IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

MANUEL PALACIOS CUETO,
Airman First Class (E-3), USAF
Appellant.

USCA Dkt. No. 21-0357/AF

Crim. App. Dkt. No. ACM 39815

REPLY BRIEF ON BEHALF OF APPELLANT

SARA J. HICKMON, Maj, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 37207
Appellate Defense Division
1500 West Perimeter Rd, Ste 110
Joint Base Andrews, MD 20762
(240) 612-4770
sara.hickmon@us.af.mil

MARK C. BRUEGGER
Senior Counsel
U.S.C.A.A.F. Bar No. 34247
Appellate Defense Division
1500 West Perimeter Rd, Ste 110
Joint Base Andrews, MD 20762
(240) 612-4770
mark.bruegger.1@us.af.mil

ABHISHEK S. KAMBLI, Maj, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 35920
Appellate Defense Division
1500 West Perimeter Rd, Ste 110
Joint Base Andrews, MD 20762
(240) 612-4770
abhishek.kambli @us.af.mil

Index

TABLE OF AUTHORITIES

CASES

State Courts

Statutes, Rules, and Other Authorities

Pursuant to Rule 19(a)(7)(B) of this Honorable Court's Rules of Practice and Procedure, Airman First Class (A1C) Manuel Palacios Cueto (hereinafter Appellant), hereby replies to the Government's Answer (Gov. Ans.) concerning the granted issue, filed on April 11, 2022.

ARGUMENT

I.

TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT WHEN THEY STATED THAT THEY REPRESENTED "THE PURSUIT OF JUSTICE" AND ARGUED JUSTICE WOULD ONLY BE SERVED IF APPELLANT WAS CONVICTED AND ADJUDGED A SUFFICIENT PUNISHMENT.

1. Appellant did not waive an objection to improper argument during findings.

Prior to addressing whether the Circuit Trial Counsel (CTC) committed prosecutorial misconduct in his findings argument, the Government urges this Court to conclude that Appellant waived this issue due to trial defense counsel's "strategic decision to not object." Gov. Ans. at 24. The Government cites no authority for applying waiver in this context and, notably, its request conflicts with this Court's affirmation of "well established" precedent directing plain error review

for unobjected prosecutorial misconduct and improper argument. *United States v. Andrews*, 77 M.J. 393, 398-401 (C.A.A.F. 2018). But more fatal to the Government's position is the fact that Appellant's case was referred after January 1, 2019; thus, the Rules for Court-Martial (R.C.M.) from the *Manual for Courts-Martial* (*MCM*)*, United States* (2019 ed.) were applicable. Joint Appendix (JA) at 2, n.1. Pursuant to R.C.M. 919(c) in this *MCM*, "[f]ailure to object to improper argument before the military judge begins to instruct the members on findings shall constitute *forfeiture* of the objection." (Emphasis added). Consequently, the Government's waiver request is without merit and this Court, like the court below, should review CTC's findings argument for plain error.

2. Trial counsels' theme of "justice," as applied in this case, was clear and obvious error.

a. When viewed in the context of the entire court-martial, the Government's "justice" theme was impermissible.

The Government acknowledges that it is improper to "surgically carve" out portions of an argument without regard to its overall context. Gov. Ans. at 19 (citing *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000)). Yet, that is precisely what the Government does when it

separately analyzes each of the prosecutors' comments at the various stages of Appellant's trial. Gov. Ans. at 21 (arguing that, in voir dire, CTC's "statement on its own did not equate justice with conviction"), 23 (contending that the Assistant Trial Counsel's (ATC) comment in opening statement "was brief and not thoroughly developed"), 26 (deeming it uncertain, "[f]rom the statement alone," how CTC defined "justice" or equated it to a conviction). Even when the Government finally attempts to address the prosecutors' comments in total, it downplays their combined effect by characterizing "each of trial counsel's [sic] references to 'justice'" as "brief and not well-developed." Gov. Ans. at 32.

Properly viewed from the context of the entire court-martial, the prosecutors presented their "justice" theme every time they had an opportunity to speak directly to the panel. CTC twice made it known in voir dire that he was not a mere base-level prosecutor, but rather a *circuit* trial counsel who had travelled specifically to pursue justice in this case. JA at 066-67. ATC then opened the Government's case by urging the members to "bring justice to [A1C MT] by finding [Appellant] guilty." JA at 073. This theme culminated during closing argument

when CTC explicitly asked the panel to determine "whether justice will be served, or whether [Appellant] will be acquitted." JA at 242. He subsequently added that the prosecution's burden of proof was not "100 percent mathematical certainty" because "[i]f that were the standard, there would be no justice." JA at 264-65. And prior these statements, CTC reminded the panel how he had previously spoken to them in voir dire—the origin of the prosecution's "justice" theme. JA at 240, 264.

Based on the above, the Air Force Court of Criminal Appeals (hereinafter Air Force Court) correctly concluded that, collectively, "the messages the prosecutors sent to the court members was that the Prosecution seeks justice for the alleged victim, and justice can only mean a conviction." JA at 027. ATC concluded this improper message by capping his argument with yet another request for justice during sentencing. JA at 317-18. The "contextual lens" by which to view the prosecutors' comments is not as limited as the Government's piecemeal analysis; rather, it extends to the entirety of Appellant's court-martial.

b. Given the prosecutors' overarching "justice" theme, this Court should infer both a damaging meaning and interpretation.

The Government cites *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974) for the proposition that this Court "should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." Gov. Ans. at 14 (quoting *DeChristoforo*, 416 U.S. at 646). But in *DeChristoforo*, the Supreme Court was addressing an ambiguous remark by the prosecutor that "was but one moment in an extended trial and was followed by specific disapproving instructions" from the judge. *DeChristoforo*, 416 U.S. at 645. Those are not the circumstances here, as the prosecutors' improper comments extended from voir dire through sentencing, and were left to linger with the panel without curative instructions.

Likewise, the facts of this case belie the Government's implication that the prosecutors' conduct was the result of improvisation or a lack of planning. Gov. Ans. at 14 (citing *DeChristoforo*, 416 U.S. at 646). Trial counsels' continued reference to and reliance on "justice"

throughout the court-martial indicates their comments were intended as a cohesive and deliberate strategy. In addition, CTC had an opportunity—in rebuttal—to correct any potential "ambiguous statements" that may have been left "less than crystal clear." *DeChristoforo*, 416 U.S. at 646. He instead "did not retract his earlier assertions" (JA at 028) and denied that he provided a "false choice" at all. JA at 290. This only exacerbated the improper method by which the prosecutors had collectively referenced justice throughout the trial.

A prosecutor has just as much duty to refrain from prosecutorial misconduct as he does to obtain a conviction. *See Berger v. United States*, 295 U.S. 78, 88 (1935). Trial counsel in this case had the opportunity to correct the misconduct that occurred but instead compounded it further, and this Court should not accept the Government's invitation to so easily dismiss it.

The Government further asks this Court to "assume the panel members gave trial counsel's [sic] words a 'less damaging meaning'" because neither *expressly* stated that "doing 'justice' always or only equates to convicting the accused." Gov. Ans. at 14; *see also id.* at 23, 27-28. This ignores CTC's unambiguous assertion that the panel "will have

the ultimate decision on what happened in this case and whether justice will be served, or whether the accused will be acquitted." JA at 242. As emphasized by Judge Meginley in his dissent, this was "as if to say an acquittal would not be justice." JA at 043. ATC's opening request to "bring justice to [MT] by finding [Appellant] guilty of all charges and specifications," if not expressly stated, at least strongly suggested that A1C MT would not obtain the justice she deserves if Appellant was acquitted. JA at 294. And CTC's admonition that "there would be no justice" if the Government must prove its case to 100 percent certainty (JA at 264-65), when viewed together with other improper comments, sent a clear message that "the Prosecution [sought] justice for the alleged victim, and justice [could] only mean a conviction." JA at 27. Without any cure, the panel was left to interpret these messages in a damaging, and as discussed more fully in Appellant's brief, prejudicial fashion. Appellant's Brief (App. Br.) at 33-40, 44-46.

c. *It is well established that argument must be tied to the evidence, and may not lessen the Government's burden of proof nor inflame the passions of the members.*

The Government argues that because "the parameters for arguing for 'justice' are too unchartered [sic] in military appellate

courts and too nuanced in other appellate courts," this Court cannot find plain error. Gov. Ans. at 15. Describing how "civilian courts have reached varying conclusions on when arguing for 'justice' is permissible" (Gov. Ans. at 15), the Government cites cases from the Court of Appeals of Idaho and the Supreme Court of Mississippi as support for its position. Gov. Ans. at 22. But there are several problems with the Government's contentions.

As a starting point, Appellant does not assert that a prosecutor may *never* argue that "justice" is required. Rather, impropriety occurs when justice is equated with a conviction rather than the evidence, thereby undermining the presumption of innocence or the Government's burden of proof, or serving to inflame the passions of the panel. *See* App. Br. at 21-22; JA at 029-30. This is hardly uncharted territory.

