IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	FINAL BRIEF ON BEHALF OF APPELLANT
v.	)	Crim. App. No. 20110337
Private First Class (E-3) **AMANDA N. MOSS,** United States Army, Appellant	)	USCA Dkt. No. 13-0348/AR

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

Issues Presented

I.

WHETHER APPELLANT WAS DENIED HER SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE THE DEFENSE COUNSEL MADE AN UNSWORN STATEMENT ON HER BEHALF WHEN SHE WAS TRIED *IN ABSENTIA* AND THERE IS NO EVIDENCE THAT SHE CONSENTED TO THE UNSWORN STATEMENT.

II.

WHETHER APPELLANT WAS DEPRIVED OF HER RIGHT TO CONFLICT-FREE COUNSEL WHEN HER DEFENSE COUNSEL MADE AN UNSWORN STATEMENT WITHOUT HER CONSENT AND SUBSEQUENTLY INVOKED HIS FIFTH AMENDMENT RIGHTS AND FAILED TO ASSERT THAT APPELLANT WAS PREJUDICED.

III.

WHETHER THE MILITARY JUDGE COMMITTED PLAIN ERROR WHEN HE ALLOWED THE DEFENSE COUNSEL TO MAKE AN UNSWORN STATEMENT ON BEHALF OF APPELLANT WHEN SHE WAS TRIED *IN ABSENTIA*.

IV.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE FOUND THAT THERE WAS NO PREJUDICE WHEN THE DEFENSE COUNSEL READ AN UNSWORN STATEMENT WITHOUT APPELLANT'S CONSENT AND THEN FAILED TO INSTRUCT THE PANEL TO DISREGARD THE UNSWORN STATEMENT AND SERGEANT FIRST CLASS M'S REBUTTAL TESTIMONY.

Statement of Jurisdiction

The Army Court of Criminal Appeals [hereinafter Army Court] had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 866 (2012). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On March 7, April 29, and May 4-5, 2011, an officer panel sitting as a special court-martial tried Private First Class (PFC) Amanda N. Moss in absentia at Fort Stewart, Georgia. Contrary to the plea the military judge entered on PFC Moss' behalf, the panel convicted PFC Moss of one specification of desertion, in violation of Article 85, UCMJ, 10 U.S.C. § 885 (2006). The panel sentenced PFC Moss to reduction to E-1, forfeiture of $978.00 pay per month for twelve months, confinement for six months, and a bad-conduct discharge. The military judge credited PFC Moss with eighteen days of confinement against the sentence to confinement.

The convening authority approved the adjudged sentence. The convening authority credited PFC Moss with eighteen days of confinement against the sentence to confinement.

On January 17, 2013, the Army Court affirmed the findings and sentence. (JA 1-8). The Army Court mailed notice of its decision to PFC Moss. In accordance with Rule 19 of this Court's Rules of Practice and Procedure, appellate defense counsel petitioned this Court for review on March 18, 2013. On June 20, 2013, this Honorable Court granted PFC Moss' petition for review.

Statement of Facts

Private First Class Moss was absent throughout her court-martial. (JA 23-24). She was represented *in absentia* by her detailed defense counsel, Captain (CPT) Anthony Schiavetti, for all phases of the trial. (JA 18-20).

During presentencing, CPT Schiavetti read an unsworn statement to the panel. (JA 73-74). While reading the unsworn statement, CPT Schiavetti spoke in the first person to represent that it was PFC Moss' statement. (JA 73). The unsworn statement was primarily an explanation by CPT Schiavetti as to why PFC Moss had been absent in desertion for almost three years. (JA 73-74). Captain Schiavetti explained that PFC Moss went home for leave on August 5, 2007, where she found that her

aunt, Viola Mitchell,[1] was severely ill and living in a filthy house. (JA 73). Captain Schiavetti stated that PFC Moss felt like she could not leave her aunt, who had raised her, in that condition. (JA 73). Captain Schiavetti went on to explain that PFC Moss' aunt was bed-ridden and that the bed was fouled by her aunt's feces and urine. (JA 73). Captain Schiavetti further explained that PFC Moss stayed to provide financial support while caring for her aunt. (JA 74). Captain Schiavetti closed by asserting for PFC Moss that "I wanted to come back to my unit but there was nobody else to take care of my aunt and she couldn't be left alone. I always planned on coming back." (JA 74).

After the defense rested its presentencing case, the government called PFC Moss' father, Sergeant First Class (SFC) David Moss, for rebuttal. (JA 74). The trial counsel asked SFC Moss if PFC Moss' mother had any sisters named Viola Mitchell. (JA 74). He was then asked if he had any sisters named Viola Mitchell. (JA 75). Sergeant First Class Moss answered both questions in the negative. (JA 74-75). On cross-examination, SFC Moss confirmed that he had heard of situations where someone may refer to someone else as an aunt even though they are not

[1] Viola Mitchell was the subject of a defense motion to compel production of a witness. (JA 25-29). The government was unable to secure her presence. (JA 25-29, 33). Captain Schiavetti never found Viola Mitchell nor could he tell the court what her testimony would be or how it would be relevant. (JA 27-28).

technically related. (JA 75). A panel member then asked SFC Moss questions to clarify some of the previous testimony:

> Q. Sergeant Moss, who raised Private First Class Moss?
>
> A. Me and her mother.
>
> Q. What is the relation of Viola Mitchell to Private First Class Moss?
>
> A. Sir, I don't know a Viola Mitchell.
>
> Q. You don't know Viola Mitchell?
>
> A. No, sir.

