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 REPLY BRIEF ON THE MERITS

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INTRODUCTION

The State has considerably narrowed the issues before this Court. First, the essential facts are not in dispute. Following her encounter with a man she would later identify as Mr. Akien, T.S. waited approximately ten minutes before first calling her mother. During their conversation, T.S. told her mother that she did not want to call the police for fear of what might happen to her family. T.S.'s mother then contacted the police for her daughter. The police, however, insisted that T.S. make the report. After what appears to have been a second telephone conversation with her mother, T.S. ultimately dialed 911. The State played the 911 tape – which consisted of T.S.'s narrative of the events at issue – during T.S.'s direct examination and its closing argument. During its closing, the State urged that the 911 tape proved T.S. testified truthfully.

In addition, the State does not challenge the law – as it exists today. More importantly, the State does not object to Mr. Akien's request that this Court fashion a bright-line rule which would exclude as an excited utterance any comment made by a declarant following their conversation with a third party. Moreover, the State does not dispute that such a rule is a natural extension of this Court's decision in *Hamilton v. State,* 547 So. 2d 630 (Fla. 1989). Indeed, subsequent decisions from a majority of the district courts have found that statements made in circumstances similar to those at issue here did not constitute excited utterances.

Instead, the State argues that there is no jurisdiction here and that the Fourth District did not err in admitting the 911 call as an excited utterance. The State limits its analysis to simply distinguishing Mr. Akien's citations to authority. In so doing, the State misses the mark. As Mr. Akien demonstrates below, the State's own review of Florida's excited utterance jurisprudence not only establishes a clear conflict between this Court's prior decisions and those of a majority of the district courts of appeal, it proves the need for a bright-line rule.

Contrary to the State's position, the Fourth District's decision here expressly and directly conflicts with decisions of this Court and a majority of the district courts of appeal. Indeed, the Fourth District's decision here conflicts with its own prior precedent. Because the admission of the 911 tape was contrary to this Court's prior decisions, a majority of the decisions of the district courts of appeal, and ultimately constituted harmful error, reversal is warranted.

REPLY

Without any analysis, the State persists that this Court lacks jurisdiction because the Fourth District's decision does not expressly and directly conflict with any decision of this Court. Ans. Br. at 6, 7. To the contrary, Mr. Akien has demonstrated in his initial brief that the Fourth District's decision conflicts with this Court's decisions in *Stoll v. State*, 762 So. 2d 870 (Fla. 2000), *Rogers v. State*, 660 So. 2d 237 (Fla. 1995), *Hamilton v. State*, 547 So. 2d 630 (Fla. 1989), and

State v. Jano, 524 So. 2d 660 (Fla. 1988). These decisions established this Court's excited utterance jurisprudence. Read together, these decisions make clear that the opportunity to engage in reflective thought renders a declarant's statements inadmissible under the excited utterance exception to the hearsay rule. The State has failed to explain how the Fourth District's finding here that T.S. "may have had an opportunity to engage in reflective thought," *Akien v. State*, 44 So. 3d 152, 155 (Fla. 4th DCA 2010), does not conflict with this Court's settled authority. Simply stated, if T.S. engaged in reflective thought, her statements are inadmissible.

The State also does not explain the Fourth District's additional holding that T.S.'s declaration was admissible because "[t]he record does not clearly refute the contention that the victim spoke to the 911 operator 'under the stress of excitement caused by' her rape." *Akien*, 44 So. 3d at 155. This is in direct conflict with this Court's decision in *Jano.* In *Jano*, this Court made clear that the admissibility of a statement as an excited utterance is a three-part test. *Jano*, 524 So. 2d at 662. As Mr. Akien demonstrated in his initial brief, the Fourth District here conflated the second and third elements of the test, focusing solely on the fact that T.S. was excited at the time she made her statement. Ini. Br. at 33-34. The State ignores Mr. Akien's argument that T.S.'s stress, at the time of the 911 call, does not

obviate the fact that she had time to reflect before she made the statement at issue. *Id.*

Contrary to the State's argument, Ans. Br. at 7, 11, Mr. Akien has also established that the Fourth District's decision expressly and directly conflicts with decisions from the First, Third, Fourth, and Fifth District Courts of Appeal. Ini. Br. at 26-29. The State's own discussion of these cases illustrates that a clear conflict exists between the Fourth District's decision here, and the majority of the district courts that have considered the issue:

- The First District in *Blandenburg v. State*, 890 So. 2d 267 (Fla. 1st DCA 2004), found that statements made by two declarants, which articulated concern for the defendant, their mother, evidenced reflective thought and did not constitute excited utterances. Ans. Br. at 13;
- The Second District in *J.A.S. v. State*, 920 So. 2d 759 (Fla. 2d DCA 2006), ruled that a father's statement made 15 minutes after the event did not qualify as an excited utterance because the declarant had sufficient time to engage in reflective thought. Ans. Br. at 13-14;
- The Third District in *Strong v. State*, 947 So. 2d 552 (Fla. 3d DCA 2006), ruled that a statement made after the declarant had contact with paramedics and hospital personnel during a four to five hour time period did not qualify

as an excited utterance because the declarant had sufficient time to engage in reflective thought. Ans. Br. at 14-15; and

- The Fifth District in *Pressley v. State*, 968 So. 2d 1039 (Fla. 5th DCA 2007), found that a teenager's statement to her mother made 45 to 60 minutes after she initially told her mother she had something to disclose did not constitute an excited utterance because it was not made under the stress of the startling event. Ans. Br. at 15.

