IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLANT
v.	)	Crim. App. Dkt. No. 20140071
Major (O-4), **DAVID L. JERKINS**, United States Army, Appellant	)	USCA Dkt. No. 17-0203/AR

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

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

ISSUE PRESENTED

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION BY ALLOWING A GENERAL OFFICER MEMORANDUM OF REPRIMAND INTO SENTENCING EVIDENCE WHERE THE REPRIMAND WAS ISSUED TWO WEEKS BEFORE THE COURT-MARTIAL AND CONTAINED HIGHLY PREJUDICIAL AND MISLEADING LANGUAGE.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals [hereinafter Army Court] had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On December 9, 13, and 16, 2013, and January 21–24, 2014, a military panel sitting as a general court-martial tried Major (MAJ) David L. Jerkins. Contrary to his plea, the panel convicted MAJ Jerkins of assault consummated by battery upon a child under 16 years, in violation of Article 128, UCMJ. (JA 17). The panel sentenced MAJ Jerkins to six months confinement and a dismissal. (JA 153). The convening authority approved five months confinement and the remainder of the adjudged sentence. (JA 8).

On December 1, 2016, the Army Court affirmed the findings and sentence. (JA 1–5). Major Jerkins was notified of the Army Court's decision and, in accordance with Rule 19 of this Court's Rules of Practice and Procedure, appellate defense counsel filed a Petition for Grant of Review on January 26, 2017. This Honorable Court granted appellate defense counsel's motion to extend time to file the supplement, and the Supplement to the Petition for Grant of review was filed on February 15, 2017. On March 3, 2017, this Honorable Court granted appellant's petition for review.

Statement of Facts

Major Jerkins married Jenna Engel on March 24, 2011. (JA 154). On February 22, 2012, *eleven months* after their marriage, Major Jerkins and his wife had a child together. (JA 156). On August 12, 2013, the government originally charged MAJ Jerkins with violating Army Regulation 600-20, Army Command Policy [hereinafter AR 600-20], paragraph 4-14(e)(2) (18 March 2008), for allegedly having sexual relations with Jenna Engel while she was on active duty in 2011. (JA 6). On December 6, 2013, the government dismissed this charge and its specification. (JA 6).

On January 8, 2014, approximately one month after the government dismissed this charge and less than two weeks before trial, MAJ Jerkins was issued a General Officer Memorandum of Reprimand (GOMOR) by the Commander of First Army Division West, Major General (MG) Warren Phipps, for the same alleged conduct with Jenna Engel. (JA 154). Major General Phipps was MAJ Jerkins' commanding general. (JA 154). In addition, MG Phipps was the commanding general of at least one of the panel members, as LTC Randy Jimenez fell under First Army Division West. (JA 15).

The GOMOR contains the following language:

> You are being reprimanded for fraternization. You violated AR 600-20, Army Command Policy, dated 18 March 2008, by wrongfully engaging in an inappropriate relationship with Specialist Jenna L. Engel, an enlisted person. SPC Engel served on active duty until her discharge on 31 December 2011. The reason for separation cited on SPC Engel's DD Form 214 was "Pregnancy or Childbirth." On 21 March 2011, you applied for a marriage license in the State of Florida. Subsequently, you married SPC Engel on 24 March 2011. Under these circumstances, your relationship with SPC Engel prior to the marriage was in violation of AR 600-20, Army Command Policy.
>
> . . .
>
> You have failed to live up to the Army values and you have betrayed our trust. *I have serious doubts regarding your ability for continued service in the United States Army . . .* You have fallen short of the standards expected of you as a Soldier. Furthermore, I expect my commissioned officers to lead by example and conduct themselves in a professional manner at all times. Your actions have brought discredit upon you, your unit, and the United States Army.

(JA 154) (emphasis added).