Counsel have long been cautioned to limit arguments to evidence in the record and reasonable inferences therefrom. *See*, *e.g.*, *United States v. White*, 36 M.J. 306, 308 (C.M.A. 1993) (citations omitted); *accord Baer*, 53 M.J. at 237 (citation omitted); *United States v. Norwood*, 81 M.J. 12, 21 (C.A.A.F. 2021) (citations omitted). Likewise,

the courts are justifiably wary when the burden of proof is muddled. *See*, *e.g.*, *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016). A prosecutor is similarly barred from "unduly . . . inflam[ing] the passions or prejudices of the court members." *United States v. Frey*, 73 M.J. 245, 248 (C.A.A.F. 2014) (citations omitted). As applied here, the prosecutors broke each of these well-established parameters.

For example, in his first appearance before the panel, CTC sought to establish his bona fides by introducing himself as a "circuit trial counsel" who was stationed at a separate base but was "TDY . . . to represent the United States of America in the pursuit of justice in this case." JA at 066; *see also* JA at 067. He thus informed the members of several points not otherwise in evidence: (1) he was a senior prosecutor, (2) he had travelled from his home base to prosecute Appellant, and (3) his job was to pursue justice.[1] Also implicit in this message was that the United States of America had an interest in his pursuit, which naturally translated into obtaining Appellant's conviction. To a largely

[1] *Cf. United States v. Voorhees*, 79 M.J. 5, 10 n.3 (C.A.A.F. 2019) (noting how the senior trial counsel's self-bolstering statements in voir dire and during rebuttal "may have falsely suggested to the panel that trial counsel was so experienced he could select and try only winning cases.").

inexperienced panel[2] composed of individuals sworn to protect the nation, this non-evidence embodied an improper appeal to their passions. Yet, CTC did not stop there.

At the beginning of his closing argument, he reminded the panel of voir dire and then discussed how the duties of the prosecutors "will be over" and the panel's "duties will begin." JA at 241-42. In other words, trial counsel's pursuit of justice would conclude and the panel would inherit this mantle. And to dispel any confusion as to this latter point, CTC explicitly questioned "whether justice will be served, or whether [Appellant] would be acquitted." JA at 242. None of this was tied to the evidence, it muddled the Government's burden, and it further inflamed the panel's passions—if they did not convict Appellant, then justice would never be served.

The cases the Government cites in opposition do not involve similar facts, nor do they universally condone a prosecutor's request for justice. In *State v. Adams*, for instance, the Court of Appeals of Idaho declined to find error because counsel's demand for justice was in context to addressing facts that demonstrated the accused's guilt. 147

[2] *See* App. Br. at 37-38.

Idaho 857, 864 (Ct. App. 2009). This is distinguishable from both the present circumstances and a case referenced in *Adams*, wherein the same appellate court determined it was "outside the boundaries of proper closing argument" for the prosecutor to urge either explicitly or implicitly for a verdict based on sympathy for a victim or concerns for public safety. *State v. Beebe*, 145 Idaho 570, 575-76 (Ct. App. 2007). The Government's reliance on *Caston v. State*, 823 So.2d 473 (Miss. 2002) is even more unavailing, as it provides a limited recitation of facts by which to glean any true comparison. Conversely, the cases referenced in Appellant's brief better address the issues at play here (*see* App. Br. at 26-28), to include citations to authority prohibiting irrelevant and inflammatory arguments—issues that underlie the prosecutors' "justice" theme. *See*, *e.g.*, *United States v. Quesada-Bonilla*, 952 F.2d 597, 601 (1st Cir. 1991) (citing *United States v. Capone*, 683 F.2d 582, 585 (1st Cir. 1982); *United States v. Maccini*, 721 F.2d 840, 846 (1st Cir. 1983)).

The Government also fails in its attempt to distinguish *United States v. Condon*, No. ACM 38765, 2017 CCA LEXIS 187, at *53 (A.F. Ct. Crim. App. Mar. 10, 2017) (unpub. op.), *aff'd*, 77 M.J. 244 (C.A.A.F.

2018).[3] Gov. Ans. at 22. Specifically, the Government omits how the trial counsel in *Condon* "repeatedly referred to the military judge's instructions and implored the members to follow the law." JA at 371. The same did not occur here, nor were trial counsels' comments limited to just closing argument. Moreover, the lower court acknowledged "that referencing the jury's societal obligation is inappropriate if it suggests that the panel base its decision on the impact of the verdict on . . . a victim." *Id*. This recognition further underscores how the prosecutors' comments constituted plain error, despite the Government's arguments to the contrary.

In sum, when the statements made by the prosecution in this case are viewed in the context of the entire trial, they rise to the level of plain error. Their "justice" theme was pervasive and continued throughout trial. If viewed in isolation, as the Government attempts to do (*see* para. 2(a) *supra*), this conduct may not necessarily amount to plain error. But when properly viewed as a whole, the message to the members was clear: justice meant Appellant's conviction. This message was not sufficiently tied to evidence in the record, muddled

[3] *See* JA at 353.

the burden of proof, and served to unduly inflame the passions of the panel. It is well established that such conduct is impermissible, and this Court should find plain error as a result.

3. Harmless beyond a reasonable doubt is the appropriate standard of review because the improper argument in this case was of a constitutional dimension.

Contrary to the Government's contention, the Air Force Court applied the correct prejudice standard: harmless beyond a reasonable doubt. Gov. Ans. at 32. As the lower court aptly concluded, this standard was appropriate because the "prosecutor's argument for justice can be interpreted as arguments to reduce the Government's burden of proof to something lower than proof beyond a reasonable doubt based upon the evidence and to disregard the presumption of innocence." JA at 029 (citing *Hills*, 75 M.J. at 357).

The Government misses the mark when it argues that because CTC did not put forth a different standard of proof, there was no error of constitutional dimension. Gov. Ans. at 32-33. This argument focuses on CTC's statement that the "Government has no obligation to prove its case with 100 percent mathematical certainty. . . If that were the standard there would be no justice." *Id.* at 33 (quoting JA at 264-

65). Once again, however, the Government is carving out portions of the argument without regard to the overall context. While that statement in and of itself may not necessarily be problematic, when combined and viewed in relation to the prosecutors' other improper statements on "justice," the errors are not only plain and obvious, they rise to constitutional dimension.

The Government effectively asks this Court to depart from its "long-standing and settled precedent" in applying the harmless beyond a reasonable doubt standard "when assessing prejudice for a forfeited constitutional error under Article 59, UCMJ." *United States v. Tovarchavez*, 78 M.J. 458, 464 (C.A.A.F. 2019). Specifically, the Government asserts that this Court should not find constitutional error unless there "was a reasonable likelihood that the panel members did interpret trial counsel's statements to lower the burden of proof." Gov. Ans. at 35. As its catalyst, the Government cites *Tyler v. Cain*, 533 U.S. 656 (2001)—a case whose focus was on whether a new rule, which applied to jury instruction, was retroactive on collateral review. This Court has only cited *Tyler* once in its decisions, in a quote from a separate Supreme Court case relating to the retroactivity of new

constitutional rules,[4] and obviously did not find it controlling with respect to the prejudice standard for unpreserved constitutional errors. *Tovarchavez*, 78 M.J. 458. Instead, this Court maintained that the harmless beyond a reasonable doubt standard articulated in *Chapman v. California*, 386 U.S. 18 (1967) controls. *Tovarchavez*, 78 M.J. at 460. The Air Force Court was therefore justified in applying this standard for its prejudice analysis, and this Court should follow suit.

4. The prosecutorial misconduct materially prejudiced Appellant.

a. Material Prejudice in Findings

As discussed in Appellant's brief, the Air Force Court erred in its analysis that Appellant was not materially prejudiced by trial counsel's improper argument. App. Br. at 33-40, 44-46. In response, the Government largely adopts the reasoning of the lower court regarding the first and second factors from *United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005). Gov. Ans. 35-38. Respectfully, Appellant maintains his disagreement with the assessment below that the prosecutors' misconduct was only "moderately severe" and that "several measures

[4] *United States v. Loving*, 64 M.J. 132, 138 (C.A.A.F. 2006) (quoting *Schiro v. Summerlin*, 542 U.S. 348, 352 (2004)).

were taken to cure the [prosecutor's] misconduct." App. Br. at 33-38.

Turning to the third *Fletcher* factor, the Government describes the prosecution's evidence as "strong." Gov. Ans. at 38. Notably, not even the lower court's majority labeled it such. JA at 029 (characterizing the weight of evidence as "moderate"). And the fact that Judge Meginley deemed the evidence both factually and legally insufficient with respect to "Specification 2 of the Charge, which alleged that Appellant made sexual contact upon MT by touching her stomach with his hand," further undercuts the Government's contention. JA at 030.

The Government next argues that "[t]he panel's mixed findings show that the panel was less swayed by trial counsel's arguments and more swayed by the weight of the evidence." Gov. Ans. at 40. But as the lower court properly observed with respect to the lone acquittal: "The record indicates Appellant was charged with committing an act while [A1C MT] was incapacitated by alcohol, but the evidence supported a finding that [A1C MT] instead was asleep, a point civilian defense counsel returned to more than once during his closing argument." JA at 29, n.27. This technical error serves to explain why

the panel was so willing and able to discount the lack of proof for Specification 2. Indeed, it is more than reasonable to conclude that the panel, when confronted with weak evidence on one offense and a dispositive technical issue on another, ignored what evidentiary holes it could in order to uphold the "justice" demanded by the prosecutors.

