DISTRICT OF COLUMBIA COURT OF APPEALS

Appeal No. 22-CF-85

Joshua C. Austin,
Appellant

v.

United States of America,

Appellee

Appeal from the Superior Court of the District of Columbia
Criminal Division

APPELLANT JOSHUA C. AUSTIN'S OPENING BRIEF

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DISCLOSURE STATEMENT

Appellant-Defendant is Mr. Joshua C. Austin. Mr. Austin was represented in Superior Court proceedings by attorneys Adam Hunter and Wole Falodun. He is represented on appeal by attorney Cecily E. Baskir. The government was represented during trial by Assistant U.S. Attorneys Emma McArthur and Kristian Hinson and is represented on appeal by Chrisellen Kolb, Chief of the Appellate Division of the Office of the United States Attorney.

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ISSUES PRESENTED

1. Whether the trial court incorrectly determined that now-deceased Emilie Marvil's recorded statements were not testimonial, where Marvil had left the scene before initiating a call to 911 to report a past event, narrated in past tense, and declined medical assistance.

2. Whether the trial court abused its discretion by admitting the entire recorded 911 call as both an excited utterance and a present sense impression, where Marvil controlled her emotional state throughout the call; delivered detailed, patient, and rational answers to the operator's questions; and delayed initiating the call until she had returned home.

STATEMENT OF THE CASE AND JURISDICTION

On Feb. 12, 2020, a grand jury indicted Appellant Joshua Austin on charges of first-degree burglary of a senior citizen, kidnapping of a senior citizen, and robbery of a senior citizen. R.13. The charges, which were later amended to also include assault with intent to commit robbery of a senior citizen, R.44, arose from an Oct. 30, 2019 incident in the stairwell of the apartment building at 5922 13th Street, Northwest.

The Honorable Rainey Brandt presided over Austin's jury trial in Dec. 2021, and the jury acquitted Austin of kidnapping on Dec. 15, 2021. It found him guilty that day of the remaining three counts: first-degree burglary of a senior citizen,

robbery of a senior citizen, and assault with intent to rob a senior citizen. R.66. Judge Brandt sentenced Austin on Feb. 14, 2022 to concurrent terms of 24 years incarceration for the burglary and robbery convictions, followed by five years of supervised release. R.71. Judge Brandt recognized that the assault conviction merged into the robbery conviction and thus did not impose a sentence for the assault conviction. 2/14/21 Tr. 23. Austin timely appealed, and this appeal is from a final order that disposes of all parties' claims. R.72.

STATEMENT OF FACTS

On Oct. 30, 2019, Emilie Marvil returned to her apartment building at 5922 13th Street, NW, after buying groceries at the nearby Missouri Market. Surveillance video captured images of a man entering the apartment building lobby and then looking at his phone as Marvil crossed and then left the lobby. Moments later, out of sight of the building's cameras, Marvil was robbed in the stairwell, and after returning to her apartment, she called 911 to report the incident. Eventually Joshua Austin was identified as the man in the lobby surveillance video and charged with the robbery and related crimes.

At trial, the government's theory was that Austin had seen Marvil's money when she paid for her groceries and then had followed her home to rob her. The defense theory was that Austin was innocently present in the building lobby, while the unknown perpetrator had left unobserved through the basement.

The 911 Call

Marvil died of unrelated causes approximately seven months before trial.[1] Over Austin's Confrontation Clause and hearsay objections, the trial court admitted Marvil's entire 911 call at trial, ruling that Marvil's statements were nontestimonial and qualified as both excited utterances and present sense impressions. *See* 5/27/21 Tr. 34, 36 (App. 14, 16); *see also* 12/8/21 Tr. 162-63 (App. 20-21) (continuing objection to 911 call denied); 12/9/21 Tr. 41 (App. 23) (same); R. 39, 47 (government motions to admit statements); R. 41, 48 (Austin's oppositions to motions to admit statements).

In the call, made at 12:49pm on Oct. 30, 2019, Marvil provided initial identifying information and then recounted what had happened to her, because she "just wanted to report that." Gov. Exh. 2 (App. 1 & Vol. II); *see* 12/9/21 Tr. 40-41 (admitting Gov. Exh. 1 & 2). As the operator's questions continued over almost five minutes, Marvil described her unknown assailant and offered additional detail about the incident. Gov. Exh. 2. Although she indicated that she was injured, she declined medical treatment and told the operator she would be fine, and the operator said the police would come. *Id.*

[1] At trial, her sister Carol Quase explained to the jury that Marvil had died from long-term illnesses including pneumonia. 12/13/21 Tr. 174.

The main portion of the 911 interrogation went as follows:[2]

> *Operator:* Emilie, what's your emergency?
>
> *Marvil:* I was just attacked in my apartment building walking up the stairs. He took my money, and he threw me down and hit me in the arms, and they are kind of bleeding now. But I just wanted to report that.
>
> *Operator:* Ok. Do you know who he is?
>
> *Marvil:* I've never seen him. I-
>
> *Operator:* Did he have any weapons?
>
> *Marvil:* I don't know. He threw me down part of the stairs.
>
> *Operator:* Is he still there?
>
> *Marvil:* No sir. He…
>
> *Operator:* Ok.
>
> *Marvil:* He got my, he dumped my package, my groceries onto the floor and pulled me down the stair and found my money. He had a bike with him.
>
> *Operator:* Ok, give me his description. Was he… How long ago did it happen?
>
> *Marvil:* About five minutes ago.
>
> *Operator:* Ok. And give me a description. Was he Black, White, Hispanic, or Asian?
>
> *Marvil:* He was Black and tall and thin. I think he had a cap on. He was riding a bike. He came up behind me in my building. Our security door doesn't work.

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[2] A recording of Gov. Exh. 2, the 911 call, is included on DVD in Austin's Limited Appendix, Vol. II, and a full transcript prepared by undersigned counsel appears in Vol. I of Austin's Limited Appendix at App. 1-3. Austin has moved to supplement the record with these items.

Operator: Ok.

Marvil: *S*o he followed me into the building.

Operator: Did you see what type of shirt he had, what type of shirt or pants he had on?

Marvil: No, I'm sorry I didn't.

Operator: You said, you said… And did you see the color of his bike?

Marvil: It was a black bike, and--

Operator: He left on a black bike? Did you see what direction he went in?

Marvil: No, I was in the stairwell. I only saw him coming in, and because the door doesn't lock, he just kept following me.

