IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-1837

LOWER COURT CASE NO. 4D09-1224

BOBBY LEE AKIEN

Petitioner,

vs.

STATE OF FLORIDA

Respondent.

PETITIONER'S INITIAL BRIEF ON THE MERITS

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INTRODUCTION

Florida courts have adopted a clear standard for determining whether a statement constitutes an excited utterance. The burden of proof rests with the proponent. As the ultimate gatekeeper, trial courts will not admit statements as excited utterances unless the proponent can lay the proper foundation. The law further provides that where a declarant engages in "reflective thought," her statement will not be admitted as an excited utterance. Reflective thought undermines the credibility typically ascribed to true excited utterances.

Unfortunately, there is no clear standard for determining whether reflective thought has occurred. In the majority of cases, the question arises as a result of timing. Courts have grappled with the significance of the passage of time between an event and statements regarding that event. For example, the witness to a shooting or some other crime waits for a period of time before contacting the police. The impact of the passage of time becomes a factor that courts consider in determining whether reflective thought occurred. Because there is no definitive rule regarding how much time can pass before reflective thought is deemed to occur, each case requires a fact-intensive inquiry which can lead to inconsistent results.

This case, however, presents the opportunity to draw a narrow, bright line rule regarding whether a declarant has engaged in reflective thought. Unlike those

cases which turn simply on the passage of time, this case involves a declarant who first spoke to her mother before contacting the police to report a crime. A majority of Florida's district courts of appeal have ruled that a declarant's conversation with a third party is evidence of reflective thought which renders a subsequent statement inadmissible as an excited utterance. The logic behind this reasoning is simple. The impact of a third party's questions, suggestions, or personal recollections (if a witness to the event as well), can result in alterations to the statement, or a wholesale fabrication. This necessarily undermines the inherent credibility of a true excited utterance.

This case presents an ideal vehicle for creating the rule. After her sexual encounter with Petitioner Bobby Lee Akien ended, the complainant, T.S.,[1] took no action for five to ten minutes. The first call she made following the encounter was to her mother. During that call, T.S.'s mother urged her to contact the police. T.S. resisted because she claimed to be afraid. Her mother then contacted the police for her. When the police told the mother that T.S. would need to call, the mother again insisted that her daughter call 911. It was only then that T.S. relented and contacted the police. T.S.'s conversations with her mother (she may have had more than one) here, like those conversations between the declarants and other third parties in the cases considered by the majority of Florida's district courts of

[1] In this brief, the complainant is referred by her first and last initials, or "T.S."

appeal, constituted clear evidence of reflective thought which should now bar the admission of T.S.'s 911 call as an excited utterance.

STATMENT OF THE FACTS

T.S.'s Relationship With Mr. Akien. T.S. first met Mr. Akien when she was five years old. R-271.[2] From that time, until she accused him of rape at the age of 17, T.S. saw Mr. Akien on a regular basis. *Id.* Mr. Akien was T.S.'s neighbor, R-312, and he played an important role in her life during those early years. At trial, T.S. remembered that Mr. Akien would regularly "check on the family." R-271-72, 312. She described him as a friendly and concerned neighbor. R-312. T.S. noted that her grandmother suffered from asthma. *Id.* When the ambulance would come to their home, Mr. Akien would check in. *Id*. "Every time something was wrong with my grandmother, he'd be the type of person that would come over and be like 'Is everything okay?'" R-271-72, 312.

As T.S. became older, her relationship with Mr. Akien changed. She gave him her cell phone number, R-318-19, 337, and spoke to him on her way home from school, R-316-18. T.S. noted that Mr. Akien flirted with her. R-318. Mr. Akien, according to T.S., wanted to have sex with her. *Id.* When T.S. told Mr. Akien that she wanted a car, R-317-18, he offered to help her if she would "do certain sexual things with him," R-317. T.S. claimed that Mr. Akien offered to

[2] Citations to "R-_" refer to the record on appeal.

help her get a car if she would have sex with him two times. R-318. T.S. was not offended or otherwise put off by Mr. Akien's advances. She did not tell her mother, R-339, or anyone else, about Mr. Akien's solicitations. Rather, T.S. testified that she "blew off" Mr. Akien's comments, R-317, 339, and "would never pay any mind" to them, R-317.

T.S.'s Sexual Encounters. The day before her sexual encounter with Mr. Akien, T.S. testified that she went to school, and then worked at a local McDonald's from 8:00 p.m. to midnight. R-272-73, 320-21. T.S.'s boyfriend, Jimmy, took her home after work. R-273, 321. The couple, who first met at the McDonald's, had known each other for about one year. R-273. After T.S. finished work, Jimmy took her home. R-274-75, 321. The couple got home around 12:15 a.m. R-275. T.S.'s mother was at work and she and Jimmy were home alone. R-275-76. Although she would repeatedly lie about this important fact, T.S. ultimately conceded that she had sex with Jimmy a few hours before her encounter with Mr. Akien. R-276, 321. Jimmy left T.S.'s home around 1:30 a.m. *Id.*

After Jimmy left, T.S. explained that she locked her front door (the top and bottom locks), had something to eat, showered, and went to sleep. R-276-77, 282. T.S. identified two ways to get into her home: the front door, which she locked, R-276-77, and her bedroom window, which she would crawl through whenever she forgot her keys, R-277.

T.S. claimed that she was asleep by 2:00 a.m. R-282, 321. However, T.S. testified that she woke up a couple of hours later when she felt a single, gloved hand around her neck and heard a "strange voice." R-282, 321-22. When she tried to move, T.S. said that this gloved stranger would squeeze her neck. R-284-86, 322. There were no lights on, T.S.'s blanket covered her face and eyes, and she could see nothing. R-283-84. Although T.S. fought the intruder for about five to ten minutes, she stopped because the pressure around her neck became so strong that she thought she could not breathe. R-322. T.S. claimed that the intruder warned her to stop fighting, R-284, or he would kill her, R-286. T.S. complied. *Id.* He spoke to her in a low, scratchy voice which she did not recognize. R-284-85. T.S. recalled that the intruder also told her that there were two other individuals inside her home. R-284.

