IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	) REPLY BRIEF TO GOVERNMENT'S) ANSWER)
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
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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 the Case

On March 21, 2017, this Honorable Court granted appellant's petition for review. On April 20, 2017, appellant filed his final brief with this Honorable Court. The government responded on May 17, 2017. Pursuant to Rule 19 of this Honorable Court's Rules of Practice and Procedure, appellant hereby submits his reply.

A. The government incorrectly claims the General Officer Memorandum of Reprimand (GOMOR) was admissible as a personnel record. (Gov. Brief at 10).

Although R.C.M. 1001(d), not R.C.M. 1001(b)(2), is the applicable rule to determine this issue, the government asserted at trial and continues to assert on appeal that the GOMOR was admissible as a personnel record under R.C.M. 1001(b)(2). (JA 128; Gov. Brief at 10). Thus, Appellant reasserts his previous arguments that the GOMOR was not a personnel record because Appellant had not been afforded the opportunity to respond and his Commanding General had not yet chosen whether to file or rescind the GOMOR. (*See* Appellant Brief at 10–12).

B. Even under *United States v. Eslinger,* 70 M.J. 193 (C.A.A.F. 2011), the military judge abused her discretion by allowing the GOMOR as rebuttal evidence because rebuttal evidence must be fair and remains subject to Mil. R. Evid. 403.

"Where a party opens the door, principles of fairness warrant the opportunity for the opposing party to respond, *provided the response is fair* and is predicated on a proper testimonial foundation." *Eslinger*, 70 M.J. at 198 (emphasis added). Put another way, this Court's analysis and findings in *Eslinger* remain consistent with the overarching principles of Mil. R. Evid. 403. Under Mil. R. Evid. 403, relevant evidence may still be excluded if its probative value is substantially outweighed by a danger of unfair prejudice. As outlined below, the GOMOR in this case – which was admitted as rebuttal evidence – was neither fair rebuttal under *Eslinger,* nor admissible pursuant to Mil. R. Evid. 403.

1. The probative value of the GOMOR was minimal because the military judge made the limited finding that the GOMOR was "proper rebuttal, specifically with regard to rehabilitative potential." (JA 126).

In claiming the GOMOR was admissible in light of Mil. R. Evid. 403, the government incorrectly asserts that appellant's GOMOR was properly admitted as rebuttal to his mitigation evidence. (Gov. Brief at 8).

Critically, the military judge did not admit appellant's GOMOR as rebuttal to defense mitigation evidence. Instead, the military judge made the specific finding the GOMOR was admissible as "proper rebuttal, specifically with regard to *rehabilitative potential*." (JA 126) (emphasis added).[1] Under R.C.M. 1001(c)(1), "The defense may present matters in rebuttal of any material presented by the prosecution *and* may present matters in extenuation and mitigation." (emphasis added). Evidence under R.C.M. 1001(b)(5)(D) does not apply to defense mitigation evidence. *United States v. Griggs*, 61 M.J. 402, 409 (C.A.A.F. 2005)

In this case, the defense presented several different types of sentencing evidence, including testimonial evidence from four different witnesses regarding their opinion of rehabilitative potential under the specific definition of R.C.M. 1001(b)(5)(D). (JA 037). The defense counsel informed COL Simpson, COL Peeters, COL Rasmussen, and Major Culberston that, "Rehabilitative potential

[1] The military judge also noted for the record that she considered the rebuttal evidence under 1001(b)(2) "just for defense purposes." (JA 128).

refers to the accused's potential to be restored, through vocational, correctional, or therapeutic training or other corrective measures to a useful and constructive place in society." (JA 037; JA 047; JA 081; JA 086). They each provided their opinion based on this definition. A plain reading of the military judge's ruling limited the government's rebuttal to the defense presentation of this R.C.M. 1001(b)(5)(D) rehabilitative evidence. To that extent, the probative value of the GOMOR to rebut this rehabilitative evidence was negligible, particularly in the context of the overall circumstances.

In fact, the probative value of the GOMOR – if any actually existed – related to retention because of MG Phipps' "serious doubts regarding [appellant's] continued service in the United States Army." (JA 154). The GOMOR provided no probative value in determining whether appellant had rehabilitative potential as defined under R.C.M. 1001(b)(5)(D). However, rehabilitative potential was the very reason the military judge found the GOMOR was admissible as rebuttal evidence. The military judge did not make any findings that the GOMOR was proper rebuttal to defense mitigation evidence, including retention.

