UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

Misc. Dkt. No. 2026-06

UNITED STATES
Appellant

v.

Chevaughn J. CUNNINGHAM
Airman First Class (E-3), U.S. Air Force, *Appellee*

Appeal by the United States Pursuant to Article 62, UCMJ

Decided 20 November 2026[1]

Military Judge: Ryan D. Brunson (motions), Tiny L. Bowman (trial).

GCM convened at: Joint Base San Antonio – Fort Sam Houston, Texas.

For Appellant: Major Donnell D. Wright, USAF (argued); Lieutenant Colonel Brian H. Adams, USAF; Major Morgan R. Christie, USAF; Mary Ellen Payne, Esquire.

For Appellee: Major Olga Stanford, USAF (argued); Megan P. Marinos, Esquire.

Before KUBLER, JAMES, and KINDNESS, *Appellate Military Judges*.

Judge JAMES delivered the opinion of the court, in which Judge KUBLER and Judge KINDNESS joined.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.3.

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[1] The court heard oral argument in this case on 30 September 2026.

JAMES, Judge:

This case arises out of an interlocutory appeal under Article 62, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 862,[2] in a pending court-martial.

Appellee is charged with two specifications of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920, six specifications of domestic violence in violation of Article 128b, UCMJ, 10 U.S.C. § 928b, and one specification of burglary in violation of Article 129, UCMJ, 10 U.S.C. § 929. AN is the named victim in all specifications.

During the Government's case-in-chief, it called two outcry witnesses, Staff Sergeant (SSgt) CB and Senior Airman (SrA) JLM, to testify regarding Specifications 1 and 5 of Charge II, two of the six domestic violence allegations (strangling AN and hitting AN's face).[3] After hearing testimony by SSgt CB, the military judge granted a defense oral motion to exclude SSgt CB's testimony entirely as irrelevant. Additionally, during testimony by SrA JLM, the military judge sustained multiple objections by the trial defense counsel to potential testimony by SrA JLM of excited utterances. The Government filed a motion to reconsider the military judge's rulings excluding the testimony of SSgt CB and to reconsider the objections to SSgt CB and SrA JLM's testimony as excited utterances and as a present sense impression. The trial defense counsel responded to the motion for reconsideration orally. After hearing the trial defense counsel's argument and considering the Government's written filing for reconsideration, the military judge orally denied the Government's motion for reconsideration.

The Government filed a timely notice of appeal asserting jurisdiction under Article 62(a)(1)(B), UCMJ.[4] The Government requested this court find the military judge abused her discretion by excluding SSgt CB's testimony as irrelevant, sustaining trial defense counsel's objections to SSgt CB's and SrA JLM's

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[2] Unless otherwise specified, references to the UCMJ, the Rules for Courts-Martial, and the Military Rules of Evidence (Mil. R. Evid.) are to the *Manual for Courts-Martial, United States* (2024 ed.).

[3] The Appellee was originally charged with six specifications of domestic violence against AN, however, the military judge presiding over motions granted a defense motion for appropriate relief and found Specifications 5 and 6 were multiplicious for findings purposes and subsequently merged those two specifications into a rewritten Specification 5.

[4] After oral argument, Appellee moved to dismiss this Article 62, UCMJ, appeal as moot because the military judge, the factfinder for Appellee's court-martial, was no longer assigned as a military judge in the trial judiciary. Because this court received an allegation of legal error through Article 62, UCMJ, this purported change in case posture did not render the appeal moot and the motion was denied on 15 October 2026.

testimony as not meeting the requirements for an excited utterance or present sense impression under Mil. R. Evid. 803(1) and 803(2), and sustaining the trial defense counsel's objection to speculation regarding testimony by SrA JLM that the female he heard sounded "upset" and "distressed."

I. BACKGROUND

The named victim, AN, testified during the findings portion of Appellee's court-martial. During her testimony, AN stated Appellee had assaulted her on multiple occasions. She was specifically asked about 17 July 2023, and if she remembered the events of that day. AN said she did not remember 17 July 2023, specifically but did remember an incident that occurred around mid-July. AN testified that she and Appellee were in his dorm room on base and started yelling at each other. The yelling progressed to them pushing each other. Appellee then allegedly put his hands on AN's throat, hit her in the face, slammed her head against the wall, and poured a bottle of juice on her head. AN testified her airway was constricted from Appellee placing his hands on her neck and she could speak "a little bit." AN clarified she could not speak in the same manner as she was speaking in the courtroom during her testimony. She stated her airway was constricted for a little while after the Appellee allegedly put his hands on her neck. AN testified that after Appellee poured juice on her head she went and showered.

