IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellant

v.

Sergeant First Class (E-7)
DASHAUN K. HENRY,
United States Army,
Appellee.

BRIEF ON BEHALF OF *AMICI CURIAE* LEGAL MOMENTUM AND SANCTUARY FOR FAMILIES IN SUPPORT OF APPELLANT

Crim. App. No. ARMY MISC 20190688

USCA Dkt. No. 20-0342/AR

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IDENTITIES AND INTERESTS OF *AMICI CURIAE*[1]

Amici are established non-profit organizations that have unique experience regarding the dynamics of domestic violence, the perpetration of domestic violence before and after separation, and the impacts of domestic violence on victims and their children. *Amici* offer the Court a unique perspective on the domestic violence issues that arise in this case based on their deep understanding of the dynamics of domestic violence.

As a result of their extensive experience with domestic violence issues, *Amici* are well-positioned to highlight for the Court the importance of evidence-based prosecutions for the protection of domestic violence victims and their children and for bringing domestic violence perpetrators to justice. *Amici* here present the Court with social science research into the dynamics of domestic violence, including the frequency with which domestic violence victims recant earlier testimony or change their accounts—often because of force, control, or coercion exerted by the perpetrator—confirms that evidence-based prosecutions are a critical tool in any effort to eradicate domestic violence. The trial court's imposition of a new, heightened standard for application of the exceptions to the rule against hearsay,

[1] No counsel for a party authored this brief in whole or in part, and no party's counsel, party, or person other than *amici curiae* contributed money intended to fund preparing or submitting the brief.

which is not supported by the case law, undercuts prosecutors' ability to advance cases necessary to protect domestic violence victims and their children.

Amici here include:

- **Legal Momentum**: The Women's Legal Defense & Education Fund is the nation's oldest legal advocacy organization for women. Legal Momentum advances the rights of all women and girls by using the power of the law and creating innovative public policy. For example, Legal Momentum was the leading advocate for the landmark Violence Against Women Act and its subsequent reauthorizations, which seek to redress the historical inadequacy of the justice system's response to domestic and sexual violence. Legal Momentum has a particular interest in ensuring that the judicial system adequately protects the rights of victims of domestic and sexual violence and their children and has participated as amicus curiae in numerous relevant cases, including before the United States Supreme Court in *Giles v. California*, 554 U.S. 353 (2008) and *Davis v. Washington*, 547 U.S. 813 (2006). Legal Momentum's National Judicial Education Program (NJEP) provides education for judges, attorneys and justice system professionals on the realities of sexual and domestic violence and their intersection. NJEP's extensive web course, *Intimate Partner Sexual Abuse: Adjudicating This Hidden Dimension of Domestic Violence Cases*, is available free at www.njep-ipsacourse.org. NJEP Director Lynn Hecht Schafran's publications include *Risk Assessment and Intimate Partner Sexual Abuse: The Hidden Dimension of Domestic Violence*, JUDICATURE, January-February 2010 at 161 and *Domestic Violence, Developing Brains and the Lifespan: New Knowledge from Neuroscience*, THE JUDGES' JOURNAL, Summer 2014 at 32.

- **Sanctuary for Families** ("Sanctuary") is New York's largest dedicated service provider and advocate for survivors of domestic violence, human trafficking, and related forms of gender violence. Every year, Sanctuary offers legal, shelter, clinical, and economic empowerment

services to thousands of survivors and their children. Sanctuary provides training on domestic violence and trafficking to community advocates, pro bono attorneys, law students, service providers and the judiciary. Sanctuary also engages in extensive community outreach, education, and training, and advocates for policies and legislation designed to protect survivors.

Legal Momentum and Sanctuary for Families are joined by:

- **National Coalition Against Domestic Violence**: Founded in 1978, the National Coalition Against Domestic Violence ("NCADV") is the nation's oldest national grassroots domestic violence organization. NCADV's mission is to lead, mobilize and raise our voices to support efforts that demand a change of conditions that lead to domestic violence such as patriarchy, privilege, racism, sexism, and classism. We are dedicated to supporting survivors and holding offenders accountable and supporting advocates.