At some point, the intruder told T.S. to turn over on her back. R-286-87. Because there was a blanket over her face, she did not see anything. *Id.* With his hand still on her neck, T.S. testified that the intruder made her take off her clothes. R-287. T.S. was wearing boxer shorts and what she described as a "wife beater" t-shirt. *Id.* While the boxer shorts came off, the t-shirt was pulled up over her face. *Id.*; R-331-32. Once naked, T.S. explained that the intruder took off his shorts and got on top of her. R-287.

According to T.S., she felt his penis on top of her, but it did not immediately penetrate her vagina. *Id.* T.S. still could not see anything. R-288. At first, T.S. explained, the intruder could not penetrate her vagina. R-323. He attempted to do so for about five to ten minutes unsuccessfully. *Id.* This hurt T.S. *Id.* The intruder was later able to partially penetrate her, which further hurt T.S. R-324. At some point, T.S. recalled that the intruder asked her to apply some lotion to his penis. *Id.*; R-288, 324. He then directed her to manually stimulate him with her hand, which she did. R-288-89. This occurred for approximately five to ten minutes. R-289. T.S. further recalled that the intruder kissed her right breast. *Id.* After she stopped touching him, T.S. testified that the intruder forcibly penetrated her. R-289, 325. T.S. said that the intruder remained "inside of her" for thirty to forty-five minutes. *Id.;* R-325, 327. Her face remained covered throughout this encounter and she did not see anything. R-290. According to T.S., this was "forceful sex." R-327.

When he finished, T.S. testified that the intruder got up, but somehow kept his hand around her neck. R-290. He then grabbed T.S. by the right arm and directed her to the bathroom. R-291, 327. T.S. claimed that the intruder turned on the lights and told her to take a shower. R-291. Although she turned on the water, T.S. testified that she did not take a shower. *Id.* T.S. estimated that she was alone in the bathroom for about five minutes. R-327. After she got out of the shower,

T.S. explained that she wrapped a towel around her waist. R-291. The intruder, who remained by the door, asked if she had something around her face. *Id.* T.S. responded that she had a washcloth over her face. R-291-92. The washcloth was apparently too small, so T.S. put the towel she was wearing around her face. *Id.* Although she still could not see the intruder's face, T.S. testified that she was able to see him from the knees down, and noted that he was black. R-332-33.

While standing in the bathroom, T.S. claimed that the intruder photographed her nude body. R-292, 327-28. After he finished, T.S. claimed that the intruder asked for pen and paper. *Id.* According to T.S., the intruder directed her to write a note indicating that their sexual encounter had been consensual. R-293-94. He told her to sign and date the note. *Id.* T.S. testified that she gave the note to the intruder. *Id.* He then asked her for a plastic bag and took her bed sheets. R-294. Finally, T.S. recalled that the intruder asked for her phone number and keys. *Id.*

Before he left, T.S. claimed that the intruder warned her that if she called the police, or told anyone about what had happened, both he and his friends would hurt her family. R-294-95, 328. He then told T.S. to count to 150 so that he and his friends would have a chance to leave. R-295, 328. T.S. complied. *Id.* T.S. was still wearing a towel over her head and could not see anything. *Id.* She did, however, hear the intruder leave through the front door. *Id.* At no point did she hear any other doors open or shut. *Id.*

T.S. Engages In Reflective Thought. T.S. did not immediately contact the police, or anyone else for that matter. Rather, T.S. explained:

> . . . I locked the door after he walked out of my home, after he left my home. I heard the door shut and I went to lock the door. And then I waited for a little bit. Like I went in my room and I sat down and I cried and then I called my mother.

R-329. In fact, T.S. waited five to ten minutes to call her mother. R-296, 328-29. When the two spoke, T.S. recalled that her mother told her to call the police. R-295-96. Recalling the intruder's purported threats, T.S. told her mother that she was afraid to call the police. R-297, 329. T.S.'s mother, however, insisted. *Id.* Nevertheless, T.S. did not immediately dial 911; her mother was the first to call. R-329-30. As T.S. explained:

> She called 911 first and she got on the phone and she spoke to 911 and they told her that I have to speak to them. And I told her I didn't want to call because [the perpetrator] threatened. My mom was like, "No, go ahead and call." And I got off the phone with her and she called my grandmother to come from next door to come over to check on me. And then I spoke to the police after I got on the phone.

R-329.

Although it is not clear from the transcript, it would appear that T.S. spoke to her mother twice before finally dialing 911. The first conversation occurred several minutes after the intruder left her home, while the second conversation took place after T.S.'s mother called 911 and was informed that T.S. needed to

personally contact the police. It was only after receiving this message, presumably during a second telephone call, that T.S. dialed 911.

The 911 Tape. At trial, the State sought to admit the 911 tape recording. R-297-98. The defense objected on the ground that there was no foundation for admitting the tape as an excited utterance. R-298. As the defense explained, the facts established that T.S. did not immediately call 911. *Id.* After the attack ended, T.S. waited five to ten minutes before doing anything. *Id.* Thereafter, the first call that she placed was not to the police, but to her mother. *Id.* It was only after speaking to her mother – and at her mother's direction – that T.S. contacted the police. *Id.*

In its response, the State ignored T.S.'s intervening conversation with her mother. Indeed, the State made no effort to establish that T.S. did not engage in any reflective thought before calling 911. Instead, the State focused on the fact that T.S. was still upset and in shock when she ultimately called the police. R-298-99. Moreover, the State minimized the significance of the amount of time that passed between the event T.S. described and her actual call:

> And I submit we're not talking about hours of reflective thought here. We are talking about ten minutes in which she just testified that she called her mother, told her what happened, and then she hung up with her mom and called 911 because her mom was on the phone with 911 and she had to hang up and do it.