(JA 76).

During their presentencing argument, the assistant trial counsel referred to the unsworn statement by arguing:

> Now, let's talk real quickly about -- PFC Moss was in trouble. She knew she was in trouble and when she came back she did was [sic] Soldiers do, she made a story up to try to limit her culpability for being AWOL for three years. She made up a story about an aunt, an aunt that her own father had no idea who this person was. And yes sometimes families do have close friends that they call their aunt, but the parents who raise the child usually know who that person is.

(JA 79).

Despite SFC Moss' testimony that PFC Moss did not have an aunt named Viola Mitchell, CPT Schiavetti referenced the unsworn statement several times in his presentencing argument. At one point, he stated that "PFC Moss returned home on leave and she found her beloved aunt in that condition, in a filthy home,

confined to her bed which was soiled by her own urine and feces unable to care for her own even most basic human needs." (JA 81).

Following the arguments, but prior to the court announcing the sentence, the military judge held an Article 39(a), UCMJ, session to discuss the unsworn statement. (JA 93-96). The military judge inquired as to whether PFC Moss had authorized CPT Schiavetti to make an unsworn statement on her behalf. (JA 93). Captain Schiavetti responded that he was unable to answer the question based on the attorney-client privilege. (JA 93). The military judge then asked CPT Schiavetti if he knew that he was not allowed to present an unsworn statement without his client's permission. (JA 93). Captain Schiavetti then invoked his right to remain silent by stating, "Sir, I think I have to refuse to answer that question on Fifth Amendment grounds." (JA 93).

The military judge found that he was unable to determine whether PFC Moss had authorized CPT Schiavetti to make the unsworn statement. (JA 93). However, the military judge found that it was an error for the defense counsel to make an unsworn statement on PFC Moss' behalf. (JA 94). The military judge found that the information contained in the unsworn statement was not disclosed in breach of the attorney-client privilege since the information contained in the statement was previously

given by PFC Moss in two sworn statements. (JA 94-95, 97-105). Finally, the military judge found that PFC Moss was not prejudiced by the defense counsel's error. (JA 95).

In a post-trial affidavit, CPT Schiavetti stated that PFC Moss insisted on discussing Viola Mitchell and her condition in an unsworn statement. (JA 133). Captain Schiavetti stated that he discussed the possible disadvantages of presenting such evidence, but PFC Moss was insistent on making Viola Mitchell the primary subject of her unsworn. (JA 133). Finally, CPT Schiavetti stated that he and PFC Moss discussed the possibility of CPT Schiavetti rendering the unsworn statement. (JA 133-34). However, they did not discuss CPT Schiavetti presenting the statement in PFC Moss' absence since they did not contemplate PFC Moss being absent from trial. (JA 133-34).

In preparation for trial, CPT Schiavetti interviewed SFC Moss about Viola Mitchell's role in PFC Moss' life. (JA 160-61). Captain Schiavetti learned that SFC Moss did not know anyone named Viola Mitchell and that SFC Moss raised PFC Moss with PFC Moss' mother. (JA 160). Despite knowing that PFC Moss did not have an aunt named Viola Mitchell, CPT Shiavetti made the decision to reference Viola Mitchell in the unsworn statement and characterize her as PFC Moss' aunt. (JA 73-74).

The Army Court found that PFC Moss impliedly consented to CPT Schiavetti rendering an unsworn statement on her behalf.

(JA 5). Thus, the Army Court found that CPT Schiavetti was not ineffective.

Summary of Argument

Private First Class Moss was denied the effective assistance of counsel when CPT Schiavetti read an unsworn statement at her presentence hearing held in her absence. Private First Class Moss was prejudiced when CPT Schiavetti attributed statements of fact to PFC Moss that were immediately rebutted by a government witness. After the presentation of the unsworn statement and government rebuttal evidence, the military judge informed CPT Schiavetti that the unsworn statement should not have been presented in PFC Moss' absence unless she consented. Private First Class Moss was denied her right to conflict free counsel when CPT Schiavetti invoked his right to remain silent and remained as PFC Moss' counsel and did not request any remedy from the military judge. Private First Class Moss was again prejudiced when CPT Schiavetti argued the rebutted facts during his presentencing argument despite the government's successful impeachment of them. The panel was left only with the impression that PFC Moss lied.

Argument

I.

WHETHER APPELLANT WAS DENIED HER SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE THE DEFENSE COUNSEL MADE AN UNSWORN STATEMENT ON HER BEHALF WHEN SHE WAS TRIED *IN ABSENTIA* AND THERE IS NO EVIDENCE THAT SHE CONSENTED TO THE UNSWORN STATEMENT.

