IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
v.	)	**USCA Dkt. No. 13-0348/AR**
Private First Class (E-3) **AMANDA N. MOSS** United States Army, Appellant	)	Crim. App. Dkt. No. 20110337

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Granted Issues:

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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.

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

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Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. This Court has jurisdiction under Article 67(a)(3), UCMJ.

Statement of the Case

A panel of officer members sitting as a special court-martial tried and convicted appellant, in absentia and contrary to her plea, of desertion, in violation of Article 85, UCMJ.[1] The panel sentenced appellant to confinement for six months, reduction to the grade of E-1, forfeiture of $978.00 per month for twelve months, and a bad-conduct discharge.[2] The convening authority approved the sentence as adjudged and credited appellant with eighteen days of confinement against the sentence of confinement.[3]

On January 17, 2013, the Army Court of Criminal Appeals (Army Court) affirmed the findings and sentence.[4] On June 20, 2013, this honorable court granted appellant's petition for review on all four issues presented.

Statement of Facts

After being absent from her unit for almost three years, during which time she missed a deployment, appellant was apprehended by civilian authorities after an incident of "affray" in Albany, Georgia.[5] Appellant was charged and pleaded nolo contendere.[6] She was subsequently returned to her unit at

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1 (JA at 15, 24).
2 (JA at 16).
3 (JA at 17).
4 (JA at 1-9).
5 (JA at 2, 99).
6 (JA at 2).

Fort Stewart, Georgia and charged with desertion.[7] Following arraignment, appellant's assigned defense counsel, CPT A.S., successfully negotiated a pretrial agreement that imposed a cap of six months on any sentence to confinement.[8] Despite extensive pretrial preparations with CPT A.S., including plans to make an unsworn statement regarding the "illness of her aunt [Ms. V.M.]," appellant absented herself from trial approximately two weeks before the trial date.[9]

The military judge determined, over CPT A.S.'s objection, that appellant's absence was voluntary, entered a plea of not guilty, and the trial proceeded *in absentia*.[10] CPT A.S. tried to bring in Ms. D.C. and Ms. V.M. as witnesses on the merits and sentencing, but due to the resistance of Ms. D.M. and the unavailability of Ms. V.M., he chose not to present a case on the merits.[11] Appellant was convicted of desertion as charged and the trial proceeded to the pre-sentencing phase.[12]

In an Article 39(a) session following the announcement of findings but prior to the sentencing phase, trial defense counsel stated appellant's intention to offer an unsworn

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7 (JA at 2, 13).
8 (JA at 144, paras. 2-3).
9 (JA at 2, 18-23; JA at 144, paras. 4-7).
10 (JA at 2, 23-24; JA at 144, paras. 8-9).
11 (JA at 25-40; JA at 145-47, paras. 10-21).
12 (JA at 2, 15).

statement "through counsel."[13] Trial defense counsel's purpose in offering the unsworn statement was to put before the panel the substance of two sworn statements which were not offered as evidence during the merits phase.[14] The government stated that it had no objection if trial defense counsel only intended to "state what was said" in the sworn statements and not make any inferences.[15] The military judge commented that it was trial defense counsel's prerogative to do so and noted, "I am unable to give the allocution rights to the accused but it is certainly her right to have you deliver the unsworn statement."[16]

The government presented two sentencing witnesses, one of whom testified that appellant had "high" rehabilitative potential.[17] CPT A.S. presented testimony from three witnesses about appellant's performance following her return to her unit and her rehabilitative potential.[18] Appellant's father, SFC D.M., also testified to appellant's rehabilitative potential.[19] The government cross-examined each defense witness and asked if their opinion about appellant's rehabilitative potential would change if they knew of appellant's civilian conviction.[20]

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13 (JA at 41).
14 (JA at 41, 99-101, 103-05).
15 (JA at 41).
16 (JA at 42).
17 (JA at 46).
18 (JA at 49-50, 55-57, 61-62).
19 (JA at 68-69).
20 (JA at 52, 58, 63).

CPT A.S. then presented an unsworn statement, which he prefaced by saying, "This is her statement."[21] The unsworn statement averred that appellant remained away from her unit to take care of her ailing "aunt [V.M.]," who raised her, because Ms. V.M. had no other relatives to care for her.[22] In rebuttal, the government recalled SFC D.M. as a witness and asked him if he or his wife had any sisters named V.M., to which he replied in the negative.[23] Under cross-examination by CPT A.S., SFC D.M. acknowledged that the term "aunt" is often used as a term of affection for non-relatives.[24] A panel member asked SFC D.M. who raised appellant, to which he responded that he and his wife raised her.[25] The military judge then asked SFC D.M. what relation Ms. V.M. was to appellant and he said he did not know Ms. V.M.[26]

The government's sentencing argument remarked that appellant "made up a story about an aunt" and asked the panel to adjudge a sentence of nine months confinement, reduction to E-1, and a bad-conduct discharge.[27] CPT A.S. maintained in his argument that appellant remained absent from her unit to care

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21 (JA at 73).
22 (JA at 73-74).
23 (JA at 74-75).
24 (JA at 75).
25 (JA at 76).
26 (JA at 76).
27 (JA at 79, 80).

for Ms. V.M. and asked the panel to "temper your justice with mercy."[28]

After the panel had gone into sentencing deliberations, the government challenged the unsworn statement based on an assumption that appellant had not expressly authorized it.[29] When the military judge directly posed the question of consent, CPT A.S. declined to answer based on the attorney-client privilege.[30] When asked if he knew he was not permitted to make an unsworn statement without his client's consent, CPT A.S. invoked his Fifth Amendment right to remain silent.[31] The military judge was unable to determine whether the unsworn statement was authorized by appellant and asked the parties for any proposed remedies.[32] Both the government and CPT A.S. stated their belief that no remedy was needed.[33]

The military judge went on to find that "the statement was error," but found no prejudice because it did not reveal privileged information, contained no admissions of guilt, and contained extensive mitigation evidence.[34] The panel adjudged a sentence of six months confinement, reduction to the grade of E-1, forfeitures of $978 pay per month for twelve months, and a

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28 (JA at 81, 83).
29 (JA at 93; JA at 149, para. 30).
30 (JA at 93).
31 (JA at 93).
32 (JA at 93).
33 (JA at 94).
34 (JA at 94-95).

