No. _____

In The
Supreme Court of the United States

THE STATE OF NEW MEXICO,

Petitioner,

vs.

BRUCE SCHWARTZ,

Respondent.

On Petition For Writ Of Certiorari To The New Mexico Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether live, two-way video testimony – which is given under oath, allows the jury to assess the witness's demeanor, and provides the accused a fair opportunity to confront and cross-examine – satisfies the constitutional requirement of face-to-face confrontation or qualifies as a permissible substitute for in-person testimony upon a showing of unavailability or other necessity-based standard.

2. Whether any impermissible use of two-way video testimony is subject to the harmless error standard of *Delaware v. Van Arsdall*, which evaluates a missing element of confrontation in the context of the witness's testimony and the trial as a whole, or instead subject to the standard of *Coy v. Iowa*, which disregards the offending testimony in its entirety and considers only the remaining evidence.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, the State of New Mexico, respectfully petitions for a writ of certiorari to issue to the New Mexico Court of Appeals.

OPINIONS AND ORDERS BELOW

The New Mexico district court's judgment, sentence and commitment is unreported (App. 28-29). The opinion of the New Mexico Court of Appeals reversing the district court's judgment (App. 1-26) is reported at 327 P.3d 1108. The New Mexico Supreme Court's denial of the State's petition for writ of certiorari (App. 30) is reported at 328 P.3d 1128.

JURISDICTION

The New Mexico Supreme Court denied the State's petition for writ of certiorari on June 17, 2014 (App. 30), thereby declining to review the opinion of the New Mexico Court of Appeals issued on March 17, 2014 (App. 1). Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

1. Following a jury trial, Defendant Bruce Schwartz was convicted of the second degree murder of Martha McEachin, a woman with whom Defendant had been living at the time of her death. The victim's body was discovered wrapped in an air mattress and sheets in an advanced state of decomposition in an alley 500 feet from Defendant's apartment in Albuquerque, New Mexico. Police officers were initially unable to identify the body and sought to discover the victim's identity through DNA testing of the remains.

McEachin had recently moved to Albuquerque from California, and two of her close friends – one living in California and the other in Ohio – became

concerned when they did not hear from McEachin for an unusually long period of time. Her friend in Ohio contacted the Albuquerque police to request a welfare check at Defendant's address, where she knew McEachin had been staying. Officers associated the welfare check with the body found in the alley based on its proximity to Defendant's home.

Before receiving any DNA test results for the body's remains, police officers executed a search warrant at Defendant's apartment and spoke to Defendant for over two hours. In their search, officers found trace evidence of a blood stain in a section of carpet of sufficient size that the blood had soaked through to the bottom. Swabs from the carpet matched McEachin's DNA. Officers also found a letter addressed to McEachin in Defendant's apartment.

During the interview, Defendant admitted living with a woman whose name "could have been" Martha. He claimed she went out for wine one day and never returned. Defendant remembered receiving an air mattress from his mother but said he sold it for cigarettes.

The body found in the alley had distinctive physical characteristics – a scar on the right calf, brown hair, and no upper teeth – that matched McEachin's distinctive physical characteristics. In addition, the air mattress and sheets wrapped around the body matched those Defendant's mother had mailed to him.

DNA testing of the remains from the alley continued for another two years, with a femur from the body being sent to laboratories in other states with more sophisticated equipment than that available in New Mexico. Eventually, scientists found a kinship match between a DNA profile taken from McEachin's daughter and the DNA profile of the remains.

Defendant began his opening statement to the jury, before any evidence had been introduced, as follows: "Folks, this is a sad case. This is a sad end to the life of Martha McEachin. We think the evidence is going to show you this is Martha McEachin in this alley, okay." His defense was that someone else killed McEachin after she left him and the police pinned the murder on him by ignoring evidence in order to close a file.

2. Given the complications involved in identifying McEachin's badly decomposed body, the State was required to call a number of out-of-state witnesses with technical, scientific, or foundational knowledge about the case. At a pre-trial hearing, the State observed that eight of its twenty witnesses resided outside of New Mexico and requested that some of those witnesses testify by live, two-way video. The State argued that it would be "very costly" and impose a "hardship" to have all of the out-of-state witnesses testify in person.[1]

[1] McEachin's daughter from California and her friends from California and Ohio testified in person. Suzanna Kehl, a DNA

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Specifically, the State requested video testimony for James Bas, an FBI agent who drew blood for DNA testing from McEachin's daughter in California, and for two DNA analysts Defendant had already interviewed, Ann Marie Gross from Minnesota and Laura Pearn, who left New Mexico after her DNA testing to attend law school in Arkansas (and who had difficulty arranging child care if required to return to New Mexico). Defendant agreed that Bas was merely a "technical witness." The trial judge concluded that live, two-way video testimony would not prejudice Defendant because the jury could observe the witnesses' demeanor.

The State also sought live, two-way video testimony for Defendant's mother, Patricia Labance, based on medical necessity. Labance resided in Florida. In a letter written on Labance's behalf two weeks before the hearing and less than a month before trial, Labance's attending physician stated that she suffered from "severe stress, anxiety and depression and is physically and psychologically unable to travel" outside of Florida for the foreseeable future. Defendant did not challenge the doctor's opinion, seek to obtain Labance's medical records, or question his mother – who was available by telephone – about her

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analyst from the FBI laboratory in Quantico, Virginia, who generated a DNA profile for McEachin's daughter, testified in person even though the State had initially requested that she testify by video. The DNA analyst who tested the carpet swabs from Defendant's home resided in New Mexico and testified in person.

health at the hearing. Defense counsel recognized that having Labance testify remotely "could actually harm the State" because "the jury might find it very powerful that the Defendant's own mother is going to come from [Florida] to testify for the State against him." Defendant nonetheless argued that, while he was "sympathetic" to his mother's "medical care," the video testimony would violate his right to confront and to "have the person in the room." The trial court credited the doctor's health assessment and permitted the video testimony.

At trial, Labance testified about her phone conversations with the victim during the time she lived with Defendant, about Defendant telling her that McEachin had left to go to Mexico, and about sending Defendant an air mattress and sheets. She also authenticated letters Defendant mailed to her and the receipt reflecting her purchase of the air mattress and sheets.

Agent Bas testified from California that he obtained a blood sample from McEachin's daughter and mailed it to the Albuquerque field office. Gross testified from Minnesota that she extracted and analyzed DNA from a bone sample submitted to her laboratory by the FBI and performed a kinship analysis with the DNA profile of McEachin's daughter, which resulted in a match. Pearn testified from Arkansas that Defendant could not be excluded as the source of blood stains from a shirt found in his apartment, that a blood stain on a pair of jeans found near the body was consistent with McEachin's DNA,

and that McEachin and Defendant could not be eliminated as contributors to a DNA profile from skin cells on the waistband of the jeans, which contained the DNA of three people.

In total, the video testimony occupies seventy-nine pages of the eight-hundred-page trial transcript. Of those seventy-nine pages of video testimony, Defendant's cross-examination covers a mere twelve pages. More specifically, Defendant asked no questions at all of Bas. He asked Gross, the Minnesota DNA analyst, if her lab had a connection to the FBI. He asked his mother questions about her health, despite having declined to question her on the subject at the pre-trial hearing. And over the course of nine pages, he confirmed with Pearn, the Arkansas DNA analyst, that McEachin's DNA was not found on the shirt from Defendant's apartment and emphasized that the waistband of the jeans found near McEachin's body contained the DNA of three people, one of whom was unknown.

3. In the New Mexico Court of Appeals, the State argued that live, two-way video testimony satisfies the Sixth Amendment's requirement of face-to-face confrontation (Ans. Br. 25-26). The State further argued that the trial court properly allowed Labance to testify on the basis of medical necessity (*id.* at 26-30). Finally, recognizing that the New Mexico Court of Appeals had previously declared two-way video testimony unconstitutional in the absence of a case-specific showing of necessity in furtherance of an important public policy other than taxing public

resources, the State argued that any error had been harmless (*id.* at 30-35). The State expressly asked the New Mexico court to consider Defendant's video confrontation and cross-examination of the witnesses in its harmless error inquiry (*id.* at 31).

The New Mexico Court of Appeals declined to reconsider its precedent declaring two-way video testimony unconstitutional (App. 5 n.1),[2] ruled that the analysts' testimony was not supported by the requisite case-specific findings (App. 5), and found the evidence of medical necessity for Labance's video testimony insufficient as a matter of law "[g]iven the importance of the confrontation right" (App. 9). The court declined to consider the extent to which Defendant confronted and cross-examined the video witnesses for purposes of harmless error (App. 13-14) and reversed Defendant's murder and tampering with evidence convictions based on the conclusion that the introduction of video testimony was not harmless beyond a reasonable doubt (App. 17-19).

[2] The lower court described the State as having conceded a confrontation violation for some witnesses (App. 5), but the State conceded only a violation of confrontation rights "as interpreted" in New Mexico cases – cases the State argued were inconsistent with this Court's precedent. The lower court refused the State's request to reconsider those New Mexico cases. That refusal, in itself, shows that the State raised – and did not concede – the issue presented here. The State also raised the issue in its petition seeking certiorari review in the New Mexico Supreme Court.

REASONS FOR GRANTING THE PETITION

I. The confrontation implications of two-way video testimony is a matter of national importance.

The appearance of a witness at trial by live, two-way video "that enable[s] the testifying witness to see and respond to those in the courtroom, and vice versa," raises an important constitutional question. *Wrotten v. New York*, 130 S. Ct. 2520, 2520 (2010) (Sotomayor, J., statement respecting denial of certiorari). But this Court has not yet squarely addressed the constitutionality of two-way video testimony. Until now, the Court has addressed the right to face-to-face confrontation only in the context of procedures that deprived the defendant of the important confrontation element of the witness being able to see the defendant while testifying. *Maryland v. Craig*, 497 U.S. 836 (1990) (one-way remote video); *Coy v. Iowa*, 487 U.S. 1012 (1988) (physical screen in the courtroom). The constitutionality of two-way video testimony "is not obviously answered" by these cases. *Wrotten*, 130 S. Ct. at 2520 (Sotomayor, J., statement respecting denial of certiorari).