- **Women Lawyers on Guard**: Women Lawyers On Guard Inc. ("WLG") is a national non-partisan, non-profit organization harnessing the power of lawyers and the law in coordination with other non-profit organizations to preserve, protect, and defend the democratic values of equality, justice, and opportunity for all. WLG has participated as amicus curiae in a range of cases before the United States Supreme Court and other federal courts to secure the equal treatment of women under the law and to challenge sex discrimination, and gender-based violence.

* * *

PRELIMINARY STATEMENT

The Military Judge excluded from evidence the exclamations of a minor child and his mother as they fled their home, in the middle of a freezing night with Appellee in pursuit, to seek refuge in a neighbor's home following a domestic assault. The Military Judge's exclusion of contemporaneous evidence of Appellee's assault not only was an abuse of discretion, but in effect gave dispositive weight to the mother's later recantation of her testimony despite decades of research establishing that such recantation in domestic violence cases is frequently the result of the abuser's coercion.

The result turns the law of evidence on its head. The premise of evidence law is to aid the search for truth by identifying relevant and reliable material for the factfinder's consideration. To that end, the hearsay rule is designed to exclude out-of-court statements except where they are generally reliable, like those made under the influence of a startling event—such as a domestic assault—where the declarant would not have time to fabricate the statements offered for their truth. In sharp contrast, more than two decades of research shows victims of domestic violence who recant largely do so under their abuser's coercion. The dynamic between abusers and their victims involves not only physical violence, but coercive tactics that result in acute psychological trauma and traumatic bonding. That traumatic bonding explains why so many victims recant or refuse to cooperate with authorities, and

why abusers are so successful in their efforts to coerce their victims to recant. Abusers are also highly motivated to engage in those efforts because, often, their victims and vulnerable minor children are the only available witnesses to the crimes they committed.

In this case, anything less than a reversal would signal support for this insidious form of witness tampering against victims of domestic violence in military families stationed throughout the world, who rely on the military system of justice for protection and redress. It would also signal that courts should in effect prioritize later and likely unreliable recantations over contemporary and likely reliable statements following domestic assault, contrary to the core principles of evidence law and decades of research showing such recantations are often coerced. The Court should not tolerate that result.

ARGUMENT

I. PROPER APPLICATION OF THE HEARSAY EXCEPTIONS IS ESSENTIAL TO THE PROSECUTION OF DOMESTIC ABUSERS, AND TO THE PROTECTION OF VICTIMS AND THEIR CHILDREN.

A. Abusers Hold Significant Influence Over Victims and Their Children Through Coercive Control.

Though physical violence is a visible and widely recognized form of domestic abuse, it is only one part of a broader documented pattern of behavior by abusers designed to strip victims of their independence and subject them to the abuser's will. That dynamic between abuser and victim is called "coercive control," and refers to

a set of tactics abusers deliberately use to deprive their victims of autonomy and liberty. Evan Stark, *Coercive Control*, FATALITY REVIEW BULLETIN 2 (2010); *see also* Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* 5 (2007); *People v. Abdur-Razzaq*, 77 N.Y.S.3d 842, 846 (N.Y. Sup. Ct. Bronx Cty. 2018) (admitting expert witness testimony about traumatic bonding and coercive control).

Rather than obtaining control over victims exclusively through physical violence, coercive control is characterized by an ongoing pattern of gender-based domination by which abusive partners "interweave repeated physical abuse with intimidation, sexual degradation, isolation, and control." Stark, *Coercive Control*, FATALITY REVIEW BULLETIN 2; *see also* Stark, *Coercive Control: How Men Entrap Women in Personal Life* 5. The negative effects of this psychological abuse are long-lasting, and often trap victims and their children in a cycle of domestic violence at the hands of the abuser.

Coercive control is made especially dangerous by its invisibility. One of the most pernicious effects of coercive control is that victims often become psychologically incapable of understanding the utter domination that an abuser has over their entire lives. Abusers take advantage of the dynamic that coercive control imposes on domestic partners to tighten their grip on the victim and avoid responsibility for their abuse.

B. Abusers Use Coercive Control to Cause Their Victims to Recant Their Testimony or Refuse to Cooperate with Authorities.