Operator: Ok. Do you need medical, do you need medical treatment, ma'am?

Marvil: I'm going to clean up the abrasions myself and the blood. And I'll be fine.

Operator: Oh, ok. And so you said the security door is not working so police don't need any access codes to get into your building?

Marvil: No.

Operator: All right.

Marvil: And he has a little, oh no, well, he's got $60 with him, that's what he has.

Operator: Ok, give me one second. He just stole $60?

Marvil: Yes, that's what he got. He got really, really angry because I didn't have a wallet.

Operator: Ok. All right, I've already sent your call for dispatch, okay. Give us a call back if there are any changes or any updates. The next available officer will be dispatched and will respond to your location. Ok?

Marvil: Oh, what does dispatch mean, please?

Operator: It's sent, it's sent, it's sent out, like, to the queue for officers.

Marvil: Will they come to my door?

Operator: Yes, ma'am.

After listening to the call, the trial court characterized Marvil as "in shock…. as if she's trying to bite back her emotions." 5/27/21 Tr. 26-27 (App. 6-7). According to the trial court, Marvil did not want to cry and was trying to hold back her tears through the conversation with the 911 operator, politely suppressing them until she could break down in private. *Id.* at 27-28. (App. 7-8). The trial court could hear from Marvil's tone that she was "distracted throughout that conversation," *id.* at 28 (App. 8), and the content of the call was "this rambling stream of consciousness dump, most of which isn't directly in response to a question." *Id.* at 26 (App. 6); *see also id*. at 35 (App. 15). The trial court also believed that Marvil was having trouble breathing during the call, taking small breaths or gasping for breath. *Id.* at 26-27 (App. 6-7).

Analyzing the call from the perspective of the 911 operator, the trial court concluded that it was an ongoing emergency situation because the operator did not have clear answers to whether the "angry mystery man" was still in the building or had a weapon, and the operator did know that Marvil was bleeding. 5/27/21 Tr. 31-32 (App. 11-12). The trial court found that Marvil "made that call to get …

help," *id.* at 34 (App. 14), and her answers were not deliberate, reflective, or "made in reaction to some kind of structured police questioning or interrogation." *Id.* at 32 (App. 12). Thus, because the "primary purpose … for the 911 call was to meet an ongoing emergency," the 911 tape was not testimonial. *Id.* at 33-34 (App. 13-14).

Transitioning from the Sixth Amendment to the evidentiary question, the trial court continued, "But even if you don't believe that it's not testimonial, it would survive a hearsay objection because it is both a present sense impression and an excited utterance." 5/27/21 Tr. 34 (App. 14). First, it reasoned that the 911 call was an excited utterance because "that everybody has to react to a startling event the same way by crying and … throwing up their arms in hysterics, … that's too narrow a way to view or interpret how people process the traumatizing things that happen to them." *Id.* at 35 (App. 15). In addition, the call was made "within a reasonable time period for an elderly woman to … get to her apartment and pick up the phone," and the whole call came "across very sincere," without time for Marvil to reflect on what had happened to her. *Id.* at 35-36 (App. 15-16). Alternatively, the trial court ruled that the call was a present sense impression, because Marvil called 911 within five or six minutes of the event, a "time lag [that] can easily be explained away due to her age, the fact that she had to get to her apartment, open the door and make the phone call." *Id.* at 36 (App. 16).

In addition to the 911 call, the trial court also admitted Marvil's statements to EMT Tekola Pettis over Austin's objections. *See* 5/27/21 Tr. 39-40; 12/14/21 Tr. 14-15. Pettis, an employee of D.C. Fire and EMS, then testified at trial that she evaluated Marvil on the afternoon of Oct. 30, 2019, in response to a call for medical attention. 12/14/21 Tr. 13-14. Marvil said "she had been assaulted in the hallway of her apartment building" but decided she did not need to go to the hospital, despite some bruising and abrasions that Pettis observed on Marvil's arms. 12/14/21 Tr. 15-16.

The Trial

The evidence at trial also included details about Marvil's apartment building and the police investigation, as well as surveillance video from Missouri Market at 5900 Georgia Avenue, NW, and from the entrance to the apartment building at 5922 13th Street, NW.

Marvil's neighbor Esperanza Canales explained at trial that their apartment building's doors were always broken back in 2019, so people could get into the building without a key. 12/9/21 Tr. 94, 104. One of the two doors in the basement never required a key to open, *id.* at 105, and when it was cold outside, people would come in from the street to sleep in the stairwells and laundry room. *Id.* at 104. She confirmed that the building has cameras by the basement exit doors. *Id.* at 106.

On Oct. 30, 2019, as Canales returned from shopping, she heard Marvil asking for help. 12/9/21 Tr. 99-100; *see also* Gov. Exh. 11 at 12:46:30 (App. Vol. II). Canales found Marvil injured in the stairwell with her things on the ground and offered to call the police or an ambulance. *Id.* at 100-01. Marvil declined, so Canales and her son helped Marvil to Marvil's apartment, and Canales then went home. *Id.* at 100-102.

When Metropolitan Police Department (MPD) Officers Tirik Davis and Norbert Dengler arrived at Marvil's apartment, they spoke with Marvil to see if she needed medical attention and to get a time frame and basic suspect description. 12/9/21 Tr. 115-16, 138-39. Marvil again refused medical attention but provided Davis with a "lookout" description of a black male in his mid-twenties with a medium complexion and thin build, approximately 5'6" to 5'7" tall, wearing dark clothing and maybe a skull cap and riding a black bike without a kickstand.[3] *Id.* at 134-35. Dengler then unsuccessfully canvassed the area in his patrol car. *Id.* at 145. He did not, however, remember looking around the back of the building. *Id.* at 148.

[3] The government did not elicit the lookout description during its direct examination of Davis. Defense counsel, however, raised the issue during cross-examination, asking if Davis could remember details of Marvil's description. Davis could not, and the government then refreshed his recollection out of earshot of the jury. *See* 12/9/21 Tr. 121-24, 133-34.

The first detective to arrive at Marvil's apartment was Ryan Savoy, who assisted lead detective John Pugh with the investigation. 12/13/21 Tr. 135, 176. After interviewing Marvil and Canales, Savoy walked through the crime scene and found a bottle of wine on the basement floor near the stairwell area. *Id.* at 136, 138.