SrA JLM lived in the same dorm room as Appellee. The dorms were set as a quadplex, meaning four dorms shared a common area, but each dorm had its own bedroom. On 17 July 2023, SrA JLM was in his dorm room with his then-girlfriend, now wife, SSgt CB, watching a movie. SrA JLM and SSgt CB heard noises coming from Appellee's dorm room. In the Government's motion to reconsider, the Government attached SSgt CB's and SrA JLM's written statements to law enforcement from 17 July 2023. In SSgt CB's written statement, she explained they heard a girl screaming in an adjacent room in the quadraplex. SSgt CB said she heard, "[Y]ou hit me first, you were choking me, you hit me [sic] head so hard I was seeing stars . . . I told you to stop abusing me" and "stop touching me." SSgt CB also said she heard "loud thumping sounds." She heard both of "them . . . yelling at each other" and "[the female] was crying a lot."

In SrA JLM's written statement dated 17 July 2023, he said he heard "what sounded like a young female . . . crying," and saying, "[Y]ou always abuse me when I take care of you [,] how am I supposed to go to work like this, you hit my head against the wall [,] I was seeing stars [, and] you are choking me [ ]." He said he heard "a very audible thud," but it is unclear when the sound occurred.

Because of what SrA JLM and SSgt CB heard, SrA JLM called Security Forces. Security Forces arrived while AN was in the shower. When she came out, Security Forces separated her and Appellee and spoke with AN about what had allegedly occurred. AN told Security Forces she and Appellee got into an argument, pushed each other around, and he poured juice on her. She did not tell them Appellee hit her or placed his hands on her neck.

As part of the Government's case-in-chief, the Government called SSgt CB as a witness to testify. SSgt CB disclosed that on 17 July 2023, she heard "a lot of screaming, yelling, crying, and it sounded like there was a disturbance going on in one of the rooms within the quad." SSgt CB clarified what she heard came from Appellee's dorm room. SSgt CB testified she heard a female voice that sounded "distressed" who was "crying, screaming. Kind of shaky, at times." SSgt CB further indicated she also heard some "banging," but did not know what the sound was. During SSgt CB's direct testimony, she testified this went on for "about 30 minutes:"

> [Special Trial Counsel (STC):] Okay, and you mentioned her crying, and screaming, how did the crying sound to you?
>
> [SSgt CB:] It -- I don't know how to describe it. It was like a painful, screaming, crying, like she was definitely in distress.
>
> [Senior Defense Counsel (SDC)]: Objection, Your Honor.
>
> [Military Judge (MJ):] The objection is sustained.
>
> STC: And when you heard this, what did she say --
>
> SDC: Objection, Your Honor. Hearsay.
>
> STC: Your Honor, the [G]overnment -- the [G]overnment offers this as [Mil. R. Evid.] 802 [sic] evidence excited utterance, as well as [Mil. R. Evid.] 803(1), present sense impression.
>
> MJ: The objection is overruled -- [I] mean, it's sustained. Sorry.

The special trial counsel continued to try to ask SSgt CB what she heard the female voice say on 17 July 2025. The military judge continued to grant trial defense counsel's objections to hearsay. The following colloquy occurred:

> [STC:] So, you testified that she made statements while she was screaming. What did she say next?
>
> SDC: Objection, Your Honor. Hearsay.
>
> STC: Your Honor --
>
> MJ: Yes, [special trial counsel]. You can respond.

> STC: The [G]overnment -- the [G]overnment's position is at the -- an excited event or -- excuse me, an event occurred. The witness --
>
> MJ: The witness [does not] even know who the person is. At this point, the court is actually at the point of disregarding this whole testimony as being irrelevant because we don't even know if the person that was in his room was him or her.
>
> STC: Can I lay more -- foundation, Your Honor?
>
> MJ: Yeah.

The special trial counsel continued to ask SSgt CB questions, most of which were objected to by the trial defense counsel and sustained by the military judge. The following colloquy occurred:

> STC: Thank you. And after the screaming, what happened?
>
> [SSgt CB:] I called my First Sergeant. I told --
>
> SDC: Objection, Your Honor. Relevance.
>
> MJ: What is the relevance of her calling her First Sergeant of about -- of something that she heard in [Appellee]'s dorm room?
>
> STC: Establishing that we already have testimony from other witnesses that Security Forces was called, and that it corroborates what was already testified to before about the event that occurred that day.
>
> MJ: Okay. Then, get -- what, what, what you need to do is ask the questions in what you're trying to get out.
>
> STC: Okay.
>
> MJ: But last time I checked, her First Sergeant was not Security Forces. The objection is sustained.
>
> . . . .
>
> STC: Okay. Where was the screaming coming from?
>
> [SSgt CB:] [Appellee]'s dorm.
>
> STC: Okay, and what was said when the screaming was going on --
>
> SDC: Objection, Your Honor --
>
> MJ: The objection is sustained. [Special trial counsel], you have asked that question two or three different times in different ways and I have sustained the objection.