R-299. As a result, the State surmised that T.S. did not have any time to fabricate her claims. *Id.*

The defense countered that T.S. did have the opportunity to engage in reflective though in the five to ten minutes following the intruder's departure. *Id.* The trial court overruled the defense's objection without making any specific finding that T.S. did not engage in reflective thought. R-300. Thereafter, the jurors heard T.S.'s detailed narrative of the events leading up to Mr. Akien's prosecution:

Operator: 911. What is your emergency?

T.S.: (Unintelligible at 11:27:33).

Operator: Okay. What's going on?

T.S.: (Unintelligible at 11:27:37).

Operator: Okay. What were you doing?

T.S.: (Unintelligible at 11:27:39).

Operator: Huh?

T.S.: I had my face covered.

Operator: Do you know who raped you?

T.S.: No.

Operator: You don't? How long ago did this happen?

T.S.: It just happened.

Operator: Huh?

T.S.: It just happened.

Operator: It just happened? How many people were there?

T.S.: He said there were three, but I don't know.

Operator: Was it only one person?

T.S.: Yes.

Operator: White or black?

T.S.: I think he was black.

Operator: He was black? Can you tell me what he was wearing?

T.S.: I didn't see him.

Operator: You didn't see him?

T.S.: No.

Operator: Did this happen there?

T.S.: Yes.

Operator: Is there somebody knocking on her door? Is there somebody knocking on her door? Who's at your door, ma'am?

T.S.: My grandmother.

Operator: Your grandmother? Okay. What I need you to do is do not take a shower or take your clothes off, okay?

T.S.: He made me take a shower.

Operator: He made you take a shower?

T.S.: Yes.

Operator: Okay. How long ago did this happen?

T.S.: (Unintelligible at 11:28:37)

Operator: Okay. What's your name?

T.S.: My name is [T.S.].

Operator: [T.S.]?

T.S.: Yes.

Operator: Okay. Did he hurt you? Are you injured?

T.S.: No.

Operator: You're not injured? Okay. And you didn't know this person, right?

T.S.: No, I didn't see his face.

Operator: Okay. Were you sleeping, or how did this happen?

T.S.: I was sleeping in my bed.

Operator: Okay. You were sleeping and he came in and assaulted you?

T.S.: Yes.

Operator: How old are you?

T.S.: I'm seventeen.

Operator: You're seventeen?

T.S.: Yes.

Operator: Just stay on the phone with me, okay?

T.S.: Okay.

Operator: Was his face covered or anything?

T.S.: I don't know.

Operator: Was his face covered?

T.S.: I don't know. I could not see him.

Operator: Okay. He covered your face?

T.S.: Yes.

Operator: Where did he come in through, do you know?

T.S.: No.

Operator: Did he say anything to you?

T.S.: He told me he would hurt me and my grandmother if I call the police.

Operator: Okay. And he threatened to hurt your grandmother if you call the police?

T.S.: Yeah, and my mom.

Operator: Okay. Just stay on the phone, okay? Which way did he leave? Did he leave out the window or a door?

T.S.: He went out the door.

Operator: He went out the door?

T.S.: Yes.

Operator: Did you hear a car leave?

T.S.: No.

Operator: He left through the front door?

T.S.: Yes.

Operator: Okay. Was the front door broken or anything?

T.S.: No.

Operator: No?

T.S.: It was locked.

Operator: The front door was locked?

T.S.: Yes.

Operator: Just stay on the phone with me, okay? How long did this last for?

T.S.: I don't know.

Operator: Was he armed? Did he have any weapons?

T.S.: I don't know.

Operator: Okay. We got the police outside, okay? I'm going to stay on the phone until you've made contact with them, okay?

T.S.: Okay.

Operator: Did you hear a car leave or anything?

T.S.: No.

Operator: No car? Okay. Does your grandmother live there with you?

T.S.: Yes.

Operator: Okay. Go ahead and open the door. That's the officer. All right. Go ahead and speak with them [T.S.], okay?

T.S.: Okay.

Operator: Bye-bye.

R-300-05.

T.S. Makes Conflicting Statements To The Police. Officer Steven Mooney responded to T.S.'s 911 call. R-437. When Officer Mooney first encountered T.S., she was crying, shaking, R-440, 443, and covering herself with a blanket, R-443. In questioning T.S., Officer Mooney noted the importance of determining "whether its [sic] a true rape or not because people do lie." R-440. Officer Mooney testified that T.S. first told him that the intruder brought her into the bathroom and "sexually raped her while in the shower." R-440-41. The officer noted that T.S. then "clarified" her story. R-444. T.S. later claimed that there was only one assault, and it occurred in the bedroom. R-440-41.

Inside the bedroom, Officer Mooney found no signs of a struggle. R-442. The officer further noted that T.S. claimed not to have seen the man's face,

although she mentioned the names "Bob" or "Bobby." *Id.* She did not, however, identify this person. R-442-43, 446. T.S. told Officer Mooney that the intruder entered her home through her bedroom window or the front door. R-445. Upon arrival, however, the officer walked the home's perimeter and did not see any evidence of forced entry. R-437-38, 445. The officer found no broken windows, no pry marks, nothing that would indicate the use of excessive force to gain entry into T.S.'s home. R-445. Officer Mooney also did not observe any pry marks on the door. *Id*.

T.S. Lies To A Detective And Her Doctor. After her initial conversation with Officer Mooney, T.S. travelled separately with her mother to the hospital where she underwent a physical examination and gave another statement to the police. R-306. At the hospital, T.S. met with Detective Lori Colombino. R-373.