Savoy also obtained video from surveillance cameras at the Missouri Market convenience store, located about a block to a block and a half from Marvil's building.[4] 12/13/21 Tr. 139-40. Footage from the different security cameras at Missouri Market showed Marvil entering the store, followed almost five minutes later by a man who had arrived on a bicycle; was wearing a black hat, dark jacket, and camouflage pants; and was carrying a backpack. *Id.* at 179; Gov. Exh. 18, 20 (App. Vol. II). Inside, Marvil purchased some wine and other items, which the cashier put into a white plastic bag for her.[5] *See* 12/13/21 Tr. 185; Gov. Exh. 19, 21, 22 (App. Vol. II). As Marvil paid from a green pouch at the front counter and received her change, the man - identified by Pugh at trial as Austin - stood nearby along with other customers. Gov. Exh. 19, 21, 22 (App. Vol. II); *see* 12/13/21 Tr.

[4] According to Savoy, the timestamps on the surveillance video from Missouri Market were 3 days, 15 hours, and about 30 minutes behind the actual date and time. 12/13/21 Tr. 142; *see also id*. at 109.

[5] Beletech Woledmaiiam, the owner of Missouri Market, testified at trial that she and her family members work at the store; employees are the only ones with access to the plastic bags they use for packing items. 12/13/21 Tr. 129-30, 132.

179, 184, 186-87. Marvil left the store after transferring her groceries into a reusable bag; Austin left afterwards and rode away on his bicycle in a different direction. Gov. Exh. 18, 19, 20 (App. Vol. II); *see* 12/13/21 Tr. 180, 182.

The police also requested surveillance video from the security cameras at Marvil's apartment building, but the video admitted at trial included only footage showing the front entrance and lobby. 12/9/21 Tr. 146; *see* Gov. Exhs. 11-15 (App. Vol. II). Savoy could not remember at trial if he had watched surveillance video from the back of the apartment building, 12/13/21 Tr. 160, and he admitted that he had not looked for cameras in the back of the building. *Id.* at 157. Dengler similarly could not recall if he had seen those cameras. 12/9/21 Tr. 149.

At timestamp 12:43,[6] the admitted videos show Marvil entering the front door, followed by a man in camouflage-style pants identified as Austin. 12/13/21 Tr. 189; Gov. Exh. 11, 12 (App. Vol. II). After entering, Austin walked to the side of the lobby to use his phone, while Marvil walked up the lobby steps and turned to look at him. Gov. Exh. 12 (App. Vol. II); *see* 12/13/21 Tr. 191. Marvil then exited the lobby camera's view. *Id*. About nine seconds later, Austin also left the camera's view in the same direction. *Id*. Another forty seconds later, Austin reappeared in the lobby, exited the front door, and rode away on his bicycle. Gov.

[6] According to Savoy, the surveillance video from 5922 13th Street, NW, had timestamps approximately five minutes faster than real time. 12/13/21 Tr. 152.

Exh. 14; Gov. Exh. 11 at 12:44:48 (App. Vol. II); *see* 12/13/21 Tr. 190, 193. Two minutes later, Canales entered the lobby. Gov. Exh. 11 at 12:46:30 (App. Vol. II).

After the incident, forensic scientist Rodney Langford photographed the basement and Marvil's apartment and recovered a green plastic purse, a plastic bag, a fabric bag, and a small bottle of Sutter Home wine that forensic evidence analyst Catryna Palmer later tested for latent fingerprints. 12/9/21 Tr. 52-53, 57, 64-65, 67; 12/13/21 Tr. 31, 34. Palmer was not able to recover any prints from the green plastic pouch, fabric bag, or wine bottle. 12/13/21 Tr. 33, 53, 57. The only latent prints she found were on the plastic bag. *Id.* at 38-42.

Fingerprint expert Glenn Langenburg then compared 19 images of prints taken by Palmer to known prints of Austin. 12/13/21 Tr. 91, 92-93. He found nine prints suitable for comparison and determined that there was extremely strong support to conclude that three of them matched Austin: left palm print, left ring finger, and right middle finger. 12/13/21 Tr. 91, 96, 97, 99. Another print belonged to someone else, and he could not reach a definitive conclusion for the remaining five. *Id.* at 98.

When questioned at trial by defense counsel, Detective Pugh testified that Marvil said she could not identify the suspect in a photograph identification process because she was attacked from behind. 12/14/21 Tr. 10-11. After learning of the fingerprint match, however, Pugh showed a screen shot from the apartment

building lobby surveillance video to Renee Austin, who identified her nephew Joshua Austin. 12/9/21 Tr. 47; 12/13/21 Tr. 195-97. In addition, Pugh compared the jacket and watch Austin wore on Sept. 25, 2019, captured on another video, with the jacket and watch in the Oct. 30 video and concluded they were the same or similar. 12/13/21 Tr. 198.

The defense presented no witnesses. Although the trial court and government had expressed concern during trial that one juror was sleeping (a student in the middle of exams who was scheduled to graduate the following week), neither party requested substituting an alternate. *See* 12/9/21 Tr. 80-86, 153-55; 12/13/21 Tr. 10, 115-20, 201-06; 12/14/21 Tr. 39-41. After deliberating, the jury then acquitted Austin of kidnapping Marvil but convicted him of burglary, robbery, and assault with intent to commit robbery. 12/15/21 Tr. 91-92; R.66.

SUMMARY OF ARGUMENT

The government failed to meet its burden of establishing that Emilie Marvil's 911 call was admissible at Austin's trial under both the Confrontation Clause of the Sixth Amendment and the rules of evidence governing hearsay, and the trial court committed reversible error by ruling otherwise.

First, the circumstances, indicate that Marvil made her statements to the 911 operator with the primary purpose of reporting a completed crime, absent any imminent danger or ongoing emergency. By the time Marvil initiated the 911 call

to report what had happened, her assailant had left the scene, Marvil herself had also left the scene and returned to her apartment, and she felt no need for medical assistance. The emergency having passed, she then provided the 911 operator with a measured and responsive narrative description of what had already happened. The call was thus testimonial, and its admission at trial violated Austin's constitutional right of confrontation.

Even if Marvil's out-of-court statements on the 911 call were not constitutionally inadmissible, the trial court abused its discretion by admitting them as exceptions to the rule against hearsay. Contrary to the trial court's conclusion, Marvil's control of her emotional state during the call represented a degree of cognitive functioning inconsistent with an excited utterance, and the content and tone of her statements further indicated self-awareness and reflection. Similarly, the statements' lack of spontaneity and contemporaneity with the assault preclude the admission of the call as a present sense impression. By relying on an improper legal standard and clearly erroneous factual findings, the trial court erred in admitting the call as both an excited utterance and present sense impression.

