No. _____

IN THE

Supreme Court of the United States

CALEB A. C. SMITH,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a statement, made hours after an alleged assault that the declarant has no memory of, is admissible as an excited utterance?

PARTIES TO THE PROCEEDING

All parties to this proceeding appear in the caption on the cover page of this petition.

CORPORATE DISCLOSURE STATEMENT

No nongovernmental corporations are parties to this proceeding.

RELATED PROCEEDINGS

The following is a list of all proceedings related to this case within the meaning of Rule 14.1(b)(iii):

- *United States v. Smith*, No. 22-0237 (C.A.A.F.), decided July 12, 2023.
- *United States v. Smith*, No. ACM 40013 (A.F. Ct. Crim. App.), decided May 25, 2022.

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INTRODUCTION

The Military Rule of Evidence governing the excited utterance exception to the hearsay rule mirrors the Federal Rule word-for-word. The lower courts in this case expanded the excited utterance exception to include a statement made hours after an alleged assault that the declarant had no memory of.

In a unanimous opinion, the Court of Appeals for the Armed Forces (CAAF) held that a text message sent by the alleged victim several hours after an alleged sexual assault was admissible at trial as an excited utterance.

The CAAF's decision presents a question that has not, but should be, decided by this Court: whether a statement, made hours after an alleged assault that the declarant has no memory of, can be an excited utterance. The CAAF's decision contradicts the rule's plain language and the strong presumption against the admission of statements as excited utterances when separated from the startling event by long periods of time. The CAAF found the startling event was the discovery of bruises, but the statement was relating to the alleged sexual assault ("I think he raped me) not the bruises. Its ruling represents a significant expansion of the scope of the excited utterance exception.

PETITION FOR A WRIT OF CERTIORARI

Airman (Amn) Caleb A.C. Smith, United States Air Force, respectfully petitions for a writ of certiorari to review the decision of the CAAF.

OPINIONS BELOW

The July 12, 2023, opinion of the CAAF is reported at 83 M.J. 350 and reproduced at pages 1a-22a of the

Appendix. The May 25, 2022, decision of the Air Force Court of Criminal Appeals (AFCCA) is not reported. It is available at 2022 CCA LEXIS 308 and reproduced at pages 23a-53a of the Appendix.

JURISDICTION

The CAAF issued its decision on July 12, 2023. On October 10, 2023, the Chief Justice extended the time to file a petition for a writ of certiorari to December 9, 2023. This Court has jurisdiction under 28 U.S.C. § 1259.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 36, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 836 (2016), *President may prescribe rules*, states, in relevant part:

> (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions, and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

Under the authority of Article 36, UCMJ, the President promulgated the Military Rules of Evidence, which almost identically mirror the Federal Rules of Evidence. Military Rule of Evidence 803(2) is

identical to Fed. R. Evid. 803(2). Both read, in relevant part:

> The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:
>
> . . .
>
> (2) Excited Utterance. A statement relating to a startling event or condition, made while the declarant was under the stress of excitement it caused.

STATEMENT OF THE CASE

A. Factual Background

The alleged victim, H.S., and Amn Smith were both stationed at Fort Gordon, North Carolina. R. at 449-50. They worked together and were friends. R. at 450-51.

In November 2018, H.S. invited Amn Smith to see one of her favorite bands at a venue in Charlotte, North Carolina. R. at 454. On November 16, 2018, H.S. and Amn Smith left Fort Gordon and drove straight to the concert venue in Charlotte, North Carolina, arriving around 6:30 p.m. and intending to stay at a hotel together that night. R. at 456-58.

The venue was crowded, and the lines at the bar were long. R. at 456-58. H.S. recalled having three drinks that evening. R. at 540. She described the drinks as "very strong." R. at 460.

After the first band finished, at around 9:00 p.m., the pair walked to the merchandise table. R. at 461. H.S. testified that this was when her memory became "hazy." R. at 462. She reported no memories of the

interaction between the merchandise table and the hotel room. R. at 463.

H.S. testified that her next memory was in the hotel room. R. at 463. Her last memory until she awoke the following day was "claiming" the bed near the air conditioner. *Id.*

The following day, H.S. woke up in the other bed—not the one she had "claimed"—next to Amn Smith, completely undressed and facing the wall. R at 463-64. She quickly went into the bathroom. R. at 465. Her vaginal area felt sore, which she attributed to her clothes chafing. R. at 550. H.S. eventually found her underwear ripped and underneath the covers at the foot of the bed near the air conditioner—the bed she first "claim[ed]." R. at 465-66.

