**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ARMED FORCES**

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**UNITED STATES**,
Appellee,

v.

**ELLWOOD T. BOWEN III**
Airman First Class (E-3), USAF
Appellant.

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Crim. App. No. 38616
USCA Dkt. No. 16-0229/AF

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# BRIEF IN SUPPORT OF PETITION GRANTED

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

## Issue Granted

**WHETHER THE MILITARY JUDGE ERRED IN APPLYING THE "EXCITED UTTERANCE" EXCEPTION TO THE HEARSAY RULE TO PERMIT THE GOVERNMENT TO INTRODUCE THROUGH THE TESTIMONY OF LAW ENFORCEMENT PERSONNEL THAT APPELLANT'S WIFE NODDED HER HEAD IN RESPONSE TO A QUESTION WHETHER HER HUSBAND "DID THIS," AND IN CONCLUDING THAT THE PREJUDICIAL EFFECT OF THIS TESTIMONY WAS OUTWEIGHED BY ITS PROBATIVE VALUE.**

## Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals reviewed this case pursuant to Article 66(c), UCMJ, affirming the approved findings and

sentence on 26 October 2015. JA 10. This Court granted review, and has jurisdiction pursuant to Article 67, UCMJ. JA 1.

## Statement of the Case

On 5-8 March 2014, Appellant was tried at a general court martial by officer members at Edwards Air Force Base, California. JA 15. Contrary to his pleas, Appellant was found guilty—with certain exceptions—of a specification of aggravated assault and a specification of assault in violation of Article 128, UCMJ. JA 11-12. The panel acquitted on other allegations of assault and communicating a threat. *Id.* Appellant's sentence was a reduction to the lowest enlisted grade and confinement for one year. JA 12. On 16 May 2014, the convening authority approved the sentence as adjudged, while waiving mandatory forfeitures in the amount of $800 pay per month pursuant to Article 58b, UCMJ, for the benefit of Appellant's dependent child. JA 13.

## Statement of Facts

On Sunday morning, 24 November 2013, A1C John Brodski, 412th Security Forces Squadron (412 SFS), Edwards AFB, CA, was posted for guard duty with SSgt Brett Peltz. JA 169. Around 0600, an unidentified male approached A1C Brodski in the squadron

headquarters. JA 169. The individual appeared "[c]alm, cool, collected, wide-eyed, but he was very in control of how he was speaking." JA 170. The individual had some "minimal scratches on his face," but otherwise appeared "put together." JA 170. The individual stated "that there was a woman being beaten up" by another male in a house and there was "a domestic in progress." JA 177. The individual identified himself as SrA BB. JA 169.

A1C Brodski perceived the conversation to be unusual because the subject matter was serious but SrA BB's demeanor did not match the context of what he was saying. JA 179-81. A1C Brodski did not smell alcohol on SrA BB, nor did he observe any initial signs of intoxication. JA 180. SSgt Brett Peltz indicated that SrA BB did not demonstrate any sign of intoxication and his hands appeared very clean as if they had been recently washed. JA 259, 273-75.

A1C Brodski testified that his conversation with SrA BB was awkward and he suspected SrA BB was lying. JA 181. SrA BB claimed to be taking shots with a female and "right after taking shots he just went to sleep." JA 182. SrA BB claimed to then be suddenly awakened in the bedroom "because the female was being attacked" by Appellant.

JA 182-83. The female was identified as Mrs. MB, Appellant's wife. JA 183. SrA BB gave no explanation for why this was occurring, and stated that "nothing happened between" him and Mrs. MB. JA 183. SrA BB stated that he "didn't know why" Appellant came after him in that moment. JA 184.

Thereafter, 412 SFS personnel proceeded to the home of Appellant and his spouse. JA 231. Appellant answered the front door appearing disoriented. JA 233, 242. TSgt Valerie Cabrera, the 412 SFS flight chief, found Mrs. MB unconscious in the tub of the master suite bathroom with her head leaning against the faucet. JA 234. There was a pillow beside the toilet and Mrs. MB's hair was covering the front of her face. JA 234.