The trial court's constitutional and evidentiary errors are reversible, because the recorded 911 call was the only direct evidence at trial of what happened to Marvil in the stairwell of her apartment building and, as the government admitted, filled an important gap for the jury. The government cannot show that its improper

admission was harmless, and this court cannot say with fair assurance that it did not substantially sway the judgment. This court should therefore reverse Austin's convictions and remand for further proceedings.

ARGUMENT

I. The trial court violated Austin's 6th Amendment Confrontation Clause right by admitting testimonial statements from the deceased complainant Emilie Marvil.

The Confrontation Clause of the Sixth Amendment ensures the right of the accused "to be confronted with the witnesses against him" in all criminal prosecutions. U.S. Const. amend. VI. It thus forbids admission of out-of-court testimonial statements made by a witness unavailable at a criminal trial, unless the defendant has a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004); *see Andrade v. United States*, 106 A.3d 386, 388 (D.C. 2015). The government bears the burden of establishing that out-of-court statements by a non-testifying witness are not testimonial, and this court "review[s] de novo a trial court's ruling that a statement is not testimonial." *Andrade, supra*, 106 A.3d at 388.

In this case, the government failed to meet its burden, and the trial court violated Austin's Confrontation Clause right by admitting Emilie Marvil's testimonial statements to the 911 operator. The court should therefore reverse Austin's convictions, because the government cannot show that the trial court's

error was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24 (1967).

To determine whether out-of-court statements to law enforcement agents are testimonial, courts engage in an objective, "highly context-dependent inquiry." *Andrade, supra*, 106 A.3d at 388; *accord, Michigan v. Bryant*, 562 U.S. 344, 363 (2011). A statement to a 911 operator, acting as an agent of law enforcement, is "testimonial when the circumstances objectively indicate that there is no **…** ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822 (2006). In contrast, when circumstances objectively indicate that "the primary purpose of [police] interrogation is to meet an ongoing emergency," the statements are nontestimonial and not restricted by the Confrontation Clause. *Id.* "Even if no emergency actually existed at the time of the questioning, it is sufficient for purposes of the Confrontation Clause '[i]f the information the parties knew at the time … would lead a reasonable person to believe that there was an emergency.'" *Andrade, supra*, 106 A.3d at 388 (quoting *Bryant, supra*, 562 U.S. at 361 n.8).

Thus, while "statements made in initial response to [a 911 operator's questions] are generally considered nontestimonial," the inquiry depends on "whether the questions asked by the dispatchers and statements made by the

complainant … were primarily motivated by the urgency of seeking assistance in an ongoing emergency." *Tyler v. United States*, 975 A.2d 848, 854-55 (D.C. 2009) (quoting *Smith v. United States*, 947 A.2d 1131, 1134 (D.C. 2008)). The court must consider the perspectives of both parties to the interrogation. *Andrade, supra*, 106 A.3d at 388-89.

This court and the Supreme Court have identified several circumstances that help to determine whether out-of-court statements "were testimonial or were instead directed at responding to an ongoing emergency." *Id.* For instance, the declarant's effort to seek aid, her present-tense narration, and the existence of an imminent threat are objective indications that statements are nontestimonial, made in an effort to help police meet an ongoing emergency. *See Davis, supra*, 547 U.S. at 831. The severity of injuries, the use of a weapon, and a declarant's emotional distress are also circumstances that may indicate an ongoing emergency and nontestimonial statements. *See Bryant, supra*, 562 U.S. at 371-377; *Andrade, supra*, 106 A.3d at 389, 392; *Frye v. United States*, 86 A.3d 568, 573 (D.C. 2014).

In contrast, the "gathering of information so that the police could apprehend a suspect in a completed offense" supports a conclusion that the primary purpose of interrogation was not to meet an ongoing emergency, as does a declarant's knowledge that her assailant has left on a bicycle, her failure to request medical assistance, and the absence of a weapon. *Andrade, supra*, 106 A.3d at 390-91

(concluding statements were testimonial). The use of the past tense in the declarant's narrative after the described danger has passed similarly suggests that the speaker is bearing witness in a testimonial manner. *See Davis, supra*, 547 U.S. at 832.

In *Davis*, the Supreme Court recognized that statements made to a 911 operator may be testimonial. *Id.* at 827. For instance, someone "might call 911 to provide a narrative report of a crime absent any imminent danger." *Id.* (emphasis omitted). In the case before the *Davis* Court, however, the declarant's call, in the midst of an assault by her former boyfriend, "was plainly a call for help against a bona fide physical threat." *Id.* at 817, 827. Where the declarant gave "frantic answers…over the phone, in an environment that was not tranquil, or even … safe" and "was seeking aid," the primary purpose of her initial interrogation by the 911 operator "was to enable police assistance to meet an ongoing emergency." *Id.* at 827-28, 831.

Here, unlike *Davis,* the circumstances objectively indicate that Marvil's statements to the 911 operator were testimonial and should not have been played for the jury. In the absence of imminent danger, Marvil called 911 after the crime was over, because she "just wanted to report that." Gov. Exh. 2. Her choice of words aptly captured her primary purpose: to assist the police in an investigation of the apparently criminal past conduct of her assailant. Although she called about

five minutes after the incident, the assailant had already left, and Marvil was no longer in the more publicly-accessible stairwell where she had been assaulted. *See id.* Instead, she was alone and safe in her own tranquil apartment. *See* 12/9/21 Tr. 100. Like *Andrade*, Marvil knew her assailant had left, presumably on a bike, and she did not report any weapon. Gov. Exh. 2; *see Andrade, supra*, 106 A.3d at 391. Like *Andrade*, "[t]here was no evidence that [Marvil] had specific reason to fear that [the assailant] was planning to return soon or that he posed an immediate threat to any other person." *Andrade, supra*, 106 A.3d at 391; *see* Gov. Exh. 2. And again like *Andrade* (and unlike *Davis*), Marvil never asked for aid during the 911 call. Gov. Exh. 2; *see Andrade, supra*, 106 A.3d at 391; *Davis, supra,* 547 U.S. at 831. On the contrary, she said she would be fine, and her past-tense narrative was instead focused on providing a historical description of what had already happened.[7] Gov. Exh. 2.

