IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee, v. Omar M. Gomez Boatswain's Mate Second Class (E-5) United States Coast Guard, Appellant.	APPELLANT'S REPLY BRIEF USCA Dkt. No. 16-0336/CG Crim. App. No. 1394

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

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Argument

Appellant, Boatswain's Mate Second Class (BM2) Omar M. Gomez, United States Coast Guard (USCG), through counsel, hereby replies to the United States' Answer of June 01, 2016.

1. The Government asserts evidence of pregnancy complications was not offered to show BM2 Gomez was responsible for them.

The Government attempts to minimize the impact of Seaman (SN) MS and SN SW's pregnancy complications by asserting they "did not state that [BM2 Gomez] caused their pregnancy complications. Rather they explained how the stress that [BM2 Gomez] did cause impacted their lives." (Appellee's Brief at 10.) This is disingenuous based on the record and the Government's concessions before the court below.

First, SN SW unquestionably asserted BM2 Gomez was responsible for her premature delivery. She said she suffered from pre-eclampsia due to stress and the trial process caused her stress. (J.A. at 41.) Seaman MS's testimony was less clear. Nonetheless, it appears she was linking stress caused by "this case" to her miscarriage. (J.A. at 46-47.)

Before the court below, the Government conceded SN SW's testimony blamed BM2 Gomez for her premature delivery and was

"possibly beyond the scope of proper aggravation evidence." (Appellee's Brief before CGCCA at 20.) After conceding the error, the Government went on to argue the error was not plain and obvious. The Government cannot now assert there was no error at all.

With regard to SN MS, the Government argued below it was "difficult to tell from her short testimony whether she was worried about the stress of the trial on her remaining unborn twin, or whether she felt the stress had in fact cause[d] [sic?] the miscarriage of the first twin." (Appellee's Brief before CGCCA at 20.) The Government cannot now argue it is clear she was only testifying about stress affecting her surviving twin.

If, as the Government now argues, SN MS and SN SW were not blaming BM2 Gomez for their pregnancy complications, then their testimony about the complications was not relevant. R.C.M. 1001(b)(4) limits aggravation evidence to "circumstances directly relating to or resulting from the offenses of which the accused has been found guilty." If the witnesses were merely testifying about the stress they experienced as a result of XYZ and were not linking the stress to the complications, then the complications should not have been brought up

at all. They were brought up. Even assuming for the sake of argument the witnesses did not intend to blame BM2 Gomez, the statements still imply BM2 Gomez bears responsibility. The implication is inflammatory.

2. Violations of M.R.E. 403 can be plain error.

The Government correctly cites to *United States v. Greene*, 21 M.J. 633, 636 (A.C.M.R. 1985) for the proposition that a military judge is not required to *sua sponte* conduct an M.R.E. 403 balancing test with regard to each piece of evidence absent objection. Yet when an M.R.E. 403 violation rises to the level of plain error, the military judge must intervene. *United States v. Quarles*, 25 M.J. 761, 776-77 (N-M. Ct. Crim. App. 1987).

Petty Officer Gomez does not assert, as the Government seems to argue (Appellee's Brief at 14), the military judge erred by failing to conduct an M.R.E. 403 balancing test. Rather, consistent with *Quarles,* Appellant argues the military judge erred by failing to intervene when it was plain and obvious the prejudicial impact of the evidence far outweighed any probative value. The issue is the obviousness of the M.R.E 403 violation, not the failure to conduct a balancing test.

Conclusion

For the foregoing reasons and those previously stated, the decision of the Court of Criminal Appeals should be reversed and sentence should be set aside.

Respectfully submitted,

/s/

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I certify that the foregoing Reply Brief was electronically filed with the Court and served on Appellate Government Counsel on 13 June 2016.

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This Reply Brief complies with the page limitations of Rule 24(c) because it contains less than 7000 words. Using Microsoft Word 2010 with 14-point-Century-Schoolbook font, it contains 914 words.

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