When TSgt Cabrera moved Mrs. MB's hair, she observed both eyes swollen shut and a gash over one eye. JA 235. When she initially saw Mrs. MB, TSgt Cabrera thought she was dead. JA 239. TSgt Cabrera asked Mrs. MB if she was okay, and heard a groan. JA 235. TSgt Cabrera, with the assistance of SSgt Taylor, lifted Mrs. MB out of the tub and placed her on the opposite side of the bedroom where TSgt Cabrera had noticed blood stains. JA 235, 244. When they laid her

down, Mrs. MB's eyes were closed and she seemed semi-conscious. JA 244.

Based on evidence conflicting with SrA BB's account, SFS apprehended SrA BB, and read him his rights. JA 247, 260. After being read his rights, SrA BB provided a statement claiming that he woke in the couple's house to Appellant beating his wife, but denied any sexual contact with Mrs. MB. JA 268-69.

SrA BB became the prime suspect in a rape investigation. JA 151, 402. In exchange for a grant of immunity, SrA BB testified that he and Mrs. MB were the victim of an assault by Appellant. JA 125, 162. The defense's theory at trial was that Appellant caught SrA BB raping his wife and her injuries were from a sexual assault. JA 52-53.

Mrs. MB testified that when she, Appellant, and SrA BB were dropped off at the house, her husband was placed on the couch, lying down. JA 217. SrA BB was in the kitchen, while Mrs. MB tried to give her husband water and a bucket in which to vomit. JA 217. Then, she went to the kitchen and took a shot. JA 217. Her next memory after taking the shot was her "laying on the floor right by the couch" and hearing her husband and SrA BB fighting. JA 217, 228. She

remembers her husband saying "what . . . did you do to her?" JA 217. She remembers getting up and starting to walk, and falling after becoming dizzy. JA 222. She also remembered being in the shower and feeling cold. JA 218. Her only other memory concerning Appellant, her husband, was "feeling like [he] was concerned, and I couldn't explain to him because I was confused. I remember feeling confused." JA 218.

Mrs. MB did not feel any fear toward her husband that night. JA 223-24. She remembers feeling like Appellant was taking care of her, like he had done in the past when she had become drunk, and he had given her a bath and put her to bed. JA 223.

Mrs. MB did not remember talking to first responders. JA 219. She remembers waking up in the hospital, and having a "subdural hematoma, brain craniotomy, and a traumatic brain injury, a visual loss up to 70 percent, loss of smell, and body [sic] concussions." JA 219. Medical records available to the military judge at trial confirmed these injuries. JA 369-405.

Mrs. MB testified that she was not attracted to SrA BB, did not know his last name at the time, did not know him well, did not give him

any signs that she was interested in him, and would never have engaged in consensual sexual activity with him. JA 221.

Mrs. MB did not remember talking to any first responder, or anyone other than her husband before she went to the hospital. JA 206, 225. She testified she was not in her right state of mind, and that if she had said anything to anyone, she did not think it would be reliable. JA 225.

At trial, however, the government offered the testimony of TSgt Cabrera, that Mrs. MB was asked "if her husband did this to her," after taking her out of the tub and laying her on the bed, and Mrs. MB "shook her head yes" in an "affirmative, up and down," sort of way. JA 35, 235. Simultaneously, Mrs. MB groaned. JA 123. TSgt Cabrera stated this was a "direct question" proffered to Mrs. MB by a SFS member accompanying TSgt Cabrera. JA 38.

Prior to the question regarding whether her husband "did this," being asked, TSgt Cabrera and the other SFS member had identified themselves as security forces to Mrs. MB, and inquired whether she was okay. JA 33. TSgt Cabrera informed Mrs. MB that she was going to touch her, and then proceeded to brush her hair away from her face,

call for medical attention, lift her out of the tub with assistance and place her covered on a nearby bed. JA 34-35. Throughout, Mrs. MB had only moaned or groaned. JA 34.