In addition to these circumstances, Marvil's telephone demeanor did not display an acute emotional distress sufficient to transform her calm report of a past incident into an "implicit appeal for safety." *Frye, supra*, 86 A.3d at 574. Just as the content of her words did not describe an ongoing emergency situation, her tone

[7] To the extent Marvil provided what the trial court characterized as a "rambling stream of consciousness dump, most of which isn't directly in response to a question," 5/27/21 Tr. 26 (App. 6), that narrative quality supports, not detracts from, the conclusion that Marvil's primary purpose was to report "past events potentially relevant to later criminal prosecution." *Davis, supra*, 547 U.S. at 822.

was also not characteristic of someone still in the thralls of an emergency. *See* Gov. Exh. 2. It was measured -- not panicked, hysterical, or even distracted. *Id.* From Marvil's perspective, the context, content, and qualities of the 911 call together objectively suggest that her statements were testimonial, with a "primary purpose of creating an out-of-court substitute for trial testimony." *Bryant, supra*, 562 U.S. at 358.

Moreover, although some of the specific questions the operator asked may have been directed at resolving a possible emergency and ascertaining whether Marvil needed assistance, he quickly learned that the assailant was no longer there and that no gun had been used. *See* Gov. Exh. 2. "[A]ny prospect that [the police] would need to act to protect [Marvil] or seek medical treatment on her behalf faded" as Marvil responded to the questions. *Wills v. United States*, 147 A.3d 761, 768 (D.C. 2016). The queries about descriptions of the assailant and bike and about the amount stolen were an agent of law enforcement's "straightforward investigative" inquiries into a possible crime. *Id*.; *see* Gov. Exh. 2; *Davis, supra*, 547 U.S. at 823 n.2. When considered with the totality of the circumstances, and especially in light of the strong evidence that Marvil's stated purpose was to report past criminal conduct, the 911 operator's specific questions were not enough to

transform Marvil's responses into nontestimonial statements made with a primary purpose of helping police meet an ongoing emergency.[8]

The situation here is easily distinguishable from domestic violence cases where the 911 call occurred while the dispute was ongoing, the perpetrator was still present and/or the declarant feared he would return, and the complainants were in extreme emotional and physical distress. In *Frye*, for instance, the police, responding to a call about an assault in progress, arrived during a heated altercation; they found several "children present who needed to be protected; the woman appeared to need medical assistance; and the officers were still trying to clarify and control a fluid, confused, and volatile situation." *Andrade, supra*, 106 A.3d at 393 (describing and distinguishing *Frye*, *supra,* 86 A.3d 568). None of those circumstances existed here.

In addition, unlike *Smith*, *supra,* 947 A.2d at 1133-35, Marvil was confident her assailant had left, expressed no fear of further assault or that he would come to her apartment, and did not request an ambulance. Gov. Exh. 2; *see Andrade,*

[8] This case thus resembles several of the cases from other jurisdictions cited by this court in *Andrade, supra*, 106 A.3d at 391-92, in which statements were held to be testimonial, including *State v. Lucas*, 965 A.2d 75 (Md. 2009) (among other things, statements recounted completed offense); *Commonwealth v. Lao*, 877 N.E.2d 557, 565 (Mass. 2007) (victim "was not in imminent personal peril at the time the 911 call was made because the defendant had already left the scene of the incident"); *State v. Moua Her*, 750 N.W.2d 258, 267 (Minn. 2008) (no evidence assailant intended to return or posed threat to others, among other things); *Dixon v. State*, 244 S.W.3d 472, 486-87 (Tex. App. 2014) (complainant went home after assault, which took place elsewhere).

supra, 106 A.3d at 393 (distinguishing *Smith*). And unlike *Lewis v. United States*, 938 A.2d 771, 773-82 (D.C. 2007), and *Long v. United States*, 940 A.2d 87, 90-99 (D.C. 2007), Marvil was not crying or extremely upset when she spoke to the operator, and she denied needing any medical assistance. Gov. Exh. 2; *see also Andrade, supra*, 106 A.3d at 393 (distinguishing *Long* and *Lewis*).

This case is also distinguishable from *Tyler, supra,* 975 A.2d 848, in which this court held that the anonymous callers reporting a shooting made nontestimonial statements to the 911 operator. *Id.* at 854-56. There, the court reasoned that the victims, who had been shot multiple times, were still in need of assistance, while the armed shooter "still was at large with a weapon that could injure others." *Id.* at 855. Under those circumstances, with "injured and dying victims on the ground and an armed assailant on the loose," the statements on the 911 call were related to a continuing emergency, and the call had the primary purpose of enabling the police to respond to it. *Id.* at 856. Here, in contrast, there was no shooter at large nor gunshot victim needing treatment – in other words, there was no continuing exigency at which the 911 call was directed.

In sum, considering the totality of circumstances, the court should conclude that the government here "did not carry its burden of establishing that the primary purpose of the questioning in this case was to enable the police to meet an ongoing emergency." *Andrade, supra*, 106 A.3d at 391. Marvil's statements to the 911

operator were thus testimonial, and the trial court violated Austin's Sixth Amendment right to confront Marvil by admitting them.[9]

Nor can the government prove beyond a reasonable doubt that the constitutionally improper admission of Marvil's statements to the 911 operator was harmless. *See Chapman, supra*, 386 U.S. at 24. The 911 call was the only evidence the jury heard about what happened in the stairwell, as the government recognized at the outset of its closing argument.[10] 12/15/21 Tr. 27. In the government's own words, Marvil's statements on the 911 call filled "a gap" for the jury "to tell us all what happened to her that day in the stairwell," and they

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[9] Because Marvil's purpose throughout the call was to report past criminal conduct that had occurred in the stairwell, the court should conclude that the entire 911 call was wrongly admitted. Assuming arguendo, however, that the initial questions and answers instead had a primary purpose of enabling the police to respond to an ongoing emergency, the trial court at the very least should have excluded all of Marvil's statements after she confirmed that the assailant was no longer there. By that time, the 911 operator knew (1) that Marvil was no longer at risk of further attack and (2) that no firearm had been used that could potentially pose a threat to the public at large. He also knew that Marvil's stated goal was to report past conduct.