Airman Smith and H.S. went to breakfast and then to a café for coffee. R. at 472-73. There, H.S. asked Amn Smith why her underwear was ripped. R. at 472-73. Airman Smith said he did not know. R. at 472-73.

They next went to a gas station. R. at 474. While in the bathroom, H.S. claimed that she first noticed a hickey or bruise on her neck. R. at 474. She also saw bruises on her chest and arms. R. at 475. At that point, she "was sort of putting together everything [she] noticed at the hotel room, and [she] just sort of came to the realization that [she] shouldn't have brushed everything off at the hotel room." R. at 475. While in the bathroom, she messaged her friend, Amn M.H., "I think he raped me." R. at 511. She sent the text message around 12 hours after waking up next to Amn Smith. R. at 495.

After sending this text message, H.S. rejoined Amn Smith in her car, and they listened to podcasts and music for the rest of the ride home. R. at 513.

Later, H.S. reported a sexual assault to the authorities and completed a rape kit. R. at 520.

At trial, the prosecutor began his opening statement with a quote from H.S.'s text message: "I think he raped me." R. at 431-32. The prosecutor also began and ended his closing argument with this evidence. R. at 1032-33, 1071.

B. The Air Force Court Decision

On appeal, Amn Smith challenged the text message—"I think he raped me"—that H.S. sent to a friend hours after the alleged assault as inadmissible testimonial hearsay that the military judge admitted over Defense objection. Pet. App. at 25a, 40a-41a. The Air Force Court found that the military judge did not abuse his discretion in admitting the Text message. (Pet. App. at 46a-48a. The Air Force Court pointed to H.S.'s testimony that, at the time she sent the text message, she was experiencing "sweating, shakiness and nausea brought on by seeing the bruising on her body and *making the connection* to what occurred at the hotel." Pet. App. at 43a (emphasis added). The Air Force Court concluded that these symptoms showed that H.S. was under the stress of a startling event at the time she sent the text messages. Pet. App. at 47a. The Air Force Court found that H.S.'s statement, "I think he raped me," was not a statement of fact but a "spontaneous belief or opinion" made under physical and emotional stress. Pet. App. at 46a-47a. As support for this finding, the Air Force Court cited H.S.'s "seeing hickeys and bruises" along with the torn underwear, blood, and bruising to her genitals, concluding that H.S. was "putting all the pieces together in her mind" at the gas station. Pet. App. at 47a.

C. The CAAF Decision

In a unanimous decision, the CAAF affirmed the Air Force Court, holding that H.S.'s statement was spontaneous and not the product of deliberation. Pet. App. at 3a, 15a. The CAAF also found that the "startling event" was not the alleged sexual assault itself but rather its supposed discovery by H.S. after she spotted bruising in the gas station. Pet. App. at 16a. The CAAF embraced the reasoning of an unpublished, Tenth Circuit opinion. Pet. App. At 16a-17a. The CAAF quoted *United States v. Lossiah*, for the proposition that, "'[t]he basis of the excited utterance exception rests with the spontaneity and impulsiveness of the statement; thus, the startling event does not have to be the actual crime itself, but rather may be a related occurrence that causes such a reaction.'" Pet. App. At 17a (quoting *Lossiah*, 129 F. App'x 434, 438 (10th Cir. 2005) (citations omitted)).

Finally, the CAAF found "[i]t was within the military judge's discretion to conclude that [H.S.] was 'under the stress of excitement caused by the event'" when she sent the text message. Pet. App. at 17a (quoting *United States v. Arnold*, 25 M.J. 129, 132 (C.M.A. 1987)).

REASONS FOR GRANTING THE PETITION

This Court should grant review as this is a case of first impression, presenting a question of law that has not been, but should be, settled by this Court: whether a statement made hours after an alleged sexual assault the declarant has no memory of qualifies as an excited utterance. In deciding the case below, the CAAF relied upon—and distorted the logic of—an unpublished Tenth Circuit decision.

The CAAF's decision expands the definition of an excited utterance. The CAAF decided that a statement made by an adult declarant about an event that she does not remember, after 12 hours of necessary deliberation and "putting the pieces together in her mind" was an excited utterance.

This expansion has consequences not only for the Military Rules of Evidence, but also for the Federal Rules of Evidence, given the rules are the same.

A. The CAAF wrongly decided that a declarant need not have memory of the startling event for her statement to be admissible and that a "realization" many hours after an alleged assault was excepted under Mil. R. Evid. 803(2).

The CAAF improperly expanded the excited-utterance exception under Mil. R. Evid. 803(2) when it decided: (1) that an alleged declarant need not have memory of the event her statement is about, and (2) that the startling event prompting an excited utterance about a crime could be a deductive realization hours after the crime.