The conduct cited in the GOMOR concerns MAJ Jerkins marrying his current wife, Mrs. Jenna Jerkins, a former enlisted Soldier.[1] (JA 154). The GOMOR also references Mrs. Jerkins' "pregnancy or childbirth" as the reason for

[1] Notably, Mrs. Jerkins was a major witness in the defense case. (JA 16).

her discharge. (JA 154). However, their child was born on February 22, 2012, which was *eleven months* after their marriage. (JA 156).

Major General Phipps stated in the GOMOR that he had not made his final decision and would defer his filing decision to allow MAJ Jerkins time to submit rebuttal matters or documents for his consideration. (JA 154). For numerous reasons, including the GOMOR being issued directly before the contested court-martial, the defense requested an additional delay to respond to the GOMOR. (JA 155).

During the court-martial, the defense called eight different witnesses to testify on behalf of MAJ Jerkins at sentencing, including three Colonels (COL) and two retired Major Generals (MG).[2] For example, COL Michael Peeters – a brigade commander with over 27 years of service – testified about MAJ Jerkins' "excellent duty performance" during their eighteen-month "train up" and deployment to Iraq. (JA 33–34). Colonel Peeters further testified that he would serve with MAJ Jerkins again, and MAJ Jerkins had "high" rehabilitative potential. (JA 33–38). Similarly, MG (Ret.) Joseph Chaves expressed that MAJ Jerkins' duty performance was "outstanding" (JA 75), COL William Spray said he was "proud" of MAJ Jerkins' performance in Iraq (JA 63), and COL Shawn Rasmussen

[2] Major Jerkins also provided a lengthy unsworn statement. (JA 92–114).

explained how he personally nominated MAJ Jerkins for the Douglas MacArthur Leadership Award. (JA 80–81).

Even further, Lieutenant Commander Aaron Simpson, a licensed clinical social worker who had "chaired the case review committee . . . and dispositioned over 1,400 [cases of domestic violence or child abuse]," testified that MAJ Jerkins completed his treatment program and "our prognosis for him was that he was well adjusted, functioning well, [and] we did not see him as a threat to anyone." (JA 41–48). Based on their time together, Lieutenant Commander Simpson also believed MAJ Jerkins had "high" rehabilitative potential. (JA 48).

Following the defense sentencing case, the government sought to admit the GOMOR in rebuttal. (JA 116–18). The defense immediately objected to the introduction of the GOMOR on three separate grounds: 1) it was improper extrinsic evidence, 2) under Military Rule of Evidence [hereinafter Mil. R. Evid.] 403, its probative value was substantially outweighed by its prejudicial effect, and 3) the processing of the GOMOR was not complete. (JA 116–20, 126–28). The defense objection to the incomplete processing of the GOMOR was based on the fact that MAJ Jerkins had not been afforded the due process opportunity to respond and MG Phipps had not taken final action. (JA 117).

In her ruling admitting the GOMOR into evidence, the military judge cited Mil. R. Evid. 403, but failed to conduct the balancing test on the record and then

admitted the GOMOR as "proper rebuttal, specifically with regard to rehabilitative potential." (JA 126). The military judge also allowed MAJ Jerkins' extension of time request for his GOMOR response into evidence. (JA 120–21, 127, 155).

Following her ruling, the military judge asked if the trial counsel wanted to clarify the government's position for the record. (JA 127). The trial counsel responded, "It's part of—it's a personnel document and we believe it is proper rebuttal," and "we don't believe that we are limited in a way that we rebut the material from their case in chief on sentencing." (JA 127–28). The defense again objected to the GOMOR being incomplete and added "just to be clear, that was our objection on incompleteness under 100l(b)2." (JA 128).

Additional facts necessary to determine the disposition of this case are contained in the issue below.