bad-conduct discharge.[35] In the R.C.M. 1105 matters, CPT A.S. repeated appellant's claims about Ms. V.M. and made no mention of the circumstances surrounding the making of the unsworn statement at trial.[36]

Appellate defense counsel, in appellant's continuing absence, alleged before the Army Court the same issues now before this court. Without an affidavit from appellant personally alleging ineffective assistance, the Army Court ordered CPT A.S. to respond to the allegations of ineffective assistance.[37]

CPT A.S. provided an affidavit with supporting documents detailing his extensive pretrial preparations, including interviews with SFC D.M. to determine the nature of appellant's relationship to Ms. V.M.[38] CPT A.S. maintained that before she absented herself from trial, appellant insisted on presenting an unsworn statement and that Ms. V.M. would be the "thrust" of the unsworn statement.[39] CPT A.S. admitted that appellant never explicitly authorized him to make an unsworn statement in her absence and further acknowledged, only days after the trial, that he would not have made the unsworn statement if he knew

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35 (JA at 16).
36 (JA at 125-26).
37 (JA at 127-29).
38 (JA at 133-203).
39 (JA at 135, para. 2c).

that appellant's express consent was required to do so.[40] Additional facts drawn from CPT A.S.'s affidavit and its supporting documents are incorporated in the arguments below where relevant to the disposition of the granted issues.

Summary of Argument

Although CPT A.S.'s decision to make an unsworn statement violated the rule in *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004), none of the prejudice that was found in *Marcum* is present in this case. Additionally, appellant has failed to show prejudice under the second prong of *Strickland v. Washington*, 466 U.S. 668 (1984), because CPT A.S.'s decision was reasonable under circumstances closely analogous to *Florida v. Nixon*, 543 U.S. 175 (2004). The benefit to appellant that accrued from the presentation of mitigation evidence is reflected in the lenient sentence adjudged by the panel.

The record in this case shows that no actual conflict of interest resulted from CPT A.S.'s invocation of his right to silence. He was still able to assess what was in appellant's best interests and continue in his representation of appellant through the post-trial process. There is no basis in the record to conclude that any alternative courses of action could have been taken that had a reasonable probability of achieving a more favorable sentence.

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[40] (JA at JA at 134, para. 2a; JA at 150, para. 33).

Appellant forfeited her right of allocution when she absented herself from trial and cannot establish prejudice under the third prong of the plain error test. Any material prejudice to appellant's substantial right of allocution was self-imposed. Appellant has failed to show that CPT A.S.'s decision to exercise a forfeited right resulted in a sentence more severe than what would have resulted without any mitigation evidence. CPT A.S.'s decision afforded appellant a defense that was as robust as could reasonably be expected under the circumstances.

By accommodating appellant's forfeited right of allocution as a means of allowing the panel to consider matters in mitigation and extenuation, the military judge did not abuse his discretion. In finding no prejudice, the military judge gave full consideration to the true import of the rule in *Marcum* and the benefit to appellant of allowing the panel to consider mitigation evidence.

Granted Issues I & II

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.

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A. Standard of Review

In reviewing ineffectiveness, questions of deficient performance and prejudice are reviewed de novo.[42] "Even under *de novo* review, the standard for judging counsel's representation is a most deferential one."[43]

B. Law and Argument

"In order to prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice."[44] "It is not necessary to

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[41] The government has consolidated its response to appellant's two interrelated claims of ineffective assistance of counsel.
[42] *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012) (citing *United States v. Gutierrez*, 66 M.J. 329, 330-31 (C.A.A.F. 2008)).
[43] *Harrington v. Richter*, 131 S. Ct. 770, 788 (2011).
[44] *United States v. Green*, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

decide the issue of deficient performance when it is apparent that the alleged deficiency has not caused prejudice."[45]

With respect to the first *Strickland* prong, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[46] "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom."[47] "Defense counsel do not perform deficiently when they make a strategic decision to accept a risk or forego a potential benefit, where it is objectively reasonable to do so."[48]

As to the second prong, "[appellant] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[49] "A reasonable probability is a probability sufficient to undermine confidence in the outcome."[50] "'[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the

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[45] *United States v. Bradley*, 71 M.J. 13, 16 (C.A.A.F. 2012) (citing *Loving v. United States*, 68 M.J. 1, 2 (C.A.A.F. 2009)).
[46] *United States v. Rose*, 71 M.J. 138, 143 (C.A.A.F. 2012).
[47] *Harrington*, 131 S. Ct. at 788 (quoting *Strickland*, 466 U.S. at 690). *Accord Rose*, 71 M.J. at 143.
[48] *Datavs*, 71 M.J. at 424 (citations omitted).
[49] *Green*, 68 M.J. at 362 (quoting *Strickland*, 466 U.S. at 698).
[50] *Id.*

defendant.'"[51] An ineffectiveness claim should be decided for lack of prejudice if easier to do so.[52]

The decision to make an unsworn statement during sentencing is "personal to the accused" and should only be made with full knowledge of the consequences of making an unsworn statement.[53] If an accused is absent without leave at the time of sentencing, "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."[54]

1. Appellant has failed to establish prejudice under the analysis employed in *Marcum*

In *Marcum*, this court's prejudice analysis focused on the fact that defense counsel made an unsworn statement after appellant went absent from trial and disclosed attorney-client

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[51] *Datavs*, 71 M.J. at 424 (citing *Strickland*, 466 U.S. at 697).
[52] *Id.* at 424-25 (same).
[53] *United States v. Marcum*, 60 M.J. 198, 209 (C.A.A.F. 2004).
[54] *Id.* at 210. In light of CPT A.S.'s affidavit and supporting documents, the government acknowledges that appellant never explicitly authorized CPT A.S. to make an unsworn statement in her absence and that it was error for him to do so. (JA at 134, para. 2a); *United States v. Brewer*, ARMY 20040625, 2008 WL 8104044, at *3 n.2 (A. Ct. Crim. App. 28 Aug. 2008) (citing *Marcum*, 60 M.J. at 209) (summ. disp.). Days after the trial, CPT A.S. memorialized in a memorandum for record that he was not aware of the rule in *Marcum* and *Brewer* requiring the accused's consent for any unsworn statement made in the accused's absence. (JA at 148, para. 25). He also noted, in anticipation of an ineffective assistance claim, that he would not have made the unsworn statement had he been aware of the rule in *Marcum* and *Brewer*. (JA at 150, para. 33).