One problematic effect of coercive control is its use by abusers to interfere with the investigation and prosecution of domestic violence. Coercive control is especially effective in domestic abuse cases because abusers, victims, and their children are often the only witnesses. Abusers cannot be compelled to testify, yet they can and do exert control over the ability of the only other witnesses to their crimes to testify. Abusers are therefore highly motivated to coerce victims to recant or decline to participate in prosecutions, and correctly estimate they will succeed in intimidating the victim into recanting or to declining to participate in the prosecution.

This well-documented result of coercive control is nothing short of witness intimidation and tampering. Abusers' tactics to evade responsibility start before a criminal prosecution. Many victims never give their account of the abuse at all, constrained by the fear and intimidation that abusers impose upon them through an established pattern of coercive control. Law enforcement, prosecutors, and courts must be vigilant to avoid letting a victim's initial silence become improperly conflated with a lack of credibility. *Cf.* Clare Dalton et al., *High Conflict Divorce, Violence, and Abuse: Implications for Custody and Visitation Decisions*, 54 JUV. & FAM. CT. J. 11, 16 (2003) ("One party's argument in court that allegations of abuse

lack credibility because they would surely have been made earlier if they were true may be nothing more than an exploitation of this earlier silence.").

Once authorities become involved in a domestic violence situation, abusers shift their tactics, using their psychological domination to interfere in investigations and stymie prosecutors. Abusers' ability to interfere with prosecutions has been documented in a growing body of social science research. By some estimations, more than 80 percent of domestic abuse victims recant their testimony over the course of a prosecution. Amy E. Bonomi et al., *"Meet me at the hill where we used to park": Interpersonal Processes Associated with Victim Recantation*, 73 SOC. SCI. & MED. 1054 (2011).

Courts across the country recognize the likelihood that abusers will at least attempt to interfere in their prosecutions. The Supreme Court in *Davis v. Washington* opined that domestic violence victims are "notoriously susceptible to intimidation or coercion of the victim to ensure that [they] do[] not testify at trial." 547 U.S. 813, 833 (2006). Likewise, this Court's predecessor recognized that "[t]he fact that [the victim] did not appear at trial does not render her statements false," because "the lapse of time between the date of the incident and the trial was sufficient to permit this young girl to be pressured in various ways not to testify." *United States v. Arnold*, 25 M.J. 129, 133 n.4 (C.M.A. 1987) (further noting that

cohabitation with the perpetrator could have been a factor in the victim's decision not to testify).

The record here includes a clear illustration of DH actively exercising his coercive control over the victim KH. While speaking with law enforcement in his living room, DH asked whether "he can get his belongings which were on the couch consisting of four different cellular phones." JA166. When Ofc. Ploss asked which of the phones was his, DH replied "all of them." *Id.* Ofc. Ploss correctly guessed that DH was lying, and asked KH to "identify her phone and it was one of the four and given back to her." *Id.* DH's effort to keep KH's phone from her has all the hallmarks of an abuser attempting to exercise coercive control. Not only was DH attempting to keep the victim from her personal property, but in seeking to keep KH from her phone, DH was seeking to deprive her of a line of communication that could be used to further expose his abusive actions.

C. Given That Context, the Proper Application of the Exceptions to the Rule Against Hearsay are Critical to the Prosecution of Abusers and the Protection of Victims and their Minor Children.

Abusers' ability to dissuade and prevent victims from cooperating with authorities is not only disruptive to an investigation and prosecution, it limits prosecutors' options to pursue an "evidence-based prosecution," meaning, a prosecution based on evidence other than the victim's live testimony. As a result,

proper application of the exceptions to the rule against hearsay is critical to the prosecution of domestic assaults in military courts around the world.

Protection of victims and their children—who are themselves victims—is dependent on authorities' ability to bring and effectively prosecute actions against abusers. Because of the circumstances of domestic violence, testimony from percipient fact witnesses is often unavailable. The abuser and the victim are often the only available witnesses with percipient knowledge of a given incident—and where the abuser prevents the victim from testifying, it is imperative that courts consider the available evidence in accordance with the law.