When asked whether she had sex with anyone else, Detective Colombino testified that T.S. said no. R-376. After the detective explained the importance of being truthful, T.S. confirmed that she did have sex with her boyfriend. R-376, 389. Nevertheless, T.S. still lied, telling the detective that their last sexual encounter occurred a month earlier. *Id*. According to the detective, T.S. told her that she was afraid her mother would find out she was having sex with her boyfriend. R-376. T.S. made a similar misrepresentation to the emergency room physician who examined her at the hospital. R-263.

T.S. did not dispute that she lied to the detective and her doctor. Indeed, T.S. admitted that she was not truthful when she denied having sex before her encounter with Mr. Akien, as well as when she stated that her last sexual encounter occurred a month prior to that encounter. R-307. The only consistent statement from T.S. on this point was the fact that she did not want her mother to find out about her sexual activity. *Id.*

T.S. Identifies Mr. Akien. In speaking to Detective Colombino, T.S. claimed that her neighbor, Mr. Akien, might be the culprit. R-308, 378. To back up her suspicion, T.S. noted that the intruder smelled like cigarette smoke. R-308, 378, 386. According to T.S., she had previously seen Mr. Akien smoking. R-309. T.S. further advised the detective that the intruder made some comments to her that suggested his identity. R-378. T.S. explained that the intruder's statement that he would leave her house keys on the washer/dryer outside her home led her to believe that Mr. Akien was responsible. R-338-39, 378. Apparently, not everyone in the neighborhood knew that T.S. owned these appliances. R-338-39. Finally, T.S. cited Mr. Akien's "passes" as further proof that he was the intruder. R-339.

The Physical Evidence. Although T.S. claimed that the intruder forcibly restrained her, choked her, and vaginally penetrated her for a period of thirty to forty-five minutes, she suffered no physical injuries. Dr. Elise Zahn examined T.S. at the hospital. R-255. Although T.S. complained of pain, R-256, Dr. Zahn's

"head-to-toe" examination revealed no injuries, R-265. Dr. Zahn noted that she found no injuries to T.S.'s private parts; she saw no signs of blood; and she saw no sign of trauma to T.S.'s vaginal area. R-267. Detective Colombino also observed T.S. at the hospital. The detective saw no marks or cuts on T.S.'s face, R-387; she saw no bruising or marks on T.S.'s neck, 387-88; nor did she observe any bruising or marks on T.S.'s arms, R-388. T.S. herself confirmed that she had no bruises or marks. R-309. DNA testing of vaginal swabs containing semen revealed that Mr. Akien was the source of the DNA profile. R-413. This was consistent with the defense's claim that T.S. and Mr. Akien had consensual sex. R-248.

The State Replays The 911 Tape During Closing Argument. During closing arguments, the State replayed the 911 tape for the jurors in its entirety. R-486-91. The State played the tape with the specific goal of bolstering T.S.'s credibility. "Everything she told that 911 operator is consistent with what she told you in court. Why would she even call 911 if it didn't happen the way she told you?" R-492.

The Appeal. On direct appeal, the Fourth District Court of Appeal considered whether the trial court erred by admitting T.S.'s 911 call as an excited utterance. *Akien v. State*, 44 So. 3d 152, 153 (Fla. 4th DCA 2010). The appellate court noted that at trial, Mr. Akien objected on the ground that too much time had elapsed from the attack to the call such that T.S. could have engaged in reflective

thought. *Id.* at 154. The Fourth District explained that to qualify as an excited utterance "there must be an event startling enough to cause nervous excitement, the statements must have been made before there was time to contrive or misrepresent, and the statement must be made while the person is under the stress of excitement caused by the event." *Id.* (quoting *State v. Jano*, 524 So. 2d 660, 661 (Fla. 1988)) (internal quotation marks omitted).

In applying this test, the appellate court noted that courts will look to the interval of time between the startling event and the making of the statement. *Id.* (internal citations omitted). In so doing, the Fourth District explained that "[t]he exact amount of time between the event and the statement which will justify a finding that the declarant engaged in 'reflective thought' will depend on the specific facts of each case and may vary substantially between cases." *Id.* The court further explained that whether a declarant is under "the necessary state of stress or excitement" is a function of the person's age, physical and mental condition, the characteristics of the event, and the subject matter of the statements." *Id.*

Applying these standards to the facts of this case, the Fourth District determined that:

> While the victim *may have had an opportunity to engage in reflective thought*, we cannot say that the trial court abused its discretion by allowing the introduction of the 911 tape. The record does not clearly refute the

> contention that the victim spoke to the 911 operator "under the stress of excitement caused by" her rape.

Id. at 155 (emphasis added). The Fourth District also found that even if the trial court erred in admitting the 911 tape, its admission constituted harmless error. *Id*.

In so ruling, the Fourth District affirmed Mr. Akien sentence of forty years in prison. R-556.

STANDARD OF REVIEW

A trial court's evidentiary rulings are reviewed for abuse of discretion. *Hayward v. State*, 24 So. 3d 17, 29 (Fla. 2009). It is well established that "[t]he exercise of discretion is not unbridled but is subject to the test of reasonableness," requiring a "determination of whether there is logic and justification for the result." *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980). A trial court abuses its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence. *McDuffie v. State*, 970 So. 2d 312, 326 (Fla. 2007). As further discussed below, the admission of the 911 tape here as an excited utterance constituted an abuse of discretion. The State failed to establish that the declarant, who had at least one conversation with her mother before calling the police, did not engage in reflective thought.

SUMMARY OF THE ARGUMENT

This Court should reverse the Fourth District Court of Appeal's decision for several reasons. First, a majority of the district courts of appeal have now ruled

that a statement does not constitute an excited utterance when the declarant has one or more conversations with other individuals before making the statement to be admitted. The First, Third, Fourth, and Fifth District Courts of Appeal have held that the opportunity to confer with a third party renders a statement inadmissible as an excited utterance. Simply put, the statement's reliability is suspect in these situations. This Court should now adopt a rule, based on the reasoning of these appellate courts, barring statements as excited utterances where the declarant has first spoken to one or more third parties.