In sum, the significant evidentiary concerns regarding Specification 2, as noted in Judge Meginley's dissent, should give this Court pause. JA at 030-36. With the additional pressure exerted by the prosecution on the members to uphold justice, while simultaneously muddling the burden of proof, there is a reasonable possibility that but for the prosecutors' misconduct, there would be a different outcome in findings.

b. Material Prejudice in Sentencing

This Court recently recognized that it is more difficult to assess prejudice at sentencing because while "there is a binary decision to be made with respect to the findings (guilty or not guilty), there is a broad spectrum of lawful punishments that a panel might adjudge." *United States v. Edwards*, ___ M.J. ____, No. 21-0245/AF, slip. op. at 14 (C.A.A.F. April 14, 2022). This Court concluded that it is therefore

harder to show that a "sentencing error did not have a substantial influence on a sentence." *Id.* Here, the Government argues that "appellant's relatively light sentence" should reassure this Court that he was sentenced based on the evidence alone. Simply because the members did not sentence Appellant to ATC's "unfathomable recommendation"[5] does not detract from the probability that the improper argument resulted in a harsher sentence for Appellant. Given the spectrum of lawful punishments that the panel could have adjudged, they still chose 90 days of hard labor, the maximum grade reduction, and a punitive discharge for relatively minor offenses. The inflammatory nature of the ATC's misconduct (*see* App. Br. at 40-45), which harkened back to the prosecution's duty to ensure "justice"—here a harsh sentence—casts significant doubt that the sentence was based on the evidence alone.

WHEREFORE, Appellant respectfully requests that this Honorable Court set aside the findings and sentence.

[5] JA at 043 (Meginley, J., dissenting).

II.

TRIAL DEFENSE COUNSEL WERE INEFFECTIVE.

1. Defense counsel have a duty, in general, to provide advice on unsworn statements.

The Government broadly contends that defense counsel have no duty to advise an accused on what to include in an unsworn statement. Gov. Ans. at 17, 47. The implication from this argument is that the Defense here did not err in failing to advise Appellant on particular matters since they had no duty to advise at all. But the Government's predicate position is inaccurate.

This Court has long recognized "that an accused servicemember's right of allocution is considered an important right at military law." *United States v. Martinsmith*, 41 M.J. 343, 349 (C.A.A.F. 1995) (citing *United States v. Provost*, 32 M.J. 98, 100 (C.M.A. 1991); *United States v. Rosato*, 32 M.J. 93, 96-97 (C.M.A. 1991)). And while this "valuable right" is certainly "personal to the accused," this is a far cry from absolving defense counsel of *any* responsibility in advising an accused as to the statement's contents. *United States v. Marcum*, 60 M.J. 198, 209 (C.A.A.F. 2004) (citations omitted). On the contrary, this Court has opined that "[d]efense counsel undoubtedly has a duty to consult

with the client regarding important decisions, including questions of overarching defense strategy." *United States v. Larson*, 66 M.J. 212, 218 (C.A.A.F. 2008) (quoting *Florida v. Nixon,* 543 U.S. 175, 187 (2004)) (other citations and internal quotation marks omitted). This duty of consultation naturally extends to allocutions, which represent not just an important decision in terms of whether to provide a statement at all, but what message to deliver to the sentencing authority and how it can advance the Defense's sentencing strategy. *See*, *e.g.*, *United States v. Davis*, 60 M.J. 469 (C.A.A.F. 2005) (addressing ineffective assistance of counsel, but generally acknowledging how the Defense can present its sentencing strategy through an unsworn statement).

Air Force regulations likewise state that a defense counsel "should advise the accused with complete candor concerning *all aspects* of the case." Air Force Instruction (AFI) 51-110, *Professional Responsibility Program*, Attachment 7, Air Force Standards for Criminal Justice, Standard 4-5.1(a) (Dec. 11, 2018) (emphasis added). Moreover, in sentencing, a "[d]efense counsel should alert the accused to the right of allocution and to the possible dangers of making a

judicial confession in the course of allocution which might prejudice an appeal." *Id*. at Standard 4-8.1(d). Consequently, it is Appellant's position that while an accused ultimately controls what to include in an unsworn statement, an Air Force defense counsel has a regulatory duty, in addition to what is imposed by precedent, to advise on the contents of an unsworn statement. *Cf. United States v. Bishop*, ARMY 20150441, 2017 CCA LEXIS 365, at *15 (A. Ct. Crim. App. May 26, 2017) (unpub. op.)[6] (recognizing that although the decision to make an unsworn statement is personal to the accused, "when the defense strategy on sentencing is to deliver key pieces of information through the unsworn statement, failure to adequately plan and prepare appellant for his unsworn statement is not a sound strategy.").

2. Mandatory administrative discharge is an appropriate matter for sentencing, and trial defense counsel were ineffective for failing to present this matter to the members.

In challenging Appellant's comparison of mandatory administrative discharges to the loss of retirement benefits (*see* App. Br. at 53-54), the Government claims this Court has previously differentiated between the two. Gov. Ans. at 45. The Government does

[6] App. A. at *15.

not cite any authority for this specific assertion,[7] and Appellant has been unable to locate any case directly on point. That said, the Government identifies one occasion where this Court's predecessor characterized a mandatory discharge as a collateral consequence. Gov. Ans. at 45 (citing *United States v. Bedania*, 12 M.J. 373 (C.M.A. 1982). However, this case turned on whether the accused was correctly advised regarding the consequences of his guilty plea, not on whether a mandatory administrative separation was a collateral consequence that could not be considered for the purposes of sentencing. *Bedania*, 12 M.J. at 376.

As Appellant noted in his initial brief, he does not contend that *any* administrative separation after a court-martial is relevant for

[7] The two cases the Government cites after its contention are *United States v. Tschip*, 58 M.J. 275 (C.A.A.F. 2003) and *United States v. Talkington*, 73 M.J. 212 (C.A.A.F. 2014). Gov. Ans. at 45. *Tschip* involved an accused who referenced the "possibility" of an administrative discharge in his unsworn statement (58 M.J. at 277), while *Talkington* had an accused who similarly discussed his "personal belief" that he would be discharged, rather than any mandatory process initiated by his commanders. 73 M.J. at 214. *United States v. Quesinberry*, 31 C.M.R. 195 (U.S.C.M.A. 1962), which the Government cites on page 46, also did not deal with mandatory administrative separations; rather, the Court was reviewing the refusal to advise the court-martial of the administrative effects of a bad-conduct discharge.

sentencing. App. Br. at 54. But he was facing the initiation of a *mandatory* administrative separation, which was directly related to whether he received a punitive discharge. As such—akin to the loss of retirement benefits—it was a proper matter for the sentencing authority to consider, and his defense counsel were ineffective in failing to present it. To the extent the Government attempts to minimize the mandatory nature of the discharge based on a potential waiver (Gov. Ans. at 44-45), Appellant respectfully rests on his belief that this waiver process was illusory, and particularly so in his case. App. Br. at 54, n.17. Likewise, Appellant maintains that even if this Court believes mandatory administrative discharges to be collateral matters, the military judge had broad discretion to issue tailored instructions addressing the matter. App. Br. at 55.

3. The change in the law regarding sex offenses was a proper consideration for sentencing and trial defense counsel were ineffective for failing to present the matter before the members.

With respect to Appellant's unique position of being convicted of two offenses *after* Congress saw fit to remove them from Article 120, UCMJ (*see* App. Br. at 56-57), the Government counters that because this is a "case of first impression, counsel could not be constitutionally

ineffective for failing to raise a new claim." Gov. Ans. at 51 (citing *United States v. Beague*, ___ M.J. ___, No. 21-0183/NA, slip. op. at 17 n.12[8] (C.A.A.F. March 3, 2022)). This position overvalues the complexity of the matter and undervalues the ethical obligations of defense counsel.

The Air Force Rules of Professional Responsibility require a defense counsel to provide competent representation to a client through "legal knowledge, skill, thoroughness, and preparation reasonably necessary for representation." AFI 51-110, Rule 1.1. Like their Government counterparts, trial defense counsel had an "obligation to monitor statutory changes and not once, but twice" they were put "on notice of the change in the law with the 2017 [National Defense Authorization Act (2017 NDAA)] and the President's Executive Order." JA at 038, n.8. Moreover, it was not as if the legal landscape changed surreptitiously; rather, the modifications at issue were heralded as including the "most significant reforms to the Uniform Code of Military Justice since it was enacted six decades ago." Amy Bushatz, *Need to Know: These New UCMJ Laws Start Jan. 1*,

[8] The Government's brief erroneously cites to footnote 17.

Military.com (December 31, 2018), https://www.military.com/daily-news/2018/12/31/need-know-these-new-ucmj-laws-start-jan-1.html (quoting Senator John McCain). Competent defense attorneys would have researched the statute their client was alleged to have violated, including any changes thereto, prior to trial. Their failure to do so here was deficient.