The special trial counsel did not ask any further questions. After, the military judge asked if the senior defense counsel intended to cross-examine the witness, and the following colloquy occurred:

> SDC: Your Honor, no, and also based on the fact that, at this point, there's no evidence before the court of who, if anyone, was in the room with [Appellee], I request the court disregard this witness's testimony.
>
> MJ: The court will do so. Is this witness subject to recall?

The military judge did not explain why she was granting trial defense counsel's request to exclude the entire testimony of SSgt CB.

Next, the Government called SrA JLM. When asked about the night of 17 July 2023, SrA JLM explained his dorm room was on the opposite side of the Appellee's dorm room in the quad, approximately 20 paces apart. SrA JLM testified that he called Security Forces that evening because he heard "the shouting of someone, like, in distress, kind of," during a quiet part of the movie he was watching with SSgt CB. Trial defense counsel objected to the testimony as speculation. The military judge sustained the objection as to speculation, but considered the shouting. SrA JLM was then asked if he heard "the female voice" make any statements. The following colloquy occurred:

> [Assistant Trial Counsel (ATC):] Okay. And during the shouting, did you hear the female voice make any statements without going into what the person may or may not have said?
>
> [SrA JLM:] I heard a statement, but I couldn't -- I can't recall it off the top of my head what she said exactly, sir.
>
> [ATC:] Okay, would anything help you remember?
>
> [SrA JLM:] My statement that I wrote that night, sir.
>
> [ATC:] Your Honor, permission to approach the witness?
>
> MJ: Well, let me ask you -- let me ask you a question. Did the witness not just answer your question that he heard a statement, he just doesn't remember what it is. And your question was, did you hear a statement being made without telling me what it is? So, what are you doing right now.
>
> [ATC:] Your Honor, the -- the [G]overnment is wanting -- I am trying to lay foundation for an excited utterance. One of the foundational steps is to establish that there's a statement made about an event going on, and I'm unable to do that unless the witness recalls the statement in question.

> MJ: Okay. Also, what -- what else is -- when you look at it -- with excited utterance, right? It had to be when?
>
> ATC: During, Your Honor.
>
> MJ: During what?
>
> ATC: An event, Your Honor.
>
> MJ: While the declarant was under the stress of excitement that it caused.
>
> ATC: Yes, Your Honor.
>
> MJ: Right? So, how does this witness be able to -- how do you lay a foundation with this particular witness to even say that the statement has anything to do with an event that was caused *because he wasn't even in there*.
>
> [ATC:] Your Honor, the content of the statement is indicative of whether there was a[n] event and a startling event going on.
>
> MJ: Yeah, but how does he know what the event and the startling event is, *and he was not there*?
>
> [ATC:] Your Honor, based on the statement -- a statement can have an indicia of reliability regarding a[n] event and startling event going on.
>
> MJ: At the time?
>
> ATC: At the time, Your Honor.
>
> MJ: But how does he know that that event occurred at the time? Because a person can be in a room and scream anything about something that happened 4 days ago. How does he know that what the person was screaming about occurred at that time?
>
> [ATC:] The grammar and verbiage of the statement, Your Honor.
>
> MJ: The court is not going to allow that. Anything else?
>
> [ATC:] Your Honor, can you please clarify what you mean by allow that? What will you not be allowing?
>
> MJ: The entrance [sic] of whatever statement is that you plan on trying to refresh his recollection on to be admitted under excited utterance?

(Emphasis added).

Further during SrA JLM's testimony he was asked the following:

> [ATC:] Okay. And going back a little bit, without discussing what you thought might be going on, how did the things you heard make you feel?
>
> SDC: Objection, Your Honor. Relevance.
>
> MJ: The objection is overruled. You may answer the question.
>
> [SrA JLM:] Concerned.

SrA JLM was asked further questions regarding the call to Security Forces. These questions prompted a recess and Rule for Courts-Martial (R.C.M.) 802 session. The assistant trial counsel finished up his questioning soon thereafter. Before the senior defense counsel started cross-examination, she stated:

> SDC: Your Honor, before cross-examination, given the fact that this witness has not stated who, if anyone, was in the room with [Appellee], we would make the similar request that the court disregard this testimony as irrelevant.
>
> MJ: The court is going to deny that request.