privileged information without the appellant's consent.[55] The harm identified by this court was not that an unsworn statement was made without the appellant's consent as a general matter, but that the statement revealed privileged information that the appellant would not have disclosed had he prepared the statement himself.[56] This court went on to examine whether the appellant "waived his right to confidentiality" by testifying at trial to "a great deal of information contained within the statement."[57] The appellant "suggest[ed] that if he had prepared an unsworn statement for sentencing it would have been different than what was ultimately presented by his defense counsel."[58] Comparing the appellant's trial testimony to the unsworn statement, this court found that "the tone and substance of the sentencing argument was more explicit."[59]

In this case, in contrast to *Marcum*, CPT A.S. made an unsworn statement containing information that appellant insisted on presenting for sentencing.[60] While the appellant in *Marcum* testified to much the same information disclosed in the unsworn statement, he nonetheless maintained on appeal through an affidavit that the statement he would have given would have been

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55 *Id.* at 209-10.
56 *Id.* at 210.
57 *Id.*
58 *Id.*
59 *Id.*
60 (JA at 133-35, paras. 2a, c).

different than what his defense counsel presented.[61] Appellant in the instant case, by remaining absent throughout the entirety of these proceedings, has not met her burden of showing what, if anything, she would have done to depart from the sentencing case she prepared with CPT A.S. prior to absconding from trial.[62] With no affidavit from appellant, appellate defense counsel proffers wishful thinking and invites this court to engage in pure speculation.[63]

While this court could parse out the differences between appellant's sworn statements and the unsworn statement, such an exercise would be moot because this case is not about the breach of attorney-client privilege and there is no basis in the record to believe appellant would have changed course in a specific way

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[61] 60 M.J. at 210.

[62] *See United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997) (finding appellant did not meet burden of production under *Strickland*). *Cf. Brewer*, ARMY 20040625, 2008 WL 8104044, at *3 n.2 (finding no prejudice where appellant ratified defense counsel's erroneous decision to make unsworn statement and unsworn statement "contained only "non-specific apologies, no admission of guilt, and extenuating evidence").

[63] Appellate defense counsel conjectures that appellant might have changed course "once at trial" and aware of her father's presence at the courthouse. (Appellant's Br. 15). However, at the arraignment, appellant asked for a trial date about two weeks after her father's redeployment because she wanted to call him as a witness. (JA at 23-24). As purported evidence of prejudice, appellate defense counsel posits three possible scenarios as to what appellant "could have" done at trial. (Appellant's Br. 18). Instead of providing the kinds of specific factual assertions required to support an ineffective assistance claim, appellant's argument reads like an after action review of CPT A.S.'s tactical decisions. (Appellant's Br. 18).

had she been present for sentencing. Appellate defense counsel asserts that CPT A.S. "stood in place of [appellant], asserted facts as if they were coming directly from [appellant], and acted contrary to *Marcum*."[64] By presenting fanciful scenarios of what his fugitive client might have done differently, appellate defense counsel hoists himself by his own petard and illustrates the difficulties faced by CPT A.S. at trial.

Appellate defense counsel's proffer of various scenarios that could have been more favorable to appellant is of no relevance to this case as they are all predicated on appellant's presence at trial. Appellant's absence throughout these proceedings and her failure to provide any specific factual allegations to which the prejudice analysis in *Marcum* can be applied underscores her larger failure to show prejudice under the second prong of *Strickland*. The only factual scenarios relevant for determining whether the second prong of *Strickland* has been satisfied are the defense sentencing case as presented with and without the unsworn statement. The question for this court is therefore whether appellant has shown a reasonable probability that the exclusion of the unsworn statement and SFC D.M.'s rebuttal testimony would have resulted in a different sentence.[65]

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[64] (Appellant's Br. 15).

[65] *See Green*, 68 M.J. at 362.

2. Appellant has failed to establish prejudice under the second prong of *Strickland* in that CPT A.S. made a strategic decision pursuant to appellant's desires by presenting rebuttable mitigation evidence

"Defense counsel 'undoubtedly has a duty to consult with the client regarding "important decisions," including questions of overarching defense strategy.'"[66] "Whether the client must consent to the strategic decision made by counsel before counsel may proceed is a different question."[67] "[W]hen a defendant, informed by counsel, neither consents nor objects to the course counsel describes as the most promising . . . counsel is not automatically barred from pursuing that course."[68] "[T]he lawyer has—and must have—full authority to manage the conduct of the trial. The adversary process could not function effectively if every tactical decision required client approval."[69]

CPT A.S. maintained that appellant insisted on presenting mitigation evidence regarding Ms. V.M., despite the foreseeable risk that her factual assertions could be rebutted by the government.[70] Through investigation and the assistance of law enforcement, CPT A.S. confirmed the existence of Ms. V.M. and

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[66] *United States v. Larson*, 66 M.J. 212, 218 (C.A.A.F. 2008) (principally citing *Florida v. Nixon*, 543 U.S. 175, 187 (2004)) (secondary citation omitted).
[67] *Id.* (citing *Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988)).
[68] *Nixon*, 543 U.S. at 178.
[69] *Taylor*, 484 U.S. at 418.
[70] (JA at 133-36, paras. 2a, c, d).

Ms. D.C., a mutual friend of appellant and Ms. V.M.[71] He also confirmed with Ms. D.C. the veracity of appellant's claims regarding appellant's relationship with Ms. V.M. and her infirmities.[72] Most importantly, CPT A.S. interviewed SFC D.M. before trial and learned that he did not know of Ms. V.M. and that appellant had no other family in Georgia other than SFC D.M.'s brother, whose wife was not Ms. V.M.[73] SFC D.M. also admitted that appellant had run away from home and that he lost contact with her for long periods of time.[74]

With the information gleaned from his investigation into appellant's claims regarding Ms. V.M., CPT A.S. decided to present the sentencing case that he and appellant had been preparing before she fled from the trial.[75] Even though CPT A.S. advised appellant of the "potential risks and benefits" of presenting claims about Ms. V.M., appellant "insisted to [CPT A.S.] that she wanted to make this the thrust of her unsworn statement."[76] Having staked herself to a mitigation case centered on Ms. V.M. and intending to call her father as a

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71 (JA at 106-17; JA at 134, para. 2b).
72 (JA at 134, paras. 2b, d).
73 (JA at 136, para. 2d; JA at 161).
74 (JA at 136, para. 2e; JA at 160).
75 (JA at 136, para. 2e; JA at 147, para. 23).
76 (JA at 135, para. 2c; JA at 147, para. 23).