Law

The Sixth Amendment to the United States Constitution guarantees an accused the right to "effective assistance of counsel." *United States v. Cronic*, 466 U.S. 648, 653-56 (1984). The right to effective assistance of counsel is likewise guaranteed to every member of the United States Armed Forces. *United States v. Cain*, 59 M.J. 285, 294 (C.A.A.F. 2004); *see also* UCMJ art. 27. This right applies with equal force to the sentencing phase of a trial because an accused's substantial rights are equally affected as in the merits phase of a trial. *Moore v. Michigan*, 355 U.S. 155, 160 (1957); *Mempa v. Rhay*, 389 U.S. 128, 134 (1967); *Townsend v. Burke*, 334 U.S. 736 (1948). A military sentencing proceeding is a critical stage. *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000).

To prevail on a claim of ineffective assistance of counsel, appellant must satisfy a two-prong test: (1) competency and (2) prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984). "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." *Id.* at 693-94. The proper inquiry under the first prong is whether counsel's conduct fell below an objective standard of reasonableness, or was it outside the "wide range of professionally competent assistance." *Id.* at 694. The second prong is satisfied by merely showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* Accordingly, appellant need not establish that his counsel's deficient conduct was outcome-determinative or even that his actions "more likely than not altered the outcome in the case." *Id.* at 693.

The issue of ineffective assistance of counsel is a mixed question of law and fact. *United States v. Wean*, 45 M.J. 461, 463 (C.A.A.F. 1997). Whether counsel's performance was deficient, and if so, whether it was prejudicial, are questions that the appellate courts review de novo. *Id.*

Rule for Courts-Martial [hereinafter R.C.M.] 1001(c)(2)(C) provides:

> The accused may make an unsworn statement and may not be cross-examined by the trial counsel upon it or examined upon it by the court-martial. The prosecution may, however, rebut any statements of facts therein. The unsworn statement may be oral, written, or both, and may be made by the accused, by counsel, or both.

"[R]egardless of whether the unsworn statement is made by the accused or presented for the accused by his counsel, the right to make the unsworn statement is personal to the accused." *United State v. Marcum*, 60 M.J. 198, 209 (C.A.A.F. 2004). "[I]f an accused is absent without leave his right to make an unsworn statement is forfeited unless prior to his absence he authorized his counsel to make a specific statement on his behalf." *Id.* at 210.

Argument

A. Deficient Performance

Private First Class Moss was denied the effective assistance of counsel when her defense counsel made an unsworn statement on her behalf without her knowledge or consent. The decision to make an unsworn statement rested with PFC Moss alone. *Id.* at 209. Since she was absent during trial, she did not have the ability to make a decision regarding the unsworn statement. *See id.* at 210. The Army Court erred when it found that PFC Moss impliedly consented to CPT Schiavetti making the unsworn statement on her behalf. (JA 5).

Private First Class Moss was prejudiced when CPT Schiavetti presented facts to the panel that were immediately rebutted by the government and used by the government to characterize PFC Moss as untruthful. Captain Schiavetti's unsworn statement explained that PFC Moss remained away from her unit because she

was taking care of her aunt, Viola Mitchell. (JA 73). On rebuttal, the government obtained testimony from PFC Moss' father, SFC Moss, that indicated that PFC Moss does not have an aunt named Viola Mitchell. (JA 74-76). The government then argued this fact during its closing argument to assert that PFC Moss is mendacious. (JA 79).

The defense counsel knew, before he gave it, that the contents of the statement that he presented to the panel could be attacked on rebuttal by SFC Moss' testimony. (JA 135-36, 160-61). Captain Schiavetti's decision to provide an unsworn statement exceeded the limits of his representation of PFC Moss. Under *Strickland*, the defense counsel's decision to render the unsworn statement without PFC Moss' permission fell below an objective standard of reasonableness. 466 U.S. at 694; *see also Marcum*, 60 M.J. at 209-10. This Court in *Marcum* was clear when it held that the decision to make an unsworn statement is personal to the accused. *Marcum*, 60 M.J. at 209.

The Army Court's finding that PFC Moss *impliedly consented* to CPT Schiavetti giving the unsworn statement in her absence is not supported by the law or the record. (JA 5). *Marcum* does not support a finding that an accused can impliedly consent to their counsel making an unsworn statement on their behalf. Either there is consent or there is not. The fact that CPT Schiavetti and PFC Moss discussed the contents of PFC Moss'

unsworn statement over two weeks prior to trial does not support a finding of consent to give that statement in her absence. In his post-trial affidavit, CPT Schiavetti states, "[PFC Moss and I] did not discuss me presenting the unsworn statement in her absence . . . ." (JA 134). Simply discussing the possibility that CPT Schiavetti could render the unsworn if PFC Moss was uncomfortable doing so does not equate to a conclusion that PFC Moss consented to CPT Schiavetti making the statement in PFC Moss' absence. (JA 133). The plain language of CPT Schiavetti's affidavit forecloses any possibility that PFC Moss consented to CPT Schiavetti making the unsworn statement on her behalf. (JA 133). It was not even contemplated, therefore she could not have consented to something unknown to her.