During cross-examination of SrA JLM, the defense counsel elicited that SrA JLM heard a female voice yelling in an angry manner but that "it didn't sound like that voice was crying out for help." On redirect examination, the assistant trial counsel tried to impeach SrA JLM with his pre-trial statement he gave to Security Forces by asking him if he had previously stated, "that [he] heard the female voice state, '[Y]ou always abuse me when I take care of you. How am I supposed to go to work like this? You hit my head against the wall. I was seeing stars --[.]'" The senior defense counsel objected to this approach as improper impeachment, and the military judge sustained the objection. The assistant trial counsel attempted again to impeach his own witness, and the military judge sustained the defense counsel's objections to the statements. The assistant trial counsel had no further questions.

AN was recalled to testify after SrA JLM. The special trial counsel attempted to lay the foundation for video clips from AN's Air Force Office of Special Investigations (OSI) pre-trial interview, as prior consistent statements. The military judge denied three different offered exhibits, eventually allowing the Government to splice out one part of one exhibit and admitted it over the defense counsel's objection. The special trial counsel then asked AN if she recalled "not wanting to tell people what happened to [her] face after the 17 July 2023 incident." AN stated she did. When asked why, AN stated, "I did not want this to escalate legally, and have to deal with all of the things that come after that." The special trial counsel never asked AN if she made any statements on 17 July 2023, after Appellee allegedly assaulted her.

The trial recessed, and the parties and the military judge had another R.C.M. 802 session, where the Government requested the evening to decide how they would move forward on their case. The following morning, the military judge stated the Government had filed a motion for reconsideration of two of her rulings from the day prior. While discussing the motion for reconsideration with the trial counsel, the military judge asked if the trial counsel had anything else to add. The trial counsel stated he "would like to go through each and every element" of the applicable hearsay exceptions. The military judge replied that "[she was] not going to let [the trial counsel] go through each and every element."

The military judge then invited the senior defense counsel to argue her objections to the motion for reconsideration. The following colloquy occurred:

> SDC: Both the [G]overnment and Defense went through in -- in great detail with [AN], the events of that night, and at no point did she make any -- any testimony. There was no testimony that she made any statements that night, Your Honor. Certainly no testimony that -- when she would have made the statements that don't exist, according to her testimony that she was under excitement at that time --
>
> MJ: Does -- let me ask you this.
>
> SDC: Yes, Your Honor.
>
> MJ: Does this contradictory evidence in and of itself make the authority for this court to exclude the evidence in which they are seeking admission of?
>
> SDC: Not --
>
> MJ: Or does it go to weight?
>
> SDC: Your Honor, for excited utterance, contradictory evidence does not. For present sense impression, that does require corroboration as a piece of it. Which is also in the [G]overnment's filing is present sense impression. So, we would argue that it -- it does go to admissibility for that piece.

Later, the senior defense counsel stated, "[F]or excited utterance, Your Honor, it goes exactly to the exciting event. If we don't even know who is making these statements --[.]"

The military judge replied, "A declarant does not need to be known for an excited utterance to be admitted."

The senior defense counsel continued her argument. After the senior defense counsel was done, the military judge stated, "Based on the

[G]overnment's pleadings, the [D]efense's argument, the court maintains its rulings from yesterday for the same reasons that it placed on the record yesterday." The Government then filed its notice of intent to file this Article 62, UCMJ, appeal.

We granted oral argument on the following specified issues, which we heard on 30 September 2026:

> I. WHETHER THE MILITARY JUDGE'S EXCLUSION OF TESTIMONY AMOUNTS TO A "SUBSTANTIAL PROOF OF FACT MATERIAL IN THE PROCEEDING," TO ESTABLISH THIS COURT'S JURISDICTION UNDER ARTICLE 62(a)(1)(B), UCMJ, 10 U.S.C. § 862(a)(1)(B), TO HEAR THIS APPEAL.
>
> II. WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION WHEN SHE EXCLUDED THE ENTIRE TESTIMONY OF [SSGT] CB AS NON-RELEVANT.
>
> III. WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION WHEN SHE EXCLUDED STATEMENTS OFFERED BY [SSGT] CB AND [SRA] JLM AS INADMISSIBLE UNDER THE HEARSAY EXCEPTIONS OF EXCITED UTTERANCE AND PRESENT SENSE IMPRESSION.

