IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	
Appellee,	) BRIEF OF AMICUS CURIAE IN) SUPPORT OF APPELLEE
	)
v.	) USCA Dkt. No. 16-0229/AF
	)
Airman First Class (E-3)	) Crim. App. No. 38616
ELLWOOD T. BOWEN III, USAF,	)
Appellant	)

BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLEE

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Appellant	)	

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

Issue Presented

WHETHER A MILITARY JUDGE'S ADMISSION OF HEARSAY EVIDENCE UNDER THE EXCITED UTTERANCE EXCEPTION DESERVES SUBSTANTIAL DEFERENCE AND WHETHER THE ADMISSION OF ONE INSTANCE OF SUCH TESTIMONY POSES A SUFFICIENTLY HIGH LEVEL OF PREJUDICE TO JUSTIFY REVERSAL UNDER THE HARMLESS ERROR DOCTRINE.

Statement of Statutory Jurisdiction

Amicus Curiae adopts Appellee's Statement of Statutory Jurisdiction.

Statement of the Case

Amicus Curiae adopts Appellee's Statement of the Case.

Statement of the Facts

Amicus Curiae adopts Appellee's Statement of the Facts.

Summary of the Argument

This Honorable Court should affirm the lower court's decision for two reasons. First, the military judge's admission of evidence under the excited utterance exception in this case is a mixed question of law and fact, and should therefore receive greater deference than other evidentiary issues which may ultimately be reviewed *de novo*. Although the abuse of discretion standard of review generally governs the admission of hearsay evidence, this Court has not adopted a bright line rule for how much deference should be given in the admission of hearsay evidence. The similarities between the analysis used by a military judge while deciding to admit an excited utterance and the analysis for the admission of expert testimony, which receives a higher level of deference, dictate that substantial deference should be awarded to the admission of an excited utterance. Second, even if this Court finds that the military judge's admission of hearsay evidence was error, the evidence admitted was not sufficiently prejudicial to justify a reversal and was therefore harmless.

Argument

A MILITARY JUDGE'S ADMISSION OF HEARSAY EVIDENCE UNDER THE EXCITED UTTERANCE EXCEPTION DESERVES SUBSTANTIAL DEFERENCE AND THE ADMISSION OF ONE INSTANCE OF SUCH TESTIMONY DOES NOT POSE A SUFFICIENTLY HIGH LEVEL OF PREJUDICE TO JUSTIFY REVERSAL UNDER THE HARMLESS ERROR DOCTRINE.

Standard of Review

The standard of review of a military judge's decision to admit or exclude evidence is abuse of discretion. *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008) (citing *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)). A military judge's factfinding is reviewed under a clearly erroneous standard of review. *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995). However, a binary approach to this standard, reviewing military judge's decisions as both findings of fact and conclusions of law, may be necessary as military courts are conflicted about what this standard of review means when applied to different evidentiary issues involving hearsay. Jeremy S. Weber, *The Abuse of Discretion Standard of Review in Military Justice Appeals*, 223 Mil. L. Rev. 41, 51 (2015) (internal citations omitted).

For mixed questions of law and fact, the abuse of discretion standard is one of substantial deference, requiring a reviewing court to have a firm conviction that the lower court committed a clear error of judgment before setting aside a military judge's action in a matter of discretion. *United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1993). Reversal under an abuse of discretion standard similarly requires a reviewing court to find that the military judge's findings of fact were clearly erroneous or that his decision was based on an erroneous view of the law. *Sullivan*, 42 M.J. at 363. Furthermore, this standard recognizes that military judges have a

range of choices to govern a trial, and they will not be reversed unless their decision falls outside of that range. *United States v. Wallace*, 964 F.2d 1214, 1217 n.3 (D.C. Cir. 1992).

Law

Where a decision is arguably a mixed question of law and fact, a reviewing court may need to separate fact from law to make the proper determination of the level of deference it owes to a lower court decision. Weber, *supra*, at 66.