The Government nevertheless surmises that counsel were not ineffective in failing to highlight this change in the law because it would have been inadmissible under R.C.M. 1001 and was a collateral consequence. Gov. Ans. at 50-51. Under this reasoning, the Government again asserts that this Court should not find counsel ineffective for failing to advise a client to include "irrelevant and inadmissible matters." *Id.* at 51. However, given the specific facts of Appellant's case, evidence of this change in the law was mitigation that trial defense counsel should have presented to the members.

A matter in mitigation is "introduced to lessen the punishment to be adjudged by the court-martial, or to furnish grounds for a recommendation of clemency." *Talkington*, 73 M.J. at 215, n. 2 (citing R.C.M. 1001(c)(1)(B)). An accused has a broad right to present

mitigation evidence to a court-martial during sentencing. *United States v. Becker*, 46 M.J. 141, 143 (C.A.A.F. 1997). So long as the evidence in mitigation is relevant to reducing a pending punishment or to provide grounds for a recommendation of clemency, that evidence may be introduced by the accused and considered by the sentencing authority. *Id.* (citing R.C.M. 1001(c)(1)(B)).

Here, the change in the law provided relevant facts that would have reduced the punishment to be adjudged by the members and provide potential grounds for a clemency recommendation. At the time Appellant committed the offenses he was later convicted of, Congress had revised Article 120, UCMJ. *See* App. Br. at 56-57; JA at 036-37. But for the law's delayed implementation—which occurred three-and-a-half months after Appellant's offenses were committed—the charged crimes would not be considered sexual offenses and would no longer require sex offender registration. Failure to introduce evidence that would be of value to an accused in extenuation and mitigation is ineffective assistance of counsel. *United States v. Boone*, 49 M.J. 187, 196 (C.A.A.F. 1998). This information was clearly of value to Appellant. It lessened the seriousness of the offenses significantly.

Without this information, the members were allowed to "unreasonably believe that Appellant had committed a serious sex offenses." JA at 040.

4. Appellant was prejudiced by the ineffective assistance of counsel.

The Government concludes that Appellant cannot demonstrate prejudice because a panel would not have been able to consider what the Government casts as solely collateral consequences—his sex offender registration, mandatory administrative discharge, and the change of the law. Gov. Ans. at 52. For the reasons described above, the mandatory administrative separation, as well as the change in the law, were not collateral matters. Furthermore, just as counsel is ineffective for failing to present matters in extenuation and mitigation that would be of value to the accused, so too is defense counsel ineffective for failing to advise on matters to be included in an unsworn statement that would be of value in Appellant's sentencing case. These matters were material to the specific facts of Appellant's case and the failure to present these matters to the members materially prejudiced Appellant.

a. Failure to present the mandatory administrative discharge to the members materially prejudiced Appellant.

Trial defense counsel's failure to present the fact that Appellant would face a mandatory administrative discharge, regardless of the sentence adjudged, left the members with an erroneous belief. Namely, that should they not adjudge a punitive discharge for Appellant, he would remain in the Air Force. This was no doubt an unpleasant thought for the members given ATC's repeated attacks labeling Appellant a "predator"[9] and casting him as someone who took advantage of another Airman. JA at 312-18. Had the members known Appellant would face a mandatory administrative separation if not punitively separated, there is a reasonable probability they would not have spared him the lifelong stigma of bad conduct discharge for relatively minor offenses.

Even assuming *arguendo* that this matter was considered a collateral consequence, trial defense counsel should have advised

[9] *See* App. Br. at 40-42. Contrary to the Government's assertion that Appellant attempted to "shoehorn other complaints outside the granted issue," this matter was included in Appellant's Supplement to the Petition for Grant of Review (App. Supp.). *Compare* Gov. Ans. at 30 *with* App. Supp. at 42.

Appellant to include this matter in an unsworn statement. Given the specific facts of Appellant's case and the erroneous belief that the members were left regarding Appellant's future in the Air Force, this information was clearly important.

b. Failure to advise Appellant to include sex offender registration and the change in the law prejudiced Appellant.

The Government deems it "inconceivable that counsel could be ineffective for failing to advise a client [to] include such matters from an unsworn statement when ultimately the sentencing authority cannot consider those matters." Gov. Ans. at 48 (citing *Talkington*, 73 M.J. 215-16). However, as explained by Judge Meginley in his dissent, "*Talkington* does not advise military judges to instruct members they are to disregard sex offender references." JA at 040 (citing *Talkington*, 73 M.J. at 217). Instead, this Court held that the military judge had *discretion* to temper an unsworn statement with appropriate instructions. *Talkington*, 73 M.J. at 217. Ultimately, while "the military judge's discretion in choosing whether to instruct upon such 'collateral' matters is broad, he or she is required to give legally correct instructions that are tailored to the facts and circumstances of the

case.'" *Id.*

By failing to advise Appellant on the inclusion of sex offender registration, defense counsel not only deprived him of the opportunity to provide additional details about how sex offender registration personally affected him, they deprived him of the opportunity to request a tailored instruction. The instruction is especially important given the extraordinary facts of this case. "Appellant's case exposes a reality that not all sex-related offenses are created the same to warrant such harsh collateral consequences, particularly given Appellant's crimes are no longer sex offenses." JA at 041.

Additionally, it is worth noting that this Court has recognized the tension between an accused's right to include matters in an unsworn statement and the military judge's responsibility to provide accurate instructions. *Talkington* 73 M.J. at 216. While members are required to give due consideration to an accused's unsworn statement, they are typically then instructed to ignore what may be the "most significantly stigmatizing and longest lasting effect arising from the fact of conviction." *Id.* at 218 (Baker, C.J., concurring). In Chief Judge Baker's concurring opinion, "because sex offender registration is

addressed to the purposes of sentencing, in many cases it is also appropriate as mitigation." *Id.* He ultimately concluded that it was "not good enough to call it collateral and leave it to the members to sort out," it instead required a "tailored and appropriate instruction." *Id.*

Chief Judge Baker's concurring opinion underscores the importance of tailored and appropriate instructions, and given the extraordinary circumstances Appellant found himself in, it was what was needed in this case. There was no strategic reason why defense counsel would not advise Appellant to include the sex offender registration. There was nothing to lose and everything to gain in this regard. Instead, trial defense counsel acquiesced to the standard instruction that made Appellant's situation even worse—it essentially told the members that Appellant *could have* provided the information about being a sex offender to the members in an unsworn statement but failed to do so—causing a mistaken belief that this was unimportant to him. This was clearly not the case, as evidenced by Appellant's reference to these matters in his clemency submission. JA at 041, n.10.

As discussed above, the change in the law was not inadmissible

as the Government suggests. This was evidence in mitigation that was of significant value to Appellant's sentencing case. As such, trial defense counsel had a duty to at least attempt to provide this information to the members; whether it through an exhibit, testimony, instructions, or, at minimum, Appellant's unsworn statement. Appellant was prejudiced for his counsel's failure to present this matter to the members.

The members were ultimately left with an incomplete picture that could have easily been remedied by trial defense counsel. Instead, ATC was provided "ammunition to argue what can only be described as an unreasonable sentencing argument." JA at 039. For example, in arguing for a punitive discharge, ATC posited how a punitive discharge is reserved for "the most serious offenses." JA at 314. In an attempt to highlight the seriousness of Appellant's offenses, he then stated that in this case each offense carried seven years confinement—"that's what Congress says." *Id.* The fact that Congress had already revised the statute that Appellant was convicted under, making it no longer even a sex offense, at the time the offense was committed—would have easily rebutted Appellant's argument.

In the end, Appellant received a bad conduct discharge for "a half-second kiss and an indeterminate stomach touching." JA at 042. Trial defense counsel could have and should have put up a better fight by casting the charged offenses in their true light. There is a reasonable probability that, but for the Defense's failure in this regard, the result would be different.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the sentence.

Respectfully Submitted,

SARA J. HICKMON, Maj, USAF
U.S.C.A.A.F. Bar No. 37207
Appellate Defense Division
1500 W. Perimeter Rd, Ste. 1100
Joint Base Andrews, MD 20762
(240) 612-4770
sara.hickmon@us.af.mil

MARK C. BRUEGGER
Senior Counsel
Appellate Defense Division
1500 West Perimeter Rd, Ste. 1100
Joint Base Andrews, MD 20762
(240) 612-4770
mark.bruegger.1@us.af.mil

ABHISHEK S. KAMBLI, Maj, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 35920
Appellate Defense Division
1500 West Perimeter Rd, Ste 110
Joint Base Andrews, MD 20762
(240) 612-4770
abhishek.kambli @us.af.mil

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Appellate Government Division on April 21, 2022.

CERTIFICATE OF COMPLIANCE WITH RULES 24(d) and 37

This brief complies with the type-volume limitation of Rule 24(c) because it contains 6,266 words.

This brief complies with the typeface and type style requirements of Rule 37.

Respectfully submitted,

SARA J. HICKMON, Maj, USAF
U.S.C.A.A.F. Bar No. 37207
Appellate Defense Division
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4770
sara.hickmon@us.af.mil

Appendix A

United States v. Bishop

United States Army Court of Criminal Appeals

May 26, 2017, Decided

ARMY 20150441

Reporter
2017 CCA LEXIS 365 *

UNITED STATES, Appellee v. Warrant Officer One TONY L. BISHOP United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Motion granted by *United States v. Bishop, 76 M.J. 440, 2017 CAAF LEXIS 750 (C.A.A.F., July 26, 2017)*

Review denied by *United States v. Bishop, 2017 CAAF LEXIS 1035 (C.A.A.F., Oct. 26, 2017)*

Prior History: [*1] Headquarters, Eighth Army Mark A. Bridges, Military Judge Colonel Craig A. Meredith, Staff Judge Advocate.