II. DISCUSSION

A. Standard of Review

1. Article 62, UCMJ, Appeal

When the Government appeals a ruling under Article 62, UCMJ, "this court reviews the military judge's decision directly and reviews the evidence in the light most favorable to the party which prevailed at trial." *United States v. Lewis*, 78 M.J. 447, 453 (C.A.A.F. 2019) (quoting *United States v. Pugh*, 77 M.J. 1, 3 (C.A.A.F. 2017)). Because this issue is before us pursuant to a government appeal, we "may act only with respect to matters of law." Article 62(a), UCMJ, 10 U.S.C. § 862(a). We are limited to determining whether the military judge's factual findings are "unsupported by the record or clearly erroneous." *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004). When a military judge's "findings of fact and conclusions of law are incomplete and ambiguous . . . the case must be remanded to the military judge for further proceedings." *United States v. Kosek*, 41 M.J. 60, 62 (C.A.A.F. 1994).

"A military judge's decision to admit or exclude evidence is reviewed under an abuse of discretion standard." *United States v. Roberson*, 65 M.J. 43, 45–46 (C.A.A.F. 2007) (citations omitted). "The abuse of discretion standard is a strict

one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. Holmes*, 84 M.J. 704, 709 (A.F. Ct. Crim. App. 2024) (quoting *United States v. Solomon*, 72 M.J. 176, 179 (C.A.A.F. 2013)). "The military judge's findings of fact are reviewed under a clearly erroneous standard and conclusions of law, de novo." *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010) (citing *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)).

2. Jurisdiction

The parties disagree as to whether this court has jurisdiction to hear the Government's appeal. Appellant asserts that this court has jurisdiction to hear this appeal under Article 62(a)(1)(B), UCMJ, because

> the military judge's rulings excluded "evidence that is substantial proof of a fact material in the proceeding"—specifically, corroborating evidence that Appellee struck AN in the face, strangled her, and caused her head to hit a wall, and generally abused her on 17 July 2023—the misconduct charged in Charge II, Specifications 1 and 5.

In their response to Appellant's appeal, Appellee argues "the Government has not established the identity of the declarant, or the specific charged event to which the statements pertain, or whether the statements reference misconduct as opposed to something that happened during rough consensual sex." In addition, during oral argument, Appellee argues the exclusion of SSgt CB's testimony alone was not substantial proof of a material fact.[5] Jurisdiction is discussed more thoroughly below.

We review the question of whether we have jurisdiction *de novo*. *United States v. Jacobsen*, 77 M.J. 81, 84 (C.A.A.F. 2017). As the Government is the moving party, it has the burden of establishing jurisdiction. *See United States v. LaBella*, 75 M.J. 52, 53 (C.A.A.F. 2015) (citation omitted). In order to do so, they must meet two requirements. First, the military judge's ruling must exclude evidence, and second, the evidence must be "substantial proof of a fact material in the proceeding." *Jacobsen,* 77 M.J. at 85 (quoting Article 62(a)(1)(B), UCMJ). When determining if the Government has met its burden, Article 62(e), UCMJ, states "[t]he provisions of this [A]rticle shall be liberally construed to effect its purposes."

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[5] *Cunningham Oral Argument* (Misc. Dkt. No. 2026-06), at 31:52, https://afcca.law.af.mil/content/afcca_audio/cp/us_v__cunningham_3022061.mp3.

Neither party argues the first requirement—exclusion of evidence—is not met. We agree. Appellee argues that while evidence was excluded, it was neither substantial nor material.

In *Jacobsen*, the United States Court of Appeals for the Armed Forces (CAAF) dealt with jurisdiction at an Article 62, UCMJ, appeal and found the Government had not met the second requirement. *Id.* at 87. However, Article 62, UCMJ at that time did not include the current liberal construction clause to effect its purpose. *Id.* at n.5.

Our sister service courts have dealt with similar issues in this regard. Recently, in *United States v. Rodriguez*, the United States Coast Guard Court of Criminal Appeals (CGCCA) found testimony from an outcry witness close in time to the alleged assault was "substantial" proof of a material fact. No. 25-012(62), 2025 CCA LEXIS 391, at *8–9 (C.G. Ct. Crim. App. 18 Aug. 2025) (unpub. op). Regarding the determination that the proof was substantial, the CGCCA stated, "We need not here attempt to draw precise contours of when proof is 'substantial' enough to meet this jurisdictional requirement other than to note that, reading the term broadly, it is a relatively low bar." *Id.* We concur.