Despite these facts, the State nevertheless urges that *Blandenburg, J.A.S., Strong*, and *Pressley* are all distinguishable on two grounds.[1] First, the State contends that the time between the startling event and excited utterance was greater in these cases than the time at issue here. Ans. Br. at 13-15. Second, it argues that in this case T.S. was still under stress at the time she made her statement. *Id*. The first argument articulates the need for a bright-line rule, while the second is simply wrong.

As Mr. Akien established in his initial brief, the issue is not how much time has elapsed between the startling event and the declaration, but whether the declarant has had the opportunity to engage in reflective thought. Ini. Br. at 29-30. Because reflective thought can occur over a period of hours, or in just a few

[1] The State attempts to further distinguish *Strong* by noting that the victim there died before trial, while T.S.'s statement was not inconsistent with her trial testimony. Ans. Br. at 14-15. The significance of this point, especially with respect to the excited utterance analysis at issue here, is not clear.

minutes, a time-based standard is simply unworkable. Indeed, the majority of district courts to have considered the issue have looked to and taken into account other more objective factors, such as whether the declarant had the opportunity to confer with a third party before making a so called "excited utterance." *Id*. at 26-30.

The State's second point, that T.S. was still under stress at the time of the call, misses the mark. Ans. Br. at 13-15. As Mr. Akien explained in his initial brief, the declarant's emotional state is a question separate and apart from her ability to contrive or misrepresent the details of the event. Ini. Br. at 34. Conflating two separate standards, however, is only one of several errors the Fourth District made in this case. The State entirely ignores the fact that the appellate court's decision relieved the prosecution of its burden of proof as the proponent of the excited utterance and failed to follow its own precedent. *Id*. at 32-36.

On this latter point, the State once again attempts to distinguish cases which are analogous to the facts here. The State notes that in *Beck v. State*, 937 So. 2d 821 (Fla. 4th DCA 2006), the Fourth District found that the trial court erred in admitting a statement as an excited utterance where the declarant waited more than an hour before calling the police's non-emergency number and providing a narrative. Ans. Br. at 11. Likewise, in *Mariano v. State*, 933 So. 2d 111 (Fla. 4th

DCA 2006), the State explains that the appellate court found that the declarant had the opportunity to engage in reflective thought where the statement at issue was made 30 to 90 minutes after the startling event. Ans. Br. at 11-12. The State adds that it did not matter that the declarant was upset at the time of the statement. *Id.* at 12.

Both of these decisions are not only analogous to the facts of this case, they highlight the aberrant nature of the Fourth District's decision here. As in *Beck*, T.S. offered the 911 operator a narrative recitation of her encounter with Mr. Akien. Separate and apart from evidencing reflective thought, Mr. Akien has already established that the narrative nature of T.S.'s statement also rendered it inadmissible. Ini. Br. at 30-32. Critically, the State does not challenge this argument. *Mariano* likewise does not support the State's argument. The passage of time is but one factor to consider in determining whether a declarant has engaged in reflective thought. Another important factor, as Mr. Akien has already demonstrated, is the declarant's contact with third parties before making the statements at issue. *Id.* at 26-29. *Mariano* does not foreclose the possibility that a statement made within a short period of the startling event, but after speaking to a third person, would also be excluded as an excited utterance.

Finally, the State argues that the admission of the 911 call did not constitute harmful error. Ans. Br. at 15. In his initial brief, Mr. Akien established that the

admission of the 911 call constituted harmful error. Citing to the analogous case of *Pressley v. State*, 968 So. 2d 1039 (Fla. 5th DCA 2007), Mr. Akien explained that where, as here, a conviction is premised entirely on the credibility of the only eyewitness to the event – the victim – the improper admission of a hearsay statement as an excited utterance constitutes harmful error. Ini. Br. at 36. The improper testimony would have the damaging effect of bolstering the victim's testimony. *Id.* That is exactly what happened here. As Mr. Akien demonstrated, the prosecution introduced the 911 call not only in its case-in-chief, but also during its closing argument. *Id.* at 38. Indeed, the prosecution made it clear that it was introducing the 911 call to bolster T.S.'s credibility – "Everything she told that 911 operator is consistent with what you told you in court. Why would she even call 911 if it did happen the way she told you?" *Id.* (quoting R-492).

CONCLUSION

This Court should reverse the Fourth District Court of Appeal's decision below and hold that a statement cannot be deemed an excited utterance where the declarant first confers with a third party.

Dated: Miami, Florida
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CERTIFICATE OF SERVICE

I certify that the foregoing was sent by U.S. Mail this 24th day of June, 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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