Counsel: For Appellant: Captain Daniel C. Kim, JA (argued); Lieutenant Colonel Charles D. Lozano, JA; Captain Heather L. Tregle, JA; Captain Katherine L. DePaul (on brief); Lieutenant Colonel Melissa R. Covolesky, JA; Major Andres Vazquez Jr., JA; Captain Katherine L. DePaul, JA (on reply brief); Colonel Mary J. Bradley, JA; Major Christopher D. Coleman, JA; Captain Katherine L. DePaul, JA; Captain Daniel C. Kim, JA (on supplemental brief).

For Appellee: Captain Cassandra M. Resposo, JA (argued); Colonel Mark H. Sydenham, JA; Lieutenant Colonel A. G. Courie, III, JA; Major Melissa Dasgupta Smith, JA; Captain Christopher A. Clausen, JA (on brief); Colonel Mark H. Sydenham, JA; Lieutenant Colonel A. G. Courie, III, JA; Major Cormac M. Smith, JA; Captain Cassandra M. Resposo, JA (on supplemental brief).

Judges: Before MULLIGAN, FEBBO, and WOLFE Appellate Military Judges.

Opinion by: FEBBO

Opinion

MEMORANDUM OPINION

FEBBO, Judge:

Appellant alleges his counsel were ineffective during trial and cites multiple deficiencies in performance. We reject all but one. The defense counsels' strategic and tactical decisions during the merits **[*2]** and presentencing were reasonable. We agree defense counsel were deficient in preparing appellant for his unsworn statement during the presentencing phase of trial. However, appellant has failed to establish prejudice from the deficiency.

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of two specifications of assault consummated by a battery upon a child under sixteen years of age, in violation of *Article 128*, Uniform Code of Military Justice, *10 U.S.C. § 928 (2012)* [hereinafter UCMJ]. The convening authority approved the adjudged sentence of a dishonorable discharge and confinement for six months.[1]

---

[1] Appellant is a Warrant Officer One. Since he was not a commissioned officer at the time of trial, the only authorized discharge options available to the military judge were no punitive discharge or a dishonorable discharge. The military judge did not have the option of considering a dismissal or bad-conduct discharge as part of the sentence. *See* Rule for Courts-Martial [hereinafter R.C.M.] 1003(b)(8)(B).

We review this case under *Article 66, UCMJ*. Appellant assigns two errors, alleging ineffective assistance of counsel[2] and unreasonable multiplication of charges.[3] The first merits discussion but no relief; the second merits brief discussion in a footnote but no relief. We have considered matters personally asserted by appellant under *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*; they do not warrant relief.[4]

BACKGROUND

A. Findings

In April 2014, appellant was assigned with his family to the Republic of Korea. Appellant's step-son BB was fifteen years old, had special needs, and had long-term **[*3]** behavioral health issues. On 3 April 2014, appellant learned BB was bragging in public about smoking marijuana and skipping school. When BB returned to their apartment, appellant and his spouse (BB's mother) confronted BB about his misbehavior. BB was not apologetic and smirked at his mother. In response, appellant became upset and went to retrieve a belt to punish his stepson. Appellant physically punished BB previously by laying him on a bed and striking him with a belt.

However, appellant could not find a belt, so he unplugged an electrical extension cord. Appellant used the extension cord to strike BB multiple times on his shoulder and arm. His step-son ran from the apartment screaming and ran down the hall. Appellant chased after his step-son and intentionally pushed him. This push caused BB to hit the floor and injure his face. Afterward, appellant dragged his step-son down the hall. Neighbors heard yelling in the hallway, saw appellant drag his step-son, and afterward observed blood in the hallway. Neighbors called the police and Emergency Medical Services (EMS).

When EMS arrived, BB lay unconscious and had difficulty breathing due to significant amounts of blood in his nose and **[*4]** mouth and was transported to the hospital for treatment. As a result of the assault, BB had four fractures to his face, swelling of the face, linear lacerations[5] on his left shoulder and arm, and injuries to his right wrist. BB required a dental procedure to save his teeth. BB told medical providers appellant got angry with him, hit him with an extension cord, and threw him

---

[2] Appellant was represented by a civilian defense counsel, Mr. GH, and a military defense counsel, Captain (CPT) JS. At the time of trial, CPT JS was on active duty and detailed as appellant's U.S. Army Trial Defense Service (TDS) military defense counsel.

[3] We do not find an unreasonable multiplication of charges. The two specifications of assault were aimed at distinctly separate criminal acts. Specification 1 was focused on appellant striking BB's shoulder and arm with an electrical cord inside their apartment. Specification 2 was focused on appellant pushing BB into a wall outside their apartment and injuring his face. The two specifications did not exaggerate appellant's criminality and did not unfairly increase appellant's punitive exposure. There was no evidence of prosecutorial overreach or abuse in drafting the charges. *See United States v. Quiroz, 55 M.J. 334, 338-39 (C.A.A.F. 2001)*

[4] Appellant asserts that his defense counsel were ineffective during the merits portion of trial for not conducting a competent investigation, not interviewing witnesses, and not presenting evidence of his step-son's prior false allegations of abuse. We have reviewed the record of trial and do not find that defense counsel were deficient during the findings phase of trial. Even if we were to assume deficiency, appellant has not shown prejudice. The government's evidence of the assault, to include medical evidence, photos of BB, eyewitness testimony, and appellant's admissions to law enforcement, was overwhelming. "[I]n any case in which the evidence is overwhelming, the choice as to which course of defense is best pursued is quintessentially a tactical one, not to be second guessed under *Strickland*." *Hunt v. Smith, 856 F.Supp. 251, 257 (D. Md. 1994)* (citing *Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*). Appellant also asserts his defense counsel were ineffective for advising appellant to be tried by military judge alone after the judge ruled against appellant's request for an expert assistant in the area of false confessions. Defense counsels' strategy and appellant's agreement to be tried by a military judge alone were reasonable given the charges and defense strategy at trial. Finally, appellant also asserts there was dilatory post-trial processing of his record of trial. We find no due process violation caused by the government taking 205 days to complete the 753-page record of trial.

[5] At trial, a government expert on child abuse and general pediatrics testified that BB had several "looped abrasions" on his body. The marks were made by a "flexible cord or looped object" and could not have been caused accidentally.

on the floor, which caused the injuries to BB's face and teeth. Appellant's spouse stated to the medical care provider that her son tripped on his flip-flops when he ran from the apartment and stumbled into the wall by accident.

An agent from the Air Force Office of Special Investigations (OSI) questioned appellant. At first, appellant denied hitting his step-son. Appellant eventually confessed to the assault and stated when he could not find his belt, he unplugged an extension cord from the wall and used it to strike BB. BB began screaming and ran from the apartment. Appellant chased BB, and when BB would not stop appellant pushed BB twice, who fell to the floor. Appellant then dragged his step-son down the hallway.

The defense theory at trial was appellant gave a false confession to OSI and his step-son fabricated **[*5]** the allegations. At trial, BB recanted his prior statements about appellant assaulting him and testified that he was actually injured riding his skateboard and slipping in the hallway. He testified that he made up the allegations of physical assault by appellant since he was angry for getting grounded. Appellant also testified on the merits and denied he assaulted BB.

At trial, the government attempted to introduce evidence of prior domestic violence against the step-son. The defense was successful in excluding any prior child abuse allegations during trial.

The record shows a defense team who devoted significant effort toward contesting, and even offering alternative explanations for, the forensic medical evidence and appellant's admissions to law enforcement. The matters submitted by appellant on appeal show an appellant who was confident that recantations would result in an acquittal.

B. Sentencing

Prior to beginning the presentencing phase at the trial, the military judge confirmed directly with appellant that he understood his rights to present evidence in extenuation and mitigation, including his right to testify or make an unsworn statement. He also confirmed appellant had fully **[*6]** discussed his rights with his defense counsel.

The only presentencing evidence presented by the government was appellant's Officer Record Brief (ORB).

The defense presentencing case included calling BB's therapist and appellant making a twelve-line unsworn statement. Appellant's entire unsworn statement is as follows:

> Sir, I respect your opinion. I do love my family very, very much. These felony convictions are really, really going to cause a big issue in my life. I know you're a judge, so I know you know the effect that they have. I just really would like the opportunity to make a difference in my family's life and continue being there for my family. I've been the sole provider for my family for the last 15 years we've been together. I just think it's going to have a significant impact for me to be away from them for an extended amount of time. I'll also like the opportunity to continue to serve in the Army; although, that may not work out. I'd like that opportunity. That's all I have to say.

After appellant made his unsworn statement, the government argued for four years confinement and a dishonorable discharge. The civilian defense counsel's presentencing argument to the military judge **[*7]** focused on minimizing appellant's assaults, shifting focus to appellant's spouse for problems in the family, advocating for the family to be reunited after nine months of being separated, and avoiding any sentence to confinement.

