IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	**REPLY 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

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.

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.

The government concedes that Captain Schiavetti made an unsworn statement on behalf of Private First Class (PFC) Moss without PFC Moss' permission and in violation of *United States v. Marcum*. (Appellee Br. at 8, 12 n.54). However, the government contends that PFC Moss did not suffer prejudice as a result of the unsworn statement. (Appellee Br. at 8, 12). Instead, the government asserts that PFC Moss benefitted from both the unsworn statement and the panel hearing the story of Ms. Viola Mitchell. (Appellee Br. at 8, 26).

A. This Court should accept the government's concession and find deficient performance

This Court should accept the government's concession that the rendering of the unsworn by CPT Schiavetti was done without PFC Moss' permission and in violation of this Court's holding in *Marcum*. (Appellee Br. at 12 n.54); *see* 61 M.J. 198, 210 (C.A.A.F. 2004). The government concedes this was an error. (Appellee Br. at 12 n.54). Since it was error, CPT Schiavetti's

performance fell below an objective standard of reasonableness and the first prong of *Strickland v. Washington* has been satisfied. 466 U.S. 668, 694 (1984).

B. The unauthorized unsworn statement was prejudicial to PFC Moss' sentencing case and such prejudice is not speculative

Contrary to the government's argument, PFC Moss suffered prejudice when CPT Schiavetti rendered the unsworn statement. After CPT Schiavetti made the unsworn statement, trial counsel immediately recalled PFC Moss' father (a defense witness) to present rebuttal evidence that PFC Moss does not have an aunt named, Viola Mitchell. (JA 74-76). Trial counsel then argued that PFC Moss "made a story up to try to limit her culpability for being AWOL for three years. She made up a story about an aunt." (JA 79). The government's sentencing case consisted of only two witness. None of the witnesses presented by the government offered an opinion on PFC Moss' character for truthfulness or her reputation for truthfulness. It was not until the unsworn statement was rendered that trial counsel was able to argue that PFC Moss was untruthful and that she fabricated a story. The unsworn statement's impact is high, as it was the only basis for making such an argument.

The government wasted no time in recalling PFC Moss' father in rebuttal. (JA 74). Trial counsel knew the exact responses that Sergeant First Class (SFC) Moss would give and then was ready to argue the damaging testimony during closing argument.

It is not speculative that the unsworn statement was prejudicial to PFC Moss. The first defense sentencing witness, Sergeant (SGT) Bradley Sopazek testified that he knew PFC Moss had an "ill aunt" that PFC Moss cares for. (JA 49-50). The government did not cross-examine SGT Sopazek about PFC Moss' aunt and Viola Mitchell's name was not given. (JA 47-52). None of the other defense witnesses (including SFC Moss) were questioned by the defense or the government about their knowledge of PFC Moss' aunt and no one gave testimony about "Viola Mitchell." Until the unsworn statement, the government did not have a basis to cross-examine SFC Moss (or any other witness) about the identity of PFC Moss' aunt or the existence of "Viola Mitchell."

Indeed, the name "Viola Mitchell" was only presented to the panel by CPT Schiavetti in the unsworn statement. Additionally, prior to the unsworn statement, the government did not have a basis to argue that PFC Moss was untruthful, nor does it appear that it intended to do so. The fact that the government actually used the information and argued it against PFC Moss shows prejudice.

The standard for prejudice is whether there is a "reasonable probability that . . . the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; see *also United States v. Alves*, 53 M.J. 286, 291 (C.A.A.F. 2000)("Normally, ineffective assistance of counsel at the

sentencing phase is prejudicial and requires a new sentencing hearing . . . ."). There is a reasonable probability that the unsworn statement prejudiced PFC Moss. This is because the panel was left with the belief that PFC Moss was untruthful, a belief that stemmed only from the improper unsworn statement.

Contrary to the government's assertion, the unsworn statement was not a vehicle for getting in much-needed mitigation. (Appellee Br. at 18). The government seems to argue that there needs to be a story in every desertion or AWOL case to explain the absence and provide mitigation. (Appellee Br. at 19-20). This case illustrates why such a default practice would be illogical. There was absolutely no utility obtained by telling the panel that PFC Moss went home to care for her sick "aunt Viola." The panel could not be expected to have sympathy for PFC Moss and her "aunt Viola" once they were led to believe the story was false. Simply put, the unsworn statement was not necessary and it failed to present any beneficial information for PFC Moss. The only possible conclusion is that the panel held the story of Viola Mitchell against PFC Moss.

Equally unpersuasive is the government's argument that PFC Moss received fifty percent of the possible maximum confinement. The standard is not a proportionality review. If there is a reasonable probability that the result would have been less, as

to any portion of the sentence, then there is prejudice. *See Strickland*, 466 U.S. at 694; *see also United States v. Dobrova*, 64 M.J. 503 (Army Ct. Crim. App. 2006)(sentence of five months confinement, reduction to E-1, and a bad-conduct discharge set aside and sentence rehearing ordered at a special court-martial). In this case, there is a reasonable probability that PFC Moss would have received a shorter sentence to confinement, shorter forfeitures, no reduction in rank, or a bad-conduct discharge.