Second, and in the alternative, this Court should find that a 911 call is inadmissible as an excited utterance where the declarant is not seeking immediate help, but merely providing a narrative of past events. In this case, for example, T.S. was clearly not in any danger, nor was she requesting immediate, medical assistance by the time she called 911 As the transcript of the 911 call made clear, T.S. was essentially interviewed regarding the events at issues.

Third, this Court should reverse because the Fourth District's ruling was contrary to both the law and the facts. As this Court has previously held, the State, as the proponent of an excited utterance, must establish that the declarant did not engage in any reflective thought. Here, it is clear that the State did not meet its burden. Indeed, the State made no effort to rebut the defense's claim that T.S. engaged in reflective thought, nor did the trial court make any findings in that

regard. Ultimately, the Fourth District found that T.S. may well have engaged in reflective thought prior to calling 911.

Fourth, the Fourth District appears to have conflated two of the factors used in determining whether a statement constitutes an excited utterance. Although the appellate court found that T.S. may have engaged in reflective thought, it nevertheless ruled that the record did not refute the fact that T.S. was still under a state of excitement when she called 911. In so ruling, the Fourth District erroneously assumed that if the declarant was under stress at the time the statement was made, she could not have engaged in reflective thought.

Not only are these two separate inquiries, but the fact that the declarant may have been excited while making a statement does not eliminate the possibility that she engaged in reflective though beforehand. That the Fourth District would ignore this important distinction here is curious in light of its prior decisions in *Beck v. State*, 937 So. 2d 821 (Fla. 4th DCA 2006) and *Mariano v. State*, 933 So. 2d 111 (Fla. 4th DCA 2006). In both of those cases, the appellate court found that the trial court erred in admitting statements as excited utterances on facts nearly identical to those presented here.

Finally, the admission of the 911 call here constituted harmful error. Because this case came down to a credibility contest regarding whether the sexual encounter at issue was consensual, and because the State's only witness to the

offense made conflicting statements to the responding officer, lied to the investigating detective and treating physician regarding her sexual history, and had a motive to lie, the 911 tape clearly served the improper purpose of bolstering her credibility. The State admitted as much during its closing argument when it urged the jurors to view the 911 tape as evidence of T.S.'s credibility.

ARGUMENT

I. Florida Courts Have Routinely Excluded Testimony As Hearsay Where The Declarant Discussed The Events Giving Rise To The Excited Utterance Prior To Making The Statement.

A. Excited Utterances And Reflective Thought.

Section 90.803(2), Florida Statutes, contains the "excited utterance" exception to the hearsay rule. This exception includes any "statement or excited utterance relating to a startling event or condition while the declarant was under the stress of excitement caused by the event or condition." *See also Deparvine v. State*, 995 So. 2d 351, 367 (Fla. 2008) (quoting the definition of excited utterance in Section 90.803(2), Florida Statutes).

To constitute an excited utterance, the statement must satisfy a three-part test. *State v. Jano*, 524 So. 2d 660, 661 (Fla. 1988). First, there must be an event startling enough to cause nervous excitement. *Id.* Next, the statement must have been made before there was time to contrive or misrepresent. *Id.* Finally, the statement must be made while the person is under the stress of excitement caused

by the event. *Id.* "If the statement occurs while the exciting event is still in progress, courts have little difficulty finding that the excitement prompted the statement." *Id.* at 662. It is where the statement is made after the passage of some time that courts find themselves in a grey area.

In these cases, courts must consider whether the declarant engaged in "reflective thought." As a general rule, if "the time interval between the event and the statement is long enough to permit reflective thought, the statement will be excluded in the absence of some proof that the declarant did not in fact engage in a reflective thought process." *Id.* (quoting Edward W. Clearly, *McCormick on Evidence,* § 297 at 856 (3d ed. 1984)); *Stoll v. State*, 762 So. 2d 870, 873 (Fla. 2000) (same); *Rogers v. State*, 669 So. 2d 237, 240 (Fla. 1995) (same). The time between the event and the statement can be as short as a few minutes, or as long as several days. *State v. Jano*, 524 So. 2d at 662.

This Court's prior decision in *Hamilton v. State*, 547 So. 2d 630 (Fla. 1989), is instructive. Two and one-half hours after Hamilton shot and killed two people, his son made a statement to an HRS caseworker identifying his father as the perpetrator. *Id.* at 633. Hamilton argued that the statement should not have been admitted under the excited utterance exception to the hearsay rule, and this Court agreed. *Id.* The Court reasoned that Hamilton's son "had ample opportunity while at the scene of the shootings to overhear deputies, investigators, and several other

people" opine as to Hamilton's guilt. *Id.* As the Court made clear, "[i]t is central to the reliability of the statement that the declarant not have time to reflect on the event before making the "excited utterance." *Id.* The Court concluded that the "time lapse" there rendered the son's statement "unreliable."

While *Hamilton* placed heavy emphasis on the passage of time, it is what happened in the hours before Hamilton's son made his statement that is of critical importance. During that time period, as the Court made clear, Hamilton's son was exposed to a variety of individuals, all of whom had their own opinions regarding Hamilton's guilt. Although it appears that Hamilton's son was merely a passive observer who did not engage any of the deputies, investigators, and others in a discussion about the crime, or his father's culpability, the impact of their views on his own statement could not be ignored. Although this scenario occurred over the course of a couple of hours, one can easily imagine the same thing happening in a more compressed time period.