The standard for "substantial" is low. Here, like *Rodriguez*, we have statements from outcry witnesses who could provide material evidence related to a specific charged offense, *i.e.*, the alleged assaults by Appellee against AN on 17 July 2023. Whether the offense occurred was a central matter in dispute at trial and the evidence tended to corroborate that some form of altercation occurred in the dorm room. Although other corroborating evidence was admitted during trial, like reporting a disturbance to Security Forces on 17 July 2023 and another witness seeing AN with a bruise on her face sometime in July, SSgt CB and SrA JLM offered direct and circumstantial evidence of a potential domestic violence incident occurring between AN and Appellee. Therefore, the excluded evidence constituted substantial proof of a material fact in the proceeding. The Government has met its burden to establish jurisdiction under Article 62, UCMJ, and we answer Issue I, *supra*, in the affirmative. Next, we turn to Issues II and III.

B. Exclusion of Evidence

1. Judicial Deference

"Military judges are presumed to know the law and to follow it absent clear evidence to the contrary." *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007) (citing *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997)). "[W]here the military judge places on the record [her] analysis and application of the law to the facts, deference is clearly warranted. On the contrary, [i]f a military judge fails to place [her] findings and analysis on the record, less deference will be accorded." *United States v. Smith*, 83 M.J. 350, 355 (C.A.A.F. 2023) (first and third alterations in original) (quoting *United States v. Finch*, 79 M.J. 389, 397 (C.A.A.F. 2020)).

2. Hearsay

As a general rule, out-of-court statements offered for the truth of the matter are not permitted unless an exemption or exception applies. Mil. R. Evid. 802.

a. Excited Utterance

In *United States v. Henry*, 81 M.J. 91, 96 (C.A.A.F. 2021), CAAF confirmed, "'[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement caused by the event or condition,' is admissible as an exception to the general prohibition on hearsay." *Id.* (first citing Mil. R. Evid. 803(2); and then citing the *Manual for Courts-Martial, United States* (2016 ed.), App. 22, at A22–63 (2016 ed.) ("[Mil. R. Evid.] 803(2) is taken from the Federal Rule [803(2)] verbatim.")).

"The implicit premise [of the exception] is that a person who reacts 'to a startling event or condition' while 'under the stress of excitement caused' thereby will speak truthfully because of a lack of opportunity to fabricate." *Henry*, 81 M.J. at 96 (citing *United States v. Jones*, 30 M.J. 127, 129 (C.M.A. 1990)); *see also White v. Illinois*, 502 U.S. 346, 357 (1992) ("[A] statement that qualifies for admission under a 'firmly rooted' hearsay exception is so trustworthy that adversarial testing can be expected to add little to its reliability.") (quoting *Idaho v. Wright*, 497 U.S. 805, 820–21 (1990)).

For a statement to qualify as an excited utterance: (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. Arnold*, 25 M.J. 129, 132 (C.M.A. 1987) (internal quotation marks and citations omitted).

Excited utterances do not require corroboration—the declarant's statement is sufficient to prove the existence of the startling event. 2016 *MCM*, App. 22, at A22-63.

In order to meet the burden to show the statement or statements were an excited utterance, "[t]he proponent of the excited utterance has the burden to show by a preponderance of the evidence that each element is met." *Henry*, 81 M.J. at 96 (citations omitted).

b. Present Sense Impression

"A statement describing or explaining an event or condition made while or immediately after the declarant perceived it." Mil. R. Evid. 803(1). Corroboration of the statement is required. *See Henry*, 81 M.J. at 97 ("[W]e emphasize that [Mil. R. Evid.] 803(2), in contrast with [Mil. R. Evid.] 803(1), present sense impression, does not contain a corroboration requirement.").

3. Relevant Evidence

"Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Mil. R. Evid. 401. "Irrelevant evidence is not admissible." Mil. R. Evid. 402(b). The standard for relevance is low. *United States v. Roberts*, 69 M.J. 23, 27 (C.A.A.F. 2010).

C. Analysis

1. Exclusion of SSgt CB's Testimony as Irrelevant

The military judge stated during the objection to SSgt CB's testimony that she was considering disregarding the "whole testimony as being irrelevant because we don't even know if the person that was in [Appellee's] room was him or her." However, during the charged timeframe for Specifications 1 and 5 of Charge II, SSgt CB testified she heard "a lot of screaming, yelling, crying, and [what] sounded like a disturbance going on in one of the rooms in the quad." SSgt CB clarified what she heard came from Appellee's dorm room. SSgt CB testified she heard a female voice that sounded "distressed" who was "crying, screaming[,]" and "kind of shaky, at times." SSgt CB testified she also heard some "banging," but did not know what the sound was. SSgt CB testified this went on for "about 30 minutes."

Trial defense counsel requested the military judge exclude SSgt CB's testimony as irrelevant. The military judge granted the defense request, without providing the analysis behind her decision.