In addition to the military judge's limited finding regarding the admissibility of the GOMOR, the military judge also failed to conduct the proper Mil. R. Evid. 403 balancing test. Thus, this Court is unable to determine what the military judge considered to be probative and prejudicial factors in her decision to admit the

GOMOR. 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).

2. Even though the government ignores the plain language of the military judge's ruling, the GOMOR should still have been excluded because its probative value was substantially outweighed by its prejudicial effect.

First, in its brief, the government expressly admits the GOMOR "was not highly probative." (Gov. Brief at 11). However, without citing any authority, the government concludes that because the defense presented a strong sentencing case, the probative value of the GOMOR was greatly increased. (Gov. Brief at 11). Essentially, the government argues that because appellant presented an effective sentencing case, his freshly issued GOMOR – which contained misleading, inaccurate, and prejudicial information – morphed from being "not highly probative" into admissible and highly probative evidence.

Such a position from the government remains particularly chilling in light of the facts of this case. Again, appellant's GOMOR was issued only two weeks before trial, involved an alleged offense that was previously dismissed by the government, and he had not submitted his authorized rebuttal matters. However, based on the government's brief, appellant ostensibly had two choices: 1) put on a strong sentencing case from multiple witnesses containing information from his lengthy

military career (which would then "heighten" the purported probative value of the GOMOR), or 2) fail to put on his full sentencing case (which would then leave the GOMOR as "not highly probative"). (Gov. Brief at 11). Such a position remains wholly untenable.

In addition, the government relies extensively on *Eslinger* for the proposition that because appellant opened the door, the government was unconstrained and free to rebut this evidence in any manner they choose. (Gov. Brief at 8). Indeed, the government appears to take the same position as the government at trial that "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).

Critically, the government's reliance on *Eslinger* fails to account for the specific limitations this Court put on government rebuttal evidence in *Eslinger*. These limitations are consistent with Appellant's position that the GOMOR should have been excluded under Mil. R. Evid. 403 for several reasons, including: 1) the GOMOR was issued by the commanding general of appellant and at least one panel member less than two weeks before the court-martial, 2) the GOMOR contained highly inflammatory language, including that MG Phipps had "serious doubts regarding [MAJ Jerkins'] ability for continued service;" 3) the GOMOR contained false and misleading language regarding the birth and conception of

appellant's daughter;[2] and 4) the GOMOR implicated Mrs. Jerkins, an important defense witness and appellant's wife, of committing misconduct while on active duty, and 5) the notice and opportunity to be heard afforded in the issuing of a GOMOR had not been completed.

In *Eslinger*, this Court noted three specific concerns with rebuttal evidence: 1) When the government's rebuttal to defense retention evidence is testimony of the accused's commander, it may well "raise the specter of command influence;" 2) "A commander may testify, but it is essential for the military judge to be on guard for the possibility, intended or not, that a commander's testimony could convey undue command influence to the members. While not an absolute requirement, a tailored instruction from the military judge can ameliorate these risks and clarify the scope of permissible opinions;" 3) Military Rules of Evidence [M.R.E.] are applicable to sentencing, thus providing procedural safeguards to ensure the reliability of evidence admitted during sentencing. *Eslinger*, 70 M.J. at 198–199.

Applying these concerns to the present case, the specter of command influence was raised. Based on the overall circumstances, the GOMOR in this case raises the same type of concerns this Court noted in *Eslinger*. In this case, appellant had numerous character witnesses testify on his behalf. However, none of these

[2] The government does not dispute these facts. (Gov. Br. at 12).

witnesses were from appellant's command, and the government was allowed to submit the equivalent of testimony from his unit's commanding general questioning appellant's "ability for continued service in the United States Army." (JA 154). Even further, the commanding general was also at least one of the panel members' commanding general. (JA 15).

The specter of UCI in this case presents the same concern as *United States v. Pope*, 63 M.J. 68 (C.A.A.F. 2006), where this Court found a letter from the accused's commanding general admitted during sentencing violated Mil. R. Evid. 403. Such a practice invades the province of the sentencing authority by raising the specter of command influence. *Id*. at 75.

Second, instead of recognizing the improper influence the GOMOR would have in the proceedings, the military judge failed to take any type of precautionary steps (such as instructing the panel members) that would have ameliorated these risks and clarified the scope of permissible opinions. This Court noted in *Pope* that the commander's letter was admitted without the benefit of an instruction to the members as to how such a view should be considered. *Pope*, 63 M.J. at 76.