In responding to the question from law enforcement personnel whether her husband "did this," Mrs. MB did not use any specific words identifying an assault, beating, or crime. JA 38. TSgt Cabrera acknowledged that Mrs. MB could have been referring to her husband helping her into the bathtub. JA 39. Mrs. MB testified that placing her in the bathtub is what her husband generally did when she was drunk. JA 223.

The defense moved *in limine* to exclude the evidence as hearsay not within a recognized exception, and contended the evidence was irrelevant and its unfair prejudicial effect substantially outweighed its probative value. JA 23-29, 30, 58, 66-68, 186, 207, 208-14.

The military judge allowed the evidence, ruling as follows:

> So that leaves the court with the question of whether or not statements testified to by Sergeant Cabrera – specifically the head nod and the response to the question, did your husband do this, or words to that effect – the court does find that that statement qualifies as an excited utterance under M.R.E. 801. The court notes that there's been testimony from the neighbors who heard screaming from a female in that vicinity of the house only a few moments before law

enforcement showed up. I think although M[r]s. [MB] is in no position to testify about her own mental state at the time and, certainly, was in no physical condition to manifest outward expressions of excitement, I think the fact that there were screams heard, shouting and banging heard in the bathroom only a few moments before, combined with M[r]s. [MB]'s physical condition when law enforcement arrived, I think it's reasonable.

The court finds that that does fall under the excited utterance exception to hearsay, so the court will allow Sergeant Cabrera to testify to the head nod in response to the question.

***

The court has also conducted an analysis under M.R.E. 403. The court finds that the probative value of the evidence is high. And based on the testimony of Sergeant Cabrera and the fact that the witness specifically responded to that question by nodding her head, as opposed to previously where she had just been groaning and making sounds, the court finds that the probative value of the evidence is not substantially outweighed by danger of unfair prejudice, confusion of the issues, misleading of the members, or any of the other factors laid out in M.R.E. 403.

JA 211-13.

After a recess, the military judge added to his ruling:

The court finds that a startling or stressful event occurred. And, again, the court references regardless of when some of the assault occurred on M[r]s. [MB], as the court noted previously the next door neighbors heard screaming and a female voice yelling stop, along with yelling from a male voice only minutes before. The court finds that that would be a startling stressful event for the person who is conducting the screaming. The declarant, that is M[r]s. [MB], despite the fact that she doesn't currently recall the incident,

> certainly she testified that she remembered being confused. And, certainly, from the testimony of the neighbors indicating that the female was screaming out in pain the court concludes that the declarant would have had personal knowledge, at least to the fact that she was in pain and suffering from severe injuries.
>
> The court finds that in light of those facts the court can conclude that M[r]s. [MB] was in an excited, nervous, or stressful state at the time she nodded her head in response to the question by security forces.

JA 214.

Additional relevant facts are set forth in the argument section, below.

## Summary of the Argument

This Honorable Court should reverse and set aside the findings of guilt for two reasons. First, evidence that Mrs. MB nodded her head when prompted by a suggestive, close-ended question by law enforcement was insufficiently spontaneous to meet the requirements of the "excited utterance" exception to the hearsay rule. Second, the military judge abused his discretion by conducting a cursory balancing test that failed to take into account the unfair prejudice presented by the vague nature of law enforcement's suggestive question and Mrs. MB's physical condition. These errors were not harmless, as the

government's case was primarily circumstantial and its only eyewitness possessed a strong motive to lie.