Today, *Hamilton*'s logic can be seen in a line of cases where a declarant's decision to speak to a third party renders their subsequent statement inadmissible as an excited utterance. As further discussed below, these cases focus less on the passage of time, and more on the declarant's activities between the startling event and the actual statement made. These cases, in many ways, represent the next step in *Hamilton*'s evolution. In reality, *Hamilton* could and should stand for the

proposition that a declarant's decision to speak to a third party is evidence of reflective thought which renders subsequent statements inadmissible under the excited utterance exception to the hearsay rule. Indeed, that is how a majority of the district courts of appeal view the issue today, and how this Court should ultimately analyze the question as well.

B. A Majority Of The District Courts Of Appeal Have Now Held That Conversations With Third Parties Render Subsequent Statements Inadmissible As Excited Utterances.

The First, Third, Fourth, and Fifth District Courts of Appeal have ruled that a statement did not constitute an excited utterance where the declarant first spoke to a third party before making the statement a proponent seeks to introduce.

The First District Court Of Appeal. In *Blandenburg v. State*, 890 So. 2d 267 (Fla. 1st DCA 2004), the defendant stabbed her son. *Id.* at 268. After the alleged attack, the son "left the house, walked to a neighbor's house, and asked for a ride to the hospital." *Id.* at 271. At the hospital, the son told a police officer that his mother stabbed him with a knife. *Id.* The trial court admitted the statement as an excited utterance. *Id.* at 269. On appeal, the First District reversed, finding that the son "had the opportunity to engage in reflective thought" after asking a neighbor for a ride to the hospital and being treated for his injury before making the statement to the police officer. *Id.* at 271.

The Third District Court Of Appeal. In *Strong v. State*, 947 So. 2d 552 (Fla. 3d DCA 2006), the State sought to admit as an excited utterance the wife's statement that her husband broke her spine. *Id.* at 554. Before speaking to the police, however, the wife spoke to paramedics, a nurse, a doctor, and possibly the defendant. *Id.* at 555. It was not until after she spoke to these individuals that she gave a statement to a police officer. *Id.* at 556. The Third District held that "the State put forth no evidence to demonstrate that [the declarant]'s physical condition prevented her from explaining what happened prior to her conversation with [the police officer] or from engaging in reflective thought." *Id.* at 556. Thus, the Third District found that the trial court abused its discretion by admitting the wife's statements to the police officer. *Id.* at 557. The court reasoned that the wife was able to "overhear what was being said about her injury and to reflect on what she would say." *Id.* at 555.

The Fourth District Court Of Appeal. In *Mariano v. State*, 933 So. 2d 111, 117 (Fla. 4th DCA 2006), the victim called the defendant's sister and told her that the defendant tried to kill her. Before calling the defendant's sister, however, the victim had already been questioned by three deputies at the scene to whom she relayed the details of the attempted stabbing several times. *Id.* The trial court refused to admit the victim's statement to the defendant's sister as an excited utterance because "the state failed to present evidence that the victim did not

engage in reflective thought in the time period between the fight and the phone call . . . ." *Id.* at 116. The trial court reached this conclusion despite the fact that little time passed between the incident and the call. *Id.* The Fourth District affirmed, citing the victim's intervening conversations with the deputies prior to her call to the defendant's sister. *Id.* at 116-117.

In *Beck v. State*, 937 So. 2d 821 (Fla. 4th DCA 2006), the victim called 911, informed the dispatcher that she did not need medical attention, but wanted the police to come out since she was scared that her husband would "come after" her. *Id.* at 822. On appeal, the Fourth District found that the trial court erred in admitting the 911 call as an excited utterance. Although a relatively short period of time elapsed between the startling event and the 911 call, the Fourth District explained that "the State must establish that the victim did not engage in reflective thought." *Id.* at 823. The appellate court noted that "the victim called the non-emergency police number even before she dialed 911 . . . ." *Id.* This fact alone, explained the court, "would certainly suggest the opportunity to engage in reflective thought." *Id.*

The Fifth District Court Of Appeal. In *Pressley v. State*, 968 So. 2d 1039, 1043 (Fla. 5th DCA 2007), the victim of a lewd or lascivious act called her mother after the fact, but did not tell her what had occurred. *See id.* at 1040. The victim's statements to her mother after the phone call were admitted as an excited utterance.

Id. at 1041. On appeal, the Fifth District found the State failed to establish that the victim did not engage in reflective thought after initially speaking to her mother on the telephone. *Id.* at 1043. According to the court,

> Most telling is the fact that when the victim called her mother, she did not tell her mother what happened at that time; rather, the victim told her mother she needed to speak with her when she got home. Thus, the victim made a conscious decision to refrain from saying anything until some later point, indicating that she was not 'under the stress of the startling event' at that time.

Id. at 1043.

C. Fashioning A New Rule.

In *Hamilton,* this Court made clear that for an excited utterance to be reliable, the declarant must not have the opportunity to reflect before making a statement. *Hamilton*, 547 So. 2d at 633. The Court reached that conclusion in the context of a case where the declarant was exposed, albeit as a passive listener, to a variety of views and opinions which may well have impacted his own later statements. In the end, it could be argued that it was this exposure, and not the passage of time, that ultimately led the Court to question the reliability of the excited utterance. Indeed, this is now the view of the majority of the district courts of appeal, and it is one that can form the basis of a narrowly tailored, bright line rule here.

In light of this Court's decision in *Hamilton*, and the decisions discussed above, this Court should now hold that a declarant's decision to confer with a third party (even when that party is a law enforcement officer) will render any subsequent statement inadmissible as an excited utterance. It cannot be denied that such a conversation may impact a subsequent statement to such an extent that its reliability can no longer be accepted. Because it is difficult, if not impossible, to accurately measure the degree of impact third parties may have on a declarant, the best course of action is simply to bar any statements following such conversations. To hold otherwise would erode the reliability of excited utterances following a truly startling event.