The issue has acquired greater importance since this Court adopted a new interpretation of the Confrontation Clause in *Crawford v. Washington*, 541 U.S. 36 (2004), which more severely restricted the admissibility of testimonial statements made before trial than the case it overruled, *Ohio v. Roberts*, 448 U.S. 56 (1980). *See Whorton v. Bockting*, 549 U.S. 406, 419 (2007). Applying *Crawford* in subsequent cases,

this Court dramatically changed criminal prosecutions across the country by restricting the use of pretrial statements of laboratory analysts. *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). The Court did so, however, without any consensus about which statements should be categorized as "testimonial." *See Williams v. Illinois*, 132 S. Ct. 2221, 2227-44 (plurality opinion), 2244-54 (Breyer, J., concurring), 2255-64 (Thomas, J., concurring in the judgment), 2264-77 (Kagan, J., dissenting) (2012).

Since *Crawford*, the States have struggled both to understand the scope of the Confrontation Clause and to cope with the substantial impact this Court's cases have had on the admission of evidence in criminal trials. Two-way video testimony is an important part of this struggle – and an important means by which the States can faithfully implement *Crawford* without disrupting criminal prosecutions.

Indeed, the amici for the petitioner in *Melendez-Diaz*, while advocating a broad application of *Crawford* to scientific analyses, offered several procedural innovations to mitigate the potential harm to the public's compelling interest in bringing criminals to justice. One amicus on behalf of Melendez-Diaz suggested, in addition to defense stipulations and notice-and-demand provisions, the possibility of video testimony as a way "to modernize traditional Confrontation Clause thinking by providing information the Framers thought necessary to ensure effective trials without mandating in-court testimony."

Melendez-Diaz, No. 07-591, Amicus Br. of Law Professors 17. Another suggested that "the courts should . . . be rather generous in treating the [witness] as unavailable to testify at trial, by virtue of distance or lack of memory or both" when the witness has testified in a videotaped deposition that "preserves evidence of the witness's demeanor." *Melendez-Diaz*, No. 07-591, Amicus Br. of Richard D. Friedman 19.

This Court recognized several of the suggested remedial measures in concluding "that the sky will not fall after today's decision" but did not reference video testimony. *Melendez-Diaz*, 557 U.S. at 325.

After *Melendez-Diaz*, a number of states adopted two-way video provisions, some specifically aimed at the testimony of laboratory analysts. *E.g.*, Alaska R. Crim. P. 38.3; Idaho Crim. R. 43.3; Kan. Stat. Ann. § 22-3437(b). In New Mexico, however, mitigation efforts have failed. Lengthy attempts to develop a notice-and-demand provision – with proposals that included the option of two-way video testimony – proved fruitless at both the judicial rule-making and legislative levels.[3] And since being reversed in *Bullcoming*, New Mexico appellate courts have taken an expansive view of the scope of the Confrontation Clause. *See, e.g., State v. Navarette*, 294 P.3d 435

[3] *See* Proposed Alternative R. of P. Concerning the Admission of Forensic Evidence, http://www.nmbar.org/Attorneys/lawpubs/BB/bb2011/BB101911.pdf, at 24-25; H.R. 432, 51st Legis., 1st Sess. (N.M. 2013), http://www.nmlegis.gov/Sessions/13%20Regular/bills/house/HB0432.html.

(N.M.) (autopsy reports), *cert. denied*, 134 S. Ct. 64 (2013). The courts have recognized but declined to accommodate the fact that travel for in-person analyst testimony across New Mexico's relatively large geographic area imposes substantial economic and logistical burdens on the scarce resources of a poor and sparsely populated state. *See State v. Smith*, 308 P.3d 135, 138-39 (N.M. Ct. App.), *cert. denied*, 304 P.3d 425 (N.M. 2013). New Mexico thus has a particular interest in contesting the wrongful exclusion of video testimony and in protecting the States' role as experimental laboratories in the area of criminal procedure.

It remains unsettled when States may present witnesses through two-way video. In *Craig*, the Court stated in dicta in the context of one-way video testimony that the Sixth Amendment establishes a preference for "physical, face-to-face confrontation at trial" that can only be excused if "necessary to further an important public policy." *Craig*, 497 U.S. at 850. And over a decade ago, this Court decided not to approve an amendment to the Federal Rules of Criminal Procedure that would have permitted two-way video testimony, with Justice Scalia expressing the view that the procedure was "of dubious validity under the Confrontation Clause." *See* Proposed Amends. to Fed. R. Crim. P. 26(b), 207 F.R.D. 89, 93 (2002); *see also id.* at 96-97 (Breyer, J., dissenting statement) (observing that the issue lacked "the benefit of full argument"). *But see Coy*, 487 U.S. at 1023 (O'Connor, J., concurring) (suggesting that

two-way video systems do not present a "substantial Confrontation Clause problem" because they "involve testimony in the presence of the defendant").

These intimations have produced an unnecessary chilling effect that reaches beyond the decision in this case. Some states disallow video testimony in the absence of a defense stipulation. *See* Mich. Comp. Laws § 600.2164a; Minn. R. Crim. P. 1.05(9); N.H. Rev. Stat. Ann. § 516:37. And some courts have been reluctant to engage in a more searching Confrontation Clause inquiry for two-way video testimony. *See Gentry v. Deuth*, 381 F. Supp. 2d 614, 626 (W.D. Ky.) ("While Justice Scalia's comments to Congress are certainly not binding judicial precedent, it is undeniable that he wrote for a majority of the Court, thus indicating, at least informally, its view on the matter."), *modified on other grounds*, 381 F. Supp. 2d 630 (W.D. Ky. 2004).

Only this Court can resolve definitively when States may use two-way video testimony. It stands to reason that two-way video testimony, which is more protective of the right of confrontation, should satisfy the Confrontation Clause under broader circumstances than one-way video systems. But uncertainty over the precise standard that applies has limited the technology's use. Because two-way video enables the States to comply with the confrontation demands of *Crawford* while assuring both "the just protection of the accused" and "the safety of the public," *Mattox v. United States*, 156 U.S. 237, 243 (1895), this Court's review is warranted.

II. Courts are divided on the circumstances justifying the use of two-way video testimony.

In *United States v. Gigante*, 166 F.3d 75, 80-81 (2d Cir. 1999), the Second Circuit held that the *Craig* standard, which requires a case-specific showing of necessity in furtherance of an important public policy, does not apply to two-way video testimony. The court explained that, unlike one-way video, two-way video testimony preserves all of the characteristics of face-to-face confrontation: The witness "was sworn; he was subject to full cross-examination; he testified in full view of the jury, court, and defense counsel; and [the witness] gave this testimony under the eye of [the defendant] himself." *Id.* at 80. The court, however, still required a showing of "exceptional circumstances" because video testimony "should not be considered a commonplace substitute for in-court testimony" and "[t]here may well be intangible elements" of appearing in person that are reduced or eliminated by video testimony. *Id.* at 81. Exceptional circumstances exist if the testimony is material to the case and the witness is unavailable, such as when a witness is too ill to appear in person. *Id.*

The test in the Second Circuit is therefore similar to the test *Crawford* recognized for the admission of prior testimony. The Confrontation Clause permits the introduction of prior testimony as a substitute for live testimony if the witness is unavailable and the defendant had the opportunity to cross-examine the prior testimony. *Crawford*, 541 U.S. at 54. When it

comes to two-way video testimony, the defendant has the opportunity to cross-examine during the trial itself and immediately after the witness's testimony on direct examination.

The Sixth Circuit, in an unpublished opinion, agreed with the Second Circuit that two-way video testimony fulfills the requirements of face-to-face confrontation. Without adopting any particular standard, the court permitted two-way video testimony of a witness too ill to travel. *United States v. Benson*, No. 01-3941, 79 Fed. Appx. 813, 820-21 (6th Cir. Oct. 28, 2003).[4] These courts determined that two-way video testimony satisfies the elements of confrontation even before significant advancements in technology. Today's high definition video provides jurors and the accused a much clearer image of video witnesses, perhaps clearer in some cases than their view of witnesses on the stand.

The Fourth, Eighth, and Eleventh Circuits, as well as two state courts of last resort, have taken the contrary view that the *Craig* standard of case-specific

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[4] Several intermediate state appellate courts permit video testimony upon a showing of unavailability. *State v. Sewell*, 595 N.W.2d 207, 213 (Minn. Ct. App. 1999); *State v. Marcinick*, 2008-Ohio-3553, ¶ 22 (Ohio Ct. App. 2008) (applying *Craig*); *Paul v. State*, 419 S.W.3d 446, 459 (Tex. App. 2012) (applying the *Gigante* standard); *see Commonwealth v. Leahy*, No. 2001-CA-002726-DG, 2003 WL 1270525, at *2 (Ky. Ct. App. Feb. 7, 2003) (unpublished) (relying on the "unjustifiable expense and delay" in requiring analysts to "travel throughout the Commonwealth").

necessity in furtherance of an important public policy applies to two-way video procedures. *United States v. Ali*, 528 F.3d 210, 238-43 (4th Cir. 2008) (video deposition); *United States v. Yates*, 438 F.3d 1307, 1313 (11th Cir. 2006) (en banc); *United States v. Bordeaux*, 400 F.3d 548, 553-54 (8th Cir. 2005); *Harrell v. State*, 709 So. 2d 1364, 1368-69 (Fla. 1998); *Bush v. State*, 193 P.3d 203, 214-15 (Wyo. 2008); *see People v. Wrotten*, 923 N.E.2d 1099, 1103 (N.Y. 2009) (applying *Craig* after "assuming without deciding that two-way video does not always satisfy the Confrontation Clause's 'face-to-face meeting' requirement"). The Eighth and Eleventh Circuits expressly rejected the standard adopted by the Second Circuit in *Gigante*.

