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STATE OF MINNESOTA

IN SUPREME COURT

State of Minnesota,

Appellant,

vs.

Anthony James Trifiletti,

Respondent.

RESPONDENT'S BRIEF

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A21-1101

STATE OF MINNESOTA

IN SUPREME COURT

State of Minnesota,

Appellant,

vs.

RESPONDENT'S BRIEF

Anthony James Trifiletti,

Respondent.

PROCEDURAL HISTORY

1. May 1, 2020:	Date of charged offense.
2. May 4, 2020:	The Ramsey County Attorney's Office charged Anthony Trifiletti with second-degree intentional murder.
3. February 22, 2021:	Jury trial commenced before the Honorable Thomas Gilligan Jr.
4. March 4, 2021:	Judge Gilligan instructed the jury on second-degree intentional murder, second-degree unintentional felony murder, and the lesser-include offense of second-degree culpable-negligence murder.

5. March 8, 2021: Because the jury was deadlocked, Judge Gilligan declared a mistrial.

6. April 5, 2021: Second jury trial commenced before Judge Gilligan.

7. April 19, 2021: The jury acquitted Trifiletti of second-degree intentional murder. The jury found Trifiletti guilty of second-degree unintentional felony murder and the lesser-included offense of second-degree culpable-negligence manslaughter.

8. June 2, 2021: Judge Gilligan sentenced Trifiletti to 150 months in prison.

9. August 30, 2021: Trifiletti filed a direct appeal with the Minnesota Court of Appeals.

10. September12, 2022: The court of appeals reversed Trifiletti's convictions and remanded for a new trial.

11. October 7, 2022: The State filed a petition for review with the Minnesota Supreme Court.

12. January 17, 2023: The supreme court granted the State's petition for review. The supreme court stayed the further proceedings pending the final disposition in *State v. Tate*, No. A21-0359.

13. April 18, 2023: The supreme court dissolved the stay.

LEGAL ISSUE

The Confrontation Clause of the Sixth Amendment of the United States Constitution prevents the State from introducing a transcript of a non-testifying witness' prior testimony unless the State establishes that the witness is unavailable to testify under a founding-era exception to the Confrontation Clause.

Did the State meet its burden of proving that its witness was unavailable where the witness self-reported *possible* exposure to a contagious virus, a physician instructed the witness that there was no need to test for the virus, a county health professional advised that it was safe for the witness to testify in person, the witness was symptom free at the time of trial and not in quarantine, the witness was never instructed by a health professional to quarantine, and the State did not present evidence that the witness was unable to safely testify on a later date?

Rulings below:

Over Trifiletti's repeated confrontation clause objections, the trial court concluded that the witness was unavailable to testify and allowed the State to read the transcript of the witness' prior testimony at trial. (T. 1412-13, 1640-47, 1734-35.)[1] The Minnesota Court of Appeals reversed after

[1] "T." refers to the transcript from Trifiletti's jury trial.

concluding that the trial court violated Trifiletti's right to confrontation by allowing the State to introduce the transcript of the witness' prior testimony without meeting its burden of establishing that the witness was unavailable to testify under an exception to the confrontation clause. (*State v. Trifiletti*, A21-1101 (Minn. App. Sept. 12, 2022)(addendum 1).)

Apposite authority:

Crawford v. Washington, 541 U.S. 36 (2004)

Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009)

West v. Louisiana, 194 U.S. 258 (1904)

STATEMENT OF THE CASE

The Ramsey County Attorney's Office charged Anthony Trifiletti with second-degree intentional murder in violation of Minnesota Statutes section 609.19, subdivision 1(1). At Trifiletti's first jury trial, the Honorable Thomas Gilligan instructed the jury on the additional charges of second-degree unintentional felony murder in violation of Minnesota Statutes section 609.19, subdivision 2(1) and the lesser-included offense of second-degree culpable negligence manslaughter in violation of Minnesota Statutes section 609.205 (1). After the jury indicated that it was deadlocked, Judge Gilligan declared a mistrial.

