Third, records from Child Protective Services, do not read that was coached or that made allegations that Mr. had abused her. AE LXX. In short, had defense counsel called Mr. for these purposes, trial counsel could have easily rebutted the evidence, objected on hearsay grounds, or argued that it should be given little weight based on age at the time.

20. However, I find there were other areas in which Mr. could have testified. He could have testified about character for truthfulness. He also could have testified about making false allegations about child abuse. MAJ testified that, "The goal for using was to, basically, impeach , and show that she has this history of coaching, or *making these false allegations*." HROT at 93 (emphasis added). Based on Mr. testimony, made a series of false reports to his chain of command while they were going through a divorce. These included an allegation that he had assaulted her (HROT at 160-61) and that he was not paying alimony (HROT at 162). This evidence would have been relevant to discredit and to show a possible motive to make false allegations for financial gain. This evidence would be very similar to the Defense theory in this case, that Tabatha was making false allegations for financial reasons and out of spite.

21. At the hearing, I find defense counsel's reasons were insufficient for not calling Mr. to present these other issues. MAJ described Mr. as a "bitter

ex-husband out for revenge, so we thought that something like that could've been exploited on cross-examination also." HROT at 95. Based on Mr. testimony at the hearing, I do not believe he would have appeared to be a bitter ex-husband. Rather, I find he would have calmly explained vindictive behavior in a way that would have corroborated the Defense theory of the case.

Questions from paragraph 2(d) of AE LXVII:

First Lieutenant submitted an affidavit that he spoke to (then) on numerous occasions and made detailed memorandum of records of these conversations. Mr. claims Ms. said the Army "should prosecute [appellant] for something," and that she "intended to ruin [appellant's] life after their divorce." Why did the defense team not present this evidence from 1LT ? Master Sergeant submitted an affidavit that he witnessed many, if not all, of the conversations between 1LT and Ms. . Why did the defense team not present this evidence from MSG ?

22. I find that defense counsel did not have valid tactical reasons for not calling 1LT or MSG to testify about statements.

23. I find that both witnesses would have testified in detail about and her motives to hurt the appellant.

24. Mr. testified at the *DuBay* hearing that would call him late at night complaining the appellant was going to divorce her. She said repeatedly that she wanted the appellant to be in "trouble." HROT at 169. She would also say, "He's not going to get away with this," or words to the effect (HROT at 170) and that the appellant should be prosecuted (HROT at 177). In these conversations, mood would swing dramatically from calm to angry to crying. HROT at 178. These conversation often took an hour or more. HROT at 179. Mr. was also clear that was discussing financial support and the divorce, and she denied the appellant was hurting her or the children. HROT at 169, 172. In other words, the threats about "trouble" and prosecution were about money and the divorce (and were not connected to the charged offenses).

25. Mr. clearly remembered Tabatha and was able to describe her anger towards the appellant. In addition to his recollections, he prepared several memoranda for records (MFRs) close in time to his conversations with These MFRs show erratic behavior, including her claim that she had a "stack" of evidence she would use against the appellant.

26. Mr. testified that he observed conversations between and 1LT He said her "constant theme" was that she wanted to ruin appellant's career and that he was not going to get away with divorcing her. HROT at 153.

27. I found both Mr. and Mr. to be credible and persuasive witnesses. Even though they were testifying several years after the event, they clearly remembered

and her extreme vindictiveness towards the appellant. Both remembered her specifically saying on multiple occasions that she wanted to ruin the appellant's career and that appellant was not going to get away with it.

28. Regarding the defense counsel not calling Mr. it appears that this potential witness was not listed by the appellant on his proposed witness list to counsel. In his affidavit and in his testimony at the hearing, MAJ stated that Mr. was not interviewed by the Defense and that the appellant did not list Mr. as a potential witness. HROT at 46. I find that a complete interview with 1LT would have been sufficient to discover that MSG was present when made relevant statements.

29. At trial, Mr. testified in a limited manner about his interactions with . ROT at 520-536. Regarding statements, he discussed phone conversations, "[b]asically regarding the situation between Mr. and Mrs. and their divorce and separation, and all the aspects in that." ROT at 523. Mr. further testified that Tabatha was concerned about moving and financial support (ROT at 524) and elevated these concerns to the hospital commander and others (ROT at 525). Following a series of objections, defense counsel asked the following:

> Q. What did Mrs. say about Sergeant plans to divorce her?
>
> A. She said it was illegal and that he wasn't going to get away with it.

ROT at 530. Defense counsel did not ask any follow-up questions about statement.

Questions from paragraph 2(e) of AE LXVII:

In regards to Mr. , 1LT , and MSG , was there any discussion as to whether they would be beneficial as the defense's theory of the case of the alleged victims' mother's motive to fabricate? Why were they not asked about the Ms. motive to encourage AF to fabricate despite evidence of such a motive?

30. I find that defense counsel did not have valid tactical reasons for not presenting evidence of motive to fabricate.

31. At the hearing, I read paragraph 2(e) to MAJ and asked him to respond. The following colloquy occurred:

> A. Again, Your Honor, we discussed each one of them individually. There were discussions. But the decision – I understand that we could say that the mother has this motive – at the time, anyway – yes, the mother had the motive to fabricate, but there was no connection between the mom's motives and what the daughter actually reported.
>
> Q. Why do you say there was no connection?

A. Because the daughter was adamant about never talking to her mom about what went on, and during that brief testimony that presented, I recall her saying that she never talked to her daughter about the allegations, because she didn't want anyone to think that she was coaching her.