[10] The government at trial elicited Marvil's description of the suspect to Officer Davis only during redirect examination, after the defense had opened the door. *See* 12/9/21 Tr. 123-24, 134. Had the 911 call been properly excluded, it is highly probable that the defense would have pursued a different cross-examination strategy with Davis. Similarly, although Detective Pugh testified during cross-examination that Marvil had told the police that she was attacked from behind, 12/14/21 Tr. 9, it is also highly probable that, had the trial court properly excluded the recording of the 911 call, the defense would not have tried to cast doubt on Marvil's ability to describe the attacker by eliciting that testimony.

supplied "crucial detail" connecting Marvil's assailant to the man with the bicycle visible in the surveillance videos. *Id.* at 27, 76. Significantly, the government played the recording at the beginning of both its opening statement and its closing argument, making sure to remind the jury that the entire call was admitted into evidence. 12/9/21 Tr. 29; 12/15/21 Tr. 27-28; *see [Gregory] Green v. United States*, 231 A.3d 398, 414 (D.C. 2020) ("A prosecutor's stress upon the centrality of particular evidence in closing argument tells a good deal about whether the admission of the evidence was … prejudicial.") (alteration in original) (quoting *Morten v. United States*, 856 A.2d 595, 602 (D.C. 2004)). It then continued to highlight portions of the call in an effort to bolster its case and corroborate its interpretation of the surveillance video. *See* 12/15/21 Tr. 44-47, 76.

The government correctly assessed the importance of the 911 call to its case. Without the 911 call, the jury would not have known that Marvil associated her assailant with the man with a bicycle she saw enter the lobby after her. Without the 911 call, the jury would have had to speculate about what happened after Marvil and Austin disappeared from view on the surveillance videos. Without the 911 call, the jury would not have known that the assailant took anything from Marvil. Only three of Austin's fingerprints were found at the scene and were only on the plastic bag from Missouri Market. Without the 911 call, the already uncertain reason for those fingerprints would have been even more uncertain. Without the

911 call, the jury would have had less reason to discredit Austin's defense of innocent presence and more reason to believe that he came upon Marvil after the assailant had fled through a back basement door. In other words, the government would have had no evidence that any robbery occurred, and its circumstantial case that Austin was the assailant would have been significantly weaker had the trial court properly excluded the 911 call. This court should therefore reverse Austin's convictions.

II. The trial court abused its discretion in admitting hearsay statements from the deceased complainant Emilie Marvil.

Even if this court affirms the trial court's Confrontation Clause ruling, the trial court still erred by admitting Marvil's statements as exceptions to the rule against hearsay.[11] The recorded 911 call does not qualify in its entirety as either an excited utterance or a present sense impression.

[11] The trial court incorrectly suggested (twice) that an exception to the rule against hearsay could provide an alternative means of admitting a testimonial out-of-court statement by an unavailable witness. 5/27/21 Tr. 34 (App. 14) ("But even if you don't believe that it's not testimonial, it would survive a hearsay objection because it is both a present sense impression and an excited utterance."); *id*. at 36 (App. 16) ("My first ruling was that it's not testimonial. But if you don't like that, it would survive a hearsay objection under both present sense impression and excited utterance."). If a statement is testimonial and barred by the Confrontation Clause, it does not matter if it survives a hearsay objection: hearsay exceptions are a not an alternative way to admit out-of-court testimonial statements. *Cf. [Kevin] Green v. United States*, 209 A.3d 738, 743 n.12 (D.C. 2019) (declining to analyze applicability of hearsay exceptions for statements barred by the Confrontation Clause).

A. The trial court abused its discretion by admitting the entire 911 call as an excited utterance.

Marvil's statements on the 911 call are not admissible as an excited utterance unless the government satisfies a three-part test:

> (1) the presence of a serious occurrence which causes a state of nervous excitement or physical shock in the declarant, (2) a declaration made within a reasonably short period of time after the occurrence so as to assure that the declarant has not reflected upon his statement or premeditated or constructed it, and (3) the presence of circumstances [that] in their totality suggest spontaneity and sincerity of the remark.

Gabramadhin v. United States, 137 A.3d 178, 183 (D.C. 2016) (quoting *Mayhand v. United States*, 127 A.3d 1198, 1205 (D.C. 2015), with alteration). "[T]he ultimate question is whether the statement was the result of a reflective thought or whether it was rather a spontaneous reaction to the exciting event." *Mayhand, supra*, 127 A.3d at 1205. The court reviews for clear error the trial's factual findings and for abuse of discretion its determination that a statement qualifies for admission as an excited utterance. *Id.* When the trial court "rests its conclusions on incorrect legal standards," it abuses its discretion. *Id.* Here, the trial court rested its conclusion on an incorrect legal standard, made clearly erroneous factual determinations, and abused its discretion by admitting Marvil's entire 911 call as an excited utterance.

To satisfy the first element of the excited utterance test, a declarant must be "manifestly overcome by excitement or in shock." *Mayhand, supra*, 127 A.3d at

1202. "Mere vocal strain or indication of some anxiety" is insufficient where a declarant maintained a reasonable, coherent, and balanced demeanor over an extended phone call with a 911 operator. *Id.* at 1207. Instead, the court "require[s] a much higher level of emotional upset to support the admissibility of a hearsay statement as an excited utterance." *Id.* Thus, a "calm narrative of a past event" lacks the necessary character of nervous excitement or physical shock, because it does not reflect a "suspension of cognitive function." *Id.* (quoting *Alston v. United States*, 462 A.2d 1122, 1126-27 (D.C. 1983)). A court that relies on an assessment that the declarant – outwardly calm – masked excitement or suffered hidden turmoil "misconstrue[s] the first element of the excited utterance test." *Id.* at 1202, 1208.

In addition, in considering whether statements in a 911 call were sufficiently spontaneous and lacking in reflection, the court must scrutinize the circumstances "for indicia of self-awareness and reflection that are inconsistent with the 'immediate and uncontrolled domination of the senses' necessary to establish an excited utterance." *Mayhand, supra*, 127 A.3d at 1202. Those indicia may include (1) the length of the 911 call, as "lengthier statements are less likely to reflect spontaneity and lack of reflection"; (2) the declarant's initiation of the 911 call to document criminal behavior; (3) the tone and contents of the call; and (4) the capability of the declarant to answer every question asked. *Gabramadhin, supra*,

137 A.3d at 183-84. For instance, where a declarant "spoke in an excited tone, mumbled to himself, and didn't have the wherewithal to provide his license plate number" when requested by the 911 operator, a trial court could reasonably find that the statements were not deliberative and reflective in nature. *Teasley v. United States*, 899 A.2d 124, 126, 128-29 (D.C. 2006); *see also Reyes v. United States*, 933 A.2d 785, 789-90 (D.C. 2007) (excited utterance where the victim was "rambling off several things at once in a very agitated tone of voice" and gave no lengthy and detailed statement). On the other hand, detailed, patient, and rational answers to every question, repeated when asked, lack the necessary elements of spontaneity and non-reflection to qualify as excited utterances. *Gabramadhin, supra*, 137 A.3d at 183-84.