witness, appellant cannot claim that she could not have foreseen or anticipated the risk of rebuttal testimony.[77]

CPT A.S. was left by his absent client to determine, on his own, what was the best way to present mitigating evidence about Ms. V.M. Other than an unsworn statement, the most direct evidence to support appellant's claims were her sworn statements to her command, marked for identification as Defense Exhibits B and C.[78] These exhibits were not introduced by the government during the merits phase and CPT A.S. knew he faced a hearsay objection if he tried to admit them.[79] Assuming, *arguendo*, that he could have introduced the sworn statements under relaxed rules of evidence during sentencing, they would have been rebutted in the same way that the unsworn statement was rebutted. Moreover, to the extent that appellant's claims about Ms. V.M. contained in the sworn statements could be rebutted, rebuttal would be more damning because it would show appellant's untruthfulness to her command while under oath.[80]

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[77] Assuming the unsworn statement could have been made without the risk of rebuttal testimony, there would still be a risk that the unsworn statement could be seen as "shallow, artificial, or contrived," as with many unsworn statements laden with expressions of remorse. *See United States v. Paxton*, 64 M.J. 484, 487 (C.A.A.F. 2007) (citing *United states v. Edwards*, 35 M.J. 351, 355 (C.M.A. 1992)).

[78] (JA at 99, 103-104; JA at 148, para. 24).

[79] (JA at 134, para. 2b; JA at 148, para. 24).

[80] In Defense Exhibit B, appellant admitted that she had been "arrested in Albany Ga for affray." (JA at 99). If CPT A.S. had somehow succeeded in selectively introducing only Defense

By opting to give an unsworn statement, which was the method most consistent with appellant's last expressed wishes, CPT A.S. was able to "present the information that was favorable to [appellant] and exclude that which was unfavorable."[81] With an explanation for appellant's desertion before the panel, CPT A.S. was able to argue that his client was a young soldier who made a poor choice to desert her unit, but for an ostensibly well-intentioned reason, and who still performed well after returning to her unit.[82]

Insofar as appellant now takes issue with the means by which CPT A.S. introduced mitigation evidence that she insisted be the "thrust" of her sentencing case, appellant has failed to show how that evidence would have been introduced without being rebutted in the same way that it was at trial. Had CPT A.S. gone against his client's wishes and presented no explanation for her desertion, appellate defense counsel could just as easily allege, in appellant's continuing absence before these

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Exhibit C into the record, there was a risk that the government could then have sought to introduce Defense Exhibit B to show the circumstances of appellant's civilian conviction. CPT A.S. was well aware of the risks involved in introducing these exhibits in their entirety. (JA at 148, para. 24).

[81] (JA at 134, para. 2b; JA at 148, paras. 24, 25).

[82] (JA at 81-83).

appellate proceedings, ineffective assistance for CPT A.S.'s failure to present mitigation evidence.[83]

The facts and the Supreme Court's analysis in *Florida v. Nixon*, 543 U.S. 175 (2004), are particularly applicable to the unique facts of this case. In *Nixon*, the defense counsel defended the appellant against charges of first-degree murder, kidnapping, robbery, and arson where the appellant gave a detailed confession and "[t]he State gathered overwhelming evidence that Nixon had committed the murder in the manner he described."[84] After initially entering a plea of not guilty and then deposing all the state's potential witnesses, defense counsel unsuccessfully tried to negotiate a plea deal to avoid the death penalty.[85] With a trial on a capital charge looming, defense counsel focused his efforts on presenting extensive mitigation evidence of Nixon's mental instability.[86]

Experienced in capital cases, defense counsel feared that denying guilt during the merits phase would undercut the mitigation case and determined that conceding guilt was the best

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[83] *Cf. United States v. Dobrava*, 64 M.J. 503, 508 (A. Ct. Crim. App. 2006) (finding defense counsel's decision to waive appellant's right to make an unsworn statement was ineffective). *See also United States v. Cronic*, 466 U.S. 648, 659 (1984) ("[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable").

[84] 543 U.S at 180.

[85] *Id.* at 180-81.

[86] *Id.* at 181.

strategy to achieve leniency.[87] Despite defense counsel's repeated attempts to explain this strategy, Nixon was "unresponsive," "never verbally approved or protested" the proposed strategy and gave "very little, if any assistance or direction in preparing the case."[88] Defense counsel "eventually exercised his professional judgment to pursue the concession strategy."[89] Nixon's disruptive behavior at the start of the trial and refusal to be present for further proceedings forced the judge to move forward *in absentia*.[90] Defense counsel did not present a defense case during the merits phase and Nixon was convicted of all counts.[91]

During sentencing, defense counsel presented extensive mitigation evidence of Nixon's mental deficiencies and the state presented little evidence except guilt-phase evidence by reference.[92] After three hours of deliberation, the jury sentenced Nixon to death.[93] The court commended defense counsel's performance and concession strategy.[94] On appeal, Nixon was represented by new counsel and alleged his trial defense counsel was presumptively ineffective for conceding

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87 *Id.*
88 *Id.*
89 *Id.* at 182.
90 *Id.*
91 *Id.* at 183.
92 *Id.* at 183-84.
93 *Id.* at 184.
94 *Id.*

guilt without Nixon's express consent.[95] The Florida Supreme Court ultimately agreed, finding that the concession strategy was functionally equivalent to a guilty plea made without Nixon's express consent.[96]

In a unanimous 8-0 decision, the Supreme Court reversed the Florida Supreme Court's judgment.[97] While agreeing that an accused must expressly consent to plead guilty, the court disagreed with the lower court's view that the concession strategy was equivalent to a guilty plea.[98] Noting Nixon's uncooperativeness in discussions with defense counsel, the court concluded that defense counsel's strategy was reasonable under the *Strickland* standard.[99] The court further noted that the lower court "failed to attend to the realities of defending against a capital charge" and observed that capital defenders "face daunting challenges in developing trial strategies, not least because the defendant's guilt is often clear."[100] In the final analysis, the court held:

> When counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent. Instead,

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95 *Id.* at 185.
96 *Id.* at 185-86.
97 *Id.* at 187.
98 *Id.* at 188.
99 *Id.* at 189.
100 *Id.* at 189-90, 191.