By so holding, the above courts applied a stricter standard to two-way video testimony than to prior testimony. A witness's unavailability due to illness or presence beyond the subpoena power of the court would permit the use of prior testimony that the defendant had an opportunity to cross-examine. *See Mancusi v. Stubbs*, 408 U.S. 204, 211-16 (1972); *West v. Louisiana*, 194 U.S. 258, 263-64 (1904). But for two-way video testimony, the above courts treated illness and limits on the trial court's subpoena power as more amorphous questions of public policy under the *Craig* test, with inconsistent results. The Eleventh Circuit concluded that a witness's presence in a foreign country did not justify video testimony, while the Florida Supreme Court reached the opposite conclusion. *Compare Yates*, 438 F.3d at 1315-16, *with Harrell*, 709 So. 2d at 1369. Under the *Craig* test,

traditional forms of unavailability are treated the same as other important public policies. *Compare Bush*, 193 P.3d at 215-16 (relying on "the important public policy of preventing further harm to [a witness's] already serious medical condition"), *with Ali*, 528 F.3d at 241 ("Insistence on face-to-face confrontation may in some circumstances limit the ability of the United States to further its fundamental interest in preventing terrorist attacks.").

The above conflict reflects a lengthy period of percolation and is largely attributable to ambiguous language in *Craig*. This Court should settle the issue and resolve the conflict.

III. Two-way video testimony satisfies the Confrontation Clause.

Testimony under oath by live, two-way video provides the accused a fair opportunity to confront and cross-examine the witness and therefore satisfies the Confrontation Clause. Such testimony should be permitted at the very least when the witness is unavailable to testify in person.

The Sixth Amendment provides an accused the right "to be confronted with the witnesses against him." Unlike many state constitutional provisions, the Clause does not explicitly provide for "face-to-face" confrontation. *See Kentucky v. Stincer*, 482 U.S. 730, 735 (1987) (quoting Kentucky's provision). The word "confront," however, means a face-to-face meeting. *See Coy*, 487 U.S. at 1016. But the text says

nothing about a witness's physical presence in the courtroom or about acceptable modes of confrontation. Indeed, even if the Framers considered a witness's presence at trial, it could only have been in contrast to out-of-court statements. The Framers could not have compared physical presence with video presence for the simple reason that they could not have foreseen technology that would allow a witness to testify in the courtroom during the trial while in view of the defendant and the jury, other than by physical presence. The meaning of "face-to-face," and its application to video presence, thus depends on the purposes of confrontation and the extent to which video presence satisfies those purposes.

To be sure, the Constitution demands actual, not virtual, confrontation. No one seriously contends otherwise. The Sixth Amendment guarantees that the accused will not be deprived "of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination." *Mattox*, 156 U.S. at 244. The question is whether, and under what circumstances, video presence satisfies this actual guarantee. The best reading of the Confrontation Clause, in light of the constitutional text, history, and precedent, is that two-way video testimony fully satisfies the Clause's dictates – if not on its own then, at the very least, upon a showing of the witness's unavailability to testify in person.

A. Live video presence with the witness and the defendant in sight of each other is face-to-face confrontation and provides a fair opportunity to confront.

1. There is no constitutionally significant difference between live video presence and physical presence in the courtroom. Two-way video is a procedure that permits live witness examination and cross-examination under the watchful eye of the defendant and the jury and thus secures the reliability of the testimony in the manner the Framers intended. Because two-way video testimony is functionally equivalent to live testimony, it is a constitutionally acceptable mode of confrontation.

Face-to-face confrontation, while "not the *sine qua non* of the confrontation right," is a core Confrontation Clause value. *Craig*, 497 U.S. at 847. This aspect of confrontation serves the following four purposes: (1) it compels the witness "to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief," *Mattox*, 156 U.S. at 242-43; (2) it permits the defendant to be present at trial in order to communicate with counsel and to put "'his sad plight'" in view so as to "'inclin[e] the hearts of the jurors to listen to his defence with indulgence,'" *Crosby v. United States*, 506 U.S. 255, 259 (1993) (quoted authority omitted); *Illinois v. Allen*, 397 U.S. 337, 338, 344 (1970); (3) it allows the witness to look

at the defendant so that the witness may "'understand what sort of human being'" the accused is, making it more difficult to lie, or at least convincingly so, to the defendant's face than behind his back, *Coy*, 487 U.S. at 1019 (quoted authority omitted); and (4) it requires the witness to testify under oath, "thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury," *California v. Green*, 399 U.S. 149, 158 (1970). All of these purposes are served by two-way video testimony.

With this procedure, the witness testifies under oath in view of the jury. Two-way video – unlike the screen in *Coy* and the one-way video system in *Craig* – permits the witness and the defendant to see each other such that the witness has to face the defendant and can understand that a specific person will be harmed by the testimony. The defendant has a full and complete opportunity to cross-examine the witness in the context of the ongoing trial proceedings, thereby assuring the procedural reliability established by the Framers. *See Crawford*, 541 U.S. at 61 ("[T]he Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee."). And the jury can assess the demeanor of the witness and the defendant during the testimony. In short, it *is* face-to-face confrontation. *See Brady v. State*, 575 N.E.2d 981, 989 (Ind. 1991) ("In such a closed circuit arrangement, there is no person or body interposed between the witness

and the accused and a face-to-face meeting as contemplated by the Constitution occurs.").

2. This Court need not, however, equate two-way video presence with physical presence in order to find that it satisfies the Confrontation Clause. There is no question that in-person testimony is the constitutional norm and may well provide the ideal opportunity to confront a witness. The Constitution, however, does not rigidly demand that the rights it affords the accused be implemented in a singular, ideal way. The Confrontation Clause requires only a fair opportunity to confront and to cross-examine – and defendants may confront and cross-examine witnesses who appear by two-way video.

With respect to a fair opportunity to confront, this Court in *Craig* mentioned the "many subtle effects face-to-face confrontation *may* have on an adversary criminal proceeding." 497 U.S. at 851 (emphasis added). Any actual – as opposed to theoretical – effects on a trial, however, are not necessarily unique to a witness's physical presence in the courtroom. Limited studies suggest that two-way video testimony is "treated by the courtroom participants just as if those persons were physically in the courtroom." Fredric I. Lederer, *The Potential Use of Courtroom Technology in Major Terrorism Cases*, 12 Wm. & Mary Bill Rts. J. 887, 908 (2004).

"[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte*

examinations." *Crawford*, 541 U.S. at 50. Two-way video testimony provides face-to-face confrontation and therefore stands against, not in favor of, trial by *ex parte* affidavit. *See Yates*, 438 F.3d at 1332 (Marcus, J., dissenting) ("The video link in this case decidedly had the . . . purpose . . . to allow a confrontation between the defendants and their accusers, not to prevent one."). Neither constitutional text and history nor empirical data suggest that two-way video testimony deprives a defendant of any meaningful aspect of confrontation.[5] To the extent video testimony lacks some intangible, "subtle effect" of physical presence, it does not prevent a fair opportunity to confront because the defendant and witness can see each other and the defendant can examine the witness in view of the jury.

The value that lies at the core of the Confrontation Clause is not an "eyeball-to-eyeball" stare-down or "[t]he physical distance between the witness and the accused" but instead "the opportunity to observe and to cross-examine." *State v. Self*, 564 N.E.2d 446,

[5] This is even more true for laboratory analysts, who "perform[ ] hundreds if not thousands of tests each year and will not remember a particular test or the link it had to the defendant" and who are "far removed from the particular defendant and, indeed, claim[ ] no personal knowledge of the defendant's guilt," *Melendez-Diaz*, 557 U.S. at 339 (Kennedy, J., dissenting). Like other *de minimis* deviations from the confrontation norm, the notion of personal presence having any effect on the confrontation of such witnesses is "shadowy at its greatest." *See Snyder v. Massachusetts*, 291 U.S. 97, 109 (1934).

452 (Ohio 1990). Indeed, to the extent one could argue that the accused's hostile glare is somehow diminished by two-way video testimony, the Constitution grants the accused no more license to intimidate witnesses in the courtroom than he has outside of it. A defendant who intentionally prevents a witness from testifying through intimidation forfeits the right to confront. *Giles v. California*, 554 U.S. 353, 359-61 (2008). The Framers thus could not have intended confrontation to include purposeful intimidation. *See Commonwealth v. Willis*, 716 S.W.2d 224, 230-31 (Ky. 1986) ("There is a difference between confrontation and intimidation."). "The nature and purpose of witness examination . . . are to elicit honest testimony, not fearful responses, and to procure the truth, not cause intimidation." *State v. Foster*, 957 P.2d 712, 724-25 (Wash. 1998). Two-way video testimony provides meaningful, and constitutionally sufficient, confrontation.

Of at least equal importance, video presence provides an opportunity to cross-examine and thus allows defendants to utilize the procedure that rests at the heart of the Confrontation Clause. Even before *Crawford*, this Court emphasized cross-examination as the Framers' procedure of choice for testing reliability. "[A] primary interest secured by [the Clause] is the right of cross-examination; an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation." *Douglas v. Alabama*, 380 U.S. 415, 418 (1965). "A face-to-face encounter, of course, is important, not so that the

accused can view at trial his accused's visage, but so that he can directly challenge the accuser's testimony before the factfinder." *Green*, 399 U.S. at 192 (Brennan, J., dissenting). Indeed, before *Coy*, many authorities treated the word "confront" as synonymous with "cross-examination." *See, e.g., State v. Torello*, 131 A. 429, 429-30 (Conn. 1925) ("[I]t is as if the section read 'the accused shall have the right to the opportunity of cross-examination.'"); 5 John Henry Wigmore, *Evidence in Trials at Common Law* § 1397, at 158 (James H. Chadbourne rev. 1974), *quoted in Coy*, 487 U.S. at 1029 (Blackmun, J., dissenting).

Cross-examination is "the 'greatest legal engine ever invented for the discovery of truth,'" and its principal purpose is to challenge the witness's veracity, perception, and memory, as well as the clarity and meaning of the witness's testimony on direct examination. *Green*, 399 U.S. at 158 (quoting Wigmore, *supra*, § 1367). The Confrontation Clause thus "ensure[s] reliability of evidence" by requiring that the evidence be "test[ed] in the crucible of cross-examination." *Crawford*, 541 U.S. at 61. Like physical presence, two-way video presence provides this crucible in the context of the trial proceedings, and under the defendant's gaze.

Moreover, cross-examination, like confrontation, need not occur under a perfect set of circumstances. "Generally speaking, the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever

way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985).