Deference is given to a counsel's strategic or tactical decisions. *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993). In order to make reasonable strategic decisions, the defense counsel must base them on a reasonably complete investigation. *Strickland*, 466 U.S. at 691. The duty to investigate may be diminished where the facts are made known to the counsel from the accused. *Id.* at 692. However, in this case, the defense counsel did not just rely on information that he presumably received from PFC Moss; he questioned everyone that he interviewed about the existence of Viola Mitchell. (JA 135). Despite his efforts he was unable to locate her; instead

CPT Schiavetti learned for certain that PFC Moss did not have an aunt named Viola Mitchell. (JA 135-36). This case does not present an issue of counsel failing to investigate, it presents an issue of counsel knowingly presenting information to the panel that is damaging to his client, easily rebutted, and possibly false. *See United States v. Boone*, 49 M.J. 187, 196-97 (C.A.A.F. 1998)(stating that ineffective assistance of counsel can occur during sentencing when defense counsel introduces evidence that is useless or almost useless to the accused).

Captain Schiavetti's insistence to present this evidence was not an objectively reasonable strategic decision. Captain Schiavetti knew that SFC Moss could be used by the government in rebuttal and he had no other admissible evidence to prove that PFC Moss had a close connection—that bordered on kinship—with Viola Mitchell. (JA 135-37). Captain Schiavetti asserts that he decided to render the unsworn statement because (1) it was his client's will to have that information in an unsworn statement; (2) he was unable to present PFC Moss' unsworn statements since they were hearsay; (3) by making an unsworn statement he was also able to present only the information that was favorable to PFC Moss; and (4) he had previously been able to corroborate the existence of Viola Mitchell through online research, the U.S. Marshal Service, and conversations with Delorise Campbell (a mutual friend of PFC Moss and Viola

Mitchell). (JA 134). However, it was objectively unreasonable for CPT Schiavetti to make the unsworn statement without PFC Moss' permission in contravention of *Marcum* and to present the information about Viola Mitchell to the panel. The fact that Delorise Campbell corroborated the information about Viola Mitchell during pretrial interviews was not admissible to the panel to counter the testimony of SFC Moss—testimony that CPT Schiavetti had to know was coming in upon his deliverance of the unsworn. (JA 137).

Captain Schiavetti did not just make a strategic decision to offer information potentially damaging to his client, he stood in place of PFC Moss, asserted facts as if they were coming directly from PFC Moss, and acted contrary to *Marcum*. Just because PFC Moss was insistent on presenting information about Viola Mitchell weeks prior to trial does not mean that she would have continued on that course once at trial, especially knowing her father was at the courthouse. Captain Schiavetti even ensured that PFC Moss understood that the decision to testify was hers alone when he advised her about the scope of his representation. (JA 201-02). The decision was hers to make, not counsel's. *See Marcum*, 60 M.J. at 209.

Even if *Marcum* did not prohibit defense counsel from rendering an unsworn without permission from the accused, defense counsel would still have a duty to properly assess the

impact of any factual assertions. On this count, CPT Schiavetti failed. Once the information was raised, the trial counsel was free to immediately rebut the unsworn statement. (JA 74-75).

Upon opening the door to rebuttal, CPT Schiavetti attempted to minimize SFC Moss testimony—that PFC Moss did not have any aunts named Viola Mitchell—by getting SFC Moss to agree with the proposition that people sometimes use the term "aunt" euphemistically. (JA 75). However, this testimony was ineffective when the panel itself asked SFC Moss who Viola Mitchell was and SFC Moss responded twice that he did not even know her. (JA 76). It was clear that the panel had concerns and doubts about the explanation offered in the unsworn statement and sought corroboration.

The Army Court was correct when it noted that CPT Schiavetti was in an unenviable and challenging position. (JA 7). However, the fact that potential corroborating witnesses, like Delorise Campbell, are not cooperative does not minimize the need for counsel to make sound decisions in accordance with applicable case law. Captain Schiavetti failed to heed this Court's precedence in *Marcum*, and he proceeded to enter damaging information to the panel.

B. Prejudice

In *Marcum*, this Court found prejudice where the civilian defense counsel disclosed privileged material which the trial counsel then used to argue that Marcum was still victimizing the victims. 60 M.J. at 210. However, this Court's prohibition on defense counsel making unsworn statements without the client's consent is not limited to only those cases involving the unauthorized disclosure of confidential information. *See id.* The purpose of the rule appears to be not just the protection of confidential matter, but rather to protect the accused from being prejudiced by their defense counsel.