> if counsel's strategy, given the evidence bearing on the defendant's guilt, satisfies the *Strickland* standard, that is the end of the matter; no tenable claim of ineffective assistance would remain.[101]

While the government does not seek to equate the stakes involved in a capital case like *Nixon* to those of a desertion case before a special court-martial, the facts and ineffective assistance analysis of *Nixon* are compellingly analogous to this case such that the holding in *Nixon* is dispositive on the issue of CPT A.S.'s performance.[102] Where the defense counsel's decision to proceed without his client's express consent in *Nixon* met the *Strickland* standard, there is simply no colorable claim that CPT A.S.'s decision in this case failed to meet that standard as well.

After negotiating a pretrial agreement with a six-month cap on confinement, CPT A.S. fulfilled his duty of consultation by preparing with appellant an unsworn statement about Ms. V.M. that was the "thrust" of the sentencing case. CPT A.S. was then abandoned by his client and forced to press on alone to a contested trial without Ms. D.C. or Ms. V.M. as witnesses on the merits or for sentencing. He knew the benefits and risks involved with presenting information about Ms. V.M. and

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[101] *Id.* at 192.

[102] *Cf. Larson*, 66 M.J. at 218 (applying *Nixon* in a case where defense counsel conceded, without prior consultation, appellant's misuse of a government computer).

exercised his judgment by offering the best mitigation evidence available in a way that he believed would limit the disclosure of other evidence unfavorable to appellant. Under challenging circumstances, CPT A.S.'s tactical decision to make an unsworn statement on appellant's behalf without revealing attorney-client privileged information was "not impeded by any blanket rule demanding the defendant's explicit consent."[103] CPT A.S's decision, "given the evidence bearing on [appellant's] guilt, satisfies the *Strickland* standard, that is the end of the matter."[104]

3. The adjudged sentence reflected a degree of leniency and weighing of the partially rebutted mitigating circumstances presented in the unsworn statement

In determining a sentence in this case, the panel was limited to a jurisdictional maximum punishment of one year confinement, reduction to E-1, forfeiture of two-thirds pay for twelve months, and a bad-conduct discharge.[105] Appellant was convicted of desertion for a period lasting nearly three years.[106] During sentencing, the government repeatedly mentioned appellant's desertion conviction, her prior civilian conviction, and her absence from trial.[107] Apart from the unsworn statement, the defense case presented four witnesses, including SFC D.M.,

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103 *Nixon*, 543 U.S. at 192.
104 *Id.*
105 Rule for Courts-Martial [hereinafter R.C.M.] 201(f)(2)(B).
106 (JA at 15).
107 (JA at 52-53, 58, 63-64, 70, 79).

who stated their opinion that appellant had rehabilitative potential.[108] SFC D.M.'s testimony in rebuttal to the unsworn statement had to be weighed against his stated belief that appellant could be rehabilitated.[109] The government asked for nine months of confinement, reduction to E-1, and a bad-conduct discharge.[110] CPT A.S. did not request a specific sentence, but merely asked the panel to "temper [their] justice with mercy."[111] The panel's adjudged sentence of six months confinement, reduction to E-1, forfeiture of $978 for 12 months, and a bad-conduct discharge indicates a degree of leniency as to confinement.[112]

The Army Court noted that this sentence was "very consistent with similarly situated cases" and found it appropriate, pursuant to their authority under Article 66(c), UCMJ.[113] Whether or not the panel would have been more lenient had they not considered the mitigation evidence presented in the

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[108] (JA at 49-51, 56-57, 62-63, 68-69).
[109] (JA at 68-69).
[110] (JA at 80).
[111] (JA at 83).
[112] (JA at 16). If appellant had been present for trial, and presumably opted against presenting any mitigating evidence about Ms. V.M., the approved pretrial agreement would have imposed a six-month cap on confinement. (JA at 144, para. 3). Appellant's acceptance of a six-month cap on confinement reflected an appreciation of the likelihood that the adjudged sentence to confinement would exceed six months, even with the planned for mitigation case.
[113] (JA at 8).

unsworn statement and the ensuing rebuttal testimony from SFC D.M. is highly speculative, if not unrealistic.

Appellant wishfully asserts that without the unsworn statement and rebuttal testimony, "the panel would not have been left with the belief that PFC Moss was untruthful . . . and they likely would not have sentenced her to a punishment as severe as they did."[114] It is just as plausible, and equally speculative, that the panel considered the mitigating circumstances presented in the unsworn statement, assessed its limited weight in light of rebuttal testimony, determined that a "weak excuse" was better than none at all, and thus decided only six of the nine months sought by the government was appropriate and included forfeitures to offset the reduction in confinement.[115]

Had there been no evidence of any mitigating circumstances, the panel would have been left to assess appellant's culpability, character and rehabilitative potential based on a three-year desertion during which appellant's unit deployed without her, a previous civil conviction during that period, a brief stint of good performance following apprehension and return to military control, and an empty chair where appellant

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[114] (Appellant's Br. 19).

[115] It was also likely not lost upon the panel that the enforcement of any sentence they adjudged would be conditioned upon appellant's return to military control and that any forfeitures would be largely symbolic against an absentee soldier whose pay would have been cut off by the time of the trial.

should have been sitting to accept responsibility for her actions and face the panel's judgment. By presenting a "weak excuse," CPT A.S. attempted to fill a void where no excuse at all would likely have been more damning. If the panel had completely discounted the unsworn statement and deemed appellant an unrepentant liar, they could have easily adjudged a sentence equal to or greater than what the government requested. At best, CPT A.S.'s efforts gave the panel something to consider in mitigation and it contributed to a sentence less severe than what the government requested. At worst, appellant's character was likely irreparably damaged going into sentencing and any further loss of credibility due to the unsworn statement was superfluous and negligible to the panel's sentencing calculus.[116] Accordingly, there is no reasonable probability that the sentence would have been more lenient if CPT A.S. presented nothing in mitigation.

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[116] The Army court has analogized "the sentencing problems presented by an *in absentia* trial to those presented by an accused's false testimony in his own behalf." *United States v. Denney*, 28 M.J. 521, 524 (A.C.M.R. 1989) (citing *United States v. Warren*, 13 M.J. 278 (C.M.A. 1982)). "An accused who is convicted of an offense he testifies he did not commit *obviously enters the sentencing stage of his trial with damaged credibility.*" *Id.* (emphasis added).