## Argument

**THE MILITARY JUDGE ERRED IN APPLYING THE "EXCITED UTTERANCE" EXCEPTION TO THE HEARSAY RULE TO PERMIT THE GOVERNMENT TO INTRODUCE THROUGH THE TESTIMONY OF LAW ENFORCEMENT PERSONNEL THAT APPELLANT'S WIFE NODDED HER HEAD IN RESPONSE TO A QUESTION WHETHER HER HUSBAND "DID THIS," AND IN CONCLUDING THAT THE PREJUDICIAL EFFECT OF THIS TESTIMONY WAS OUTWEIGHED BY ITS PROBATIVE VALUE.**

*Standard of Review*

This Court reviews "a military judge's ruling admitting . . . evidence for an abuse of discretion." *United States v. Grant*, 56 M.J. 410, 413 (C.A.A.F. 2002). "An abuse of discretion occurs when a military judge either erroneously applies the law or clearly errs in making his or her findings of fact." *United States v. Donaldson*, 58 M.J. 477, 482 (C.A.A.F. 2003).

*Law*

A hearsay "statement" includes "nonverbal conduct of a person, if it is intended by the person as an assertion." Mil. R. Evid. 801(a)(2); *see also United States v. Katsougrakis*, 715 F.2d 769, 774 n. 4 (2d Cir. 1983) (observing that "nods" constitute a statement for purposes of the hearsay rule and will be held to constitute hearsay if introduced to prove the truth of the matter asserted); *United States v. Reggio*, 40 M.J. 694, 700 (N.M. C.M.R. 1994) (discussing nonverbal conduct as a potential hearsay statement).

Military Rule of Evidence 803(2) adopts the corresponding Federal Rule verbatim. It provides: "The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness: … A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused."

The "excited utterance" exception to the hearsay rule requires meeting the following three-prong test: "(1) the statement must be spontaneous, excited, or impulsive rather than the product of reflection and deliberation; (2) the event prompting the utterance must be startling, and; (3) the declarant must be under the stress of excitement

caused by the event." *United States v. Feltham*, 58 M.J. 470, 474 (C.A.A.F. 2003) (citation omitted).

The Advisory Committee Notes to the federal rule explain the rationale for this exception and offer guidance regarding its application:

> The theory of Exception (2) is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication. Spontaneity is the key factor . . . .
>
> ***
>
> With respect to the time element . . . the standard of measurement is the duration of the state of excitement. How long can excitement prevail? Obviously there are no pat answers and the character of the transaction or event will largely determine the significance of the time factor.
>
> ***
>
> Permissible subject matter of the statement is [not] limited . . . to description or explanation of the event or condition . . . the statement need only relate to the startling event or condition, thus affording a broader scope of subject matter coverage.

Fed. R. Evid. 803(2) Advisory Comm. Notes (citations and quotation marks omitted).

In evaluating the applicability of the "excited utterance" exception, this Court has stated that relevant factors may include: "the lapse of time between the startling event and the statement, whether the statement was made in response to an inquiry, the age of the declarant, the physical and mental condition of the declarant, the

characteristics of the event, and the subject matter of the statement." *Donaldson*, 58 M.J. at 483.

While time is "not dispositive . . . [a]s a general proposition, where a statement relating to a startling event does not immediately follow that event, there is a strong presumption against admissibility under M.R.E. 803(2)." *Id.; see also United States v. Chandler*, 39 M.J. 119 (C.M.A. 1994) (testimony of friend concerning assault admissible as excited utterance because victim was still clearly upset by what had occurred thirty minutes after she had been assaulted).

"The theory underlying the admission of an excited utterance is that persons are less likely to have concocted an untruthful statement when they are responding to the sudden stimulus of a startling event." *Feltham*, 58 M.J. at 474 (internal quotations and citations omitted). Because of the assumptions underlying the exception, it is important that the statement have been made under the stress of the excitement of the startling event. *See United States v. Barrick*, 41 M.J. 696, 699 (A.F. Ct. Crim. App. 1995) (holding that statements which were the product of remorse and regret were not admissible as excited utterances).