For example, the Confrontation Clause imposes no limit on the prosecution's substantive use of a witness's prior statements when the witness testifies subject to cross-examination at trial, *Crawford*, 541 U.S. at 60 n.9, even though there is incomplete "demeanor evidence" with which to evaluate the prior statement. *Green*, 399 U.S. at 160. Further, the defendant is not deprived of an opportunity for effective cross-examination when the witness has no memory of the crime but remembers identifying the defendant as the witness's assailant in an unconfronted, non-cross-examined out-of-court statement to a law enforcement officer. *United States v. Owens*, 484 U.S. 554, 556 (1988); *accord Fensterer*, 474 U.S. at 19.

"[T]he assurances of reliability . . . found in the right of cross-examination are fully satisfied" when the jury can observe the witness's demeanor under cross-examination and the witness testifies under oath in the defendant's presence. *Fensterer*, 474 U.S. at 20. The two-way video testimony in this case satisfied these criteria and provided Defendant a greater opportunity for cross-examination than the defendants had in *Green, Owens*, and *Fensterer*.

Defendant confronted and cross-examined the video witnesses. His choice of abbreviated cross-examination reflects the largely uncontroverted substance of their testimony and their relative unimportance to the defense case. Defendant made no

claim that his cross-examination, or his defense, was impaired in any way by the witnesses' video appearance, nor could he. The testimony satisfied his right of confrontation.

B. Even if two-way video testimony does not fully meet the requirement of face-to-face confrontation, a witness's unavailability to testify in person should warrant its use as a substitute for physical appearance.

1. Upon a showing that a witness is "unable to testify in person," former testimony satisfies the Confrontation Clause because of the "prior opportunity for cross-examination." *Crawford*, 541 U.S. at 45, 53-54. Even if two-way video testimony is not per se admissible, it should at least be treated no worse – for Confrontation Clause purposes – than former testimony. However a witness's video appearance at trial might be compared to physical presence, it is far superior to reading the jury a transcript of an absent witness's prior testimony. With prior testimony, the defendant will have had an opportunity to cross-examine the witness but not in the context of the trial, where the focus of cross-examination might differ significantly. And confrontation is even more compromised – the jury cannot see the witness's demeanor and has no way of discerning past demeanor from the transcript. Two-way video testimony better protects an accused's Confrontation Clause

rights than prior testimony and should thus be permitted at least upon a similar showing.

The admission of prior testimony when a witness is unavailable is part of the Framers' design. "[T]he common law in 1791 conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine. The Sixth Amendment therefore incorporates those limitations." *Crawford*, 541 U.S. at 54. The Framers understood that the requirement of a witness's "personal presence," over and above an opportunity for cross-examination, is not absolute and must – when necessary – bow to the public's interest in seeking justice for criminal acts. *Mattox*, 156 U.S. at 243. "The law, in its wisdom, declares that the rights of the public shall not be wholly sacrificed in order that an incremental benefit may be preserved to the accused." *Id.* The opportunity for cross-examination may not be the same as cross-examination at trial, but "the right of cross-examination initially afforded provides substantial compliance with the purposes behind the confrontation requirement." *Barber v. Page*, 390 U.S. 719, 722 (1968).

Unavailability in this context includes a witness's death, illness, incapacity, or presence in a location beyond the subpoena power of the court. *See West*, 194 U.S. at 263-64. It also includes a witness's refusal to obey a court order to testify or invocation of a privilege not to testify "as long as the declarant's inability to give live testimony is in no way the fault of the State." *Green*, 399 U.S. at 166; *see Douglas*, 380

U.S. at 419 (concluding that a witness's invocation of the right against self-incrimination made the witness unavailable for cross-examination).

Because two-way video testimony affords the defendant a fair opportunity to cross-examine and provides more than prior testimony's "substantial compliance" with the purposes of confrontation, no greater showing of necessity or public policy should be required for its use than the witness's unavailability to testify in person. *See Yates*, 438 F.3d at 1331 (Marcus, J., dissenting) ("[W]hen a witness is truly unavailable, the requirement of face-to-face confrontation does not apply in the first place, so the *Craig* test ought not to apply either."). And given that two-way video testimony more closely approximates in-person testimony than other cross-examined testimony, unavailability to testify in person should be construed more broadly than a witness's unavailability to testify at trial.

The norm has been and will continue to be in-person testimony. But some trials, like the present one, require the testimony of a number of witnesses from distant locations on technical matters for which physical presence makes no significant difference – to the prosecution, the defense, or the jury. In the Timothy McVeigh trial, for example, the prosecution flew in twenty-seven witnesses "from around the country to authenticate hundreds of pages of phone records, each testifying for only a few minutes. One witness was on the stand for just 50 seconds." Lederer, *supra*, at 918-19 (quotation marks and quoted source omitted).

The Framers would not have intended to derail a just prosecution simply because some of those technical witnesses could not appear in person when there exists a technology that can provide a fair and reasonable substitute. A stubborn resistance to technological advances, based on nothing more than speculation about the subtle effect of physical presence, can only impede justice, not promote it.

2. The State showed that Defendant's mother was unavailable to testify in person based on the unchallenged opinion of her physician that she was physically and psychologically unable to travel out of Florida. Illness is an established and uncontroversial form of unavailability. *See* Fed. R. Evid. 804(a). By resorting to the importance of confrontation to disregard the physician's letter and the trial court's factual finding of medical necessity (App. 9), the New Mexico court in effect created the type of "categorical evidentiary prerequisite[ ]" that this Court eschewed in *Craig*, 497 U.S. at 860. *See Stevens v. State*, 234 S.W.3d 748, 782 (Tex. App. 2007) (upholding remote testimony based on a witness's health condition "documented by letters from his treating cardiologist").

The DNA analysts and Agent Bas were also unavailable to testify in person by virtue of their distance from the trial and the impersonal nature of their role in the case. None of these witnesses knew or needed to identify Defendant, and there is no indication that their physical presence would have

enhanced Defendant's confrontation or cross-examination. Whatever standard the Confrontation Clause requires for two-way video testimony, the empty formalism of making these witnesses appear in person did not outweigh the financial and logistical hardship of securing their physical presence.

This is not to say that two-way video testimony should be allowed without adequate safeguards. At a minimum, it must be conducted in a manner that ensures clarity of both image and sound, impresses upon the witness the seriousness of the occasion, reflects the dignity and decorum of the proceedings, and protects against any external influence on the witness's testimony. *See* Richard D. Friedman, *Remote Testimony*, 35 U. Mich. J. L. Reform 695, 712-14 (2002).

In this regard, there is no question that the procedure used in this case should have been more strictly controlled. Two witnesses testified from their homes, but Defendant did not object to the location of the remote testimony. One witness – Defendant's mother – referred to documents without permission; the judge, however, adequately controlled the witness with an admonishment upon Defendant's objection. And one witness's testimony was interrupted by technological glitches in the picture and sound, but Defendant waived any objection to the quality of the signal by declining the prosecutor's offer to stop the testimony and have the witness testify from the local courthouse or prosecutor's office.

The lapses during the trial certainly show the need for firm guidelines, but they do not establish a deprivation of the constitutional right to confront. The prosecutor assured at the start of each witness's testimony that the courtroom participants could see each other. In addition, there were no picture or sound issues for three of the four witnesses. Defendant chose not to cross-examine Agent Bas. He cross-examined the other three witnesses, and there is no indication in the record that his cross-examination was impaired in any way by the video procedure. There was no violation of the Sixth Amendment.

IV. A fair assessment of the effect of any error in allowing two-way video testimony requires the consideration of the defendant's opportunity to confront and cross-examine the witness.

Any possible error in the trial court permitting two-way video testimony was harmless beyond a reasonable doubt. There is no reasonable possibility that the physical presence of the DNA analysts and Defendant's mother would have altered the jury's verdict. Defendant demonstrated this himself by his minimal cross-examination of the witnesses. Likewise, the substance of the video testimony in the overall context of the trial shows no likelihood that the outcome would have been different without the error.

To the extent two-way video testimony deprives a defendant of a significant aspect of confrontation, any error in its use should be treated in the same way as a limitation on cross-examination, with the reviewing court evaluating the likely impact of a witness's video appearance on the jury's verdict in the context of the trial as a whole. The New Mexico Court of Appeals acknowledged that reviewing courts can consider the extent of cross-examination otherwise permitted, but the court erred in refusing to apply this principle on the ground that harmless error should not focus on "how Defendant responded" to the video testimony (App. 13).

There are at least three types of trial errors that are subject to harmless error review: (1) the wrongful exclusion of evidence; (2) the wrongful admission of evidence; and (3) an inaccurate or incomplete jury instruction on the elements of the crime. *See Neder v. United States*, 527 U.S. 1, 18 (1999). These trial errors, depending on "the setting of a particular case," can be deemed harmless beyond a reasonable doubt when they "have little, if any, likelihood of having changed the result of the trial." *Chapman v. California*, 386 U.S. 18, 22 (1967). All of these errors potentially "infringe upon the jury's factfinding role and affect the jury's deliberative process in ways that are, strictly speaking, not readily calculable." *Neder*, 527 U.S. at 18. But unlike structural error that infects the entire proceeding, trial errors are capable of being "quantitatively assessed in the context of other

evidence." *Arizona v. Fulminante*, 499 U.S. 279, 308 (1991).

Confrontation Clause errors – whether involving the wrongful admission of an out-of-court testimonial statement or the wrongful exclusion of evidence to impeach a witness testifying at trial – are subject to harmless error review. *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986). For both types of error, "the prosecution was . . . able to introduce evidence that was not subject to constitutionally adequate cross-examination. And in both cases the reviewing court should be able to decide whether the not-fully-impeached evidence might have affected the reliability of the factfinding process at trial." *Id.* But different considerations apply to these two types of error, and this Court has thus treated the wrongful limitation on cross-examination differently than error in admitting evidence.

In *Van Arsdall*, the trial court precluded the defendant from cross-examining a witness about the prosecution's dismissal of a charge against him. 475 U.S. at 676. For this type of error, the reviewing court "assum[es] that the damaging potential of the cross-examination were fully realized" and considers "a host of factors," including "the importance of the witness's testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and,

of course, the overall strength of the prosecution's case." *Id.* at 684.

The flexible *Van Arsdall* test reflects the reality that trial errors can occur in a wide range of contexts. Grounds for impeachment may appear superficially similar in different cases but, depending on the surrounding circumstances, do not necessarily have the same potential to affect a verdict.

