IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

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

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

REPLY BRIEF

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v.	)	
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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Pursuant to Rule 19(b)(3) of this Court's Rules of Practice and Procedures, Appellant hereby replies to the government's answer, dated July 15, 2016.

Argument

The government contends that statements prompted by law enforcement "do not infer that a declarant made the statement as a result of reflection or fabrication." Gov't Br. 9. In the cases it cites, however, the government fails to distinguish between the general, open-ended nature of the questions, as compared to the specific, suggestive questions asked by security forces in this case.

For example, in *Webb v. Lane*, 922 F.2d 390, 392 (7th Cir. 1991), a

declarant's statements in response to an officer's inquiry if he "knew who shot him," were held admissible as excited utterances. Likewise, an officer's general inquiry of "What happened?" and "Who did it?" were deemed not to destroy spontaneity in *United States v. Glenn*, 473 F.2d 191, 193 (D.C. Cir. 1972). Similarly, in *United States v. Kearney*, 420 F.2d 170, 175 (D.C. Cir. 1969), although the exact questions are not identified, the court found persuasive that the declarant did not "focus[] his account on a person who identity was known to him," which suggests the interviewing officer did not know or suggest the specific perpetrator to the declarant. *Cf. Gross v. Greer*, 773 F.2d 116, 117 (7th Cir. 1985) (holding a four year old child's statements in response to "a few general questions" admissible as excited utterances).

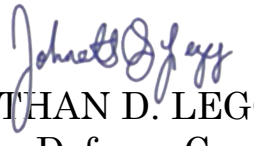
Unlike the cases cited by the government above—which involved a general, non-suggestive inquiry—security forces made a specific and suggestive inquiry of Mrs. MB, *i.e.*, the "direct question" inquiring "if her husband did this to her." JA 35, 235. The government concedes that this question was "perhaps more pointed than asking 'what happened,'" Gov't Br. at 10, but fails to account for the principle of law that "responses to detailed questioning lack the characteristic

spontaneity of an excited utterance." *United States v. Frost*, 684 F.3d 963, 974 (10th Cir. 2012).

The government attempts to bolster its case by painting Mrs. MB as a liar to her medical provider when she explained a few hours later that her husband had never hit her or pushed her. Gov't Br. at 11. The testimony the government cites as apparently inconsistent with Mrs. MB's statement to her physician references an incident in Las Vegas where Mrs. MB stated *she* struck her husband several times and "he defended himself." JA 220. Apparently finding this testimony credible, the members acquitted Appellant of a specification related to this incident. JA 12. There is no real contradiction between Mrs. MB's statement that her husband had never hit or pushed her before, and her subsequent testimony at trial that Appellant justifiably used force to defend himself from her.

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

Respectfully submitted,



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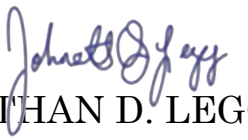
CERTIFICATE OF FILING AND SERVICE

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 July 29, 2016.



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