C. Appellant's Affidavit on Appeal

On appeal, to support his allegation of ineffective assistance of counsel, appellant submitted three

affidavits[6] in support of his claim that his civilian defense counsel Mr. GH[7] failed to adequately prepare for the presentencing phase of trial. Appellant makes three broad claims. First, appellant states that he was not aware of the importance of presenting witnesses to testify on his behalf. If he had known, he swears he would have called presentencing witnesses to testify about his good duty performance and would have assembled a "Good Soldier Book" for the military judge to consider. Second, appellant states his defense counsel failed to present evidence about the effect of a punitive discharge on his retirement and medical benefits. Appellant states his defense counsel's argument for minimal confinement made it appear appellant cared more about confinement than a punitive discharge. Third, appellant states his defense counsel **[*8]** did not help him prepare his unsworn statement.

D. Defense Counsel Affidavits

In response to appellant's allegation of ineffective assistance of counsel, we ordered the government to obtain affidavits from appellant's two trial defense counsel. The affidavits state, in pertinent part:

Mr. GH stated he asked appellant for a list of sentencing witnesses that served with him during his military career. He also advised appellant there was a risk of calling good military character witnesses during the merits. Namely, cross-examination could reveal incidents of prior domestic violence against appellant's step-son. Mr. GH's normal practice is for the client to prepare a Good Soldier Book. In appellant's case, it was the defense counsel's strategy for appellant to testify about "his career, his less than stellar job performance, and lack of military achievement, so that [Mr. GH] could dovetail this [sic] into the false confession defense." The false confession defense was focused on appellant's "low intelligence" which was a "large risk factor to false confessions." In response to the questions about whether counsel assisted appellant in preparing his unsworn statement and whether Mr. GH explained **[*9]** the importance of the presentencing phase of trial, Mr. GH's answer provided no details and was simply "Yes."

Mr. JS, then CPT JS at the time of trial, stated appellant frequently ignored the professional advice of his defense counsel. Mr. JS explained he prepared appellant for presentencing, but appellant's spouse convinced appellant he would be acquitted and would not need a presentencing case. Appellant would defer to his spouse's advice. For example, his spouse advised against appellant accepting a beneficial plea agreement. Defense counsel and the government discussed a possible plea agreement that would have protected appellant's retirement benefits after serving a period of confinement. Mr. JS stated appellant's defense counsel prepared appellant to testify about his career and effect of a discharge on his family. They also prepared appellant's spouse to testify about the effects of a discharge and loss of retirement benefits on the family. Mr. GH asked appellant for a list of sentencing witnesses. Mr. JS followed up with appellant, but he provided no potential witnesses to testify on his behalf. Mr. JS and appellant discussed the risks of using character witnesses during the **[*10]** merits. Rather than prepare a "Good Soldier Book," the defense counsel "made a strategic decision to present these matters through Appellant's testimony." This strategy allowed the defense to utilize appellant's

[6] After this court ordered oral argument, appellant submitted an affidavit along with a copy of the "Good Soldier Book" he would have wanted the military judge to consider prior to sentencing. Appellant also submitted a document and affidavit prepared by the U.S. Army Audit Agency which calculated the estimated retirement benefits appellant would receive during his life expectancy if he retired as a Warrant Office One with twenty years of service.

[7] Appellant's civilian attorney, Mr. GH, was the lead defense counsel. Appellant's affidavits and criticisms of ineffective assistance of counsel are focused on his civilian defense counsel's alleged deficiencies. However, "we evaluate the combined efforts of the defense as a team rather than evaluating the individual shortcomings of any single counsel." *United States v. Garcia, 59 M.J. 447, 450 (C.A.A.F. 2004)*.

"testimony as evidence of a false or coerced confession, which was essential in both the merits and pre-sentencing phase of this case." Defense counsel spent a "great deal of time preparing Appellant for all testimony." However, "appellant's spouse attempted to interfere and influence his statement in a manner which made her look better." "Appellant refused to execute an unsworn statement in an appropriate or helpful manner."

Pursuant to *United States v. Ginn, 47 M.J. 236 (C.A.A.F. 1997)*, we have analyzed whether a post-trial evidentiary hearing is required. After applying the *Ginn* principles, we find such a hearing is not required in this case. *Id. at 248*. Considering the third *Ginn* factor, appellant's affidavit is factually adequate, and the government's affidavits do not contest the fact appellant desired to submit extenuation and mitigation evidence at sentencing to avoid a punitive discharge. Defense counsels' affidavits also state their strategy was to introduce extenuation and mitigation evidence through appellant's unsworn statement. **[*11]** Any factual disputes about the presentencing phase of trial are not relevant in deciding the legal issue of ineffective assistance of counsel on appeal.

LAW AND ANALYSIS

A. Test for Ineffective Assistance of Counsel

Military accused have a constitutional and statutory right to the effective assistance of counsel at trial. *United States v. Bolkan, 55 M.J. 425, 427 (C.A.A.F. 2001)* (citing *U.S. Const. amend. VI*; *UCMJ art. 27, 10 USC § 827*; *United States v. MacCulloch, 40 M.J. 236 (C.M.A. 1994)*; *see also United States v. Gooch, 69 M.J. 353, 361 (C.A.A.F. 2011)*. "The right to counsel is probably the paramount right in ensuring that the adversarial system functions properly." *Bolkan, 55 M.J. at 427*. This constitutional right applies "not only to the merits phase of trial, but to each critical stage in a criminal proceeding where substantial rights of a criminal accused may be affected," which includes the sentencing phase of a military court-martial. *United States v. Dobrava, 64 M.J. 503, 505 (Army Ct. Crim. App. 2006)* (citing *United States v. Alves, 53 M.J. 286, 289 (C.A.A.F. 2000))*.

We review claims that an appellant did not receive effective assistance of counsel de novo. *United States v. Akbar, 74 M.J. 364, 379 (C.A.A.F. 2015)*; *United States v. Datavs, 71 M.J. 420, 424 (C.A.A.F. 2012)*. "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." *United States v. Green, 68 M.J. 360, 361-62 (C.A.A.F. 2010)* (citing *Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674, (1984))*. This test results in a "doubly deferential" review of counsel's performance. *Cullen v. Pinholster, 563 U.S. 170, 171, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011)* (internal quotations and citation omitted).

Under the first *Strickland* **[*12]** prong, appellant must show "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the *Sixth Amendment*." *466 U.S. at 687*. The relevant issue is whether counsel's conduct failed to meet an objective standard of reasonableness or whether it was outside the "wide range of professionally competent assistance." *Id. at 690*. In determining this issue, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id. at 689*. The presumption of competence is rebutted by "a showing of specific errors made by defense counsel" that were "unreasonable under prevailing professional norms." *United States v. McConnell, 55 M.J. 479, 482 (C.A.A.F. 2001)*.

When assessing *Strickland*'s second prong for prejudice, we require a showing "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable

probability is a probability sufficient to undermine confidence in the outcome." *Strickland, 466 U.S. at 694*. That requires a "substantial," not just "conceivable," likelihood of a different result. *Harrington v. Richter, 562 U.S. 86, 112, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011)*. "An appellant must establish a factual foundation for a claim of ineffectiveness; second-guessing, sweeping generalizations, and hindsight **[*13]** will not suffice." *United States v. Davis, 60 M.J. 469 (C.A.A.F. 2005)* (citing *United States v. Key, 57 M.J. 246, 249 (C.A.A.F. 2002)*; *Alves, 53 M.J. at 289*; *United States v. Gray, 51 M.J. 1, 19 (C.A.A.F. 1999)*.

As far as presentencing procedures, ineffective assistance of counsel can occur when counsel fail to introduce evidence that would be of value to the accused in extenuation and mitigation. *United States v. Boone, 49 M.J. 187, 196 (C.A.A.F. 1998)*.

B. Deficient Performance During Presentencing

In short, appellant asserts the defense counsel were completely ineffective in preparing for presentencing and throughout the presentencing phase of trial. His criticisms are focused on four areas of the defense's presentencing case.

1. Preparation and Presentation of Appellant's Unsworn Statement

On appeal, appellant asserts his short unsworn statement of twelve lines clearly showed he was not adequately prepared by his defense counsel. Although we find that appellant's defense counsel were deficient in preparing and presenting appellant's unsworn statement, it is not solely based on the length of appellant's unsworn statement. Many short, focused unsworn statements can be very effective and persuasive during sentencing. Similarly, even when an appellant does not submit any unsworn statement, it does not automatically establish prejudicial error.

The defense counsel stated in their affidavits their strategy was to present **[*14]** appellant's military service through his unsworn statement. Appellant's civilian defense counsel asserts he intended not to introduce the appellant's military records since they could have undermined the defense strategy that appellant gave a false confession to OSI. However, the defense sentencing strategy of using appellant's unsworn statement to testify about his military service was not supported by the record. First, defense counsel did not ask appellant any questions about his career and military service during the merits or presentencing phase of trial. Second, any concern about undermining appellant's false confession defense became moot when the military judge found him guilty of the charges. We find while it may have made sense to limit the introduction of some military service evidence during findings, to not undermine the defense, it made little sense to limit military service evidence once appellant was convicted. Military judges understand the difference between arguments and evidence presented during the merits and presentencing phases of trial. Even if there was a concern about conflicting testimony on the merits and sentencing about appellant's intelligence and susceptibility **[*15]** to giving a false confession, defense counsel had over eighteen years of military service to draw upon and highlight to the military judge.