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.'" *United States v. Lemere,* 22 M.J. 61, 68 (C.M.A. 1986). The implicit logical premise for admission of an excited utterance 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." *United States v. Jones*, 30 M.J. 127, 129 (C.M.A. 1990).

Military and federal district courts apply a strong presumption against admissibility where a proffered excited utterance does not immediately follow the startling event. *See United States v. Abdirahman*, 66 M.J. 668, 676 (C.A.A.F. 2008) (finding the facts of the alleged victim making statements more than 30 minutes after the alleged rape in response to questions and in the course of multiple, separate conversations was "more indicative of reflective comments than of excited utterances") (citing *United States v. Donaldson*, 58 M.J. 477, 484 (C.A.A.F. 2003) (citing *United States v. Jones*, 30 M.J. 127, 129 (C.M.A. 1990))); *United States v. McPike,* 512 F.3d 1052, 1055 (8th Cir. 2008) (rejecting the argument that after three months, the declarant was still under the stress of excitement caused by the appellant's arrest); *United States v. Marrowbone*, 211 F.3d 452, 455 (8th Cir. 2000) (finding allegations of abuse were not excited utterances because of the three hour lapse of time from the alleged abuse and the statement).

The CAAF's decision is made even more troubling by the fact that H.S. had no memory of the "rape" when she made the statement. Because H.S. had no memory of being assaulted, the statement must have been "the product of reflection and deliberation." *Arnold*, 25 M.J. at 132. In other words, she could not have believed that she was raped without first reflecting and deliberating on the events of the previous night, which she had been doing since she woke up nude next to Amn Smith that morning. Where the declarant lacks any memory of the actual event, her conclusions about the event are, by definition, a product of reflection. They cannot be a product of memory.

H.S. agreed that she was "taking these observations," "putting them all together," "[a]nd then drawing a conclusion to as to something that [she] had no memory of." R. at 495. Even the prosecutor described her thought process as "piecing together that she believed that she had been sexually assaulted." R. at 483. In closing argument, the prosecutor argued to the panel that "the evidence before you shows that the realization that [H.S.] came to reach in that bathroom is that he sexually assaulted her and that he is guilty." R. at 1033. The Air Force Court used similar language, concluding that H.S. was "putting all the pieces together in her mind" when she made the out-of-court statement. Pet. App. at 47a. These are explicit acknowledgments of reflection and deliberation.

Relatedly, the concept of memory is interwoven with the rationale behind the excited utterance exception. As the Supreme Court of Ohio has said of excited utterances:

> Reactive excited statements are considered more trustworthy than hearsay generally on the dual grounds that, first, the stimulus renders the declarant incapable of fabrication and, second, the impression on the declarant's memory at the time of the statement is still fresh and intense. Accordingly, Rule 803(2) assumes that excited utterances are not flawed by lapses of memory or risks of insincerity.

State v. Taylor, 66 Ohio St. 3d 295, 300 (1993) (citations omitted). This rationale cannot be satisfied when the declarant has no memory of the event.

Because H.S.'s hearsay statement of "I think he raped me" referred to an event she had no memory of,

her statement had to be derived from "reflection and deliberation." *See United States v. Arnold*, 25 M.J. 129, 132 (C.M.A. 1987); *United States v. Marrowbone,* 211 F.3d 452, 454 (8th Cir. 2000). H.S. explicitly acknowledged reflection and deliberation before sending the text message. R. at 495. The prosecutor and the Air Force Court acknowledged as much. The prosecutor described her thought process as "piecing together that she believed that she had been sexually assaulted." R. at 483. The Air Force Court echoed this language, concluding that H.S. was "putting all the pieces together in her mind" when she made the out-of-court statement. Pet. App. at 47a. As H.S. had no memory of the alleged assault, the statement she made the morning after had to have been the product of reflection and deliberation. However, the CAAF concluded that the impetus for H.S.'s exclamation was the discovery of the bruises on her body in the bathroom. Pet. App. At 17a. This event caused the "excited utterance" of a text message to a friend. Pet. App. at 15a. The CAAF ignored that H.S. had been deliberating all morning over evidence that she had been involved in sexual activity the previous evening.

B. The CAAF relied on an unpublished 10th Circuit decision to expand the scope of Mil. R. Evid. 803(2) without considering the distinctions between the cases.