In this case, as in *Mayhand,* the trial court "effectively negated the first element of the excited utterance test" and thereby abused its discretion. *Mayhand, supra*, 127 A.3d at 1208. In *Mayhand*, the trial court had found the declarant's masking of his emotional agitation meant he "was experiencing the necessary nervous excitement or shock" despite his outwardly calm demeanor through most of the 911 call. *Id.* at 1206, 1208. This court properly rejected that conclusion as a misconstruction of the excited utterance test. As it stated, "the exercise of such control [over the declarant's emotional state] is precisely the type of deliberative

cognitive function that the first element of the test for the admission of excited utterances is supposed to screen out." *Id.* at 1208.

The trial court here similarly found that Marvil was controlling her emotional state during the 911 call. It noted, "You can tell she has been trying to hold back her emotions enough to have a conversation with this 911 person. She's being polite, but she is trying to suppress her tears and her cries." 5/27/21 Tr. 27 (App. 7); *accord, id.* at 28 (App. 8) ("that woman's trying to hold herself together until she can break down and cry in private."). The recording indicates that Marvil succeeded in doing so through the call, even if she had to exert effort "to bite back her emotions." *Id.* at 27 (App.7); Gov. Exh. 2. Asserting that it was "too narrow" to require a reaction to a startling event to include "crying and … throwing their arms in hysterics," the trial court then admitted the call as an excited utterance. 5/27/21 Tr. 35 (App. 15).

Like in *Mayhand*, however, Marvil's exercise of control during the call does not support a determination that she "was experiencing the necessary 'nervous excitement or physical shock'" for her statements to be excited utterances. *Mayhand, supra*, 127 A.3d at 1206. If she had been, she should not have been "able to mask or otherwise control [her] emotional state" to deliver the calm narrative of events she provided the operator. *Id.* at 1208. The trial court thus improperly expanded the first element of the test to include "precisely the type of

deliberative cognitive function that [it] is supposed to screen out" and thereby abused its discretion. *Id.*

In addition, Marvil's call included several indicia of self-awareness and reflection inconsistent with an excited utterance. To begin with, she initiated the call to 911 because she "just wanted to report [her assault]," and she remained engaged on the phone call for almost five minutes. Gov. Exh. 2. As in *Gabramadhin* and *Mayhand*, "this was not a situation where the police, summoned by a third party, arrived at the scene and encountered an individual wholly undone by a traumatic event." *Gabramadhin, supra*, 137 A.3d at 183 (quoting *Mayhand, supra*, 127 A.3d at 1211).

The content and tone of the call provide further indicia of reflection: throughout it, Marvil gave detailed, patient, and rational responses to the 911 operator's questions, answering every question in an appropriate way like the declarant in *Gabramadhin*. *See id*.; Gov. Exh. 2. In contrast to the nervously excited declarant in *Teasley*, she did not talk in an excited tone, mumble to herself, or struggle to provide accurate information. *See* Gov. Exh. 2; *Teasley, supra*, 899 A.2d at 129. Unlike *Teasley*, Marvil spoke slowly and clearly so the operator could understand her, repeating answers when asked, such as her address, and maintaining the same deliberate, calm tone throughout the call. Gov. Exh. 2. In providing a description of her assailant, she paused between sentences, supporting

a conclusion that she was reflecting to ensure she gave accurate information with as much detail as she could remember. *Id.* She also had enough presence of mind to ask for clarification when she needed it, like inquiring what "dispatch" meant and whether the police would come to her door. *Id.*

Although the trial court characterized the call differently, its description is inconsistent with the recording and reflects clearly erroneous findings to which this court should not defer. First, Marvil did not provide a "rambling stream of consciousness dump" of information. 5/27/21 Tr. 26 (App. 6); *accord id.* at 35 (App. 15); *see* Gov. Exh. 2. As noted above, she answered each of the operator's questions directly and appropriately when asked. Gov. Exh. 2. The fact that at times Marvil then continued her narrative to add additional information reflects an effort to ensure that her report included details about what happened and what she observed about the assailant, not that she was confused or rambling. In her response to the operator's question about weapons, for example, Marvil answered, "I don't know. He threw me down part of the stairs." Gov. Exh. 2. She thereby described the manner in which the assailant attacked her without using a weapon to explain why she did not know if he had one. That logical statement is neither a non sequitur nor an example of rambling.

Similarly, the audio recording of the call does not support the trial court's findings that Marvil was distracted or having trouble breathing. Gov. Exh. 2;

5/27/21 Tr. 27-28 (App. 7-8). And it reveals no discernable difference in Marvil's enunciation of the word "wallet" to support the trial court's characterization that she was biting back emotion that was starting to bubble up. Gov. Exh. 2; 5/27/21 Tr. 27 (App. 7).

Thus, because the trial court based its excited utterance ruling on clearly erroneous factual findings and an improper misconstruction of the legal test, it abused its discretion by alternatively admitting the entire 911 call as an excited utterance.

B. The trial court abused its discretion by admitting the entire 911 call as a present sense impression.

The trial court also abused its discretion by alternatively admitting the entire 911 call under the present sense impression exception to the rule against hearsay. Present sense impressions are "statements describing or explaining events which the declarant is observing at the time he or she makes the declaration or immediately thereafter" and are admissible as exceptions to the rule against hearsay. *Hallums v. United States*, 841 A.2d 1270, 1276 (D.C. 2004). The foundation for their trustworthiness lies in their spontaneity and contemporaneity with the events they describe. *Burgess v. United States*, 608 A.2d 733, 738 (D.C. 1992) (Rogers, J., concurring); *see also Sims v. United States*, 213 A.3d 1260, 1267 n.10 (D.C. 2019); *Hallums, supra*, 841 A.2d at 1277 n.8; *id*. at 1283 & n.5 (Glickman, J., concurring). Thus, "care must be taken to ensure that this exception

is not used to admit statements that circumstances reveal were not truly spontaneous, but instead involved conscious reflection or recall from memory." *Hallums, supra*, 841 A.2d at 1277.