For example, in *United States v. Hollis*, this Court reviewed a military judge's decision to admit hearsay evidence of a child's statements to a physician during a medical examination which implicated her father in acts of sexual abuse. 57 M.J. 74, 76-77 (C.A.A.F. 2002). The military judge in that case made a preliminary factual determination that the statements offered were for the purpose of medical diagnosis and were therefore not excluded by the rule against hearsay. *Id.* at 78. On review in *Hollis*, this Court utilized the clearly erroneous standard to determine that the military judge's analysis of whether the hearsay statements made to a physician were admissible. *Id.* at 79-80. The result was that the military judge's determination received substantial deference and his ruling was upheld. *Id.*

I. The admission of hearsay evidence under an excited utterance exception is a mixed question of fact and law and deserves substantial deference by this Court.

Because admission of hearsay evidence requires a fact-centric analysis of the record and a weighing of factors to ensure fair application of fact to law, this Court should award substantial deference to the military judge's decision.

This Court has uniformly limited its review to matters of law, but the issue of whether a case involves questions of law or fact is reviewable by the Court. *United States v. Lowry*, 2 M.J. 55, 58 (C.M.A. 1976) *superseded on other grounds by* Mil. R. of Evid. 305(e). A court must avoid resolving questions of fact which are separable from questions of law, such as an issue of credibility. *Id.* An abuse of discretion arises in cases where the judge was controlled by some error of law or where the order, "based upon factual, as distinguished from legal, conclusions is without evidentiary support." *United States v. Travers*, 25 M.J. 61, 63 (C.M.A. 1987). This Court affords *substantial* discretion to a military judge's evidentiary rulings as long as, where it is required, a balancing test is conducted on the record. *United States v. Pope*, 69 M.J. 328, 333 (C.A.A.F. 2011) (emphasis added). "A reasoned analysis will be given greater deference than otherwise." *United States v Winckelmann*, 73 M.J. 11, 15 (C.A.A.F. 2013).

By analogy, and similar to the question of admissibility of hearsay evidence, this Court reviews a military judge's decision to admit or exclude expert testimony for an abuse of discretion. *United States v. Billings*, 61 M.J. 163, 166 (C.A.A.F. 2005). This Court has traditionally found that the ultimate issue on evidentiary

rulings is one of law. *See e.g. Freeman*, 65 M.J. at 453. However, for mixed questions, this Court has noted that greater deference may be warranted. *United States v. Baker*, 70 M.J. 283, 287-88 (C.A.A.F. 2011).

In *United States v. Ellis*, this Court reviewed a military judge's decision to allow an expert witness to testify as to the appellant's risk of recidivism over defense counsel's objection that the opinion lacked sufficient factual basis or reliability. 68 M.J. 341, 344 (C.A.A.F. 2010). This Court held that there was no hard and fast rule that accompanied a determination of whether the expert's opinion was sufficiently backed by the required knowledge for purposes of reliability. *Id.* at 345-46. However, where the military judge's determination of the expert's credibility was sufficiently supported by the record, no abuse of discretion was found. *Id.* Furthermore, because the military judge in *Ellis* performed a balancing test on the record, he was presumed to have knowledge of the potential prejudicial effect of the opinion and was similarly presumed to have given it appropriate weight. *Id.* at 347.

The admission of hearsay evidence in this case relies on a fact-centric analysis similar to that required for the admission of expert testimony. Therefore, it deserves a similar level of deference. Much like the preliminary factual determination in *Ellis*, that an expert possessed the requisite knowledge and his testimony presented sufficient reliability for admission, the military judge in this

case was required to observe a combination of witness testimony and the circumstantial evidence surrounding Ms. M.B.'s head nod to determine that Ms. M.B. was under the stress of a startling event for the purposes of the excited utterance exception. 68 M.J. at 344; (JA at 212, 214). Additionally, like the judge in *Ellis*, who was required to perform a balancing test on record under Mil. R. of Evid. 403, the judge in this case balanced the probative value of the head nod against its potential prejudicial effect. 68 M.J. at 347; (R. at 415). This Court should find that the military judge in this case did not abuse his discretion in admitting into evidence Ms. M.B.'s head nod, much like it held the judge in *Ellis* did not abuse his discretion in admitting the expert testimony. The judge in this case performed the appropriate balancing test for a matter involving a mixed question of law and fact. 68 M.J. at 347. Similarly, in *Hollis*, this Court afforded substantial deference to the military judge's determination that the hearsay statements were admissible. *Hollis*, 57 M.J. at 79-80.