When deciding to exclude the entirety of SSgt CB's testimony as irrelevant, the military judge applied an erroneous view of the law. The military judge *sua sponte* stated she was considering excluding SSgt CB's statement as irrelevant because SSgt CB did not know who the female was in the room with Appellee. Understanding that the abuse of discretion standard is high, the bar for relevance is low. Simply put, the evidence must make a fact of consequence more or less likely than it would be without the evidence. Without getting into the

question of whether hearsay statements may have been admissible through SSgt CB, her testimony as a bystander of what she heard on 17 July 2023, including screaming and crying coming mostly from a female who appeared to be in distress and banging noises, made it more likely that a disputed fact of consequence occurred. As will be discussed further below, SSgt CB's knowledge of the identity of who was in the room was not necessary and certainly did not transform relevant evidence into inadmissible evidence. Appellee elected to be tried by military judge alone; therefore, the military judge was also the fact-finder. As such, she was free to give the evidence the weight she believed it deserved, but she was not free to preclude its consideration entirely.

SSgt CB's testimony was probative of whether Appellee committed the charged offenses and the military judge abused her discretion when she excluded the entirety of SSgt CB's testimony as irrelevant. The Government has met its burden and we answer Issue II in the affirmative.

2. Exclusion of Evidence as Hearsay - Excited Utterance and Present Sense Impression

This court starts with what deference to give a military judge where the military judge did not provide a justification for a ruling, either orally or in writing, for this court to consider when determining if she abused her discretion. The Government asserts this court should give no deference to the military judge for any rulings she made regarding excited utterances, present sense impression, or the exclusion of evidence under a relevance standard. Appellee countered the military judge should be afforded deference because earlier in the proceedings the military judge admitted hearsay statements in accordance with *Henry* and *Arnold*, which demonstrated the military judge's knowledge and application of the law to resolve this dispute.

The court concurs the military judge did review both *Henry* and *Arnold* earlier on the record. Military judges are presumed to know the law. However, to receive full deference for rulings made on the record, a military judge should state the essential findings of fact and conclusions of law relied upon when issuing a ruling. In the present case, the military judge failed to specify findings of fact and offered scant legal analysis for her decision to exclude the evidence at issue; therefore, we give the military judge's ruling little deference. *See Finch*, 79 M.J. at 397 (finding the military judge's decision warranted "little deference" by failing to put "any findings of fact or particularized conclusions of law on the record with respect to a hearsay objection"); *see also United States v. Soloshenko*, No. ACM 40581, 2025 CCA LEXIS 358, at *39 (A.F. Ct. Crim. App. 31 Jul. 2025) (unpub. op.) (citation omitted) (finding deference to the military judge was not clearly warranted because "he did not place his analysis and application of the law to the facts" on the record).

Although it is difficult for this court to discern how the military judge applied the applicable law to the facts, she offered two distinct legal conclusions on the record regarding excited utterances, both of which this court reviews to determine whether the exclusion of evidence was erroneous.

First, the military judge stated that since SSgt CB and SrA JLM did not know the identity of the declarant in Appellee's dorm room at the time statements were made, they could not properly lay the foundation for an excited utterance. Second, the military judge stated SrA JLM could not lay the foundation for an excited utterance because he was not in the room at the time the statements were made.

Turning to the issue raised, the military judge denied the Government the ability to question SSgt CB regarding the statements she heard on 17 July 2024 when she was in the quad area of the dorms shared by Appellee and SrA JLM. In SSgt CB's written statement to law enforcement, she stated she heard a female make statements such as "you hit me first, you were choking me, you hit me [sic] head so hard I was seeing stars . . . I told you to stop abusing me" and "stop touching me." SSgt CB also said she heard "loud thumping sounds," she heard both of "them . . . yelling at each other, and "[the female] was crying a lot."

In addition, the military judge denied the Government the ability to question SrA JLM regarding the statements he heard on 17 July 2023 and documented in a written statement to law enforcement the same evening. SrA JLM reported hearing "what sounded like a young female . . . crying" and saying, "you always abuse me when I take care of you, how am I supposed to go to work like this, you hit my head against the wall, I was seeing stars, you are choking me." He also reported a "very audible thud," but it is unclear when the sound occurred.

Although much of the military judge's findings of fact and conclusions of law were unclear, this court can clearly assess the legal correctness of two of the foundational requirements imposed by the military judge to admit or exclude hearsay as excited utterances; specifically, (1) whether the identity of the declarant must be known by the witnesses of the statements; and (2) whether the witnesses who heard the statements must be present with the declarant to observe the startling event.[6]

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[6] When ambiguous findings of fact create the need for clarification to reconcile an inconsistency between findings of fact and conclusions of law during an Article 62, UCMJ, appeal, this court may have to resort to remanding the case back to the military judge to supply sufficient findings of fact and conclusions of law. *Kosek*, 41 M.J. at 64.