4. Appellant has failed to establish that CPT A.S.'s exercise of his right to silence created a conflict of interest that resulted in prejudice sufficient to satisfy the second prong of *Strickland*

"The right to effective counsel means the right to counsel who is conflict free."[117] "To demonstrate a Sixth Amendment violation, an appellant 'must establish . . . an actual conflict of interest [that] adversely affected his lawyer's performance.'"[118] Conflicts of interest "do not necessarily demonstrate prejudice under the second prong of *Strickland*."[119] "The question of whether there is inherent prejudice in a conflict between the self-interest of an attorney and the interests of the client must be assessed on a case-by-case basis."[120]

Unlike cases involving concurrent representation of multiple clients, an alleged conflict based on a difference in trial strategy "will require specifically tailored analyses in which the appellant must demonstrate both the deficiency and prejudice under the standards sets by *Strickland*."[121]

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[117] *United States v. McClain*, 50 M.J. 483, 487 (C.A.A.F. 1999) (citation omitted).
[118] *Id.* at 487-88 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980)).
[119] *United States v. Saintaude*, 61 M.J. 175, 180 (C.A.A.F. 2005) (citing *Mickens v. Taylor*, 535 U.S. 162, 175-76 (2002)).
[120] *Id.*
[121] *Saintaude*, 61 M.J. at 180 (quoting *United States v. Cain*, 59 M.J. 285, 294 (C.A.A.F. 2004)). *See also United States v. Lee*, 66 M.J. 387, 392 (C.A.A.F. 2008) (Ryan, J., dissenting) (discussing the Supreme Court's test for conflicts of interest

CPT A.S. was well aware of the awkward and difficult situation he had placed himself into by invoking his right to silence when the military judge asked if appellant had authorized the unsworn statement.[122] During a recess after invoking his right to silence, CPT A.S. consulted with Army Defense Counsel Assistance Program (DCAP) officials about the situation.[123] The officials at DCAP did not believe that a conflict existed or that it would be in appellant's interests for CPT A.S. to withdraw or request a mistrial.[124]

In both his initial reference to the attorney-client privilege when asked by the military judge if appellant had authorized the unsworn statement and his subsequent consultation with DCAP, CPT A.S.'s actions demonstrated that he had the

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and the differing presumptions to be applied based on specific contexts). Appellant goes to great lengths to argue that an "inherently prejudicial" standard should be applied in this case and that there was no waiver of the right to conflict-free counsel. (Appellant's Br. 23-27). While appellant did not explicitly authorize CPT A.S. to do whatever he needed to do to mount a viable defense in her absence, appellant's decision to flee from the trial after arraignment served the same purpose by waiving the right to be present for trial. *See United States v. Sharp*, 38 M.J. 33, 37 (C.M.A. 1993). As part of that waiver, appellant necessarily forfeited the right to conflict-free counsel, under the circumstances of this case, to the extent that the alleged conflict arose due to appellant's absence and amounts to a presumed *post hoc* disagreement over CPT A.S.'s trial tactics. Therefore, the appropriate standard is the "high hurdle" of *Strickland* analysis requiring a particularized showing of prejudice. *Saintaude*, 61 M.J. at 180.

[122] (JA at 93; JA at 149, para. 30).

[123] (JA at 149, para. 30a; JA at 152-55).

[124] (JA at 149, para. 30a, b).

wherewithal to objectively consider what was in appellant's best interests.[125] He considered requesting a mistrial and alleging ineffective assistance against himself, even though it was obviously not in his own interest to do so.[126] By consulting DCAP, CPT A.S. sought out the independent assessment of more experienced attorneys who would not be weighing CPT A.S.'s interests above appellant's.[127]

As CPT A.S.'s own admissions readily show, his awareness of a potential conflict did not "develop[] into deficiencies so serious as to deprive [appellant] of a fair trial, that is a trial whose result was reliable."[128] Had DCAP officials determined that it was in appellant's interests for CPT A.S. to withdraw from the case and request a mistrial, CPT A.S. was prepared to do so.[129] Any "unfairness" that could be surmised from CPT A.S.'s continued representation of appellant after deciding against withdrawal was no more unfair than the balance of equities inherent in the conduct of any trial *in absentia*.[130]

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125 (JA at 141, para. 4).
126 (JA at 149, para. 30a).
127 (JA at 152-55).
128 *Saintaude*, 61 M.J. at 180 (quoting *Strickland*, 466 U.S. at 687).
129 (JA at 149-50, paras. 30a, b).
130 *See United States v. Houghtaling*, 2 U.S.C.M.A. 230, 235 (1953) ("There is no problem of essential 'fairness' here, for this is not at all a case in which one was tried in absentia without notice that he was accused of a designated offense, and that he would be tried therefor").

When she fled from her trial and cut off all contact with CPT A.S., appellant forfeited the ability to "object to her counsel's actions."[131] She foreclosed her ability to influence CPT A.S.'s tactical decisions, including the decisions to present mitigation evidence and to continue representing her. Most of all, she forfeited the ability to terminate CPT A.S.'s representation, request new counsel, or request a mistrial, regardless of what another defense counsel would have recommended. Those decisions were left to CPT A.S. and in doing so, he consulted with DCAP. Furthermore, as CPT A.S.'s affidavit and supporting documents demonstrate, he made those decisions with due consideration for what was in appellant's best interests.[132]

Even in an abundance of caution, if CPT A.S. had decided to withdraw from the case and request a mistrial, appellant cannot show that such a motion would have been granted, rather than simply addressed by the appointment of new defense counsel and continuation of the proceedings *in absentia*.[133] Whether CPT A.S. or a new defense counsel proceeded as appellant's counsel, it is purely a matter of speculation as to what actions, if any, could

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131 (Appellant's Br. 26).

132 *See Houghtaling*, 2 U.S.C.M.A. at 234 ("the consequences which may follow upon [the appellant's] voluntary and willful absence are clearly the fruit of his own wrongful act no matter what the character of the charge asserted against him").

133 *See* R.C.M. 915(a) discussion ("The power to grant a mistrial should be used with great caution").

have been taken to correct CPT A.S.'s error and improve appellant's position. If the military judge recalled the panel and instructed them to disregard the unsworn statement and rebuttal testimony, then appellant' sentencing case would have no meaningful mitigation evidence and the sentence would likely have been more severe than what was adjudged. If a mistrial was declared as to any portion of the proceedings, appellant would likely be retried *in absentia* with a sentencing case lacking any mitigation evidence regarding Ms. V.M. Appellant has failed to show how this would be substantially different from a curative instruction, or that in either case, there was a reasonable probability of a more favorable sentence as a result.