Issue Presented

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION BY ALLOWING A GENERAL OFFICER MEMORANDUM OF REPRIMAND INTO SENTENCING EVIDENCE WHERE THE REPRIMAND WAS ISSUED TWO WEEKS BEFORE THE COURT-MARTIAL AND CONTAINED HIGHLY PREJUDICIAL AND MISLEADING LANGUAGE

Summary of Argument

The military judge abused her discretion by admitting the GOMOR into evidence over defense objections for two reasons. First, the GOMOR was incomplete and not a personnel record under R.C.M. 1001(b)(2) because MAJ Jerkins had not been afforded his due process right to respond and MG Phipps had not yet taken final action. Second, any probative value of the GOMOR was substantially outweighed by its highly prejudicial effect because: 1) the GOMOR was issued by the commanding general of MAJ Jerkins and at least one panel member less than two weeks before the court-martial and contained highly inflammatory language, including that MG Phipps had "serious doubts regarding MAJ Jerkins' ability for continued service;" 2) the GOMOR contained false and misleading language regarding the birth and conception of appellant's daughter; and 3) the GOMOR implicated Mrs. Jerkins, an important defense witness and appellant's wife, of committing misconduct while on active duty. Under these circumstances, this Honorable Court should set aside the sentence in this case.

Law and Standard of Review

A military judge's evidentiary rulings are reviewed for abuse of discretion. *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995).

Military judges "should be particularly sensitive to probative dangers which might arise from the admission of uncharged misconduct evidence during the sentence procedure which, though relevant or even admissible, would unduly arouse the members' hostility or prejudice against an accused." *United States v. Zakaria*, 38 M.J. 280, 282–283 (C.M.A. 1993). Rebuttal evidence, like all other evidence, may be excluded pursuant to Mil. R. Evid. 403 if its probative value is substantially outweighed by the danger of unfair prejudice. *United States v. Hursey*, 55 M.J. 34, 36 (C.A.A.F. 2001). Mil. R. Evid. 403 applies to sentencing evidence. *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995).

Argument

The military judge abused her discretion in admitting the GOMOR for two reasons. First, the GOMOR process was not complete in that MAJ Jerkins had not yet been afforded the opportunity to respond and MG Phipps had yet to decide his final action on the GOMOR. Second, for the multitude of reasons outlined below, any probative value of the GOMOR was clearly and substantially outweighed by its prejudicial effect, particularly in light of its false and misleading language involving the birth and conception of appellant's daughter.

A) The GOMOR process was incomplete in that MAJ Jerkins had not yet been afforded the opportunity to respond and MG Phipps had yet to decide his final action.

In this case, the GOMOR process was incomplete because MAJ Jerkins had not yet been provided his opportunity respond to the GOMOR and MG Phipps had not taken final action. Due process consisting of notice and the opportunity to be heard is an integral part of issuing a GOMOR:

> Statements and other evidence furnished by the recipient will be reviewed and considered by the officer authorized to direct filing in the OMPF. *This will be done before a final determination is made to file the letter*. Should filing in the OMPF be directed, the statements and evidence, or facsimiles thereof, may be attached as enclosures to the basic letter.

Army Regulation 600-37, Unfavorable Information [hereinafter AR 600-37], paragraph 3-4(b)(1)(b) (19 December 1986) (emphasis added).

> Except as provided in paragraph 3–3, unfavorable information will be referred to the recipient for information and acknowledgment of his or her *rebuttal opportunity*.

Id. at para. 3-6(a) (emphasis added).

To this extent, the military judge noted the GOMOR was issued, but she abused her discretion by ignoring the fact that the process of completing the GOMOR was incomplete. The opportunity for MAJ Jerkins to respond is an integral part of the process, and AR 600-37 even "sets forth policies and procedures" to "ensure that unfavorable information that is unsubstantiated,

irrelevant, untimely, or incomplete is not filed in an individual's official personnel files." AR 600-37, para. 1-1(a)(2). Furthermore, because MG Phipps had not taken final action on the GOMOR, it was not a personnel record for purposes of R.C.M. 1001.