Military police recognize the danger posed by domestic abuse, and have implemented at least two different danger assessment tools that have deep roots in social science literature. One, the "First Responder Domestic Violence Lethality Assessment" (JA170–71, "Lethality Assessment"), is modeled on Dr. Jacquelyn Campbell's "Danger Assessment," which is frequently used to assess the risk of dangerousness and lethality posed by intimate partner abuse. *See* Jacquelyn Campbell et al., *Assessing Risk Factors for Intimate Partner Homicides*, 250 NAT'L INST. OF JUST. J. 14 (2003) ("Campbell, *Assessing Risk*"); Jacquelyn Campbell, *Danger Assessment* (2003), https://www.dangerassessment.org/uploads/pdf/DAEnglish2010.pdf. Versions of the *Danger Assessment* are used by authorities

throughout the country in an effort to assess the potential for domestic abuse to lead to increased physical violence or lethality.

KH's responses to the Lethality Assessment highlight the importance of taking domestic violence incidents seriously and ensuring that evidence-based prosecutions can go forward. KH answered "Yes" to all of the following questions:

> 1. Has he ever used a weapon/object against you or threatened you with a weapon?
>
> 2. Has he ever threated to kill you, your children your relative(s)/family members or himself?
>
> 3. Do you believe that he might attempt to kill you?
>
> 4. Has he ever strangled or attempted to strangle (i.e. choke) you.?
>
> ***
>
> 7. Has he ever physically assaulted you, your children, or your relative(s)/family members?
>
> ***
>
> 14. Has the violence increased in frequency and/or severity over the past year?

JA170–71.

KH's concerning responses to the Lethality Assessment confirm what the evidence plainly shows—that she is afraid of DH and that DH's conduct demonstrates a high risk of dangerousness. Campbell's *Assessing Risk* lists "woman believed he was capable of killing her" as one of the key factors for assessing dangerousness or lethality. When Ofc. Ploss responded to the 911 call he found "a

woman and child standing on the front sidewalk in front of the residence huddled together." JA166. In response to the Lethality Assessment question "Do you have any other concerns about your safety?" she responded "Yes, when is soldier coming back to the house?" JA171. Ofc. Brashear also testified that KH "was concerned that her husband was going to come back to the residence" after the incident. JA120. Most critically, KH "believed" that her abuser might attempt to kill her, demonstrating a high potential for dangerousness or lethality. *Id.*

The military police also used the "Attempted Strangulation Assessment" in their response to the reported abuse. Strangulation is a uniquely dangerous signal that the domestic violence is potentially lethal. Strangulation victims are ***eight times*** more likely to become attempted homicide victims if the victim was strangled by her partner. Gael B. Strack & Casey Gwinn, *On the Edge of Homicide: Strangulation as a Prelude*, 26 CRIM. JUST. 32, 33–34 (2011).

Just as with the Lethality Assessment, KH's responses to the Attempted Strangulation Assessment are cause for great concern. The Attempted Strangulation Assessment documented KH's physical injuries that resulted from DH's abusive actions, including redness and scratch marks, as well as the strength of DH's grip during the act of strangulation (7 on a scale of 1-10) and symptoms of internal injury including hyperventilation and hoarse voice. JA168–69. Perhaps most troublingly, the strangulation only stopped because the victim's "son yelled stop." JA169.

Law enforcement uses these Assessments to gauge for themselves and to help victims understand how dangerous their situation is, as well as to preserve important evidence for possible later investigation and prosecution of cases against abusers. Through proper application of the Rules of Evidence, courts can and should also make use of this type of evidence, which is created temporally proximate to the incident and bears the necessary indicia of reliability to be admitted in court proceedings.

Advancing prosecutions on the available evidence is necessary not only to protect the adult victims of domestic abuse, but their children as well. Children are caught in the crossfire of domestic violence in the home. Even where they are not the intended targets of abuse, the effects of exposure to domestic violence on children are quite harmful.

Social science research is replete with studies confirming the unfortunate reality that children exposed to domestic violence exhibit "a host of behavioral and emotional problems, when compared to other children." Jeffrey L. Edleson, *Children's Witnessing of Adult Domestic Violence*, 14 J. INTERPERSONAL VIOLENCE 839, 846 (1999); *see also Elyashiv v. Elyashiv*, 353 F. Supp. 2d 394, 408 (E.D.N.Y. 2005) (citing the Edleson study with approval). The effects are potentially life-long, ranging from "behavioral disturbance" to "poor academic performance" to "becoming future perpetrators or victims of intimate partner violence." Mary A.