Q. At the time of trial, I think Andrea was 17 years old. Is that right?

A. Yes, sir.

Q. So it is certainly possible that a 17-year old would be able to lie about not discussing this with her mother, or being coached about how this might impact Sergeant . Did you consider trying to present that type of a theory to the court?

A. Yes, sir, and ultimately, I guess we made the decision to say, let's focus on using some of the things that she'd done to try to impeach her credibility, or call her credibility into question.

Q. You're talking about ?

A. Yes, sir.

HROT at 139-40. This explanation is insufficient. There seems to be no valid reason for choosing one strategy over the other. Defense counsel could have presented evidence about motives to fabricate as well as evidence of credibility issues. These two avenues were not mutually exclusive and could have established reasonable doubt.

CONCLUSIONS OF LAW:

32. "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)).

33. For the first prong under *Strickland*, appellant must show that "counsel's performance fell below an objective standard of reasonableness." *United States v. Akbar*, 74 M.J. 364, 379 (C.A.A.F. 2015). For the second prong under *Strickland*, the appellant must show that counsel's "deficient performance" led to a "reasonable probability" of a more favorable result if counsel had not made the alleged unprofessional errors. *Id.*

34. In assessing the first prong, "courts must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012). Courts must be "highly deferential [of counsel's performance] and should not be colored by the distorting effects of hindsight." *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000) (citing *Strickland*).

35. As set forth in *Strickland*, strategic decisions made by counsel are subject to great deference: "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable

professional judgments support the limitations on investigation." *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984), *quoted in United States v. Smith*, ARMY 20120918, 2015 CCA LEXIS 301 (A.C.C.A. July 17, 2015) (unpublished).

36. In this case, I conclude that trial defense counsel were deficient in three areas. First, counsel were deficient in failing to present evidence about Tabatha's motives to engineer this prosecution and her repeated statements that she would make sure the appellant was punished. Second, counsel were deficient in failing to conduct a full investigation regarding and her motives to fabricate. Third, counsel were deficient in failing to prepare the appellant to testify. In each of these three areas, counsel's performance fell below an objective standard of reasonableness.

37. Regarding evidence about there were witnesses who would have testified that she loathed the appellant and made several statements about ruining the appellant's life, making him pay, and pushing the Army to prosecute him. None of these comments were made in the context of the charged offenses; rather, the statements were made because of marital problems, financial problems, and the appellant's plan to divorce At trial, defense counsel failed to show the extent of vitriol. As Mr. and Mr. testified at the hearing, made erratic demands and threats. This evidence was not presented at trial.

38. Regarding the failure to investigate, defense counsel had an obligation to fully investigate the (apparently) false allegations made at Fort Bragg. As set forth above, claimed she was the victim of sexual offenses during an Article 32 hearing in October 2010. The investigating officer concluded there was insufficient evidence to support those claims and recommended charges be dismissed. It is unclear why trial defense counsel failed to investigate those allegations. An investigation could have uncovered other witnesses to show motive to fabricate. It is possible that the accused in that case would have testified that had made a false allegation and that she was using the military justice system for personal grievances.

39. Regarding the failure to prepare the accused to testify, the trial defense counsel's limited preparation of the accused fell below the wide range of reasonable professional assistance. Defense counsel prepared the accused to testify in a haphazard and last-minute manner.

40. Having found these deficiencies, I considered the second *Strickland* prong. Regarding the failure to prepare the accused to testify, I cannot conclude there would be a different result if the accused had testified differently or elected to remain silent. As discussed above, the appellant's testimony was brief and did not damage the Defense case. As a result, there is insufficient evidence to show this deficiency prejudiced the appellant. However, the deficiencies regarding Tabatha are a different matter.

41. I find there is a reasonable probability of a more favorable result had the other deficiencies not occurred. In reviewing the record, this was a close case. The court found the accused not guilty of 19 specifications and guilty of only 5 specifications. All of the

specifications involved children. The Defense had the opportunity to present evidence that has a history of making false allegations, to include a history of making false allegations about abuse of her children. Defense counsel had access to evidence from 1LT and MSG that repeatedly said she was going to find a way to punish the accused. By all accounts, was not making vague threats or blowing off steam. She specifically said the Army should prosecute the appellant. Defense counsel could have presented evidence that the chain of command did not accommodate her demand so she pressured her children to make false allegations.

42. As a final matter, I recognize that in some cases it would be a valid tactical decision to avoid this line of inquiry. As MAJ stated at the hearing, there can be a risk that an accused and his former spouse are "dragged through the mud," which can then hurt the accused's credibility. HROT at 66. However, in this case, was not just a spouse going through a difficult divorce. There was evidence that she intended to get revenge on the appellant and that she had a history of making false allegations. In October 2010 (just three years before trial), testified in an Article 32 pretrial investigation, claiming she had been the victim of abusive sexual contact and wrongful sexual contact perpetrated by another Soldier. AE LXXVIII. The investigating officer found there were not "reasonable grounds" to believe the offenses occurred. AE LXXVII at 2, 3. Years earlier, she made false allegations against Mr. including child abuse allegations.

43. This evidence about would have created a compelling theory of the case. Counsel could have argued that Tabatha has abused the criminal process in order to get revenge on men who have wronged her, including Mr. and the Soldier from the Article 32 investigation. When she was aggrieved by the appellant, she tried to pull in his chain of command. When that failed, she knew she could not claim to be a victim so soon after the Article 32 investigation, so she had to use her children. The defense counsel's decision not to present evidence to support this theory was deficient and prejudiced the appellant.

Military Judge