Critically, while the military judge found the government was entitled to present personnel records on rebuttal, the GOMOR was not yet a personnel record. Under R.C.M. 1001(b)(2):

> *Personal data and character of prior service of the accused.* Under regulations of the Secretary concerned, trial counsel may obtain and introduce from the personnel records of the accused evidence of the accused's marital status; number of dependents, if any; and character of prior service. Such evidence includes copies of reports reflecting the past military efficiency, conduct, performance, and history of the accused and evidence of any disciplinary actions including punishments under Article 15. "Personnel records of the accused" includes any records made or maintained in accordance with departmental regulations that reflect the past military efficiency, conduct, performance, and history of the accused. If the accused objects to a particular document as inaccurate or incomplete in a specified respect, or as containing matter that is not admissible under the Military Rules of Evidence, the matter shall be determined by the military judge. Objections not asserted are waived.

In this case, the defense properly objected to the GOMOR being incomplete under R.C.M. 1001(b)(2), as due process was not complete and MG Phipps had not taken final action. The requirement of notice and the opportunity to respond is firmly embedded in AR 600-37, as no negative action can be taken until one is at

least provided the opportunity to respond. For the processing of a GOMOR, the regulation specifically requires notice and the opportunity to be heard as it states "unfavorable information *will* be referred to the receipt for information and acknowledgement of his or her *rebuttal opportunity*." AR 600-37, para. 3-6(a)(1) (emphasis added).

This due process requirement in the regulation is not discretionary. "Regulations are given the force of law even though the decision to promulgate them may have been inherently discretionary." *Collins v. United States*, 101 Fed. Cl. 435, 442 (2011). The military no less than any other organ of the government is bound by statute: even when granted unfettered discretion by Congress, the military must abide by its own procedural regulations should it choose to promulgate them. *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002).

In this case, if MAJ Jerkins had been given the opportunity to respond, MG Phipps could have subsequently elected to tear up or retract the GOMOR. His final action would determine whether it actually became a personnel record. Thus, the GOMOR was incomplete and presenting it to the panel was both inappropriate and highly prejudicial.

B) The GOMOR was inadmissible under Mil. R. Evid. 403, as any probative value was substantially outweighed by the danger of unfair prejudice.

In this case, the trial defense counsel properly objected to the admissibility of the GOMOR under Mil. R. Evid. 403. Although the rules of evidence were relaxed, this "goes more to the question of whether the evidence is authentic and reliable" and "[a]lthough the rules may be relaxed . . . otherwise inadmissible evidence still is not admitted at sentencing." *United States v. Boone*, 49 M.J. 187, 198 n.14 (C.A.A.F. 1998). Here, for multiple reasons, any probative value of the GOMOR was clearly and substantially outweighed by the danger of unfair prejudice.

1) The GOMOR was issued by the commanding general of MAJ Jerkins and at least one panel member less than two weeks before the court-martial and contained language stating he had "serious doubts regarding MAJ Jerkins' ability for continued service."

First, the GOMOR was highly prejudicial because it was a direct statement made by the commanding general of MAJ Jerkins and at least one panel member addressing an additional allegation of misconduct.

Essentially, after dismissing the charged offense involving the exact same allegation of misconduct, the government conveniently chose to issue MAJ Jerkins this GOMOR only two weeks before the contested court-martial. This GOMOR ultimately became the final piece of sentencing evidence admitted during the court-martial.

Put another way, right before the panel entered deliberations, the government introduced evidence that MG Phipps had recently written a memorandum stating:

> 1) Major Jerkins "failed to live it to the Army values" and "betrayed our trust."
>
> 2) Major General Phipps had "serious doubts concerning [MAJ Jerkins'] ability for continued service in the United States Army."
>
> 3) Major General Phipps was "profoundly disappointed" that MAJ Jerkins "would engage in this misconduct" and "[fall] short of the high standards expected of [him] as a Soldier."
>
> 4) Major General Phipps determined that MAJ Jerkins had brought discredit upon himself, his unit, and the United States Army.

(JA 154).