The military judge declared she was not going to allow testimony from SSgt CB of statements she heard while in SrA JLM's dorm room, because "we don't even know if the person that was in his room was him or her." Trial defense counsel continued to apply this legal rationale by stating, "[B]ased on the fact that, at this point, there's no evidence before the court of who, if anyone, was in the room with [Appellee], I request the court disregard this witness's testimony." The military judge succinctly replied, "The court will do so." To do so was an erroneous view of the law. As the CAAF laid out in *Arnold*, there are three requirements for an excited utterance to be permitted as an exception to hearsay: (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." *Arnold*, 25 M.J. at 132. The identity of the declarant is not a requirement.

On this point, it appears the military judge later may have changed her mind, but she did not change her ruling or explain how her prior ruling should be interpreted. When trial defense counsel argued against the motion for reconsideration, the military judge interjected, "A declarant does not need to be known for an excited utterance to be admitted." Thus, it appears the military judge briefly acknowledged the correct standard of law, but she took no steps to correct her prior ruling or explain why her prior legal conclusion remained valid despite taking an opposing stance on the record. Instead, directly after the defense counsel finished her argument, the military judge orally ruled from the bench that "[b]ased on the [G]overnment's pleadings, the [D]efense's argument, the court maintains its rulings from yesterday for the same reasons that it placed on the record yesterday."

This court is left with two options for viewing the military judge's ruling. Either the military judge harbored an erroneous view of the law by requiring the identity of the declarant to be known before the hearsay statements could be admitted or the military judge reconsidered the legal standard she applied but still failed to change or explain her ruling. Both end up at the same conclusion—the military judge applied an erroneous view of the law.

Next, the military judge imposed an incorrect legal burden on the Government by requiring the witness (SrA JLM) to be present with the declarant (AN) at the time of the startling event to lay the foundation for an excited utterance.

Under such circumstances, "[t]he appropriate remedy for incomplete or ambiguous rulings is a remand for clarification." *Id.* As explained in this opinion, we find there is a sufficient basis for narrowly ruling on two of the military judge's conclusions of law involving foundational requirements to admit or exclude hearsay statements as excited utterances.

While SrA JLM was testifying, the military judge expressed concern about whether the Government could lay a proper foundation for excited utterances by saying:

> MJ: . . . So, how does this witness be able to -- how do you lay a foundation with this particular witness to even say that the statement has anything to do with an event that was caused because he wasn't even in there.
>
> STC: Your Honor, the content of the statement is indicative of whether there was a [sic] event and a startling event going on.
>
> MJ: Yeah, but how does he know what the event and the startling event is, and he was not there?

There is no such requirement for the witness to be present for the startling event. In fact, the opposite is normally true—the startling event occurs, then the declarant makes a statement heard by an outcry witness. If this were not the law, statements made to emergency operators during 911 calls would never satisfy the foundational criteria to admit an excited utterance. The 911 operator is not with the declarant, nor present to observe the startling event, but the operator can interpret important characteristics of the call, like tone, tenor, and volume of the caller and the circumstances of the reported event to provide reliable information for a court to determine if the foundational requirements of an excited utterance have been satisfied. *See Navarette v. California*, 572 U.S. 393, 400 (2014) (stating "911 calls that would otherwise be inadmissible hearsay have often been admitted on [excited utterance] grounds"); *United States v. Thomas*, 453 F.3d 838, 844 (7th Cir. 2006) (holding the district court did not err in admitting a 911 recording as a present sense impression and excited utterance); *United States v. Brito*, 427 F.3d 53, 62–63 (1st Cir. 2005) (concluding a 911 phone call was "properly admissible as an excited utterance"); *United States v. Alexander*, 331 F.3d 116, 123 (D.C. Cir. 2003) (holding the district court did not abuse its discretion in admitting a 911 phone call as an excited utterance).

This erroneous view of the law prevented the military judge from articulating the correct foundational legal standards from *Arnold* when assessing whether the hearsay statements qualified under the excited utterance exception. As this court has determined the military judge had an erroneous view of the law regarding excited utterances, we resolve Issue III in the Government's favor. As such, this court need not address whether the military judge erred in excluding AN's statements heard by SSgt CB and SRA JLM, as present sense impressions.

III. CONCLUSION

The United States' Appeal Under Article 62, UCMJ, dated 30 July 2026, is **GRANTED**.

The record is returned to The Judge Advocate General for remand to the Chief Trial Judge, Air Force Trial Judiciary, for action consistent with this opinion.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court