Kernic et al., *Children in the Crossfire*, 11 VIOLENCE AGAINST WOMEN 991, 993 (2005). Recent neuroscience research confirms that exposure to abuse causes traumatic stress, which can hinder proper brain development and lead to long-term behavioral, health, and social problems. Lynn Hecht Schafran, *Domestic Violence, Developing Brains and the Lifespan: New Knowledge from Neuroscience*, 53 JUDGES' J. 32 (2014). Further, abusers who perpetrate physical violence in the presence of children are more likely to be physically dangerous. *E.g.*, Martie P. Thompson et al., *Risk factors for physical injury among women assaulted by current or former spouses*, 7 VIOLENCE AGAINST WOMEN 886 (2001).

II. IN THE CONTEXT OF A DOMESTIC ASSAULT, THE MILITARY JUDGE PLAINLY ABUSED HIS DISCRETION BY EXCLUDING THE HEARSAY STATEMENTS.

Given the context in which KH and her child made the statements at issue and the likelihood that her later recantation is the product of Defendant's ongoing abuse, it is clear the Military Judge abused his discretion in his preliminary finding excluding those statements.

Misapplication of the Rules of Evidence not only excludes reliable evidence necessary for the prosecution of abusers, it rewards abusers for their ongoing pattern of abuse. Indeed, in other circumstances, military courts have admitted testimony describing the dynamics of coercive control in domestic violence situations. *See United States v. Chappell-Denzer*, No. ACM 38498, 2015 WL 4039360, at *5 (A.F.

Ct. Crim. App. June 5, 2015) (ruling that admission of evidence regarding coercive control was not an abuse of trial court's discretion). Admission of such evidence is a step in the right direction, but courts must use caution not to exclude other relevant and admissible evidence.

In this case, the Military Judge imposed requirements for the "excited utterance" exception to hearsay that find no support in the Military Rules of Evidence or the case law. The Military Judge's unprecedented heightened standard resulted in the exclusion of important evidence for the prosecution, which would have been admitted had the correct standard been imposed.

Excited utterances are considered reliable because they are made under the stress of excitement, before the declarant has had time to shade or fabricate the subject matter of the statements. Mil. R. Evid. 803(2). Out-of-court statements are admissible as excited utterances where: (1) the statement is "spontaneous, excited or impulsive rather than the product of reflection and deliberation"; (2) the event prompting the statement is "startling"; and (3) the declarant is "under the stress of the excitement caused by the event." *Arnold*, 25 M.J. at 132 (internal quotation marks and citations omitted). The utterances at issue here satisfy each of the Rule's requirements.

The trial court's error in excluding the hearsay statements here is especially damaging in a domestic abuse case and amplifies the power imbalance that already

exists between abusers and their victims. Social science research and practical in-court experience show an unequivocal pattern of domestic violence victims recanting their testimony during the time between when the abuse is reported and an investigation or prosecution progresses. *See supra* Section I.B.

A. The Trial Court Erred by Introducing a Requirement That the Witness Know the Declarant's State of Mind or Actual Perception to Satisfy a Hearsay Exception.

The trial court imposed an impossible standard when it required the witness, SSC, to know the declarant's state of mind or actual perception to establish an exception to the hearsay rule. There is no authority requiring a witness have read the declarant's mind for the statement to be admissible. Nor could there be: as an epistemic matter, a witness cannot speak to what the declarant in fact saw or the declarant's state of mind. By making an evidence-based prosecution impossible unless a witness is able to mind-meld with a declarant, the trial court in effect rewarded the accused for procuring his victim's unavailability as a witness. *Cf.* Mil. R. Evid. 804(6).

The record highlights the unduly high foundational bar that the trial court imposed for admission of the hearsay statements at issue. The trial court relied on "foundational" questions that asked SSC whether the declarant had in fact made a statement about "an event she had just experienced" (JA132–33), finding his answers to these questions—that he "assumed" that was the case—grounds to say it

was uncertain whether the declarant in fact witnessed those events. The only reasonable interpretation of SSC's testimony is that he believed the declarants had witnessed and remained under the stress of a domestic assault when they made their statements.