Several decisions of this Court, its precursors, and the subordinate courts of military appeals have construed the rule. For example, in *United States v. LeMere*, 22 M.J. 61 (C.M.A. 1986), the precursor to this Court held that statements by a child concerning sexual abuse made to her mother within twelve to fourteen hours of the alleged events were not excited utterances. The court reasoned that the "'startling event' … must be viewed as 'startling' by the declarant, regardless of how it might appear to some other person." As the child in question "did not seem upset at the time, later went upstairs with [the accused] to look for her shoes, fell asleep in his arms as he held her when he was being driven home, and acted in a calm and normal manner at all times after the event," there was insufficient evidence that she was under the stress of a startling event. *Id.* at 68. Further, the court concluded that "if there had ever been any 'excitement,' the 12-hour lapse of time would seem to have removed its 'stress.'" *Id.*

In *United States v. Arnold*, 25 M.J. 129, 132 (C.M.A. 1987), a divided court agreed with the Army Court of Military Review in finding that a military judge abused his discretion in admitting statements made by a 13-year-old child about her father's acts of sexual abuse to a

school nurse and a Criminal Investigation Division (CID) agent. These statements were made after the young girl "immediately sought out" her school counselor the morning following the abuse, in a "really agitated . . . very, very subdued" and "crying" manner. *Id.* at 131. The teenager asked whether "the father [is] supposed to be the first one to have sex" with his daughter, without specific prompting. *Id.* When the counselor inquired why she asked, the young girl made statements about what had happened the night prior. *Id.* The counselor "summoned the school nurse, and the story was repeated in her presence."

In holding that the statements to the nurse were not excited utterances, this Court's precursor reasoned that "while the two declarations to the counselor and the nurse were part of a continuous episode, the second to the nurse was more a result of the counselor's action in initiating the discussion with the nurse and the statement more a result of their urgings and questions." *Id.* (internal quotation omitted). While acknowledging the lack of a "bright line," this Court's precursor held that

> it is universally recognized that, in order for there to be an excited utterance, the statement must be 'spontaneous,

> excited or impulsive rather than the product of reflection and deliberation.' Further, the event must be 'startling.' And most importantly, the declarant must be 'under the stress of excitement caused by the event.'

*Id.* at 132 (citations omitted).

In holding the girl's initial statement to her counselor was properly admitted, the *Arnold* court gave weight to her "*unsolicited, spontaneous statements . . . at the first available opportunity"* while in a highly agitated state due to "the attempted sexual assault but also under the threat of being shot by her father." *Id.* (emphasis in original).

By contrast, in *United States v. Jones*, 30 M.J. 127 (C.M.A. 1990), this Court's precursor held statements by a mother regarding her husband's potential motive to murder their child, some eight months before the child's death, were inadmissible even though the declarant mother was "visibly upset, tearful, et cetera." *Id.* at 129. The court observed that the "startling event" prompting the declarant's emotional state was the accused's "attempted destruction of his son's belongings some 12 hours earlier." *Id.* The court distinguished its decision in *Arnold*, determining that although the child in that case "might have tended to remain excited because of a startling event" the declarant in *Jones* was an adult, and "instead of being the product of impulse or

instinct, her utterance was in response to a question" by someone "concerned about her emotional state." *Id.* at 130.

In *United States v. Iron Shell*, 633 F.2d 77, 80-81 (8th Cir. 1980), the Eighth Circuit held that it was not an abuse of discretion to admit a nine-year-old girl's statements to a law enforcement officer between approximately forty-five minutes and one hour, fifteen minutes after an attempted sexual assault where multiple witnesses testified that the young girl had been grabbed by the accused and pulled into tall bushes, was heard screaming, observed being assaulted by the accused, was "crying and hollering," and seen with weeds on her back and head with disheveled hair and a swollen face.