Finally, in *Eslinger*, this Court recognized the Mil. R. Evid. are applicable to sentencing. The importance of this finding cannot be understated, as one of appellant's primary arguments is the GOMOR should have been excluded under Mil. R. Evid. 403.

C. Appellant was prejudiced by the erroneous admission of the GOMOR.

The improper admission of the GOMOR prejudiced MAJ Jerkins under any standard of review, but appellant does not agree with the government that this case involves a harmless error analysis. (Gov. Brief at 13–15). Instead, this court should test whether this error was harmless beyond a reasonable doubt.

First, given that the appellant's and at least one panel member's commanding general issued a statement ten days before the court-martial that he had "serious doubts regarding [appellant's] continued service in the United States Army," the specter of UCI has been raised. Therefore, because 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.

The government argues this constitutional standard does not apply because the GOMOR is a personnel record of the appellant. (Gov. Brief at 14). The government claims this case is distinguishable from *Pope* because "evidence of any disciplinary actions including punishments under Article 15 are allowed under 1001(b)(2)." (Gov. Brief at 14)

The government's argument confuses the issue of whether the GOMOR was admissible with whether its admission prejudiced the proceedings. When determining prejudice, the determination isn't whether the GOMOR was admissible, the determination is whether the erroneous admission of the GOMOR

resulted in prejudice. Just because R.C.M. 1001(b)(2) may allow in certain evidence, it does not automatically make the evidence free from unlawful command influence or not subject to Mil. R. Evid. 403. Under the government's logic, the convening authority could place a letter ordering a punitive discharge into the accused's personnel file and, if this letter was subsequently offered and admitted under R.C.M. 1001(b)(2), there could not be any unlawful command influence.

In this case, the commanding general of a panel member provided a written statement 10 days before the court-martial that he had "serious doubts regarding [appellant's] continued service in the United States Army." (JA 154). While this letter does not state that Appellant should be punitively separated, the appearance of improperly influencing the court-martial proceedings is troubling because it conveys the commanding general's view that Appellant should no longer serve in the Army.[3] Therefore, because of the specter of UCI, the error must be harmless beyond a reasonable doubt.

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[3] For instance, Professor Edmund M. Morgan Jr., chairman of the drafting committee, explained in his statement during the House Armed Services Committee hearing that, "We have tried to prevent courts-martial from being an instrumentality and agency to express the will of the commander." Uniform Code of Military Justice: Hearings on HR 2498 Before a Subcommittee on Armed Services, 81st Cong. 606 (1949), reprinted in Index and Legislative History, Uniform Code of Military Justice (1950) (not separately paginated). *United States v. Griggs*, 61 M.J. 402, 409 (C.A.A.F. Sept. 2, 2005)

However, even assuming the constitutional standard does not apply, the sentence must still be set aside because the admission of the GOMOR "substantially influenced the adjudged sentence." *Griggs*, 61 M.J. at 410. In this case, appellant had seven high ranking leaders testify to his good military character, excellent duty performance (including receipt of the MacArthur Leadership Award), high rehabilitative potential, his 18 month deployment to Iraq where he engaged in significant combat, and that they would serve with him again. (JA 032; JA 034; JA 063–064; JA 069; JA 075, JA 086). There was little to zero cross-examination of these witnesses.

Following this extensive evidence and testimony for the defense, the improperly admitted GOMOR "directly contradicted appellant's evidence of good military character and attacked the major thrust of his defense." *United States v. Kerr*, 51 M.J. 401, 406 (C.A.A.F. 1999). Even further, the GOMOR came from the commanding general in Appellant's and one member of the panel's chain of command, "which in theory makes [the evidence] more likely to influence the members." *Eslinger*, 70 M.J. at 201.

Put simply, the government was erroneously allowed to present highly misleading, inaccurate, and inflammatory language from a Commanding General that: 1) questioned appellant's "ability for continued service in the United States Army," 2) asserted appellant "failed to live up to the Army values" and "betrayed

our trust," 3) implied significant improprieties regarding appellant's marriage and the conception of his daughter; and 4) implicated Mrs. Jerkins, an important defense witness, of committing misconduct while on active duty and being separated due to inappropriate sexual conduct outside the scope of marriage. Under the circumstances of this case, the military judge's erroneous admission of the GOMOR – which was the final piece of evidence presented to the panel members before deliberations – satisfies any standard of prejudice.

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 May 30, 2017.

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