The new requirements caused the trial court to ignore the obvious and compelling corroborating evidence. The undisputed evidence is that a child in pajamas ran in the freezing cold to a neighbor's house at two in the morning—exclaiming "he's beating my mom"—only to be followed shortly thereafter by his mom running with her children from her home to the house of a neighbor she barely knew, exclaiming she had been hit. The trial court dispensed with this evidence—of which the only reasonable inference is that a startling event occurred inside the house—by finding that because "SSC barely knew [KH] or [JH] at the time of their statements[,] he could not gauge if their behavior was out of character or based on an excited state." JA144. The Rule does not require a prior relationship between the witness and the declarant, and imposing such a requirement here only results in ignoring the ample other evidence that a startling event had occurred.

In applying the excited utterance exception, courts are particularly "flexible in cases in which the declarant is young." *See United States v. Donaldson*, 58 M.J. 477, 483 (C.A.A.F. 2003) (collecting cases). Again, courts do not ask whether the youthful declarant and the witness have had a prior relationship, but only whether it

is apparent from the circumstances and the child's demeanor at the time whether the child remained under the stress of a startling event. *Id.*

SSC's testimony was more than sufficient to support a finding that JH was still under the stress of a startling event. Indeed, there was no evidence to the contrary, other than the trial court's conjecture that there could have been other explanations for the child's excited state at two in the morning, outside, in the winter. *See* JA143 ("[T]he government has not shown that [JH] personally observed the assault as opposed to hearing a commotion or repeating something his mother told him while she was having an intoxicating [sic] argument with the accused.") The trial court should not have posited hypothetical alternative explanations for JH's statements, but should rather have ruled on the evidence in front of it—all of which pointed to the existence of a startling event in the house that caused JH to run out into the cold winter night calling for help.

The practical effect of the trial court's ruling is to amend Rule 803(2) to provide that no "declarant was under the stress of excitement that [the startling event or condition] caused" unless the witness can attest to the declarant's actual perceptions, state of mind, or mental impressions. That defies logic and is reason alone to find that the trial court erred.

The trial court's reliance on *Henley* is misplaced, because *Henley* does not support the trial court's imposition of a state of mind or actual perception

requirement to admit a statement as an excited utterance. There, the witness was unable to observe the declarant's statements that were being offered as excited utterances. *United States v. Henley*, No. ARMY 20180175, 2019 WL 4803642, at **3–4 (A. Ct. Crim. App. Sept. 27, 2019). In *Henley*, "[t]he military judge relied solely on [the victim's] demeanor over the phone as a basis to conclude that [the victim's] statement . . . was close enough in time to the event to qualify as an excited utterance." *Id.* at *4. The statement was not admitted because there was no evidence "whether [the victim's] demeanor reflected stress or excitement from the alleged assault." *Id.*

The facts here differ dramatically. SSC spoke, in person, with JH and KH at the time they made their statements. He personally observed JH running across the yard in the middle of the freezing night, and personally observed KH when she stated that she had been hit and when she was speaking with the 911 Operator. It is hard to imagine what more SSC could have observed or testified about unless he had actually been in the house at the time of the assault.

B. The Trial Court Erred by Excluding the Victim's Statements to the 911 Operator.

There is ample evidence that KH's statements to the 911 Operator were made while she was still under the stress of the assault, and no evidence that the statements had been fabricated in any way. The trial court's exclusion of those statements was error.

First, the court erred by construing the answer to the 911 operator's question about "what is going on" as not a product of impulse or instinct. This is error because it eviscerates the exception by requiring all statements to be unprompted. Under the trial court's logic, a person who witnesses a murder but is asked "what happened" before she has a chance to speak would be precluded from making an excited utterance. That is plainly wrong. Unsurprisingly, there is no support in the case law for the proposition that a statement cannot be an excited utterance when it is made in response to a general exploratory question. Nothing about the question "what is going on," would incentivize the person responding to that question to fabricate or change the details of "what was going on."

Imposing this rule would be extremely damaging to domestic abuse prosecutions. First, it undermines the use of any statements to 911 operators who speak before spoken to, which makes no sense. Second, it fails to recognize that victims of domestic abuse do not uniformly and immediately address the specifics of abuse, even if they remain under the stress of the event.