This Court condemns such references to command policies or views "which in effect [bring] the commander into the deliberation room." *United States v. Pope*, 63 M.J. 68, 75 (C.A.A.F. 2006) (quoting *United States v. Grady*, 15 M.J. 275, 276 (C.M.A. 1983)). Such a practice invades the province of the sentencing authority by raising the specter of command influence. *Id*.

In *Pope*, this Court found the military judge abused his discretion by allowing a letter from the convening authority into evidence for sentencing. The theme of the letter in *Pope* was that his conduct was unprofessional, would not be

tolerated, eroded the integrity and effectiveness of command, and concluded by stating the appellant "should not be surprised when, once you are caught, harsh adverse action follows." *Id*. at 75. In ruling this letter from the convening authority violated Mil. R. Evid. 403, this Court stated:

> While the letter does not suggest that one convicted of this type of misconduct should be punitively separated, "the appearance of improperly influencing the court-martial proceedings" is troubling because it conveys the command's view that harsh action should be taken against an accused . . . It is just such an appearance that we have cautioned against in the past. "A trial must be kept free from substantial doubt with respect to fairness and impartiality."

Id. at 76 (internal quotations and citations omitted).

In this case, the overall circumstances and language of the GOMOR give rise to the precise concerns that have led this Court to find this type of evidence violates Mil. R. Evid. 403. In fact, the language of the GOMOR in this case is even worse than the letter in *Pope*. In this case, the panel was given direct evidence of MG Phipps expressing his "serious doubts" regarding MAJ Jerkins' "ability for continued service in the United States Army." (JA 154).

2) The GOMOR contained false and misleading language involving the birth and conception of appellant's daughter.

Second, the GOMOR was unfairly prejudicial because its plain language was both misleading and inaccurate. The GOMOR – which, again, was issued

only *two weeks* before the contested trial – addresses MAJ Jerkins' marriage and subsequent pregnancy of his wife from several years earlier.

The plain language of the GOMOR states that MAJ Jerkins married his wife in March 2011, and she was forced out of the military in December 2011 because of "Pregnancy or Childbirth." (JA 154). This language clearly implies MAJ Jerkins engaged in inappropriate sexual conduct that resulted in an enlisted soldier's pregnancy before their marriage.[3] In addition, this language strongly suggests Mrs. Jerkins was forced out of the military based on inappropriate sexual conduct with MAJ Jerkins.

However, it is clear that MAJ and Mrs. Jerkins' child was conceived during their marriage because their child was born approximately eleven months *after* their marriage. (JA 156). Thus, the GOMOR presented to the panel references conduct that occurred within the sanctity of marriage. While AR 600-20, para. 4-14(c) does allow the convening authority to take negative action against MAJ Jerkins for conduct that occurred before his marriage, negative action cannot be taken against him for having a child within his marriage. The constitutional right of marital privacy of conceiving a child within marriage should be considered as a

[3] The GOMOR states that Jenna Engel was separated December 31, 2011 for "Pregnancy or Childbirth." (JA 154). However, because the GOMOR does not state when the birth of the child occurred, it leaves the clear impression that Mrs. Jerkins was forced out of the military based on sexual conduct with MAJ Jerkins that occurred before their actual marriage.

factor when weighing prejudice. *See Griswold v. Connecticut*, 38 U.S. 479, (1965).

Simply put, presenting this GOMOR to the panel was highly prejudicial because the plain language either implies the false notion their child was conceived before marriage or improperly reprimands MAJ Jerkins for conceiving a child within the sanctity of marriage.

3) The GOMOR implicated Mrs. Jerkins, an important defense witness and appellant's wife, of committing misconduct while she was on active duty.