For example, in *Van Arsdall*, the witness with an unexplored potential bias in favor of the prosecution testified to matters that were largely uncontroverted and established by other evidence, including the defendant's own testimony. *See* 475 U.S. at 675-77. A jury's verdict under such circumstances may not depend on the credibility of the not-fully-impeached witness. *See United States v. Beck*, 557 F.3d 619, 621 (8th Cir. 2009).

In other situations, the "damaging potential" of an impermissible limitation on cross-examination may not affect all aspects of a witness's testimony or may not significantly add to the defendant's actual cross-examination. There is no reasonable possibility in such cases that the additional cross-examination would have affected the jury's assessment of credibility. *See United States v. McGee*, 408 F.3d 966, 977 (7th Cir. 2005); *State v. Quintana*, 633 N.W.2d 890, 890-91 (Neb. 2001); *State v. Fuller*, 721 A.2d 475, 484 (Vt. 1998); *see also United States v. Miguel*, 111 F.3d 666, 672 (9th Cir. 1997) ("Here, . . . we cannot assume that

proffered cross-examination would have been successful, because [the defendant] has proffered none.").

When a witness testifies at trial, the context is sufficient to evaluate the way in which any restriction on cross-examination might have affected a witness's credibility or the other evidence introduced at trial. Errors in the admission of an absent witness's out-of-court statements, however, are different: "[W]hen the error involves the *admission* of evidence in violation of the Confrontation Clause, reviewing courts may not speculate as to whether cross-examination would have been effective or not, had it occurred." *Davis v. State*, 203 S.W.3d 845, 851 (Tex. Crim. App. 2006). An appellate court instead evaluates the wrongful admission of evidence by "simply review[ing] the remainder of the evidence against the defendant." *Fulminante*, 499 U.S. at 310; *see Harrington v. California*, 395 U.S. 250, 253-54 (1969) ("[O]n these special facts the lack of opportunity to cross-examine [the co-defendants about their erroneously admitted confessions] constituted harmless error . . . .").

The Court, however, departed from this model in *Coy*. There, the constitutional error was a restriction on the right to confront witnesses who testified at trial and were otherwise subject to cross-examination, an error closely resembling the limitation on cross-examination in *Van Arsdall*. But this Court did not evaluate the witnesses' testimony in the context of the trial to determine whether there was any "damaging potential" to the restriction on confrontation. Instead, the Court treated the error in the

same manner as the improper admission of out-of-court statements: "An assessment of harmlessness cannot include consideration of whether the witness' testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation; such an inquiry would obviously involve pure speculation, and harmlessness must therefore be determined on the basis of the remaining evidence." *Coy*, 487 U.S. at 1021-22.

There are undoubtedly some occasions when such an inquiry would be speculative, but surely not always. If the witness testified at trial consistently with former confronted testimony (admitted, for example, to rebut an intervening motive to lie), it would be difficult to say that placing the witness in view of the defendant would have had any concrete effects ascertainable to a jury. The same would be true if the defendant admits the substance of the witness's testimony and defends against the charges on other grounds (either by contending that the testimony is not inculpatory or by claiming an excuse or justification). An "'idle'" gaze[6] would unquestionably have less impact on a witness than a "hostile glare."[7] But under the *Coy* analysis, courts conduct the same review regardless of the subject matter or importance of the witness's testimony, the extent to which the defendant cross-examined the witness or

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[6] *Coy*, 487 U.S. at 1029 (Blackmun, J., dissenting) (quoting Wigmore, *supra*, § 1395, at 150).

[7] *Craig*, 497 U.S. at 866 (Scalia, J., dissenting).

contested the testimony's substance, or even whether the witness would have recognized which person at the defense table was the defendant.

This part of *Coy* may not have survived *Craig*. There was no harmless error analysis in *Craig*, but the Court modified *Coy* in two relevant respects. First, the Court determined that there is no reason to treat the face-to-face component of confrontation differently than other aspects of the right to confront. 497 U.S. at 849-50. Second, the Court held that the one-way video testimony at issue was reliable – in the procedural sense required by the Confrontation Clause – because it was "subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony." *Id.* at 851. These modifications of *Coy* are at odds with the notion of treating a restriction on face-to-face confrontation – but not a limitation on cross-examination – as so uniformly harmful that the entire testimony must be discarded.

Even if the rigid *Coy* standard remains valid, however, it should not apply to two-way video testimony that enables the witness to see the defendant.[8]

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[8] Few cases address video testimony; fewer still analyze the harmlessness of video testimony. There is nonetheless significant conflict on the matter. Consistent with *Van Arsdall*, some courts consider the defendant's opportunity to confront and cross-examine. *See State v. Boyd*, 127 P.3d 998, 1011-12 (Kan. 2006) (finding the error harmless); *see also United States v. Aguilar-Tamayo*, 300 F.3d 562, 566-67 (5th Cir. 2002) (video deposition); *Star v. Commonwealth*, 313 S.W.3d 30, 40 (Ky.

(Continued on following page)

In this respect, two-way video testimony is *sui generis*. It is, simultaneously, an out-of-court statement and in-court testimony. And it infringes on the right of confrontation only minimally, if at all. Because the confrontation provided by two-way video is considerable, it would be more "assumption" than "speculation" to discern the likely impact of physical presence based on the extent of confrontation and cross-examination otherwise provided. Any error in permitting two-way video testimony is thus more like a limitation on cross-examination than it is like the admission of an absent witness's out-of-court testimonial statement.

This case demonstrates the point. Defendant had the opportunity to cross-examine the video witnesses but asked very few questions of substance and did not seek to impeach any of them. Moreover, the substance of their testimony was largely undisputed. Much of the video testimony went to the issue of the victim's identity, which was an issue Defendant did not contest and which the State independently established

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2010). Other courts, consistent with *Coy*, disregard the video testimony and consider only the remaining evidence. *See Hopkins v. State*, 632 So. 2d 1372, 1377 (Fla. 1994) (finding the error not harmless); *Bowser v. State*, 205 P.3d 1018, 1024 (Wyo. 2009) (same). One court took the first approach and found video testimony of laboratory analysts harmless because it involved "the type of quantitative, scientific-based testimony that would not have varied merely because [the analysts] were present in the courtroom," *Gentry*, 381 F. Supp. 2d at 627, only to reverse itself on reconsideration by disregarding the analysts' testimony in reviewing the evidence. *Id.* at 633.

through in-person testimony. Although Labance authenticated several documents by video, a witness who testified in person provided duplicative authentication. And though Pearn testified about DNA on the jeans found near the body, the State connected Defendant to the body in the alley with other physical evidence. Defendant even sought to use Pearn's testimony affirmatively by highlighting the third DNA profile on the jeans to support his defense theory that someone else killed McEachin.

The context of the trial as a whole – including the confrontation and cross-examination afforded to Defendant – shows that any error was harmless beyond a reasonable doubt. The lower court reached the wrong conclusion because it failed to apply the proper standard of harmless error.

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CONCLUSION

For the foregoing reasons, this Court should issue its writ of certiorari to review and reverse the opinion of the New Mexico Court of Appeals.

Respectfully submitted,

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IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

Opinion Number: _____

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NO. 32,451

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

BRUCE SCHWARTZ,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY Robert S. "Bob" Schwartz, District Judge

Gary K. King, Attorney General
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OPINION

BUSTAMANTE, Judge.

{1} Bruce Schwartz (Defendant) asserts that his rights under the confrontation clauses of the United

States and New Mexico Constitutions were violated when the district court permitted four witnesses to testify by two-way video over the Internet without the necessary findings that use of video was necessary. We agree and, because there is no reasonable possibility that the video testimony did not affect the verdict, conclude that the testimony was not harmless. Consequently, we reverse Defendant's convictions. Concluding there is sufficient evidence to support Defendant's convictions, we also remand for retrial.

BACKGROUND

{2} In March 2008 Martha McEachin left her home in Los Angeles on a train bound for Albuquerque, intending to begin writing a long-planned novel in Mexico. After arriving in Albuquerque, McEachin lived with Defendant for approximately one and a half months before she disappeared. In May, a badly decomposed body was discovered wrapped in a blue air mattress and sheets and covered with a mattress in an alley approximately 500 feet from Defendant's apartment.

{3} After a two-year investigation, Defendant was charged with McEachin's murder and tampering with evidence. He was convicted by a jury of second degree murder and tampering with evidence and sentenced to fifteen years in the Department of Corrections. Additional facts are included in our discussion of Defendant's points on appeal.

DISCUSSION

{4} Defendant makes a number of arguments based on allegations of error in the admission or exclusion of evidence. Because we conclude that Defendant's confrontation rights were violated and that the violation was not harmless, we reverse Defendant's convictions. We also conclude that there is sufficient evidence of Defendant's guilt to permit retrial on remand. Given the disposition of these issues, we do not address Defendant's other arguments.

A. Confrontation Clause

{5} At trial, four of the State's witnesses testified using Skype, an "Internet software application[ ] that . . . allow[s] users to engage in real time video and audio communications between two or more locations." 131 Am. Jur. Trials 475 § 1 (2014). Defendant argues that admission of their testimony via Skype violated his rights under the Sixth Amendment to the United States Constitution and Article II, Section 14 of the New Mexico Constitution. Both the Federal and New Mexico constitutions provide that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" *See* U.S. Const. amend. VI; N.M. Const. art. II, § 14. We will refer to the clause in both constitutions as "the confrontation clause."

{6} "[T]he [c]onfrontation [c]lause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." *Coy v. Iowa,* 487 U.S.

1012, 1016 (1988). But a defendant's rights under the confrontation clause are not absolute. *See State v. Almanza,* 2007-NMCA-073, ¶ 8, 141 N.M. 751, 160 P.3d 932. Rather, they "may give way to other important interests" when those interests are "narrowly tailored to include only those situations where the exception is necessary to further an important public policy." *Id.* (internal quotation marks and citations omitted). Thus, there must be "a particularized showing of necessity in the service of an important public policy before a court may approve an exception to physical presence." *State v. Smith,* 2013-NMCA-081, ¶ 8, 308 P.3d 135, *cert. denied,* 2013-NMCERT-006, 304 P.3d 425. "The necessity must be supported by specific findings by the trial court." *Id.* ¶ 15.