In addition, the time within which present sense impressions may be made is more circumscribed than that for excited utterances. *Id.* at 1276-77 (also observing that both exceptions to the hearsay rule are "grounded in the spontaneity of the statement"). While a reasonable time period for an excited utterance "is measured by the duration of the stress," *id.* at 1277, and may thus extend for thirty or more minutes, *see Reyes-Contreras v. United States*, 719 A.2d 503, 506 (D.C. 1998), contemporaneity is key for a present sense impression. *Hallums, supra*, 841 A.2d at 1277 ("The classic present sense impression relates contemporaneous events or conditions…"); *accord, id.* at 1278; *Sims, supra*, 213 A.3d at 1266. This court has thus recognized that a 911 call made during an assault contained present sense impressions of contemporaneous hitting by the appellant. *Goodwine v. United States*, 990 A.2d 965, 967 (D.C. 2010). Statements made "[n]o more than a few seconds" after a described event have likewise qualified as present sense impressions. *Gardner v. United States*, 898 A.2d 367, 374 (D.C. 2006). That immediacy of mere seconds "eliminates the concern for lack of memory and precludes time for intentional deception." *Id.* at 374 (quoting *Hallums, supra*, 841 A.2d at 1278).

The inquiry into whether a statement qualifies as a present sense impression is fact-specific. *Sims, supra,* 213 A.3d at 1267. As with excited utterances, the government bears the burden here of justifying the admission of the 911 call as a present sense impression by a preponderance of the evidence, and this court reviews the trial court's factual findings for clear error and its determination that the facts permit admission of the statement as a present sense impression for abuse of discretion. *Id.* at 1266, 1267.

Here, for many of the same reasons that Marvil's statements on the 911 call do not qualify as excited utterances, they also are not admissible as present sense impressions. *See supra* Part IIA. Marvil's level of cognitive functioning and control that allowed her to suppress her emotions for the time being and to reflectively recount events from memory that had occurred more than five minutes earlier,[12] her deliberate and appropriate answers to all questions, her pauses to

[12] Although Marvil estimated to the 911 operator that her assault had occurred about five minutes earlier, Gov. Exh. 2, it appears from the time of the 911 call and the building surveillance video timestamps (adjusted to correspond to the correct time) that she initiated the cal1 about eight minutes after Canales entered the building and found Marvil calling for help. *See* 12/9/21 Tr. at 40 (stipulating that call was made at 12:49pm); Gov. Exh. 11 (at unadjusted timestamp 12:46:30, showing Canales entering building); Gov. Exh. 12 (at unadjusted timestamp 12:43:54, showing Marvil leaving lobby camera view); 12/13/21 Tr. 152 (noting building video timestamps were approximately five minutes fast). Based on that evidence, the assault must have occurred eight to ten minutes before the 911 call, and Marvil's estimate and any finding by the trial court that the call occurred five to six minutes after the assault are thus unsupported by trial evidence.

check her recollection – these features preclude a finding that her declarations on the 911 call were truly spontaneous.

Nor were they contemporaneous or made immediately after perceiving the assault. Without specifying what portions of the 911 call qualified as present sense impressions, the trial court justified its ruling solely because Marvil "called 911 within five, six minutes of this event happening to her. And that time lag can easily be explained away due to her age, the fact that she had to get to her apartment, open the door and make the phone call." 5/27/21 Tr. 36 (App. 16). Marvil had, however, declined the opportunity to call 911 earlier with Canales's help, instead taking the time to collect herself mentally and physically while returning to her apartment. 12/9/21 Tr. 100. Moreover, eight minutes passed from when Canales heard Marvil asking for help to the 12:49pm call, not five or six as the trial court stated. *See supra* note 12. Five, six, eight, or even ten minutes is a far cry from two or three seconds and does not constitute the same kind of contemporaneousness and immediacy as *Goodwine* and *Gardner*. That Marvil had good reasons for her delayed call does not render it contemporaneous with the assault, and it does not prevent Marvil's statements from involving conscious reflection or recall from memory, as indicated, for example, by her pauses to recall and relate the assailant's description.

Thus, contrary to the trial court's conclusion, Marvil's non-contemporaneous, non-spontaneous statements to the 911 operator more than five minutes after the assault had ended do not qualify as present sense impressions and were not admissible at trial.

C. The court cannot say with fair assurance that the trial court's hearsay errors were harmless.

The court must reverse Austin's convictions unless the government can establish that the trial court's erroneous admission of the 911 hearsay call was harmless. *Gabramadhin, supra*, 137 A.3d at 185. In this case, for the reasons explained above in Part I, *see supra*, the court cannot say "with fair assurance" that the admission of the 911 recording "did not substantially sway the judgment" or that "it is highly probable that the error… did not contribute to the verdict." *Id.* (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946), and *In re Ty.B.*, 878 A.2d 1255, 1266-67 (D.C. 2005)). It should therefore reverse Austin's convictions and remand for further proceedings.

CONCLUSION

For the foregoing reasons, Austin respectfully requests that the court reverse his convictions due to the violation of his Sixth Amendment Confrontation Clause right or, in the alternative, the improper admission of prejudicial hearsay at trial.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing Brief electronically using the Appellate E-Filing system on Chrisellen Kolb, Esq., U.S. Attorney's Office, 601 D Street, NW, Washington, DC 20530, on this 20th day of June, 2023.

/s/ Cecily E. Baskir
Cecily E. Baskir

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (amended May 2, 2023), this certificate must be filed in conjunction with all briefs submitted in all criminal cases designated with a "CF" (criminal felony), "CM" (criminal misdemeanor), "CT" (criminal traffic), and "CO" (criminal other) docketing number. Please note that although briefs with above designations must comply with the requirements of this redaction certificate, criminal sub-case types involving child sex abuse, cruelty to children, domestic violence, sexual abuse, and misdemeanor sexual abuse will not be available for viewing online.

If you are incarcerated, are not represented by an attorney (also called being "pro se"), and not able to redact your brief, please initial the box below at "G" to certify you are unable to file a redacted brief. Once Box "G" is checked, you do not need a file a separate motion to request leave to file an unredacted brief.

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A. All information listed in Super. Ct. Crim. R. 49.1(a) has been removed, including:

(1) An individual's social-security number
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(6) Financial account numbers

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(a) the acronym "SS#" where the individual's social-security number would have been included;
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(d) the year of the individual's birth;
(e) the minor's initials;
(f) the last four digits of the financial-account number; and
(g) the city and state of the home address.

B. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

C. All pre-sentence reports (PSRs); these reports were filed as separate documents and not attached to the brief as an appendix.

D. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

E. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

F. Any other information required by law to be kept confidential or protected from public disclosure.

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Name

6/20/23
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