In this case, because of CPT Schiavetti's disclosures during the unsworn statement, the trial counsel was able to argue that PFC Moss was not truthful. (JA 79). While it is not clear whether the disclosure of Viola Mitchell as PFC Moss' aunt was a violation of the attorney-client privilege,[2] it is clear that the disclosure of that information was prejudicial to PFC Moss. Without CPT Schiavetti's presentation of the unsworn statement the government would not have had a basis to recall

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[2] Private First Class Moss' sworn statements do not mention Viola Mitchell, they only mention that she cared for an aunt. (JA 97-105). On April 15, 2011, the defense counsel submitted a request for the production of a witness and the synopsis of anticipated testimony cited Viola Mitchell as PFC Moss' aunt. (JA 124). The defense requested Viola Mitchell as a witness and the government was unable to secure her presence; however, the defense counsel had not spoken to Viola Mitchell and did not know what testimony she would provide. (JA 27).

SFC Moss and rebut CPT Schiavetti's assertions.[3] Thus, PFC Moss' credibility would not have been eroded in the eyes of the panel. The panel would have been left only with the testimony of several soldiers who stated that they would gladly serve with PFC Moss in the future. (JA 50, 56, 62, 68).

Further, the panel did not know that CPT Schiavetti made the unsworn statement without PFC Moss' consent. The panel could only surmise that CPT Schiavetti was acting in PFC Moss' best interest and with her consent. Prejudice is evident because, if PFC Moss was present, she could have (1) decided to not mention Viola Mitchell in her unsworn statement as she knew that her father would contradict her testimony, (2) told her defense counsel how to minimize her father's rebuttal testimony, or (3) offered surrebuttal if necessary. There was no evidence in the record that PFC Moss' intended for this story to be presented to the court. In any event, the choice would have been for PFC Moss alone, and she would not have suffered prejudice as she has here.

While not even addressing the statement's prejudice, the Army Court reasoned that since Viola Mitchell's existence was confirmed then CPT Schiavetti acted reasonably when he introduced her to the panel in PFC Moss' unsworn statement.

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[3] The government did not seek admission of PFC Moss' sworn statements during its case-in-chief. But for the unsworn statement by CPT Schiavetti, it is unlikely that the information contained therein would have been presented to the panel.

(JA 6). This rationale fails to consider the fact that the sentencing authority was the panel and the panel had no knowledge of the federal marshals' attempts to locate Viola Mitchell. The panel was still left with the impression that PFC Moss made up an entire story and was untruthful.

If CPT Schiavetti had not provided facts that were so easily rebutted and further argued by the government to assail PFC Moss' character for truthfulness, there is a "reasonable probability that . . . the result of the proceeding would have been different." *Id.* The panel would not have been left with the belief that PFC Moss was untruthful and attempted to mislead the panel, and they likely would not have sentenced her to a punishment as severe as they did.

The burden to prove prejudice is overcome by merely showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *see Alves*, 53 M.J. at 290 (deficient performance by counsel at sentencing is usually prejudicial and requires a new sentencing hearing). Accordingly, appellant need not establish that his counsel's deficient conduct was outcome-determinative or even that his actions "more likely than not altered the outcome in the case." *Id.* at 693. In this case, the facts show that CPT Schiavetti put forth evidence that allowed the government to successfully

argue that PFC Moss was a liar. Even though CPT Schiavetti intended to put forth matters in extenuation and mitigation, the story about Viola Mitchell sounded more like a weak excuse. This weak excuse was directly attributed to PFC Moss and the panel was never told to disregard it. It is very probable that this weak excuse resulted in a more severe sentence for PFC Moss than she would have received if the unsworn statement was never made. It is reasonably probable that a portion of the sentence would have been less severe, thus this court must set aside the sentence and order a sentence rehearing. *See id.* at 694.

WHEREFORE, PFC Moss respectfully requests that this Honorable Court set aside the sentence and order a sentence rehearing.

II.

WHETHER APPELLANT WAS DEPRIVED OF HER RIGHT TO CONFLICT-FREE COUNSEL WHEN HER DEFENSE COUNSEL MADE AN UNSWORN STATEMENT WITHOUT HER CONSENT AND SUBSEQUENTLY INVOKED HIS FIFTH AMENDMENT RIGHTS AND FAILED TO ASSERT THAT APPELLANT WAS PREJUDICED.

Law

"Where a constitutional right to counsel exists . . . there is a correlative right to representation that is free from conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 271 (1981). "An accused may waive his right to conflict-free counsel." *United States v. Lee*, 66 M.J. 387, 388 (C.A.A.F. 2008)(citations omitted). "However, waivers must be voluntary,

and they must be knowing intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Id.* (citations and quotations omitted).

"Conflicts of interest, like other actions by an attorney that contravene the canons of legal ethics, do not necessarily demonstrate prejudice under the second prong of *Strickland.*" *United States v. Saintaude*, 61 M.J. 175, 180 (C.A.A.F. 2005). Much of the case law involving a counsel's conflict of interest comes from the area of multiple representation of co-accused. *See, e.g., Holloway v. Arkansas*, 435 U.S. 475, 476-77 (1978) (public defender represented three co-accused at same trial); *Cuyler v. Sullivan*, 446 U.S. 335, 337 (1980)(two lawyers represented three co-accused at trial).