Calling its decision "a close question," the court acknowledged "testimony that the declarant was calm and unexcited," by the female police officer but noted in "contrast the same witness described [her] as nervous and scared. Testimony from other sources suggested that [the girl] had struggled with the defendant, that he had threatened her with serious harm and that he had unsnapped and pulled down her jeans. *Id.* at 86. Testimony by the officer established that "she did not ask [the young girl] suggestive questions but merely reported what [she] said.

The officer only asked [her], 'what happened?'" *Id.* Finding the open-ended nature of the question compelling, the court observed that "[t]he single question 'what happened' has been held not to destroy the excitement necessary to qualify under this exception to the hearsay rule." *Id.* (citing cases).

Conversely, other courts have determined that suggestive, close-ended questions undercut findings of spontaneity. In *United States v. Frost*, 684 F.3d 963, 974 (10th Cir. 2012), the Tenth Circuit expressed disfavor of statements that "were a product of police questioning approximately an hour after the encounter [a sexual assault] . . . ." The court held that, although not conclusive, "responses to detailed questioning lack the characteristic spontaneity of an excited utterance." *Id.* at 975. Because the statements were the product of specific, close-ended questions, the court concluded a "strong case against admissibility could have been made." *Id.* But because the defendant's counsel did not object at trial the court found no plain error. *Id.*

Other decisions have likewise distinguished between open and suggestive, close-ended questioning in evaluating the excited utterance exception. *Compare Paxton v. Ward*, 199 F.3d 1197, 1211 (10th Cir.

1999) (finding statement inadmissible because, among other reasons, it "was not spontaneously volunteered, but rather was offered in response to questioning"), *with United States v. Phelps*, 168 F.3d 1048, 1055 (8th Cir. 1999) (district court did not abuse its discretion by admitting statements to officer where "[e]ach time [victim] began to talk to [officer] about the shooting, she began to cry, despite [officer's] attempts to calm her down," and victim's "statements to [officer] were not made in response to suggestive questioning"), *and Iron Shell*, 633 F.2d at 86 (discussed *supra*); s*ee also United States v. Pollard*, 38 M.J. 41, 44-50 (C.M.A. 1993) (reasoning that it was not plain error to admit child's responses to general inquiry of what is "wrong").

### A. The military judge abused his discretion in applying the "excited utterance" exception to the hearsay rule

Here, the military judge abused his discretion in holding that the head nod to SFS personnel was an "excited utterance" by failing to account for the highly suggestive questioning of law enforcement and evidence indicating Mrs. MB's was in an unexcited state and did not respond spontaneously. This case is analogous to the Navy-Marine Court of Criminal Appeals' decision in *United States v. Thomas*, 41 M.J. 732, 733-36 (N.M. Ct. Crim. App. 1995) where it was held that

statements made "in response to repeated questioning" while the declarant was in route to receive medical attention after being hit on the head with a tire jack were not excited utterances because there was nothing in the way the declarant "reacted to the infliction of his injuries that indicates he was under any stress or excitement caused by the assault when he disclosed who had assaulted him."

Here, the question posed by law enforcement was both highly suggestive and vague. The question occurred after law enforcement identified themselves as SFS personnel and moved Mrs. MB to the bed. Although there was evidence that Mrs. MB had suffered injury caused by earlier events, the evidence that she was in a state of nervous excitement when the suggestive question was posed to her is lacking. Conversely, the purported "statement" was not "spontaneous, excited, or impulsive rather than the product of reflection and deliberation," *Feltham*, 58 M.J. at 474, and was not prompted by a startling event, but rather by law enforcement's suggestive question. *See Paxton*, 199 F.3d at 1211; *Iron Shell*, 633 F.2d at 86; *Frost*, 684 F.3d at 974. Because Mrs. MB's head nod was not "the product of impulse or instinct," but rather "in response to a question" by someone "concerned about her

emotional state," it lacked the requisite spontaneity to be an excited utterance. *See Jones*, 30 M.J. at 130.