II. The 911 Phone Call Is Also Inadmissible Because It Is Narrative In Nature.

Even if T.S. had not engaged in reflective thought, her 911 tape would still not qualify as an excited utterance. Courts have drawn a distinction between statements made for the purpose of receiving aid or assistance, and those that merely recount past events. While the former may rise to the level of an excited utterance, the latter do not. "[I]f the supposed statement, exclamation, or spontaneous utterance takes the form of a narrative of a past event, it is very well established that it may not be considered as part of the transaction or res gestae." *Green*, 113 So. 121, 123 (Fla. 1927).

The 911 call here clearly falls into this category of inadmissible, narrative statements. *See, e.g.*, *Mariano*, 933 So. 2d at 117; *see also Charlot v. State*, 679 So. 2d 844, 845-46 (Fla. 4th DCA 1996) (holding that a statement was narrative in nature where the victim told a police officer at the scene of the incident what had occurred). This is in sharp contrast to the spontaneous disclosure of information, which may constitute an excited utterance. *Compare J.A.S. v. State*, 920 So. 2d 759, 763 (Fla. 2d DCA 2006) (declarant answered the questions of the deputy), *with Rivera v. State*, 718 So. 2d 856 (Fla. 4th DCA 1998) (holding that the statement was an excited utterance where the declarant, who ran to a patrol officer, screaming and crying for protection from the defendant).

Here, T.S.'s responses to the 911 operator's questions regarding her sexual encounter with Mr. Akien were clearly narrative in form. During the call, which occurred after the incident between T.S. and Mr. Akien, R-329, T.S. engaged in a back and forth conversation with the operator. R-300-05. All of T.S.'s statements were made in response to specific questions posed by the operator. *See*, *e.g.*, *id.* at 300 (Operator: "Do you know who raped you?" T.S: "No."); *id.* at 301 (Operator: "Did this happen there?" T.S.: "Yes."); *id.* at 302 (Operator: "Okay. Did he hurt you? Are you injured?" T.S.: "No."); *id.* at 304 (Operator: "Okay. Just stay on the phone, okay? How long did this last for?" T.S.: "I don't know."). At no point

during this conversation did T.S. indicate that she needed protection from Mr. Akien, or that she required medical attention. *Id.*

Accordingly, this Court should find that the conversation between T.S. and the 911 operator was narrative in nature and therefore inadmissible hearsay. *Green,* 113 So. at 123; *J.A.S.*, 920 So. 2d at 763; *Charlot*, 679 So. 2d at 845-46.

III. The Fourth District Court Of Appeal Erred As A Matter Of Law And Fact In This Case.

Separate and apart from the fact that it strayed from the majority view discussed above, the Fourth District's analysis of *Akien* is flawed on a number of levels. *See Akien v. State*, 44 So. 3d 152 (Fla. 4th DCA 2010).

As a threshold matter, the Fourth District relieved the State of its burden of proof. Although it found that T.S. "may have had an opportunity to engage in reflective thought, we cannot say that the trial court abused its discretion by allowing the introduction of the 911 tape." *Id.* at 155. The appellate court reasoned that "the record does not clearly refute the contention that the victim spoke to the 911 operator under the stress of excitement caused by her rape." *Id.* (internal citation and quotation marks omitted). This, however, is the wrong standard.

The State, as the proponent of the excited utterance, carried the burden of proof. It was the prosecution's burden to establish that T.S. did not engage in any reflective thought. If it failed to do so, the trial court could not admit the 911 call

as an excited utterance. This Court's decision in *Hutchinson v. State*, 882 So. 2d at 951-52, illustrates the point. There, the Court held that the trial court could not admit a crime victim's statement to her friend as an excited utterance where the State failed to provide evidence that the victim did not engage in reflective thought before making the statement at issue. The Fourth District's determination that T.S. may have engaged in reflective thought here, makes clear that the State failed to meet its burden of proof. The Fourth District recognized that the State carried the burden of proof in its earlier decision of *Mariano v. State*, 933 So. 2d at 116 ("*Hutchinson* reinforces the proposition that it is the state's burden to prove that the declarant ***did not engage in*** reflective thought.") (emphasis added),

Second, the Fourth District appears to have improperly conflated the second and third elements of the excited utterance test. In its decision the court correctly noted that for a statement to qualify as an excited utterance

> There must be an event startling enough to cause nervous excitement, the statement must have been made before there was time to contrive or misrepresent, and the statement must be made while the person is under the stress of excitement caused by the event.

Akien, 44 So. 3d at 154 (quoting *State v. Jano*, 524 So. 2d 660, 661 (Fla. 1988)) (internal quotation marks omitted). The fact that a statement is made while under the stress of nervous excitement, does not mean that the declarant did not engage in reflective thought. *See Blandenburg*, 890 So. 2d at 270; *Charlot*, 679 So. 2d at

845. The fact that the declarant is crying, or otherwise agitated, when making the statement does not mean that the declarant has not engaged in reflective thought. *See Hutchinson v. State*, 882 So. 2d at 952 (holding that the victim's statement to a friend that her boyfriend was gone for good was inadmissible as an excited utterance even though the victim was crying). The emotional state of the declarant is separate and apart from the declarant's ability to contrive or misrepresent the details of the event. *See, e.g., id.* at 952; *Beck v. State*, 937 So. 2d at 823; *Mariano v. State*, 933 So. 2d at 116-117.

Yet, that is exactly what the Fourth District found here. In noting that the record did not "clearly refute the contention that the victim spoke to the 911 operator under the stress of excitement caused by" her encounter with Mr. Akien, the court essentially nullified the concept of reflective thought. If all that is necessary is evidence that a statement was made while nervous or excited, then the State (or any other proponent of an excited utterance) would never have to establish that the declarant did not engage in reflective thought.