Once he decided to continue representing appellant through the post-trial process, CPT A.S. assessed the benefits and risks of relying upon appellant's claims about Ms. V.M.[134] For the same reasons he decided to present that evidence to the panel, he decided to assert appellant's claims to the convening authority in the R.C.M. 1105 matters.[135] For the same reasons the government argues that CPT A.S.'s decision to present the unsworn statement was, on balance, in appellant's interests, CPT A.S.'s decision to present the same mitigation evidence in the R.C.M. 1105 submission was in appellant's post-trial

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[134] (JA at 136-37, para. 2f; JA at 187).
[135] (JA at 136-37, para. 2f).

interests.[136] Considering the overall circumstances of the case, appellant has failed to make a colorable showing under the post-trial prejudice standard of *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998). Because CPT A.S.'s actions were the result of appellant's absence from trial, alleging what amounted to a procedural error that benefitted appellant would not have resulted in a favorable recommendation from the staff judge advocate or more favorable action from the convening authority. "Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong."[137]

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[136] The R.C.M. 1105 submission presented mitigation evidence about Ms. V.M. free of any rebuttal testimony and painted a more favorable case to the convening authority than what the panel saw during sentencing. (JA at 125-26). Emails between CPT A.S. and DCAP as CPT A.S. prepared R.C.M. 1105 matters show how CPT A.S. continued to advocate for appellant's interests through post-trial, even noting procedural issues that he and DCAP believed would later prove advantageous. (JA at 185-89).

[137] *Houghtaling*, 2 U.S.C.M.A. at 234.

Granted Issues III & IV[138]

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.

A. Standard of Review

"Failure to object to the admission of evidence at trial forfeits appellate review of the issue absent plain error."[139] "Under plain error analysis, the accused 'has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused.'"[140]

Issues concerning non-mandatory instructions are reviewed for an abuse of discretion.[141] "For [an evidentiary decision] to be an abuse of discretion, it must be more than a mere

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[138] The government consolidates its response to the third and fourth granted issues as they are closely interrelated in law and fact.

[139] *United States v. Eslinger*, 70 M.J. 193, 197-98 (C.A.A.F. 2011) (citations omitted).

[140] *United States v. Tunstall*, 72 M.J. 191, 193-94 (C.A.A.F. 2013) (citing *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011)).

[141] *United States v. Forbes*, 61 M.J. 354, 358 (C.A.A.F. 2005) (citing *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993)).

difference of opinion; rather, it must be arbitrary, fanciful, clearly unreasonable or clearly erroneous."[142] Questions of prejudice due to ineffective representation are reviewed de novo.[143]

B. Law and Argument

The right of a convicted servicemember to present, either directly or through counsel, an unsworn statement during sentencing is an important and traditional right under military law and should be broadly construed in such a light.[144] "While 'the scope of an unsworn statement may include matters that are otherwise inadmissible under the rules of evidence, the right to make an unsworn statement is not wholly unconstrained.'"[145] Nonetheless, "[t]he mere fact that a statement in allocution might contain matter that would be inadmissible if offered as sworn testimony does not, by itself, provide a basis for

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[142] *United States v. Collier*, 67 M.J. 347, 353 (C.A.A.F. 2009) (quoting *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000), and internal quotations removed).

[143] *See United States v. Rose*, 71 M.J. 138, 143 (C.A.A.F. 2012) (citation omitted).

[144] *United States v. Kloch*, ARMY 20080788, 2009 WL 6929459, at *2 (Army Ct. Crim. App. 10 Nov. 2009) (citing *United States v. Grill*, 48 M.J. 131, 132 (C.A.A.F. 1998)) (mem. op.). *Accord United States v. Rosato*, 32 M.J. 93, 96 (C.M.A. 1991) (citations omitted); *United States v. Harris*, 13 M.J. 653, 655 (N.M.C.M.R. 1982) (Byrne, J., concurring). *Cf. Dobrava*, 64 M.J. at 508 (finding counsel's decision to waive appellant's right to make an unsworn statement to be ineffective).

[145] *United States v. Sowell*, 62 M.J. 150, 152 (C.A.A.F. 2005) (quoting *United States v. Tschip*, 58 M.J. 275, 276 (C.A.A.F. 2003)).

constraining the right of allocution."[146] "[S]o long as this valuable right is granted by the Manual for Courts-Martial, [the courts] shall not allow it to be undercut or eroded."[147]

Following an unsworn statement by the accused, the prosecution may not introduce rebuttal evidence to impeach the accused's credibility, but may rebut any statements of fact in the unsworn statement and the extent to which rebuttal will be allowed is within the broad discretion of the military judge.[148]

1. Appellant has failed to meet her burden to show material prejudice to a substantial right under the third prong of the plain error test

There is no dispute that based on the record in this case, CPT A.S.'s decision to make an unsworn statement without appellant's express authorization was plain and obvious error. The military judge unequivocally deemed it error at the time and CPT A.S. admitted as much days after the trial in a memorandum for record.[149] "[T]he only question that remains is whether appellant suffered prejudice to a substantial right."[150]

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[146] *United States v. Grill*, 48 M.J. 131, 133 (C.A.A.F. 1998).
[147] *Id.* (quoting *United States v. Partyka*, 30 M.J. 242, 246 (C.M.A. 1990)).
[148] *United States v. Satterley*, 55 M.J. 168, 171 (C.A.A.F. 2001); R.C.M. 1001(c)(2)(C), (d). *See also United States v. Marsh*, 70 M.J. 101, 105 (C.A.A.F. 2011) (finding no error in military judge's instruction that panel could consider "any other matter that may have a bearing on the statement's credibility").
[149] (JA at 94; JA at 148, 150, paras. 25, 33).
[150] *Girouard*, 70 M.J. at 11.