In concluding that the statement qualified as an excited utterance, the military judge did not address or consider the concern presented by suggestive, close-ended questions. By holding that at the time of trial Mrs. MB was "in no position to testify about her own mental state at the time [of the assault]," JA 212, the military judge essentially excused himself from having to find that Mrs. MB's statement was made with the requisite spontaneity that is the touchstone of the rationale for trustworthiness of Rule 803(2)'s exception to the hearsay rule. *See* Advisory Comm. Notes to Fed. R. Evid. 803(2) ("Spontaneity is the key factor"). Further, the military judge had available in the record medical evidence suggesting that Mrs. MB had unexcited interactions with medical providers shortly after law enforcement asked her if her husband "did this," but failed to account for this evidence in his ruling. JA 369, 377, 403, 405. By failing to address the relevant legal considerations to support his findings and conclusions and ignoring relevant facts in the record, the military judge abused his discretion.

### B. The military judge abused his discretion in concluding that any unfair prejudicial effect of the head nod was outweighed by its probative value.

Relevant evidence may be excluded when its probative value is substantially outweighed by the danger of unfair prejudice or misleading the members. *United States v. Pope*, 69 M.J. 328, 333 (C.A.A.F. 2011). Although a military judge enjoys wide discretion in applying an MRE 403 balancing test, an appellate court gives military judges less deference if they fail to articulate their balancing analysis on the record. *United States v. Collier*, 67 M.J. 347 (C.A.A.F. 2009).

Here, the military judge conducted a cursory balancing test, citing that the head nod evidence had high probative value because it was in response to a specific question. JA 213. This was merely the threshold requirement for the conduct to be an "assertion" ripe for consideration as a potential excited utterance. The mere fact that a "nod" is offered as an assertion is not by itself a testament to high probative value. The military judge likewise failed to consider on the record that the vague nature of the question and Mrs. MB's physical and mental state increased the danger of unfair prejudice to Appellant. Accordingly, the military judge abused his discretion.

### C. The erroneously admitted evidence prejudiced Appellant

"This Court conducts de novo review of 'whether an error, constitutional or otherwise, was harmless.'" *United States v. Norman*, 74 M.J. 144, 150 (C.A.A.F. 2015) (quoting *United States v. Hall*, 66 M.J. 53, 54 (C.A.A.F. 2008). "For nonconstitutional errors, the Government must demonstrate that the error did not have a substantial influence on the findings." *Hall*, 66 M.J. at 54.

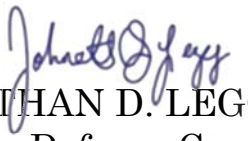
This Court determines whether prejudice resulted from an erroneous "evidentiary ruling by weighing four factors: '(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question.'" *Norman*, 74 M.J. at 150 (citing *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999).

Here, the Government cannot demonstrate that the erroneously admitted evidence did not substantially influence the panel's findings. This case was a closely contested trial that resulted in Appellant being acquitted of some of the specifications. JA 11. In its decision, the AFCCA noted that "SrA BB had a motive to conceal the true nature of his interaction with MB," and that "he was not completely truthful in

his initial statement to law enforcement, and that his estimates of time appear to be inconsistent with other evidence." JA 10. Mrs. MB's testimony at trial was favorable to Appellant's theory of the case, and the improper hearsay evidence was the only indication that Mrs. MB ever accused her husband of an assault. Additionally, the government relied on the improper hearsay evidence in its closing argument. JA 342. Without this evidence, the government's case rested on inconclusive circumstantial evidence, testimony of a witness with a motive to lie, and "ear witnesses" who had minimal information that was certainly subject to challenge.

**WHEREFORE**, Appellant respectfully requests this Honorable Court set aside the findings of guilt.

Respectfully submitted,



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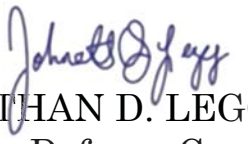
CERTIFICATE OF FILING AND SERVICE

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 15 June 2016.



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