In the context of multiple representation cases, the Supreme Court has removed the requirement for prejudice in ineffective assistance of counsel claims. In *Cuyler*, the Court held that "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." 446 U.S. at 349-50. However, to establish an ineffective assistance of counsel claim, the appellant must show "that his counsel actively represented conflicting interests." *Id.* at 350.

"Appellate courts have applied varying approaches to the question of whether a conflict of interest should be viewed as

inherently prejudicial if the conflict does not involve multiple representations." *Saintaude*, 61 M.J. at 180. Military courts determine "whether there is inherent prejudice in a conflict between the self-interest of an attorney and the interests of the client . . . on a case-by-case basis." *Id.; see, e.g., Cain*, 59 M.J. at 295 (holding that defense counsel's potential criminal liability for carrying on a consensual homosexual relationship with his accused-client "was inherently prejudicial and created a per se conflict of interest in counsel's representation of the Appellant"). *But see United States v. Babbitt*, 26 M.J. 157 (C.M.A. 1988)(holding that a limited sexual relationship between a civilian defense counsel and his married female client was not inherently prejudicial and would be tested for actual prejudice).

Argument

This case does not involve either a defense counsel representing co-accused or a defense counsel engaging in a sexual relationship with his client. The conflict of interest in this case arose when CPT Schiavetti invoked his right against self-incrimination in response to a question by the military judge about the propriety of his rendering the unsworn statement without PFC Moss' consent. (JA 93). Further, when confronted with the fact that the unsworn statement was improper, CPT Schiavetti failed to object to its admission, ask the military

judge for a limiting instruction, or ask the military judge for a new panel for sentencing. (JA 93-96). Finally, CPT Schiavetti continued to represent PFC Moss by submitting clemency matters on her behalf. (JA 125-26). In those matters, CPT Schiavetti failed to allege any legal errors or prejudice resulting from his rendering of the unsworn statement or the conflict-of-interest that it created. (JA 125-26). Captain Schiavetti continued to represent PFC Moss and allowed his concern for his own well-being to override his duty to PFC Moss.

Cases, like this one, that involve conflicts-of-interest that do not arise out of the multiple representation of co-accused are rare. In *Government of the Virgin Islands v. Zepp*, the defense counsel was subject to possible criminal prosecution in the same case as his client and agreed to stipulate to testimony against his client to avoid self-incrimination. 748 F.2d 125, 128-30 (3rd Cir. 1984). The court reviewed the case for an "actual conflict of interest [that] adversely affected [the] counsel's performance," but did not require an actual showing of prejudice. *Id.* at 134. The court looked to the applicable rules for professional responsibility and found that an actual conflict of interest existed because the defense counsel could have been indicted on the same charges and actually testified against his client. *Id.* at 135-36. The court held that it was "unrealistic" to assume that the defense

counsel represented Zepp's best interest without concern for his own criminal liability. *Id.* at 136. The court also held that the judge abused his discretion when he did not seek a waiver from the accused or disqualify the defense counsel. *Id.* at 139.

Army Reg. 27-26, Legal Services: Rules of Professional Conduct for Lawyers [hereinafter AR 27-26], Rule 1.7b (1 May 1992), states that "[a] lawyer shall not represent a client if the representation of that client may be materially limited . . . by the lawyer's own interests . . . ." (JA 209). This rule is similar to the rule that the court analyzed in *Zepp* where it found that an actual conflict existed. 748 F.2d at 135; *see also Cain*, 59 M.J. at 293 (analyzing Rule 1.7(b) in determining that a conflict of interest existed). Likewise, in this case, the court should find that a conflict of interest existed and it adversely affected CPT Schiavetti's representation of PFC Moss. *See Cuyler*, 446 U.S. at 350. Thus, this case should be analyzed under the "inherently prejudicial" standard.[4] *Cain*, 59 M.J. at 295.

The facts and the court's analysis in *Zepp* are persuasive. Here, like in *Zepp*, the defense counsel was concerned about

[4] Even if this Court finds that the conflict-of-interest does not create inherent prejudice, this Court should find that actual prejudice exists under *Strickland*. The government successfully argued that PFC Moss was not truthful, which resulted from CPT Schiavetti's making of the unsworn statement. Captain Schiavetti placed his own interests ahead of PFC Moss and she was prejudiced when he failed to seek a new sentence hearing.

negative ramifications or even possible criminal liability for his actions. While CPT Schiavetti was not likely to face criminal charges for rendering an unsworn statement, nonetheless, it was improper for him to do so. *Marcum*, 60 M.J. at 209. Subsequently, the military judge simply asked CPT Schiavetti if he knew his actions were improper. (JA 93). Captain Schiavetti invoked his right against self-incrimination and then asserted, against the interests of PFC Moss, that there was no error or prejudice. (JA 93). Captain Schiavetti's invocation of his right against self-incrimination is not consistent or compatible with his later assertion that he committed no error and that PFC Moss was not prejudiced. A plain reading of the record suggests that he may have felt that criminal charges against him were possible, otherwise he would not have invoked his Fifth Amendment rights. (JA 93). He was clearly concerned about his own well-being. He cannot throw off the mantle of conflict and, in the next instant, be presumed to be acting with PFC Moss' best interests in mind. In order to protect PFC Moss's interests, CPT Schiavetti would have had to assert to the military judge that his *own* actions were prejudicial to his client. Like the counsel in *Zepp*, CPT Schiavetti could not exercise his own right against self-incrimination and still act with his client's best interests in mind. 748 F.2d at 138 ("[The defense] counsel's interest in

testifying on his own behalf impaired the exercise of independent professional judgment on behalf of his client.").