The "decision to make an unsworn statement is personal to the accused." *United States v. Marcum, 60 M.J. 198, 209 (C.A.A.F. 2004)*. Strategic and tactical decisions are within the sole discretion of the defense counsel. *United States v. Dobrava, 64 M.J. 503, 505 (Army Ct. Crim. App. 2006)*. However, when the defense strategy on sentencing is to deliver key pieces of information through the unsworn statement, failure to adequately plan and prepare appellant for his unsworn statement is not a sound strategy.

Appellant's unsworn statement of twelve lines did not highlight his assignments, schools, awards, deployments, family situation, and desire to avoid a punitive discharge. Mr. GH states that appellant

failed to execute their agreed-upon sentencing strategy and deliver an effective unsworn statement. Sometimes a well-prepared sworn or unsworn statement can fail in execution, tone, demeanor, and include surprise testimony. In those situations, we would not find deficient performance by defense counsel.

Our criticism of the defense counsels' performance in this case is focused on the preparation and strategic and tactical decisions made *before* appellant's unsworn statement, **[*16]** and not on the twelve-line outcome during trial. Defense counsels' reasonable concern about possibly opening the door to government rebuttal of facts made during an unsworn statement[8] should have made defense counsel even more zealous in their preparation of appellant's unsworn statement.

Defense counsel did not assist appellant in preparing a written, unsworn statement that could have been read during sentencing and would not have invited rebuttal. The defense counsel did not prepare questions for the appellant to answer during his unsworn statement that would have been designed to limit rebuttal.

From our review of the record and briefs, to include Mr. GH's lack of detail in his affidavit about preparing appellant for sentencing and the unsworn statement, we find appellant's defense counsel were deficient in preparing appellant for his unsworn testimony.

2. Presentation of Evidence on Retirement and Medical Benefits

Appellant is critical of his defense counsel for not submitting a valuation of his retirement during sentencing. Considering the record of this case, appellant's defense counsel were not deficient by failing to present evidence to the military judge about the potential loss **[*17]** of retirement and medical benefits and the effect such a loss would have on appellant's family.

For a soldier close to being retirement eligible, presenting the projected future value of a soldier's retirement pay is relevant and admissible during sentencing. *United States v. Luster, 55 M.J. 67 (C.A.A.F. 2001)*; *see also United States v. Boyd, 55 M.J. 217, 221 (C.A.A.F. 2001)*. The exclusion of evidence of expected financial loss may result in prejudicial error. *Id.* As a general practice for a soldier close to retirement, it is good advocacy to present evidence of the soldier's retirement and medical benefits to underscore the soldier's proximity to retirement and the projected economic loss if adjudged a punitive discharge.

Based on appellant's ORB, the arguments by government and defense counsel, and testimony by appellant, the military judge was fully aware appellant had over eighteen years of service and was close to being eligible for retirement. Appellant testified on the merits and informed the military judge he enlisted in the Army and had been on active duty since 1996. The ORB specifically showed appellant entered the Army in September 1996 and had 228 months of active federal service. Appellant's charge sheet included his current pay.

Members of the military, to include the military **[*18]** judge and military panels, generally know that a soldier is eligible for retirement at twenty years of active federal service and the two and a half percent per year of service formula used to calculate retirement pay. More specifically, military judges routinely instruct panels on the effect of a punitive discharge on a soldier's pay and entitlements. *See* Dep't of Army, Pam. 27-9, Legal Services: Military Judge's Benchbook [hereinafter Benchbook], ch. 2, n. "effect of punitive discharge on retirement benefits" (10 September 2014). Appellant's defense counsel were not deficient in

[8] Prior to sentencing when asked by the military judge, appellant acknowledged he understood his right to make a sworn or unsworn statement. Appellant stated he understood an unsworn statement could be made orally, in writing, or both. He also acknowledged the unsworn could be made personally, by counsel on his behalf, or both. Appellant acknowledged the government could offer evidence to rebut any statement of fact in an unsworn statement.

failing to provide the military judge with a U.S. Army Audit Agency (USAAA) calculation of the projected value of appellant's retirement.

3. Presentation of Presentencing Witnesses and Evidence

Appellant is critical of his defense counsel for not putting on additional presentencing witnesses and is also critical of the one defense witness called during presentencing.

Appellant claims his counsel never explained the importance of presentencing witnesses. Appellant asserts if had known about the importance of presentencing witnesses, he would have requested the presence of "numerous individuals" from his career **[*19]** that could have testified about his good duty performance. However, the record does not support appellant's assertion he would have presented favorable sentencing witnesses at trial. The military judge explained to appellant that he could present sentencing evidence to include documentary evidence and sentencing witnesses. Appellant stated on the record he understood his rights to present extenuation and mitigation evidence at trial.

Appellant's counsel, Mr. JS, asserts the defense did not call sentencing witnesses because appellant did not provide defense counsel the names of potential witnesses. This rational by defense counsel is normally not very persuasive. Defense counsel have a professional obligation to zealously represent their client and cannot simply rely on their client to provide information for sentencing. *United States v. Weathersby, 48 M.J. 668, 672 (Army Ct. Crim. App. 1998)* ("Counsel do not satisfy their professional obligation to zealously represent their client's interests during sentencing merely by reacting to information supplied by a reluctant client."). However, the record on appeal establishes appellant has not met his burden of showing defense counsel were deficient by failing to present favorable sentencing witnesses.

As part **[*20]** of his R.C.M. 1105/1106 post-trial matters,[9] appellant included only one clemency letter from a civilian who attended his church. On appeal, appellant asserts he would have called two captains and three warrant officers as presentencing witnesses. "When claiming ineffective assistance of counsel for failure to present the testimony of a particular witness, an appellant must specifically allege the precise substance of the witness' missing testimony." *United States v. Clemente, 51 M.J. 547, 550-51 (Army Ct. Crim. App. 1999)* (citing *United States Russell, 48 M.J. 139, 141 (C.A.A.F. 1998)*; *United States v. Moulton, 47 M.J. 227, 229 (C.A.A.F. 1997)*, *cert. denied, 522 U.S. 1114, 118 S. Ct. 1048, 140 L. Ed. 2d 112 (1998))*. To support a claim for ineffective assistance of counsel, facts must be included in a statement by someone with personal knowledge that is a sworn affidavit or a declaration made under penalty of perjury for this court to consider the statement on appeal. *United States v. Cade, 75 M.J. 923, 929 (Army Ct. Crim. App. 2016)*, *pet. denied, 76 M.J. 133 (C.A.A.F. 2017)*.

Appellant has not provided affidavits from the witnesses of what they would have testified about on his behalf. Appellant has failed to establish counsel were ineffective for failing to call defense witnesses during presentencing. *Clemente, 51 M.J. at 550*. Additionally, defense counsel had a reasonable tactical reason for not calling character witnesses to discuss appellant's military career.

Appellant's counsel were concerned calling military character witnesses on the merits **[*21]** could open the door to a "did you know line of questioning by the government, which would have revealed a violent past (i.e., prior CDVs) [Childhood Domestic Violence]." This same concern would apply to cross-examination of presentencing witnesses. Defense counsels' strategy to limit the government's ability to introduce unfavorable sentencing evidence was sound. *United States v.*

---

[9] Appellant was represented by a different defense counsel when he submitted his R.C.M. 1105/1106 post-trial clemency matters.

Perez, 64 M.J. 239, 244 (C.A.A.F. 2006) (defense counsel's decision to reference "good soldier" testimony given during findings portion of trial, without calling them to the stand during sentencing was not ineffective assistance; counsel avoided dangers of cross-examination by prosecution).

The record shows the government was aware of prior misconduct, which included a family history of domestic violence against BB and appellant's failure to report his spouse's abuse of BB. Appellant's statement to OSI included admissions appellant was aware of prior violence by his wife against BB. The government unsuccessfully attempted to introduce appellant's knowledge of the prior incidents of child abuse by appellant's spouse. During the merits phase of the trial, the defense counsel was successful in limiting Military Rule of Evidence [hereinafter Mil. R. Evid.] 404(b) evidence.

The R.C.M. 1105/1106 post-trial **[*22]** matters also included a twenty-two-page excerpt of appellant's Official Military Personnel File (OMPF). These matters included his ORB, official photo, Meritorious Unit Commendation, and Non Commissioned Officer Evaluation Reports (NCOERs). On appeal, appellant asserts he would have presented a "Good Soldier Book" to the military judge. The "Good Soldier Book" includes documents and pictures not contained in his OMPF. If presented as testimony at trial, the "Good Soldier Book" would not need to be disclosed as reciprocal discovery under R.C.M. 701 and could not be used against appellant on the merits. Introducing the "Good Soldier Book" at sentencing would have required the military judge to relax the rules of evidence for its admission. *See* R.C.M. 1001(c)(3). Relaxing the rules of evidence would have similarly exposed appellant to the risk of opening the door to government evidence not favorable to appellant. Therefore, we do not find the appellant's defense counsel deficient in not submitting a "Good Soldier Book" to the military judge.