Third, in deciding this case, the Fourth District failed to follow its own precedent. In *Mariano v. State*, the victim's boyfriend attempted to stab her. She initially relayed the events surrounding the attack to three deputes. 933 So. 2d 111, 113 (Fla. 4th DCA 2006). Thereafter, the victim, who was hysterical, called her boyfriend's sister and told her what had happened. *Id.* The Fourth District ruled

that the trial court improperly admitted the victim's statement to the defendant's sister because there was no evidence that "reflective thought ha[d] not occurred." *Id.* at 117.

Likewise, in *Beck v. State*, the victim called a non-emergency police number to report that she feared her husband would "come after" her. 933 So. 2d 821, 822 (Fla. 4th DCA 2006). Thereafter, she called 911. *Id*. at 823. The Fourth District held that the trial court erred in admitting the 911 call as an excited utterance. "Here, the victim called the non-emergency police number even before she dialed 911, a fact which would certainly suggest the opportunity to engage in reflective thought." *Id.*

In this case, as in *Mariano* and *Beck*, T.S. spoke to a third party before making the statement that the State ultimately sought to admit as an excited utterance. T.S. unambiguously testified that after Mr. Akien left her home, "I went to lock the door. And then I waited for a little bit. Like I went in my room and I sat down and I cried and then I called my mother." R-329. While on the phone with her mother, T.S. told her that she was afraid to call the police. R-295-96. It was not until after T.S.'s mother insisted that T.S. call 911, that T.S. contacted the police. R-329. As in *Mariano* and *Beck*, T.S.'s decision to call her mother first, to discuss her encounter with Mr. Akien with her mother first, and to indicate that she had no desire to contact the police because of the threats Mr. Akien purportedly

made should have rendered her subsequent statement to the 911 operator inadmissible as an excited utterance. The Fourth District's decision here simply cannot be reconciled with its prior precedent.

Finally, the Fourth District erred in finding that the admission of the 911 call resulted in harmless error. "To justify affirmance of a conviction or sentence despite error at trial, the State must establish beyond a reasonable doubt on appeal that the error did not contribute to the jury's verdict." *Deparvine*, 995 So. 2d at 371 (citing *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986)). "If a reviewing court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful." *Id*.

The Fifth District's decision in *Pressley* highlights why the admission of the 911 tape in Mr. Akien's case constituted harmful error. 968 So. 2d at 1043. In *Pressley*, the Fifth District determined that the trial court improperly admitted the victim's out-of-court hearsay statement as an excited utterance. *Id.* The court explained that the defendant's "conviction was premised entirely on the credibility of the only eyewitness to the event – the victim. The disputed testimony had the effect of improperly bolstering the victim's testimony." *Id.* at 1043. So too here.

The sole witness to the charged offense here was T.S. She provided the only proof the State offered to establish that Mr. Akien committed a burglary and engaged in non-consensual sex. Yet, T.S.'s testimony suffered from numerous

deficiencies. T.S. claimed that Mr. Akien broke into her home, R-445, yet the police could not find any evidence of forced entry, on either the door or the window to T.S.'s bedroom. R-437-38, 445. T.S. further claimed that she was the victim of a forceful sexual encounter in her bedroom. R-440-41. Yet, the responding officer saw no evidence of a struggle in T.S.'s bedroom. R-442.

T.S. described a forceful sexual encounter that began when Mr. Akien unsuccessfully attempting to penetrate her vagina with his penis for a period of five to ten minutes. R-323. When Mr. Akien finally penetrated her vagina, T.S. claimed that the encounter took up to forty-five minutes. R-289, 325, 327. During the entire episode, T.S. claimed that Mr. Akien would squeeze her neck to control her. R-290. At one point, he squeezed her neck so hard that T.S. felt as if she could not breathe. R-322. And yet, T.S. did not suffer any physical injury. The treating physician found no evidence of blood or vaginal trauma. R-265-67/ The investigating detective never saw any marks, bruises, or scratches on her arms, neck, or face. R-387-89. T.S. herself admitted that she suffered no physical injuries. R-309.

In addition, T.S. repeatedly lied about her sexual history and conduct, especially on the night in question. T.S. conceded that she lied to the responding police officer, the investigating detective, and her own treating physician regarding her sexual activity. R-307. Initially, she lied about ever having had sex. R-376.

Then, when the investigating detective explained how important it was to be truthful, she admitted to having sex with her boyfriend, but claimed that their last encounter occurred one month earlier. R-376, 389. Incredibly, she even lied to her doctor, who asked about her sexual history in order to make a proper evaluation and treatment decision. T-263. This last misrepresentation is especially incredible in light of the fact that T.S. voiced concerns about an unwanted pregnancy, R-315, but nevertheless engaged in unprotected sex with Mr. Akien.

Clearly, T.S. was a damaged witness. This is why the State played the 911 tape during her direct examination, R-300-05, and why the prosecution replayed the entire tape again during closing arguments. R-486-91. Any doubt regarding the State's motivation here was resolved by the prosecutor during closing argument when he urged jurors to believe T.S. based on the 911 tape. "Everything she told that 911 operator is consistent with what she told you in court. Why would she even call 911 if it didn't happen the way she told you?" R-492. The 911 tape was used to bolster T.S.'s credibility and its admission constituted both legal and harmful error.

CONCLUSION

Based on the foregoing points and authorities, this Court should reverse the Fourth District Court of Appeal's decision. In so doing, the Court should hold that a statement cannot be deemed an excited utterance where the declarant first confers

with a third party. Alternatively, the Court should draw a clear distinction between statements made in order to secure aid, from those which are narrative in nature, and merely provide a recitation of events as they occurred.

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CERTIFICATE OF SERVICE

I certify that the foregoing was sent by U.S. Mail this 28th day of April, 2011, to Laura Fisher Zibura, Assistant Attorney General, 1515 North Flagler Drive, Ninth Floor, West Palm Beach, Florida, 33401.

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the font requirements contained in FLA. R. APP. P. 9.210(a)(2).

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