It is "unrealistic" to assume that CPT Schiavetti pursued PFC Moss' "best interest entirely free from the influence of his concern to avoid his own incrimination."[5] *Id.* at 136. Once it became apparent that CPT Schiavetti's interests were inconsistent with his representation of PFC Moss, he should have sought to withdraw. *See* AR 27-26, Rule 1.16(a)(1) ("[A] lawyer . . . shall seek to withdraw from the representation of a client if; (1) the representation will result in a violation of these Rules of Professional Conduct . . . ."). (JA 211). Since CPT Schiavetti placed his own interests ahead of his client's interest, he was in violation of Rule 1.7(b).

Finally, PFC Moss did not waive her right to have conflict-free representation. There is a presumption against the waiver of this right. *Lee*, 66 M.J. at 388. Since, PFC Moss was not present at the trial, she was not able to object to her counsel's actions. Nothing in the record supports a knowing, voluntary waiver. *See id; see also Cain*, 59 M.J. at 296 (finding no waiver where the accused consulted with two civilian lawyers about his relationship with his defense counsel); *Zepp*,

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[5] It is also unrealistic to assume that CPT Schiavetti represented PFC Moss' best interests during the post-trial process where he failed to withdraw from representing PFC Moss or raise the improper unsworn statement or conflict-of-interest as legal errors in clemency matters to the convening authority.

748 F.2d at 139 (finding that the accused did not waive her right to conflict-free representation where she was present at trial when the defense counsel testified against her).

Private First Class Moss was denied the right to conflict-free counsel when CPT Schiavetti created a conflict-of-interest. He should have sought a new panel and presentencing proceeding and withdrawn his representation of PFC Moss. By placing his own interests ahead of PFC Moss, CPT Schiavetti's representation of PFC Moss was adversely affected and created inherent prejudice. Thus, this Court should grant PFC Moss a new sentence hearing.

WHEREFORE, PFC Moss respectfully requests that this Honorable Court set aside the sentence and order a new sentence hearing.

III.

WHETHER THE MILITARY JUDGE COMMITTED PLAIN ERROR WHEN HE ALLOWED THE DEFENSE COUNSEL TO MAKE AN UNSWORN STATEMENT ON BEHALF OF APPELLANT WHEN SHE WAS TRIED *IN ABSENTIA*.

Law

"Military law is clear that the decision to make an unsworn statement is personal to the accused." *Marcum*, 60 M.J. at 209. Regardless of whether the unsworn statement is made by the accused or presented for the accused by his counsel, the right to make the unsworn statement is personal to the accused. *Id.* "If an accused is absent without leave his right to make an

unsworn statement is forfeited unless prior to his absence he authorized his counsel to make a specific statement on his behalf." *Id.* at 210.

Where the defense counsel fails to object to the admission of specific evidence, the issue is normally considered waived, absent plain error. *United States v. Tanksley*, 54 M.J. 169, 173 (C.A.A.F. 2000). To prevail under a plain error analysis, appellant must prove that (1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right. *United States v. Finster*, 51 M.J. 185, 187 (C.A.A.F. 1999). Once appellant satisfies this initial burden, the burden shifts to the government to show that the error was not prejudicial. *United States v. Carpenter*, 51 M.J. 393, 396 (1999).

Argument

At an Article 39(a), UCMJ, session, the defense counsel told the military judge that he was going to make an unsworn statement on behalf of PFC Moss. (JA 41-42). The military judge told counsel that it was the prerogative of the defense counsel to make such a statement and that he could not prevent it. (JA 42). However, the military judge applied the incorrect law when he made this statement as *Marcum* specifically prohibits the defense counsel from making an unsworn statement without the express consent of the accused. 60 M.J. at 210.

The military judge "is more than a mere referee, and as such he is required to assure that the accused receives a fair trial." *United States v. Graves*, 1 M.J. 50, 53 (C.M.A. 1975). In this case, where the unsworn statement was inadmissible, the military judge erred in allowing the defense counsel to even make the statement. The military judge correctly determined after the fact that allowing the statement was error. (JA 94). Further, he found that the error rested with him alone. (JA 94).