{7} "[M]ere inconvenience to the witness is not sufficient to dispense with face-to-face confrontation." *State v. Chung,* 2012-NMCA-049, ¶ 11, 290 P.3d 269 (internal quotation marks and citation omitted), *cert. quashed,* 2013-NMCERT-003, 300 P.3d 1182. Thus, this Court has reversed convictions where a witness testified via video or telephone conference when (1) the witness was located in Santa Fe and the hearing was held in Aztec, New Mexico, *see id.* ¶ 3; (2) the witness would have had to travel seven hours and be absent from the State Laboratory Division when it was shorthanded, *see Smith,* 2013-NMCA-081, ¶¶ 2, 11; and (3) when a chemist with the state crime lab was called on short notice and had a "busy schedule," *Almanza,* 2007-NMCA-073, ¶ 12. Our review of

confrontation issues is de novo. *See Smith,* 2013-NMCA-081, ¶ 3.

The District Court Erred in Permitting Video Testimony

{8} An FBI agent, two forensic scientists, and Defendant's mother testified via video. The State concedes that it "did not list any reason for the video testimony" of FBI Agent Bas or forensic scientist Gross "other than their residing outside of New Mexico." Additionally, it acknowledges that "the district court failed to make individualized factual findings [as] required to excuse [forensic scientist Pearn's] in-person appearance." Thus, it concedes that "[t]hese witnesses' testimony violated Defendant's confrontation rights." Although we are not bound by this concession, we agree with this conclusion because the district court failed to make specific findings supporting its conclusion that video testimony by these witnesses was necessary. *See id.* ¶ 5 ("The necessity must be supported by specific findings by the [district] court.").[1]

{9} Whether it was error to permit Defendant's mother, Patricia Labance, to testify via video presents a more complex question. As justification for

[1] The State requests that this Court reconsider its holding in *Smith* that two-way "video testimony does not itself 'satisfy' the requirements of the [confrontation clause]." *Id.* ¶ 7. We decline to do so.

permitting Labance to appear by video, the State argued that "Labance was born in 1938 and resides in Florida. . . . Labance currently suffers from severe stress, anxiety[,] and depression." It attached a letter from Labance's doctor, which stated that "this patient is suffering from severe stress, anxiety[,] and depression and is physically and psychologically unable to travel out of the state for the for[e]seeable future." At the hearing on the motion, the district court inquired into the substance of Labance's testimony and discussed with the parties how Skype works. Although the State said that Labance was available to speak to the district court, no evidence was taken at the hearing. The State also said that "[Labance was] not happy to be coming out here. She hasn't seen her son in a number of years. But she will come if necessary, but because of her failing health, . . . we'd like to do her [testimony via] live video." The State also distinguished *Chung,* in which this Court held that a defendant's confrontation rights were violated when the district court permitted video testimony based on a witness's seven-hour travel time, by arguing that "in our case, the travel is so much further and costly." *See Chung,* 2012-NMCA-049, ¶ 12. After argument, the district court stated that, "given the letter from [Labance's doctor] describing [Labance], I'm going to allow her to testify via . . . Skype[.]" The district court did not make written findings.

{10} The State arranged for Labance to testify via Skype from a courthouse in Naples, Florida. During cross-examination, Defendant questioned Labance

about her health. Labance testified that she was nervous and that the trial was "upsetting." In addition, counsel for Defendant and Labance had the following exchange.

> Q: . . . What type of health issues are you dealing with right now, ma'am?
>
> A: Well, physically I have arthritis really bad. Mentally, I've been very stressed, anxious. I've been very depressed over this whole situation.
>
> Q: And arthritis would be the main medical diagnosis you're suffering from?
>
> A: Yes.
>
> Q: Do you have trouble breathing?
>
> A: Not necessarily, no.

{11} After cross-examination was completed, Defendant moved for Labance's testimony to be stricken from the record. A bench conference was held. Defendant argued that, based on Labance's testimony, there was "no decent reason" that Labance could not have traveled to New Mexico to testify and that, therefore, his confrontation rights had been violated. The district court expressed some confusion about the contents of the doctor's letter, asking, "Is the doctor specific as to diagnoses, or is it general issues regarding health[?]" It is not clear from the record whether the letter was produced for the district court's review during the bench conference. Ultimately, the district court denied Defendant's motion stating, "None of us

are doctors, and we don't have the medical records. I'm going to accept, again on the basis of good faith, that there's a legitimate basis for [Labance to appear] by the Skype."

{12} We interpret the district court's statements to be a finding that it was medically necessary for Labance to testify via video. *See Smith,* 2013-NMCA-081, ¶ 9 (citing *Commonwealth v. Atkinson,* 2009 PA Super 239, ¶ 12, in which that court held that adult witnesses may testify by video only "when a witness is too ill to travel and when a witness is located outside of the United States") (internal quotation marks and citation omitted)). In doing so, we note that the district court's oral comments are perilously close to being inadequate for appellate review and note again that "[t]he necessity [for video testimony] must be supported by specific findings by the trial court." *Id.* ¶ 5; *see State v. Benny E.,* 1990-NMCA-052, ¶ 11, 110 N.M. 237, 794 P.2d 380 ("Absent findings indicating the [district] court was persuaded and why, the decision to deny a defendant his or her right of confrontation cannot be adequately reviewed on appeal."). The State argues that, because the district court's finding was supported by the "medical judgment" in the doctor's letter, we must affirm. We disagree that the letter alone is sufficient to demonstrate a compelling need to protect the witness as required to outweigh Defendant's rights under the confrontation clause.

{13} "[A]ny exceptions to the general rule providing for face-to-face confrontation [must be] narrowly

tailored." *Chung,* 2012-NMCA-049, ¶ 11 (internal quotation marks and citation omitted); *see Smith,* 2013-NMCA-081, ¶ 9 (stating that "[c]ourts define [policy concerns that outweigh the defendant's confrontation rights] narrowly"). Given the importance of the confrontation right and the narrowness of the exceptions to it, we conclude that the doctor's letter was inadequate as a matter of law to support a conclusion that Labance could not testify in person. *See id.* ¶ 15 (stating that "the reasons articulated by the district court for finding it necessary to allow the use of video testimony were insufficient as a matter of law to support its use"); *see, e.g., Bush v. State,* 2008 WY 108, ¶ 52, 193 P.3d 203 (Wyo. 2008) (medical necessity supported where the district court considered medical records); *State v. Sewell,* 595 N.W.2d 207, 211 (Minn. Ct. App. 1999) (medical necessity supported where the witness's doctor indicated by affidavit and through telephone contact with the court that the witness was too ill to travel); *cf. State v. Tafoya,* 1988-NMCA-082, ¶ 16, 108 N.M. 1, 765 P.2d 1183 (finding of necessity for use of video depositions of child witnesses at trial supported by substantial evidence where there was a "full day of testimony" by experts and the witnesses' parents); *State v. Vigil,* 1985-NMCA-103, ¶¶ 6-7, 103 N.M. 583, 711 P.2d 28 (finding of necessity for video deposition of a child witness supported by substantial evidence where the state presented expert testimony on the possible impact on the witness of in-person testimony). The fact that the State conceded that Labance could travel to New Mexico to testify if necessary simply

highlights the inadequacy of the evidence behind the district court's conclusion.

{14} Based on the foregoing, we conclude that it was error to permit video testimony by Bas, Gross, Pearn, and Labance because the necessity for video testimony was not supported by sufficient findings.

With One Exception, Admission of Video Testimony Was Not Harmless

{15} A violation alone, however, does not require a new trial. Rather, only when a violation of the confrontation clause is harmful to the defendant does the violation require a new trial. *See State v. Tollardo,* 2012-NMSC-008, ¶ 25, 275 P.3d 110 ("Improperly admitted evidence is not grounds for a new trial unless the error is determined to be harmful."). The State bears the burden of demonstrating that the error was harmless. *See State v. Gutierrez,* 2007-NMSC-033, ¶ 18, 142 N.M. 1, 162 P.3d 156.

{16} To determine whether an error in admission of evidence is harmless, this Court reviews "the error itself, including the source of the error and the emphasis placed on the error at trial. To put the error in context, we often look at the other, non-objectionable evidence of guilt, not for a sufficiency-of-the-evidence analysis, but to evaluate what role the error played at trial." *State v. Leyba,* 2012-NMSC-037, ¶ 24, 289 P.3d 1215. In addition, "courts may, depending upon the circumstances of the cases before them, examine the importance of the erroneously admitted evidence in

the prosecution's case, as well as whether the error was cumulative or instead introduced new facts." *Tollardo,* 2012-NMSC-008, ¶ 43 (alterations, internal quotation marks, and citations omitted). Whether certain evidence is harmless depends on a variety of factors unique to each case. *See id.* ¶ 44 ("Reviewing courts must keep in mind that harmless error review necessarily requires a case-by-case analysis.").

{17} We begin by addressing the testimony presented by video related to DNA analyses, then turn to Labance's testimony. The State presented four forensic scientists, of which two – Pearn and Gross – testified by video. Pearn developed a DNA profile of McEachin based on DNA found on McEachin's shoes. She also tested DNA found on the waistband of a pair of jeans found near the body. She concluded that "neither [the victim] or [Defendant] could be excluded as contributors to [the DNA on the waistband]." Thus, Pearn's work (1) resulted in a DNA profile of the victim, and (2) provided a possible link between the body and Defendant.

{18} Gross tested a femur taken from the body, created a DNA profile for the femur, and then compared that profile to the DNA profile of McEachin's daughter. The daughter's DNA profile had been completed by an analyst at the Federal Bureau of Investigation (FBI) and provided to Gross. Gross identified the DNA types in common between the two samples and testified that it was "42,000 times more likely to observe th[e common] genetic information if [the daughter] was the true biological daughter [of the victim] as

compared to an untested random woman from the population." The bulk of Ms. Gross's testimony thus went to identification of the body as McEachin's.

{19} Bas testified that he obtained a blood sample from McEachin's daughter that was then forwarded to the FBI for analysis. Bas's testimony went to a portion of the chain of events that led to the daughter's sample being analyzed by the FBI and then compared to the profile of the body by Gross, thus leading to identification of the body as McEachin's.