C. The government conflates the two prongs from *Strickland*

The government conceded that it was error for CPT Schiavetti to render the unsworn statement without PFC Moss' permission and simply made an argument in its brief that the error was not prejudicial. Thus, the government conceded the first prong of *Strickland*. However, in its brief, the government asserts at length that there is no prejudice because CPT Schiavetti made a strategic decision to present the unsworn statement and mention Viola Mitchell.[1] (Appellee Br. at 16-19, 24).

The two prongs of *Strickland* are mutually exclusive, whether a defense counsel's conduct is supported by a strategic or tactical decision weighs on the first prong, not the second.

[1] For example, the government states, "[T]he facts and ineffective assistance analysis of [*Florida v.*] *Nixon* are compellingly analogous to this case such that the holding in *Nixon* is dispositive on the issue of CPT A.S.'s performance.

United States v. Clemente, 51 M.J. 547, 551 (C.A.A.F. 1999)(when determining if a counsel's conduct was deficient, "the appellate courts will not second-guess the strategic or tactical decisions of the trial defense counsel")(citations omitted). Whereas the standard for prejudice is whether there is a "reasonable probability that . . . the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

Appellate defense counsel is unaware of any cases holding that the strategic or tactical decisions of trial defense counsel are a factor when determining whether the appellant has satisfied the prejudice prong of *Strickland*. The law does not support the government's assertion—that PFC Moss suffered no prejudice simply because CPT Schiavetti made a tactical decision.

D. Florida v. Nixon is not dispositive

The government's reliance on *Florida v. Nixon,* in arguing that there is no prejudice, is misplaced. In *Nixon*, the Supreme Court focused its analysis on the first prong of *Strickland* in disposing of the ineffective assistance of counsel claim. 543 U.S. 175, 186 (2004)("We granted certiorari . . . to resolve an important question of constitutional law, *i.e.*, whether counsel's failure to obtain defendant's express consent to a strategy of conceding guilt in a capital trial automatically renders counsel's *performance deficient*.")(citations

omitted)(emphasis added). The Court held that a defense counsel may rely on strategic decisions that they believe are in the best interest of their unresponsive clients. *Id.* at 192. Further, the Court found that the trial defense counsel's concession of guilt and focus on sentencing in a capital case was a sound strategic decision because the sentencing phase of a capital case "vitally affects counsel's strategic calculus." *Id.* at 190-91. However, the Court noted that a similar strategy in a normal "run-of-the-mill trial might present a closer question." *Id.* at 190.

The government suggests that the facts of *Nixon* are similar to the facts of this case and that PFC Moss, like Nixon, was unresponsive to the strategic advice of counsel. (Appellee Br. at 20). The government asserts that PFC Moss insisted on focusing on Viola Mitchell in her unsworn statement despite CPT Schiavetti's advice that it could be harmful. (Appellee Br. at 17; JA 135, 147). Despite counseling PFC Moss against the possible harm, the government argues that CPT Schiavetti made a tactical decision to introduce the story of Viola Mitchell since it was consistent with PFC Moss' last expressed wishes. (Appellee Br. at 17, 19).

The government argues that the holding in *Nixon* is dispositive. However, the government's position is untenable. *Nixon* focused on the deficient performance prong and the

government has already conceded that counsel's performance was deficient in this case. However, even if the government did not concede the deficient performance prong of *Strickland*, this case would not meet the same result as *Nixon*. This is not simply a case where a counsel acted in the best interest of an unresponsive client. As this Court held in *Marcum*, CPT Schiavetti was not allowed to make an unsworn statement on behalf of PFC Moss without her permission. 60 M.J. at 210. Even if the unsworn statement was full of mitigation, and not so easily rebutted, it was still error for CPT Schiavetti to make it. No amount of strategy or reliance on the last known desires of PFC Moss would save it from being deficient performance. Instead, the only question would be whether there is prejudice.

E. Conclusion

The government's effort to blend the two prongs of *Strickland* must fail. This Court should not be persuaded that the prejudice analysis is dependent on whether defense counsel's actions were dictated by strategic or tactical decisions. In cases like this—where a rule prohibits counsel's conduct—the government could simply concede deficient performance, then rely on *Nixon* and assert that counsel was simply following the last known wishes of the accused to overcome prejudice. This would create an unreasonable precedence.

Conclusion

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

IAN M. GUY
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
US Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0716
USCAAF No. 35498

VINCENT T. SHULER
Major, Judge Advocate
Branch Chief, Defense Appellate Division
USCAAF No. 35215

KEVIN BOYLE
Colonel, Judge Advocate
Chief, Defense Appellate Division
USCAAF No. 35966

CERTIFICATE OF COMPLIANCE WITH RULES 24(c)

1. This reply brief complies with the type-volume limitation of Rule 24(c) because this reply brief contains 2,096 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.

IAN M. GUY
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0716
USCAAF No. 35498

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing 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 August 26, 2013.

IAN M. GUY
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Service Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703)693-0716
USCAAF No. 35498