Finally, this GOMOR was highly prejudicial because it implicates an important defense witness, Mrs. Jerkins, of committing misconduct. While the GOMOR was issued to MAJ Jerkins, its language cites misconduct by Mrs. Jerkins while she was on active duty. Mrs. Jerkins was an important defense witness, and the defense presented evidence and referenced the effect a punitive discharge would have on his family during sentencing. In fact, the entire goal for the defense on sentencing was to allow MAJ Jerkins to remain in the military and support his wife and family. Therefore, the GOMOR was highly prejudicial because it presented improper character evidence of Mrs. Jerkins to the panel.

C) The military judge failed to conduct the proper Mil. R. Evid. 403 balancing test on the record.

Any of the above factors would be reason enough to find the probative value of the GOMOR to be substantially outweighed by its prejudicial effect. However,

the military judge did not state she considered any of these factors on the record. Instead, the military judge simply found the GOMOR relevant for "rebuttal, specifically with regard to rehabilitative potential." (JA 126). Even apart from the highly prejudicial nature of this GOMOR, it contains almost zero relevancy for rehabilitation purposes. Major Jerkins' alleged three-year-old fraternization misconduct and his marriage to his wife offers almost nothing to determine his ability to be "restored . . . to a useful and constructive place in society." R.C.M. 1001(b)(5).

When conducting a Mil. R. Evid. 403 balancing test, a military judge should consider the following factors: the strength of the proof of the prior act, the probative weight of the evidence, the potential to present less prejudicial evidence, the possible distraction of the factfinder, the time needed to prove the prior conduct, the temporal proximity of the prior event, and the frequency of the acts. *United States v. Berry*, 61 M.J. 91 (2005). The military judge did not state that she considered any of the above factors. Instead, the military judge simply referenced Mil. R. Evid. 403 and did not apply the balancing test on the record.

To that extent, while "[a] military judge enjoys wide discretion in applying [M.R.E.] 403 . . . [t]his Court gives military judges less deference if they fail to articulate their balancing analysis on the record." *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000). As such, this Court should give the military judge's

ruling less deference because she failed to articulate on the record her balancing of the factors for legal relevance as required by *United States v. Berry*, 61 M.J. 91 (C.A.A.F. 2005) and *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989). Thus, this court must examine the record to assess the military judge's decision. *United States v. Bins*, 43 M.J. 79, 85–86 (C.A.A.F. 1996)

D) This error was not harmless beyond a reasonable doubt.

Because one of the highly prejudicial factors from the GOMOR raises the specter of command influence, the test for prejudice in this case is the error must be harmless beyond a reasonable doubt. *Pope*, 63 M.J. at 76. *See also United States v. Thomas*, 22 M.J. 388, 394 (C.M.A. 1986).

In this case, the government was erroneously allowed to present misleading and inflammatory language from a GOMOR written by the Commanding General of MAJ Jerkins and at least one of the panel members. Again, among other things, this GOMOR directly referenced MG Phipps' "serious doubts regarding [MAJ Jerkins'] ability for continued service in the United States Army." (JA 154). Under such circumstances, the government cannot prove the admission of the GOMOR was harmless beyond a reasonable doubt.

In *United States v. Zakaria*, 38 M.J. 280, 283 (C.M.A. 1993), this Court found the military judge erred in admitting a challenged letter-of-reprimand. One of the principal concerns was the reprimand remained wholly unrelated to the

specification of which the appellant was actually convicted. Similar to *Zakaria*, MAJ Jerkins' reprimand for a three-year-old fraternization allegation remains wholly unrelated to the actual charged conduct. Even further, the GOMOR in this case contained clearly misleading language regarding the conduct of MAJ and Mrs. Jerkins.

In conclusion, the military judge abused her discretion by allowing the GOMOR into evidence during sentencing, as any probative value of this GOMOR was substantially outweighed by its prejudicial effect and the government cannot prove this specific error was harmless beyond a reasonable doubt.

Conclusion

Wherefore, MAJ Jerkins requests this Honorable Court set aside the sentence.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Jerkins*, Crim. App. Dkt. No. 20140071, USCA Dkt. No. 17-0203/AR, was delivered to the Court and Government Appellate Division on April 20, 2017.

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