{20} There is no reasonable possibility that Bas's testimony had the evidentiary importance to impact Defendant's conviction. Bas testified only about how he collected blood from McEachin's daughter and sent it to the Albuquerque field office of the FBI. At the hearing on the State's motion to permit video testimony, Defendant stipulated that Bas's testimony only established a chain of custody of the daughter's sample and, on appeal, Defendant does not address how he was prejudiced by Bas's testimony at all. In the context of this case and in light of the totality of the circumstances surrounding the testimony, we conclude that Bas's testimony by video was harmless.

{21} The same is not true of the testimony by forensic scientists Pearn and Gross. The State argues that their testimony was harmless for two reasons. It first argues that because Defendant had an opportunity to cross-examine the witnesses, the use of video had "only a marginal impact on his right of confrontation." It contends secondly that the video testimony

was "relative[ly] insignifican[t] . . . in comparison to the overall evidence of guilt." Despite these efforts to minimize the role of the video testimony in the State's case, we conclude that the video testimony was critical to identification of the body and association of Defendant with the body, both of which were essential to the State's case. Hence, there is no reasonable possibility that this evidence did not contribute to Defendant's conviction. *See id.* ¶ 45.

{22} In its first contention, the State argues that "Defendant had the ability to cross-examine all of the witnesses appearing by video conference in full view of the jury such that there was only a marginal impact on his right of confrontation." *Cf. State v. Lopez,* 1996-NMCA-101, ¶ 14, 122 N.M. 459, 926 P.2d 784 ("The right to cross-examination is viewed as the most important element of the right of confrontation."). The State argues that Defendant's limited cross-examination of the witnesses "show[s] that the video testimony had no impact on the trial or the jury's verdict." Although a defendant's cross-examination of witnesses may be considered in assessing the role of evidence at trial, whether and how Defendant cross-examined the witnesses is not dispositive of the ultimate question of harmlessness because that analysis focuses on whether the evidence affected the verdict, not how Defendant responded to it. *See State v. Serna,* 2013-NMSC-033, ¶ 25, 305 P.3d 936 (discussing the defendant's cross-examination as part of the assessment of the amount of emphasis placed on erroneously admitted evidence); *Tollardo,*

2012-NMSC-008, ¶ 42 ("[T]he central inquiry of [the harmless error analysis is] whether an error was likely to have affected the jury's verdict."). Because the State's argument shifts the focus away from this central inquiry, we are unpersuaded. Thus, we turn to the State's contentions as to the role of Pearn's and Gross's testimony at the trial and its impact on the jury.

{23} The State's second argument is that Gross's and Pearn's testimony was insignificant in comparison to the overall evidence of guilt. Specifically, it argues that (1) the video testimony as to identity was duplicative of other evidence and therefore insignificant, and (2) the video testimony tying Defendant to the body was of "minor significance" compared to evidence of "the victim's blood on the carpet in Defendant's bedroom," which was established through in-person testimony. We address these arguments in turn.

{24} We disagree that the video testimony as to identity was duplicative and therefore harmless for two reasons. First, the video testimony was not merely cumulative of other evidence. Although in-person testimony by McEachin's friends described her physical features, and the jury could infer from other in-person testimony that those features matched the body, the State nevertheless devoted a substantial amount of time presenting DNA evidence to establish identity. Three different analyses were conducted to do so: Pearn developed a profile using DNA from shoes belonging to McEachin, Gross developed a

profile from a femur of the body and compared it to McEachin's daughter's profile, and a third witness, testifying in person, compared the Pearn and Gross profiles and found that they matched. The State's attempt to minimize the importance of the DNA evidence is belied by the amount of time and effort the State took to present the DNA evidence and the emphasis placed on it. Indeed, the State itself described the body's characteristics as less probative than the DNA evidence in its opening argument. We cannot conclude that the video testimony did not have an impact on the verdict simply because there was also in-person testimony on the identity of the body. Second, even if the video testimony was cumulative, "improperly admitted evidence that is cumulative is not *ipso facto* harmless beyond a reasonable doubt." *Tollardo,* 2012-NMSC-008, ¶ 43 (footnote, internal quotation marks, and citation omitted). Rather, even cumulative evidence may be harmful if it had an impact on the jury's verdict.

{25} To the extent the State also argues that Defendant did not contest that the body was McEachin's and therefore any improperly admitted testimony on that issue was harmless, we disagree. We note first that at trial, the State acknowledged that Defendant "disput[ed] that it's even . . . McEachin's body[.]" In any case, whether Defendant disputed this fact is not conclusive of whether the testimony is harmless. In *State v. Sisneros,* our Supreme Court addressed a similar argument and held that erroneous admission of a forensic pathologist's testimony as to the cause of

death was harmless because "the cause and manner of death were never in dispute, only the identity of the shooter." 2013-NMSC-049, ¶ 33, 314 P.3d 665. The premise underlying that holding is that there was nothing about the cause and manner of death that pointed to the defendant as the shooter. That premise does not apply here. In this case, Defendant did not contest that he knew McEachin and that she had lived with him briefly. Rather, he maintained in his statement to officers that she left his apartment and never returned. Thus, the identification of the body as McEachin's, coupled with the fact that McEachin had lived with Defendant until shortly before the body was found, implicated Defendant. This argument is unavailing.

{26} In its final argument, the State maintains that Pearn's testimony about the DNA found on the jeans "held only minor significance in tying Defendant to the scene where the body had been hidden" and that because the material – presumed to be blood – found in Defendant's apartment was "the most damning physical evidence[,]" the testimony about the jeans paled in comparison. As discussed, however, Defendant never denied that McEachin had lived with him and argued at trial that McEachin's DNA could have gotten on the carpet any number of ways during that time. In this context, the DNA on the carpet merely showed that McEachin had been in the apartment. Because Defendant did not dispute this fact, evidence tying Defendant to the body in the alley was critical to the State's case. We are unpersuaded by the State's

characterization of the video testimony about the jeans in comparison to the DNA found on the carpet.

{27} Finally, the centrality of DNA evidence, including the video testimony, to the State's case is also evident in the State's opening and closing arguments. In its opening, the State referred to the jeans as "[Defendant's] jeans" and stated they were "[o]ne of the most important pieces of the evidence . . . at th[e] scene[.]" It described the DNA testing as determinative that the jeans were Defendant's. It stated that Defendant "put his jeans, evidence of the murder" near the body. The State discussed the DNA testing of the femur from the body and McEachin's daughter, stating that the physical characteristics of the body did not allow the police to be "absolutely certain" of the identity of the body. In closing argument, the State referred to DNA evidence at least four times and devoted a substantial portion of its rebuttal argument to the jeans and DNA evidence related to them, referring to the jeans as "the one piece of evidence that could tie [Defendant] to th[e] body[.]" Based on the role Gross's and Pearn's testimony played in the State's case, we conclude that there is no reasonable possibility that the DNA evidence they presented did not contribute to Defendant's conviction. *See Leyba,* 2012-NMSC-037, ¶ 30 (stating that the use of the victim's diary at trial was not harmless where "[b]oth its placement and the repetitive manner in which the [s]tate referred to the diary during closing argument[ ] strongly suggest how useful it was to the [s]tate. As any good trial lawyer knows, a

jury is most likely to remember the first and last things heard before retiring").

{28} We turn next to the question of whether Labance's testimony was harmless. Labance testified as to the nature of Defendant's relationship with McEachin, as well as how and when they met. She testified that she had sent Defendant a blue air mattress in early 2008, as well as a set of sheets, a blanket, and other household goods. She authenticated a receipt for those items that she had sent to a detective, which was admitted into evidence. The detective used the authenticated receipt to purchase an air mattress of the same model, a photo of which was also admitted into evidence. During trial, a photo of the air mattress found with the body was compared to the photo of the purchased air mattress. Labance also authenticated letters Defendant had sent her, which were then admitted into evidence. A detective later read the letters during his testimony. In one letter, Defendant acknowledged receipt of the air mattress and stated that he loved McEachin. In another, dated a little more than a week before the body was found, Defendant wrote that McEachin was "headed to El Paso a few weeks ago" and that she was going on to Juarez. Finally, Labance testified that Defendant told her he had given the air mattress away.

{29} The State concedes on appeal that it was "significant that Defendant's . . . air mattress and sheets were not only at the scene but wrapped around the victim." In its motion for video testimony, the State acknowledged that Labance's testimony

was important not only to authenticate the receipt for the air mattress, sheets, and letters from him acknowledging receipt of those items, but also to establish Defendant's relationship with McEachin. Labance's testimony provided evidence that Defendant had owned a blue air mattress, as well as details about the air mattress that matched the one found with the body. In addition, her authentication of Defendant's letters allowed the State to use Defendant's own statements against him. Labance's testimony thus established a link between Defendant, the air mattress, and the body. Although the State argues that the documents could have been authenticated another way, the State chose to rely on Labance to get the documents admitted. Having made that choice, the State cannot now argue, simply because there was another method for admission of the documents, that the jury did not rely on Labance's testimony to convict Defendant. We conclude that Labance's testimony played a key role in the State's case and that the State has failed to demonstrate that Labance's testimony was harmless.

II. [sic] **SUFFICIENCY OF THE EVIDENCE**

{30} We next examine whether the evidence was sufficient to convict Defendant for second degree murder and tampering with evidence both because Defendant asserts the evidence was insufficient and because this Court must address sufficiency in order to determine whether retrial would offend principles of double jeopardy. *See State v. Cabezuela,*

2011-NMSC-041, ¶ 47, 150 N.M. 654, 265 P.3d 705 ("Because we find that there was sufficient evidence to convict [the d]efendant, . . . retrial is not barred by double jeopardy implications.").

{31} In a review of the sufficiency of the evidence, "we [first] view the evidence in the light most favorable to the verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict." *State v. Armendariz-Nunez,* 2012-NMCA-041, ¶ 16, 276 P.3d 963, *cert. denied,* 2012-NMCERT-003, 293 P.3d 183. We "then . . . make a legal determination of whether the evidence viewed in this manner could justify a finding by any rational trier of fact that each element of the crime charged has been established beyond a reasonable doubt." *Id.* (internal quotation marks and citation omitted). "The reviewing court does not weigh the evidence or substitute its judgment for that of the fact finder as long as there is sufficient evidence to support the verdict." *State v. Mora,* 1997-NMSC-060, ¶ 27, 124 N.M. 346, 950 P.2d 789, *abrogated on other grounds as recognized by Kersey v. Hatch,* 2010-NMSC-020, ¶ 17, 148 N.M. 381, 237 P.3d 683. Defendant bears the burden of "identif[ying] with particularity the fact or facts that are not supported by substantial evidence" on appeal. Rule 12-213(A)(4) NMRA.