Appellant asserts that the substantial rights at issue are both the right to a "fair sentencing proceeding" and more specifically, the "personal right to decide whether or not an unsworn statement would be made."[151] As a matter of the overall fairness of the proceedings, however, appellant has failed to show in her ineffective assistance claims how the proceedings would have differed had she been present to dictate or influence CPT A.S.'s tactical decisions. Appellant indicated to CPT A.S. during their trial preparations that she wanted to make Ms. V.M. the "thrust" of her unsworn statement. Despite CPT A.S.'s decision to make an unsworn state statement without appellant's express consent, "[appellant] retained the rights accorded a defendant in a criminal trial."[152] Appellant's best mitigation evidence was presented in her absence and the impact of SFC D.M.'s rebuttal testimony was addressed by CPT A.S.'s cross-examination. CPT A.S. fulfilled his "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process."[153]

With regard to the more specific right to decide whether or not to make an unsworn statement, appellant forfeited that right when she removed herself from the trial without deciding how the

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151 (Appellant's Br. 29).
152 *Nixon*, 543 U.S. at 561 (citation omitted).
153 *Strickland*, 466 U.S. at 688 (citing *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)).

unsworn statement would be presented.[154] If any prejudice to appellant's right of allocution occurred, it was self-inflicted when she fled from trial. Under the peculiar circumstances of this case, the issue is therefore not whether there was material prejudice to appellant's right of allocution, but whether CPT A.S.'s *exercise* of that forfeited right was prejudicial.[155]

As addressed in the government's response to appellant's ineffective assistance claims, "the possibility that [a]ppellant would have received less confinement or would have avoided a punitive discharge, absent rebuttal testimony, was remote."[156] Had CPT A.S. decided not to make an unsworn statement and thereby forego the opportunity to introduce appellant's strongest mitigation evidence, it is more likely that appellant's sentencing case would have been weaker overall.

The evidence CPT A.S. presented was selectively drawn from appellant's sworn statements to highlight what was most favorable to appellant while excluding what was unfavorable. CPT A.S. would not have been able to prevent the government from rebutting factual assertions in the unsworn statement, such as

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[154] *Marcum*, 60 M.J. at 210.

[155] *See United States v. Olano*, 507 U.S. 725, 735 (1993) (declining to decide "whether the phrase 'affecting substantial rights' is always synonymous with 'prejudicial' and noting that '[t]here may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome') (citing *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)).

[156] *See Eslinger*, 70 M.J. at 201.

the nature of appellant's relationship to Ms. V.M. He presented what he thought was critical and attempted to minimize what he knew was rebuttable. Had he revealed anything less, it would have eroded the effectiveness of the evidence and had he revealed anything more, he would have run afoul of *Marcum*. The sentencing case CPT A.S. presented hewed faithfully to what appellant said she wanted to present. By exercising a forfeited right to allocution, CPT A.S. presented evidence that would not have been before the panel had he simply given up and rested on the limited testimony of the defense witnesses.

Abandoning altogether appellant's right of allocution would have been more prejudicial to appellant's sentencing case than exercising it to present mitigation evidence. The sentencing case was as fair as reasonably could be expected in appellant's absence and a substantial right was exercised as part of CPT A.S.'s efforts to ensure that appellant got the strongest defense possible. While CPT A.S.'s decision to make an unsworn statement implicated a substantial right of appellant, "we have nothing more than speculation as to the impact that [CPT A.S.'s decision] might have had on Appellant's rights under *Strickland*."[157] Accordingly, appellant has failed to establish

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[157] *Saintaude*, 61 M.J. at 181.

prejudice under both the second prong of *Strickland* and the third prong of the plain error test.[158]

2. There was no abuse of discretion when the military judge found no prejudice because he gave full consideration to *Marcum's* import and the benefit to appellant of the mitigation evidence in the unsworn statement

Both *Brewer* and *Marcum* turned on prejudice analysis and did not establish an absolute rule against the admission of an unsworn statement made without the accused's express consent. By applying the prejudice analysis of *Marcum*, the military judge identified the true danger to an accused when defense counsel makes an unsworn statement without the accused's consent. The military judge reviewed on the record the propriety of CPT A.S.'s decision to make an unsworn statement on appellant's behalf, determined that the unsworn statement was made in error, and that no prejudice resulted from the error.[159] The military judge weighed the potential benefit to appellant of admitting the strongest mitigation evidence available against the limited harm of the rebuttal testimony and properly determined that there was, on balance, no prejudice.[160]

In the situation that confronted the military judge, he had to weigh the importance of the right of allocution and its

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[158] *See United States v. Cary*, 62 M.J. 277, 279 (C.A.A.F. 2006) (analyzing prejudice under both plain error and ineffective assistance).

[159] (JA at 93-95).

[160] (JA at 94-95).

critical purpose as a vehicle for mitigation against the harm resulting from a "protestation of innocence in the face of a finding of guilt" and rebuttal testimony.[161] The military judge found that the "most of the proscriptions discussed in *Marcum* don't seem to apply" and that the unsworn statement contained "no admission of guilt and extensive evidence in mitigation and extenuation."[162] This mirrored the analysis in *Brewer*, where the Army Court found no prejudice from defense counsel's decision to make an unsworn statement without the appellant's express consent.[163] Thus, the military judge did not abuse his discretion in finding there was no prejudice as a result of CPT A.S.'s error and in allowing the panel to consider the unsworn statement. This court has "long recognized a military judge's general responsibility to ensure a fair trial in light of the unique circumstances of the case before him."[164]

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[161] (JA at 95).

[162] (JA at 94-95). Where an accused is absent from the proceedings, there is a concern that counsel may concede too much by making potentially adverse admissions of responsibility on appellant's behalf. *Cf. United States v. Barsotti*, ARMY 20080888, 2010 WL 3952939, at *1 (A. Ct. Crim. App. 20 Jul. 2010) (reviewing claim that counsel failed to adequately advise the appellant about the consequences of saying only two sentences of contrition in his unsworn statement without any other mitigation) (mem. op.).

[163] 2008 WL 8104044, at *3 n.2.

[164] *Satterley*, 55 M.J. at 171 (citing *United States v. Graves*, 1 M.J. 50, 53 (C.M.A. 1975)).

Conclusion

WHEREFORE, the Government respectfully requests that this honorable court affirm the decision of the Army court and uphold the findings and sentence.

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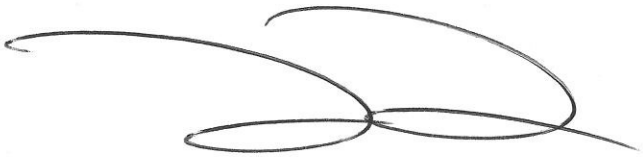

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