Second, the evidence is contrary to the trial court's assumption that KH's relatively "calm demeanor" during the 911 call indicated that she was no longer under stress. The case law is clear that "[t]he 'stress of excitement' can linger long after a traumatic episode," and even "[s]ilence does not mean they were not traumatized." *Arnold*, 25 M.J. at 133 n.4 (admitting statement as excited utterance

in spite of 12 hour lapse of time). Unlike in many situations involving a 911 call, here there was actually a testifying witness who was with KH when she was making the 911 call, SSC. When KH fled to SSC's house, she "went inside and ***cowered*** over by the coat closet." JA111 (emphasis added). Moments later, SCC called 911 at KH's request mere "minutes" after KH arrived at his house. JA152. SSC also testified that KH was "still upset," "visibly upset speaking to the [911] operator." JA153. The evidence, therefore, only supports the conclusion that the 911 call was made in close temporal proximity to the assault and that KH continued to be in an excited state during the call. It was error for the trial court to draw a conclusion contrary to that evidence.

C. The Trial Court Erred by Requiring the United States to Establish the "Precise" Time of the Startling Event to Establish an Excited Utterance.

The trial court's focus on establishment of the "precise" time that the assault occurred is misplaced. Courts give "latitude [] in proving contemporaneity in excited-utterance cases but not in proving that the declarant was under the stress of the startling event." *United States v. Chandler*, 39 M.J. 119, 123 (C.M.A. 1994). Proof that a witness was under the stress of the startling event does not depend on the precise time when that event occurred—what matters is that the victim was still under the stress of the event.

That the trial court was intensely focused on the precise timing of the startling event in a way that caused it to ignore other evidence that supported admission of the statements is beyond debate. The trial court asked repeatedly for confirmation about the specific timing of the event:

- "[W]hat evidence is in front of me about when this alleged assault occurred? What witness came in here and said the assault occurred at this time so I can make a determination whether it was close in time for both present sense impression and excited utterance" JA137.
- "[W]hich witness told me during the course of their testimony, 'We believe the assault happened at this specific time?'" JA137–38.

That misplaced emphasis led the military judge to conclude: "Without evidence of when the alleged assault occurred, I cannot make a determination that the alleged victim was acting under the stress and excitement caused by the event or condition." JA142. That conclusion is not supported in the law or in the evidence.

The case law does not include a requirement that the precise timing of the assault be established. As discussed *supra*, timing is pertinent to the excited utterance analysis only insofar as it is used to show that the declarant is still under the stress of the event. The stress of excitement can linger long after the event has ended, and courts generally reject rigid time-based formulae for making the determination of whether the stress of excitement so lingers. Indeed, if the precise time elapsed between the startling event and the time the statement is made is not

dispositive of the excited utterance, an inability to establish the precise time that the startling event occurred surely cannot be dispositive either.

The lack of any such requirement in the law notwithstanding, the testimony showed that the statements in questions were made either while the startling event was ongoing or in close temporal proximity thereafter. The testimony strongly suggests that the startling event was ongoing when JH ran from the house in the middle of the night. Indeed, as he ran back, JH shouted "You better not hit her again"—active language that supports the inference that an assault had been occurring. *E.g.*, JA149. As SSC testified, the declarant was only able to say a "couple words." JA152. In his view, those "couple words" referred to an event that had recently occurred because he "wouldn't think that somebody would come running to me – or running out of their house or anything if the event had occurred hours or days before." JA152.

CONCLUSION

Evidence-based prosecutions are imperative to protect domestic violence survivors and their children. The trial court's application of a heightened standard for the exceptions to hearsay hamstrung the prosecution's ability to bring justice in this case, and has the potential to create dangerous precedent that would hinder domestic violence prosecutions going forward. For the foregoing reasons, the Court should reverse.

Dated: August 13, 2020

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This brief complies with the type-volume limitation of Rule 24(c) because:

This brief contains 5,402 words.

This brief complies with the typeface and type style requirements of Rule 37.

Dated: August 13, 2020

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CERTIFICATE OF FILING AND SERVICE

I certify that on August 13, 2020, the foregoing was electronically filed with the Court and served on counsel for the Appellant and the Appellee via email at the following addresses:

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