II. Even if the admission of hearsay was erroneous, its prejudicial effect was sufficiently isolated and minor that reversal would be unjustified.

If the Court finds that a judge erred in his decision to admit evidence, the Court still may not reverse the holding of the lower court unless "the error materially prejudices the substantial rights of the accused." Article 59(a), UCMJ,

10 U.S.C. § 859(a) (2000). Article 59(a) recognizes that "errors are likely to occur in the dynamic atmosphere of a trial, and that prejudice must be shown before reversing the findings or sentence." *United States v. Davis*, 64 M.J. 445, 449 (C.A.A.F. 2007). The Supreme Court has held that such "trial error" may be quantitatively assessed in the context of all other evidence presented to determine if its admission was harmless beyond a reasonable doubt. *Arizona v. Fulminante*, 499 U.S. 279, 307-08 (1991). In the context of rulings on evidence, the abuse of discretion standard only measures the extent to which the appellate court disagrees with the trial judge's ruling. Article 59(a) requires that military courts go beyond mere disagreement and evaluate the impact of that ruling in light of all other properly admitted evidence. *United States v. Simmons*, 44 M.J. 819, 823 (U.S.A.F.C.A. 1996).

The reviewing court must take into account what the error meant to the members of the convicting court, not by itself but in relation to all other evidence presented, and only overturn a conviction where it can say with fair assurance that the judgment was *substantially* swayed by the error. *Kotteakos v. United States*, 328 U.S. 750, 765 (1946) (emphasis added).

The court considers four factors to determine whether the erroneous admission of evidence was harmful: (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. *United States v. Berry*, 61 M.J. 91, 98 (C.A.A.F. 2005). Application of the factors outlined in *Berry* to the facts of this case dictates that any alleged error was harmless.

One requirement for a finding of prejudice is that the evidence must have substantially prejudiced the convicting court. *United States v. Yerger*, 3 C.M.R. 22, 24 (C.M.A. 1952) (explaining that minor errors in receiving hearsay testimony and using leading questions appear in many criminal trials, and ordinarily such deviations from proper procedure would not be substantially prejudicial).

For a nonconstitutional error such as the one alleged here, the Government has the burden of demonstrating that "the error did not have a substantial influence on the findings." *United States v. McCollum*, 58 M.J. 323, 342 (C.A.A.F. 2003). When a "fact was already obvious from ... testimony at trial" and the evidence in question "would not have provided any new ammunition," an error is likely to be harmless. *United States v. Cano*, 61 M.J. 74, 77–78 (C.A.A.F. 2005). The issue raised by the Appellant alleges an isolated and minor error at worst, and should not be found to have substantially prejudiced the convicting court. Unlike the continued and repeated admission of improper evidence in *Yerger*, the admission of Ms. M.B.'s head nod is a single instance of alleged trial error. It was not sufficient, on its own, to unfairly prejudice the members of the court in this case, and was therefore harmless. This Court should follow guiding precedent in

guarding against the "magnification on appeal of instances which were of little importance in their setting." *Yerger*, 3 C.M.R. at 24 (internal citations omitted).

Conclusion

The military judge's admission of evidence under the excited utterance exception deserves substantial deference. Assuming *arguendo* that the military judge abused his discretion in admitting Ms. M.B.'s statement under the excited utterance doctrine, in light of all of the other evidence in this case, such error was harmless. This Court should therefore AFFRIM the lower court's ruling.

/s/ John G. Scott

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**Mr. Zenger has prepared this brief under the supervision of John G. Scott pursuant to Rule 13A of the Rules of Practice and Procedure of the Court of Appeals for the Armed Forces.*

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the following parties on October 18, 2016 by electronic mail pursuant to this Court's Order of July 22, 2010, and concerning the filing of electronic pleadings.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitations of Rule 24(c) in that it contains 2,782 words.

2. This brief complies with the typeface and type style requirements of Rule 37 in that it has been prepared in a proportional type using Microsoft Word Version 15.16 with 14-point Times New Roman font.

/s/ John G. Scott