25 October 2013

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES
Appellee

v.

MICHAEL L. KNAPP II
Airman First Class (E-4), USAF
Appellant

Crim. App. Dkt. No. 37718
USCA Dkt. No. 13-0512/AF

REPLY TO GOVERNMENT'S ANSWER

ISAAC C. KENNEN, Capt, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 34153

NICHOLAS D. CARTER, Captain, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 33957

Appellate Defense Division
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Suite 1100
Andrews AFB, MD 20762-6604
(240) 612-4770
isaac.kennen@us.af.mil

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES	)	
	)	
Appellee	)	
	)	**REPLY TO GOVERNMENT'S ANSWER**
v.	)	
	)	
	)	USCA Dkt. No. 13-0512/AF
Airman First Class (E-3)	)	
MICHAEL L. KNAPP II	)	Crim. App. Dkt. No. 37718
U.S. Air Force	)	
	)	
Appellant	)	

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

COMES NOW the Appellant, by and through counsel, pursuant to Rule 19(a)(7)(B) of this Honorable Court's Rules of Practice and Procedure, and files this reply to the government's answer.

In this brief, Appellant aims only to draw this Honorable Court's attention to select aspects of the government's answer that we take issue with; the Appellant does not intend in this reply to specify every point of contention therein. Appellant respectfully requests that this Court not presume any issues that Appellant allows to stand unchallenged are thereby conceded.

STATEMENT OF FACTS

In addition to the facts previously put forth in Appellant's Brief in Support of Petition Granted, the Appellant generally concurs with the government's statement of facts. However, that concurrence is with several exceptions. First, on

page 4 of its answer, the government states, "It was a monotone sound that continued for a few minutes and when it stopped, [A1C SP] heard a male voice say several times 'are you okay, are you awake?' (J.A. at 252.)" Appellant contests the government's assertion that A1C SP heard "a monotone sound," and has been unable to find anything in the record to support such a conclusion. The record, at J.A. 251-52, reflects that A1C SP heard a female moaning for two to four minutes in a manner that led him to believe that there was "possibly sex going on." J.A. at 591.

Second, the Appellant takes issue with the government's selective quotation of the transcript of the Appellant's interrogation by Air Force Office of Special Investigations (AFOSI) Special Agent (SA) DP, which appears as footnote 1, on page 6 of the government's answer. A full-context reading of that portion of the interrogation, found at J.A. 281-84, shows that AFOSI used compound questions, reverse-oriented questions, and received a series of non-conclusive assents from Appellant. The government's selective quoting of the interrogation transcript omitted questions and answers that evidenced ambiguity as to whether A1C ELS was unconscious when Appellant began having sexual intercourse with her.

ADDITIONAL ARGUMENT

THE MILITARY JUDGE (1) PLAINLY ERRED BY INITIALLY ALLOWING "HUMAN LIE DETECTOR" TESTIMONY, (2) ABUSED HIS DISCRETION BY ALLOWING FURTHER ADMISSION OF "HUMAN LIE DETECTOR" TESTIMONY OVER DEFENSE OBJECTION, AND (3) ERRED BY NOT PROVIDING A CURATIVE INSTRUCTION ON THE "HUMAN LIE DETECTOR" TESTIMONY.

The government's argument relies on the seven factors for assessing human lie detector claims that the Air Force Court enumerated in *United States v. Jones*, 60 M.J. 964, 969 (A.F. Ct. Crim. App. 2005). It is notable that the Government's answer does not discuss this Court's more recent and controlling decision in *United States v. Mullins*, 67 M.J. 113 (C.A.A.F. 2010), wherein similar factors were prescribed as part of a "context test." Appellant's Brief in Support of Petition Granted discussed the *Mullins* "context test" factors at-length; they are not readdressed herein.

Concerning *Jones* factor 1, the government trial counsel was the first to elicit the offensive testimony. Government's brief does not contest that issue, as such a finding of error is supported.

With regard to *Jones* factor 2, the government asserts that the defense theory of the case, that Appellant's eventual confession to AFOSI after repeated protestations of innocence was unreliable because it was the result of an excessively-long interrogation, precludes relief. That argument is untenable first because it ignores the fact that any other defense theory

was foreclosed by government trial counsel when, in opening statement, the government told the members that they would receive evidence from multiple sources showing that Appellant had given conflicting statements to AFOSI and that his eventual "confession" came only after hours of interrogation. J.A. 16. The defense had little other option at that point than to attempt to offer an explanation for that evidence. The government's attempt to rely on the rationale put forth in a dissenting opinion, *see United States v. Kasper,* 58 M.J. 314, 320 (C.A.A.F. 2003) (CRAWFORD, J., dissenting), fails in that its own use of improper evidence in its opening statement necessitated the defense's natural response thereto. As such, the government may not rely on defense's opening statement as justification for then having SA DP offer improper human lie detector testimony.