{32} In an apparent attempt to reframe the standard of review, Defendant's only argument on appeal relies on *State v. Malouff,* a 1970 case in which this Court held that "when circumstances alone are relied upon, they must point unerringly to [the] defendants

and be incompatible with and exclude every reasonable hypothesis other than guilt." 1970-NMCA-069, ¶ 3, 81 N.M. 619, 471 P.2d 189. Defendant's argument rests entirely on the premise that the State's case, being based on circumstantial evidence, failed to "exclude every reasonable hypothesis other than guilt." *Id.* But the standard stated in *Malouff* was expressly repudiated by our Supreme Court in *State v. Brown. See* 1984-NMSC-014, ¶ 7, 100 N.M. 726, 676 P.2d 253 (stating that "the traditional distinctions between direct and circumstantial evidence have been abolished" and that "[t]he only test recognized by [our Supreme] Court to test the sufficiency of evidence is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction"); *see also State v. Garcia,* 2005-NMSC-017, ¶¶ 18, 19, 138 N.M. 1, 116 P.3d 72 (stating that "After *Brown*, . . . the proposition that substantial evidence in support of a conviction must be inconsistent with any reasonable hypothesis of innocence" is no longer the standard in New Mexico). Defendant's reliance on *Malouff* is, therefore, unavailing.

{33} Here, the State was required to prove that

1. [D]efendant killed . . . McEachin;
2. [D]efendant knew that his acts created a strong probability of death or great bodily harm to . . . McEachin or any other human being;

3. [D]efendant did not act as a result of sufficient provocation;

4. This happened in New Mexico on or between the 23rd day of April and the 14th day of May, 2008.

See UJI 14-210 NMRA. Other than asserting that circumstantial evidence is insufficient to support the verdict, Defendant makes no argument identifying which facts lack sufficient evidence. Although we generally do not address undeveloped arguments, we do so here in order to ascertain whether Defendant may be retried on remand. *See Cabezuela,* 2011-NMSC-041, ¶ 40.

{34} Here, the jury heard testimony that McEachin and Defendant lived together until a few weeks before the body was discovered and that they shared an intimate relationship. Testimony by detectives established that the body was found in an alley 500 feet from Defendant's apartment, wrapped in a blue air mattress and sheets, covered with another mattress. Defendant's mother testified that she had sent him a blue air mattress and sheet set as a gift. The jury saw photographs and heard testimony that grid marks on the air mattress looked like the grid of a shopping cart and that there was a shopping cart at the scene. They also heard testimony that Defendant had shopping carts in his apartment. They heard testimony that a pair of jeans with DNA on it – for which Defendant could not be ruled out as the source – was found near the body. A forensic scientist testified that McEachin's blood was found on the carpet in

Defendant's apartment. There was also testimony that the cause of death was "multiple blunt force injuries . . . [to t]he head and chest area" and that Defendant gave two different explanations for why he no longer had the air mattress his mother sent him. Viewed in the light most favorable to the verdict and indulging all reasonable inferences in favor of conviction, this evidence was sufficient to permit the jury to find Defendant guilty of second degree murder.

{35} We turn to the charge of tampering with evidence. "Tampering with evidence is a specific intent crime, requiring sufficient evidence from which the jury can infer that the defendant acted with an intent to prevent apprehension, prosecution or conviction of any person or to throw suspicion of the commission of a crime upon another." *State v. Silva,* 2008-NMSC-051, ¶ 18, 144 N.M. 815, 192 P.3d 1192 *holding modified by State v. Guerra,* 2012-NMSC-027, ¶¶ 12-14, 284 P.3d 1076 (internal quotation marks and citation omitted); *see* NMSA 1978, § 30-22-5(A) (2003). The State was required to prove that

> 1. [D]efendant destroyed and/or changed and/or hid and/or fabricated and/or placed clothing belonging to himself and[/]or . . . Mc[E]achin and/or the body of . . . Mc[E]achin and/or her suitcases, her laptop, her printer, her purse[;]

2. [By doing so, D]efendant intended to prevent the apprehension, prosecution[,] or conviction of himself;

3. This happened in New Mexico on or between the 23rd day of April and the 14th day of May, 2008.

See UJI 14-2241 NMRA. The State concedes that it did not present direct evidence or evidence of "an overt act with respect to" McEachin's suitcase, purse, laptop, or printer. Nevertheless, any lack of evidence regarding McEachin's belongings does not require reversal here because there was sufficient evidence to support one or more of the other alternative bases for conviction. *See State v. Olguin,* 1995-NMSC-077, ¶ 2, 120 N.M. 740, 906 P.2d 731 ("[D]ue process does not require a guilty verdict to be set aside if an alternative basis of conviction is only factually inadequate to support a conviction.").

{36} In addition to tampering with McEachin's laptop, printer, purse, or suitcase, the jury instruction permitted conviction on the basis of tampering with Defendant's own clothing, the victim's clothing, or the victim's body. The jury could infer that Defendant placed the victim's body in the alley from the testimony that Defendant owned a blue air mattress and sheets, that the body was found wrapped in a blue air mattress and sheets, that clothes bearing his DNA were found with the body, and that the alley was approximately 500 feet from his apartment. In addition, there was testimony that a mattress was placed over the body in the alley. Although Defendant argues

that this evidence is "only" circumstantial, New Mexico does not recognize a distinction between direct or circumstantial evidence, as previously discussed. We conclude that the evidence presented, viewed in the light most favorable to the verdict, was sufficient to permit the jury to infer that Defendant intended to "prevent [his] apprehension, prosecution, or conviction" by covering and placing the body in the alley. UJI 14-2241.

{37} In conclusion, there was sufficient evidence to support Defendant's convictions for second degree murder and tampering with evidence.

III. [sic] **CONCLUSION**

{38} Having concluded that video testimony by Pearn, Gross, and Labance was admitted in error and that this error was not harmless, we reverse Defendant's convictions. In addition, since the evidence was sufficient for conviction of both second degree murder and tampering, we remand for a new trial. We need not address Defendant's other allegations of error in the admission of evidence.

{39} IT IS SO ORDERED.

/s/ Michael D. Bustamante
MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

/s/ Michael E. Vigil
MICHAEL E. VIGIL, Judge

/s/ Timothy L. Garcia
TIMOTHY L. GARCIA, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

BRUCE SCHWARTZ,

Defendant-Appellant.

NO. 32,451

Michael D. Bustamante, Presiding Judge
Michael E. Vigil, Judge
Timothy L. Garcia, Judge

ORDER ON MOTION FOR REHEARING

(Filed Apr. 10, 2014)

Bustamante, Judge.

THIS MATTER came on for review of the Motion for Rehearing filed by the Appellee. The motion was considered by each of the members of the original panel. The panel has unanimously determined to deny the motion for rehearing.

IT IS THEREFORE ORDERED that the Motion for Rehearing be, and it hereby is, DENIED.

IT IS SO ORDERED.

/s/ Michael D. Bustamante
MICHAEL D. BUSTAMANTE, Judge

SECOND JUDICIAL DISTRICT COURT

COUNTY OF BERNALILLO

STATE OF NEW MEXICO

No. CRCR 2010-02659
DA#: 2010-03157-1-DV

STATE OF NEW MEXICO,

Plaintiff,

vs.

BRUCE SCHWARTZ,
DOB: [redacted]-1957
SSN: [redacted]-5747
ADD: Department of Corrections

Defendant.

JUDGMENT, SENTENCE AND COMMITMENT

(Filed Aug. 27, 2012)

On August 14, 2012 this case came before the Honorable ROBERT M. SCHWARTZ, District Judge, for sentencing, the State appearing by TERRI KELLER, ASSISTANT District Attorney, the Defendant appearing personally and by his attorney ROBERT WORK, and the Defendant having been convicted on April 25, 2012, pursuant to, accepted and recorded by the Court, of the offenses of SECOND DEGREE MURDER, a 2nd degree felony offense occurring on or about April 23, 2008 through May 14, 2008 and TAMPERING WITH EVIDENCE, a 3rd degree felony offense occurring on or about April 23, 2008 through May 14, 2008.

The Defendant is hereby found and adjudged guilty and convicted of said crime, and is sentenced to the custody of the Corrections Department to be imprisoned for the term of FIFTEEN YEARS. The sentences for the crimes shall be served concurrent to each other.

THEREFORE, You, the Corrections Department of the State of New Mexico are hereby commanded to take the above-named Defendant in custody and confine for the above term. The Court recommends Defendant receive ***mental health care*** and ***therapeutic communities*** while incarcerated.

Defendant is to receive credit for 818 days presentence confinement and for post-sentence confinement until delivery to the place of incarceration.

IT IS FURTHER ORDERED that the Defendant be placed on parole for TWO YEARS after release and be required to pay parole costs.

/s/ Robert M. Schwartz
ROBERT M. SCHWARTZ
DISTRICT JUDGE

APPROVED:

/s/ Terri Keller
Assistant District Attorney

Robert Work approves
Attorney for Defendant

THE SUPREME COURT OF THE STATE OF MEXICO
June 17, 2014

NO. 34,690

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

BRUCE SCHWARTZ,

Defendant-Respondent.

ORDER

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition, and being sufficiently advised, Chief Justice Barbara J. Vigil, Justice Petra Jimenez Maes, Justice Richard C. Bosson, Justice Edward L. Chávez, and Justice Charles W. Daniels concurring;

NOW, THEREFORE, IT IS ORDERED that the petition for writ of certiorari is denied in Court of Appeals number 32451.

IT IS SO ORDERED.

WITNESS, The Hon. Barbara J. Vigil, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 17th day of June, 2014.

(SEAL) /s/ Madeline Garcia
Madeline Garcia, Chief Deputy Clerk