The military judge's error prejudiced a substantial right of PFC Moss to have a fair sentence proceeding. When the military judge allowed the unsworn statement, PFC Moss was denied her personal right to decide whether or not an unsworn statement would be made. *See Marcum*, 60 M.J. at 209. The government's rebuttal evidence and argument that PFC Moss was untruthful was a direct result of the military judge's decision to allow the defense counsel to make the unsworn statement and PFC Moss suffered prejudice. (JA 234-36).

WHEREFORE, PFC Moss respectfully requests that this Honorable Court set aside the sentence and order a new sentence hearing.

IV.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE FOUND THAT THERE WAS NO PREJUDICE WHEN THE DEFENSE COUNSEL READ AN UNSWORN STATEMENT WITHOUT APPELLANT'S CONSENT AND THEN FAILED TO INSTRUCT THE PANEL TO DISREGARD THE UNSWORN STATEMENT AND SERGEANT FIRST CLASS M'S REBUTTAL TESTIMONY.

Law

"Military judges have broad authority to give instructions on the 'meaning and effect' of the accused's unsworn statement, both to ensure that the members place such a statement 'in the proper context' and 'to provide an appropriate focus for the members' attention on sentencing.'" *United States v. Tschip*, 58 M.J. 275, 276 (C.A.A.F. 2003)(quoting *United States v. Grill*, 48 M.J. 131, 133 (C.A.A.F. 1998)). The sentencing instructions a military judge provides are reviewed for abuse of discretion. *United States v. Hopkins*, 56 M.J. 393, 395 (C.A.A.F. 2002). Normally, if the defense does not object to the military judge's instructions then they are reviewed for plain error. *Tschip*, 58 M.J. at 278 (citations omitted). A military judge's "findings of fact are reviewed under a clearly erroneous standard." *United States v. Ellerbrock*, 70 M.J. 314, 317 (C.A.A.F. 2011). The factual statements contained in an accused's unsworn statement are "not subject to the normal rules of evidence." *Hopkins*, 56 M.J. at 395.

Argument

In this case, the military judge revisited the unsworn statement issue and found error because the defense counsel made the statement without PFC Moss' consent. (JA 93-96). The military judge then made findings of fact that the statement was not prejudicial because it "contained no admission of guilt and extensive evidence in mitigation and extenuation to wit the care provided to one Viola Mitchell." (JA 95).

The military judge's finding of fact was clearly erroneous as it is not supported by the record. The military judge cited to the "evidence" about Viola Mitchell as providing mitigation and extenuation. (JA 94-95). This view completely ignored the damage that was caused by admitting the evidence. The judge's findings that the unsworn statement's references to Viola Mitchell was only extenuation and mitigation are clearly erroneous in light of the government's rebuttal evidence from SFC Moss that PFC Moss does not have an aunt named Viola Mitchell or that she was raised by her. Additionally, the military judge erred when he found that CPT Schiavetti's denial of the intent element for desertion was not error or prejudicial to PFC Moss. (JA 95).

Further, the military judge abused his discretion when he did not exercise his broad discretion to provide instructions to the members regarding the unsworn statement's meaning and

effect. *Tschip*, 58 M.J. at 276. This Court should review the military judge's lack of sentencing instruction for an abuse of discretion because, as detailed in Issues Presented I and II, defense counsel was not acting with PFC Moss' best interest in mind at this stage of the proceeding. Captain Schiavetti was acting with his own self-preservation in mind and could not be relied upon to object to the unsworn statement he previously rendered. It was as if PFC Moss was unrepresented at this stage of the trial and only the military judge could have protected her interests. Thus, the military judge erred by not instructing the panel to disregard the contents of the unsworn statement in its entirety and to further disregard the rebuttal evidence offered by SFC Moss.

The military judge should have recognized that CPT Schiavetti's interests conflicted with PFC Moss' and that his responses could not be relied upon as the final assertion of PFC Moss' rights. Likewise, the government was not in a position to object to the inclusion of the unsworn statement and SFC Moss' subsequent testimony because an instruction for the panel to disregard it would have taken away a powerful point of aggravation for the government. Therefore, the military judge should have disregarded the positions of both parties and properly instructed the panel *sua sponte*.

The military judge could have instructed the panel to disregard the unsworn statement and rebuttal evidence attributing error to either the government or defense. Failure to erase the effects of the defense counsel's and the military judge's error in allowing the unsworn statement and subsequent rebuttal evidence to be considered by the panel was an abuse of discretion. This error denied PFC Moss a fair and reliable presentencing hearing.

WHEREFORE, PFC Moss respectfully requests that this Honorable Court set aside the sentence and order a sentencing rehearing.

Conclusion

WHEREFORE, PFC Moss respectfully requests that this Honorable Court set aside the sentence and order a sentence rehearing.

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CERTIFICATE OF COMPLIANCE WITH RULES 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 7,057 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because: This brief has been prepared in a monospaced typeface using Microsoft Word Version 2007 with Courier New, using 12-point type with no more than ten and ½ characters per inch.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Moss, Crim. App. Dkt. No. 20110337, Dkt. No. 13-0348/AR, was delivered to the Court and Government Appellate Division on July 22, 2013.

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