Even if defense counsel had been the first to reference the lengthy interrogation and Appellant's conflicting accounts, such should not justify the admission of evidence as pseudo-scientific and hugely prejudicial as human lie-detector testimony. Such an outcome in any case serves neither the interests of truth-finding nor justice. Therefore, *Jones* factor 2 resolves in Appellant's favor.

Appellant takes legal issue with *Jones* factor 3, which the government contends on page 16 of its answer "leans heavily" in its favor: "the defense's failure to object or request

cautionary instructions." *Id.* at 969. The Air Force Court purports to derive this factor from this Court's decision in *United States v. Halford*, 50 M.J. 402, 404 (C.A.A.F. 1999). Such reliance is misplaced.

The issue in *Halford* was not human lie detector testimony, but rather whether an expert's testimony regarding counter-intuitive victim behavior failed the Military Rule of Evidence (M.R.E.) 403 balancing test. *Id.* at 404. The expert in *Halford* never offered an opinion as to whether any witness in the trial was being truthful, but merely testified that apparently counter-intuitive behavior by a victim is not necessarily inconsistent with an offense having occurred. *Id.* Given those facts, this Court found in *Halford* that the defense counsel's failure to object to such testimony under M.R.E. 403 constituted forfeiture absent plain error, and this Court then found no plain error. *Id.*

In contrast, in this case SA DP testified to having received specialized training allowing him to determine that Appellant's assertions of innocence were a lie. That testimony was patent human lie detector evidence and therefore this case is completely unlike *Halford*. This Court ruled in *Kasper*, 58 M.J. at 318 that, "[i]t is a basic principle of criminal practice that human lie detector evidence is not admissible at trial." Assuming that military judges are expected to know "basic principles of criminal practice," they must be required

to *sua sponte* exclude and cure inadmissible human lie detector testimony whether an objection is made or not. Therefore, to the extent that the Air Force Court used *Jones* factor 3 in reaching its conclusion to find no prejudice in this case, that was legal error.

That being said, even if *Jones* factor 3 were to be applied in this case, it favors Appellant since trial defense counsel objected to SA DP's human lie detector testimony, while that witness was still on the stand, albeit during redirect examination when trial counsel again elicited problematic testimony. J.A. 112-14.

The government's assertion that *Jones* factor 4 resolves in its favor is untenable. Specifically, the government's assertion at page 16 of its brief that "SA DP was testifying generally about Appellant's demeanor and behavior during the interview" rather than offering an opinion as Appellant's truthfulness defies the facts. In its own brief, the government quotes SA DP's testimony at trial that he observed nonverbal cues from Appellant, that he received training to "pick up on nonverbal discrepancies," and that those supposed discrepancies were important to him because they "indicate to me that there is some form of deception going on." *See* Final Brief On Behalf Of The United States, pages 12-13. A more specific conclusion about the truth or falsity of another witness' statements would be hard to come by. Therefore, the government's assertions

otherwise notwithstanding, *Jones* factor 4 weighs in favor of Appellant.

The government's brief does not contest that *Jones* factor 5 supports a finding of prejudice since SA DP was testifying as to a central issue in the case – whether Appellant's protestations of innocence could be believed. The government also did not contest that *Jones* factor 6 supported a finding of prejudice since this was a trial before members.

Finally, the government's assertion that *Jones* factor 7 resolves in its favor is untenable. The military judge completely failed to give any on-the-spot curative instructions after any of SA DP's illicit testimony, even after defense counsel objected. Then, the judge's instructions given at the close of findings did not cure the explicit and illicit human lie detector testimony, but instead exacerbated the prejudice. The government's brief does not address at all the military judge's "false exculpatory statement" instruction. *See* J.A. 268-69. Rather than instructing the members to disregard SA DP's testimony, the military judge used the false exculpatory statement instruction to advise the members that they could consider "the conduct of an accused . . . upon being informed that a crime may have been committed or upon being confronted with a criminal charge . . . in light of other evidence in the case[,] in determining the guilt or innocence of the accused." J.A. 269.

In summary, if this Court is inclined to utilize the *Jones* factors in deciding this case, they all weigh in favor of Appellant.

WHEREFORE, Appellant prays this Court reverse the decision below and set aside the findings and the sentence.

Respectfully submitted,

ISAAC C. KENNEN, Captain, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 34153

NICHOLAS D. CARTER, Captain, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 33957

United States Air Force
Appellate Defense Division
AFLOA/JAJA
1500 West Perimeter Rd., Ste 1100
Andrews AFB, MD 20762-6604
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on 25 October 2013.

Respectfully submitted,

ISAAC C. KENNEN, Captain, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 34153

NICHOLAS D. CARTER, Captain, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 33957

United States Air Force
Appellate Defense Division
AFLOA/JAJA
1500 West Perimeter Rd., Ste 1100
Andrews AFB, MD 20762-6604
(240) 612-4770