Due to the lack of military precedent, the CAAF looked to the reasoning of an unpublished case from the Tenth Circuit, which involved a child declarant. Pet. App. at 17a. Specifically, the CAAF cited *Lossiah* for the proposition that "'the excited utterance exception rests with the spontaneity and impulsiveness of the statement; thus, the startling event does not have to be the actual crime itself, but

rather may be a related occurrence that causes such a reaction.'" *Id.* (citing *Lossiah,* 129 F. App'x at 438) (further citations omitted)). But the CAAF's reliance on *Lossiah* ignores the actual crux of Amn Smith's argument: that H.S. did not remember what happened the night before and so needed to deliberate and reflect for hours before making the statement. The "I think he raped me" text message was a response to the conclusion she eventually reached after waking up naked next to Amn Smith, noting her torn underwear and soreness in her vaginal area, and then reflecting on it for hours before sending the text message.

The scenario in this case is different from *Lossiah* in crucial ways. First, the declarant in *Lossiah* was a child. Military and federal courts have traditionally been more flexible regarding the excited utterance exception when the declarant is a child. *See, e.g., United States v. Farley*, 992 F.2d 1122 (10th Cir. 1993) (admitting statements of five-year old though one statement was made two hours after the alleged assault and the other at least 12 hours after); *Morgan v. Foretich*, 846 F.2d 941 (4th Cir. 1988) (finding that a four-year old's three hour lapse in reporting an alleged assault was "well within the bounds of reasonableness" for an excited utterance); *State v. Duke*, 1988 Ohio App. LEXIS 3466, at *11, 13 (8th Cir. 1988) (holding that a spontaneous statement by a three year old only ten days after the incident qualified as an excited utterance when the spontaneous statement made while being bathed, "My daddy sucks my body" was of a subject matter ordinarily foreign to a child of that age); *Gross v. Greer*, 773 F.2d 116 (7th Cir. 1985) (holding that a lower court properly admitted a four-year old's

hearsay statement although she made it 12-15 hours after the startling event); *United States v. Iron Shell*, 633 F.2d 77 (8th Cir. 1980) (admitting statement of nine-year-old as an excited utterance although she made the statement one hour after the assault); *United States v. Donaldson,* 58 M.J. 477, 484 (C.A.A.F. 2003) (explaining courts have been more flexible in cases with young declarants to include when considering whether the declarant was still under the stress and excitement caused by the event); *United States v. Pearson*, 33 M.J. 913, 915 (C.M.A. 1991) (finding the child's "statement to his mother was in the vocabulary of a young child and his youth and naivete enhance the reliability of his utterance"); *United States v. Jones*, 30 M.J. 127, 129-30 (C.M.A. 1990) (statement made by adult witness that appellant had grown very jealous of their son 12-15 hours after the appellant's destruction of his son's belongings was not admissible as excited utterance); *State v. Taylor,* 66 Ohio St.3d 295, 304 (1993) (recognizing children are likely to remain in a nervous excitement state longer than adults resulting in statements being admitted as excited utterances even where there is a substantial lapse of time).

H.S., on the other hand, was an adult. Further, the delay here was necessary for her to piece everything together in her mind and come to a conclusion about something she did not actually recall.

Second, another distinction here from *Lossiah* is that the younger child in *Lossiah* remembered the actual crime itself while H.S. did not and was instead, piecing everything together trying to determine what happened. In *Lossiah*, the Court found the startling event was seeing the defendant at school and the excited utterance was the younger child's statement

that she did not want to leave with the defendant because he had raped her. 129 F. App'x at 435. The younger child did not engage in piecing together indicators of what happened to her, she remembered what happened to her and after seeing the defendant in her school, she became under the stress of the startling event and made an excited utterance about not wanting to leave with him because he raped her.

In contrast, H.S. did not remember what happened the night before. Although the CAAF found that the "stressful event" was H.S.'s discovery of bruises in the bathroom the morning after the alleged assault, Pet. App. 17a, her text message, "I think he raped me" did not refer to the bruises she found or her physical injuries; it referred instead to the conclusion that she had been slowly coming to the entire morning. So, with its ruling and its mistaken reliance on *Lossiah*, the CAAF expanded the scope of Military Rule of Evidence 803(2) and, consequently, Federal Rule of Evidence 803(2).

Now, in light of the CAAF's decision, Military Rule of Evidence 803(2) may include a statement made after a startling event that does not refer directly to the stressful event that supposedly spurred the exclamation (the bruises). This allows declarants to have hours, if not days, to deliberate about something they have no memory of prior to making a statement. This is contrary to the safeguards inherent in a traditional excited utterance. The question remains whether a declarant's statement relating to an alleged assault she has no memory of may qualify as an excited utterance. This Court should grant this petition to answer that question.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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