A review of the record supports the defense counsels' contention that their strategy was based on a concern about opening the door to appellant's and his spouses' history of **[*23]** abuse against BB.[10] Through diligent pretrial litigation, appellant's counsel successfully excluded from trial acts and omissions by appellant of other incidents of violence against BB.[11]

Accordingly, the trial and sentencing proceeded as if the charged offenses were a one-time event instead of the tragic culmination that was perhaps more accurate. Having successfully portrayed appellant in this manner, defense counsel would be rightfully cautious in opening the door to government rebuttal.

4. Defense Counsel Preparation of Ms. Jessica Acker's Testimony

Appellant asserts his trial defense counsel were deficient in preparing the defense's sole presentencing witness other than appellant. We do not find appellant's defense counsel were deficient in preparing Ms. Acker for her presentencing testimony.

Appellant's counsel called Ms. Acker, who was BB's therapist and also a witness during the merits phase of trial. She testified she provided approximately thirty-five therapy sessions for BB

---

[10] We do not and did not consider allied documents outside the record of trial. *Cade, 75 M.J. at 928*. However, the allied documents provided to the defense counsel contained appellant's prior criminal history, which include three arrests, one of which was for an assault causing bodily injury on a family member. Medical records showed BB was hospitalized seven times for injuries, including a one month-long hospitalization. A military police report showed appellant was titled for willfully disobeying a lawful order of a superior commissioned officer. Family Advocacy Systems of Records (FASOR) showed appellant was the subject in two child abuse incidents, one of which involved BB.

[11] A Letter of Concern from appellant's battalion commander was admitted for the limited purpose of establishing appellant's motive to fabricate to OSI. *See generally* Army Reg. 600-37, Personnel—General: Unfavorable Information, ch. 3 (19 Dec. 1986). The Letter of Concern was for reports of two prior domestic disturbances and appellant's wife driving without a license in Korea.

over seven or eight months. She did not believe that the abuse actually occurred. She testified about BB's behavioral health issues and concluded it would be detrimental to BB if appellant were removed **[*24]** from the home. On cross-examination during presentencing, Ms. Acker stated she was not aware appellant was convicted of assaulting BB and the assault resulted in broken bones to BB's face.

As a follow-up to the cross-examination, the military judge asked her if her opinion would change knowing that appellant was found guilty of abusing BB. In response, Ms. Acker testified "[i]f it [the abuse] was a known fact and I believed it to be true, then it would definitely change my opinion."

The presentencing hearing started immediately after findings were announced and the government rested after admitting appellant's ORB into evidence. In hindsight, it may have been prudent for defense counsel to ask for a short recess. This recess would have allowed them to inform Ms. Acker about the results of trial before she testified and determining if the conviction changed her opinion. However, trials are fluid and pretrial statements sometimes are different from trial testimony. Witnesses are sworn to provide truthful testimony and the answers may be a surprise.

Normally, unforeseen conflict in witness testimony at trial is not deficient performance by a defense counsel. Ms. Acker was not called to discuss **[*25]** the effects of a punitive discharge on appellant and the family. Her purpose was to limit any confinement. Ms. Acker's testimony was effectively used to support the defense sentencing argument that BB had medical issues and the family needed to be reunited after months of separation. The defense counsel were ultimately successful in limiting appellant's sentence to confinement.

5. Presentencing Argument by Defense Counsel

Appellant asserts during the presentencing argument his civilian defense counsel suggested appellant lied under oath. During the trial, appellant testified he did not assault or abuse his step-son. He alleged that his step-son's injuries were caused by a skateboard accident earlier that day and his son tripping into the wall outside their apartment. During the presenting argument, Mr. GH described the events of the assault as "a bad night," and stated appellant made "mistakes" and may have gone too far in punishing his step-son. Appellant asserts the defense counsel should have avoided mentioning the guilty findings. Instead, appellant believes the sentencing argument should have focused on the impact of a punitive discharge on the appellant and his family. Appellant **[*26]** speculates the military judge would not have sentenced appellant to a punitive discharge if presented a sentencing argument focused on appellant's prior service and impact of a punitive discharge on appellant and his family.

As an initial matter, appellant does not include in his affidavits any factual basis that would support his contention the defense counsel's sentencing argument improperly suggested he lied under oath and the military judge was unaware of the financial impact of a punitive discharge on appellant and his family. It is appellant's responsibility to "bring to an appellate court's attention facts rather than mere speculation" that trial defense counsel's conduct was deficient. *United States v. Russell, 48 M.J. 139, 140-141 (C.A.A.F. 1998)*. We do not find appellant's civilian defense counsel improperly inferred that appellant lied to the court and was not deficient in his presentencing argument to the court.

The presentencing argument is a tactical decision properly made by a defense attorney at trial. *Brookhart v. Janis, 384 U.S. 1, 8, 86 S. Ct. 1245, 16 L. Ed. 2d 314 (1966)* (Harlan, J., writing separately) ("A lawyer may properly make a tactical determination of how to run a trial even in the face of his client's incomprehension or even explicit disapproval."). "An attorney undoubtedly has a duty to **[*27]** consult with the client regarding important decisions, including questions of overarching defense strategy. That obligation,

however, does not require counsel to obtain the defendant's consent to every tactical decision." *Florida v. Nixon, 543 U.S. 175, 187, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004)* (internal quotations and citations omitted). It is clear the civilian defense counsel's strategy during the presentencing argument was to minimize appellant's offenses to a single "bad night" and to minimize appellant's sentence to confinement. Considering the government argued for four years confinement—and appellant received six months—the defense counsel's argument to limit the term of confinement was effective.

Given the military judge's findings, and that both assaults occurred within a short period of time on the same day, defense counsel's tactical decision on how to argue presentencing was not deficient. Defense counsel argued against confinement so that the family could be reunited. The defense counsel did not state the appellant lied to the court and did not concede a punitive discharge should be adjudged. Military judges, in particular, understand arguments during findings and sentencing may differ. As stated above, military judges routinely instruct panels **[*28]** on the effects of a punitive discharge. Defense counsel was not deficient in failing to remind the military judge about the adverse effects of a punitive discharge during presenting argument.

C. Appellant Has Not Established Prejudice

As outlined above, defense counsels' overall strategy in the presentencing phase of trial was not deficient. The defense counsel made reasonable tactical decisions to exclude government rebuttal evidence.

Appellant argues the military judge would not have adjudged a punitive discharge if his defense counsel presented more extenuation and mitigation evidence and appellant provided more emphasis in his unsworn statement on the effect of a punitive discharge on appellant and his family. Although we do find appellant's defense counsel deficient in failing to prepare appellant for his unsworn statement, we do not find there was a reasonable probability the results of the proceedings would have been different.

An "unsworn statement is an authorized means for an accused to bring information to the attention of the court." Benchbook, ch. 2. Even without a fully prepared unsworn statement, the military judge was provided considerable information during findings and **[*29]** sentencing about appellant's military career, family situation, and close proximity to retirement. In his unsworn statement, appellant acknowledged the military judge knew the effect of the convictions. Appellant explained that over the last fifteen years he was the sole provider for his family. Appellant informed the military judge he wanted to continue to serve in the Army.

Appellant's ORB and testimony at trial provided details about appellant's military career for the military judge to consider. The ORB showed appellant had eighteen years and eight months of active federal service and was deployed seven times. His awards—including six Army Commendation Medals—were included on his ORB. In addition, the ORB also included appellant's completion of military schools and courses. The charge sheet included appellant's date of initial entry on active duty and his monthly basic and foreign duty pay.

During the merits phase of trial, the military judge asked questions about the appellant's career. Appellant explained his general technical (GT) score was 110, he completed high school, and completed some college courses. Appellant explained he enlisted in 1996 as a Patriot Missile Crewmember. **[*30]** During the next fourteen years of active duty, appellant was promoted to the rank of sergeant first class and attended two advanced non-commissioned officer (NCO) courses. Appellant discussed his over four years of warrant officer duties as a "Patriot Tech Tactician." Although appellant tried to minimize his selection as a warrant officer and performance at Warrant

Officer School, it is apparent from his NCO promotions, selection to attend advanced schools, and selection as a warrant officer, that appellant received good performance evaluations.

In appellant's case, the military judge knew about appellant's eighteen years and eight months of military service at time of trial and the effects of a punitive discharge on appellant and his family. The military judge also knew about BB's medical and behavioral health issues. He found appellant guilty of serious offenses and the defense counsel were successful in limiting the sentence to confinement argued by the government.

Finally, omnipresent in this case is the tactical concern that the government was waiting in the wings with rebuttal evidence of additional misconduct by appellant. Appellant's attorneys successfully excluded this evidence **[*31]** from both findings and sentencing. This tactic may have left appellant with a spartan presentencing presentation, but we do not question the wisdom of that decision with the benefit of appellate hindsight. *See Brookhart, 384 U.S. at 8*.

Therefore, we do not find appellant has shown prejudice resulting from his defense counsel's deficiency during the presentencing hearing.

CONCLUSION

The findings of guilty and sentence are AFFIRMED.

Senior Judge MULLIGAN and Judge WOLFE concur.