A second jury trial was held before Judge Gilligan. The jury acquitted Trifiletti of second-degree intentional murder and found Trifiletti guilty of both second-degree unintentional felony murder and the lesser-included offense of second-degree culpable negligence manslaughter. Judge Gilligan sentenced Trifiletti to 150 months in prison.

On direct appeal, the Minnesota Court of Appeals reversed Trifiletti's convictions and remanded for a new trial. The court of appeals found that the trial court violated Trifiletti's constitutional right to confrontation by allowing the State to read a transcript of the eyewitness' testimony from Trifiletti's first trial without the witness testifying before the jury because

the State did not establish that the witness was unavailable to testify under the Sixth Amendment of the United States Constitution.

This Court granted the State's petition for review. Trifiletti requests that this Court affirm the court of appeals' decision

STATEMENT OF FACTS

A. BACKGROUND.

The State charged Respondent Anthony Trifiletti with second-degree intentional murder and second-degree unintentional felony murder after he fatally shot Doug Lewis following a minor traffic accident in St. Paul. Trifiletti claimed that he shot Lewis in self-defense after Lewis reached for what Trifiletti thought was a gun.

Trifiletti's first jury trial ended in a deadlocked jury, which resulted in the trial court declaring a mistrial.

B. TRIFILETTI'S SECOND JURY TRIAL

A. The makeshift courtroom.

To ensure that the trial participants, court staff, and the jurors could maintain proper social distance, and abide by the courtroom protocols required by the Chief Justice and Governor's COVID-19 orders, Trifiletti's trial took place in a makeshift courtroom in an auditorium in the basement of the Ramsey County Courthouse.[2] (2/18/21 T. 212-25.)[3] The Court described the courtroom "as not a courtroom at all, it's an auditorium in the

[2] The State erroneously asserts that the "[t]he court of appeals majority should have deferred to Judge Gilligan, who knows the tight quarters of his courtroom[.]" (App.'s brf. at 10.) The trial did not take place in Judge Gilligan's courtroom, and the trial participants were not subject to "tight quarters."

basement of the courthouse and it is just large enough to accommodate all of the essential personnel who need to participate in the trial." (2/18/21 T. 212.)

During the trial, everyone wore masks, everyone remained six feet apart, and the witnesses testified from an elevated witness stand that was protected by plexiglass. (2/18/21 T. 219-20, 222; 4/5/21 T. 8-10, 32-34, 45-47.) The court also put in place specific procedures to avoid contact between the attorneys and testifying witnesses. (2/18/21 T. 219-20.)

B. Witness exposure to COVID-19.

During Trifiletti's trial, the court considered whether three witnesses were unavailable to testify due to COVID-19 exposure: Travis Anderson, Sean Severin, and Monae Williams.

1. Travis Anderson.

On April 5, 2021, Travis Anderson reported that he tested positive for COVID-19 and that he was symptomatic. (T. 66.) The court concluded that because Anderson tested positive for COVID-19 and was symptomatic, he was unavailable to testify at trial. (T. 66.) On April 13, 2021, Anderson reported that he completed his quarantine period, which resulted in the court concluding that he was available to testify in person at trial. (T. 1317-18.)

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[3] "2/18/21 T." refers to the transcript from the hearing held on February 18, 2021.

2. Sean Severin.

On April 13, 2021, the State indicated that Sean Severin had "potential COVID exposure" on April 11th. (T. 1315.) Severin reported that he had explained his circumstances to his healthcare provider and was advised to quarantine for ten days. (T. 1315.) The court deemed Severin unavailable to testify. (T. 1734-35.) [4]

3. Monae Williams.

Prior to the April 13, 2021, hearing, Williams reported to the prosecutor that she previously had a cough, which had completely dissipated by the time the trial started, and later indicated that she had contact with someone on April 6th, who subsequently tested positive for COVID-19 on April 12th. (T. 1314-15.) Williams had sought medical care for her cough and the doctor told Williams that she did not need to take a COVID-19 test. (T. 1314-16.) Williams never tested positive for COVID-19 and was never ordered by a health professional to quarantine. Over Trifiletti's repeated objections, the court determined that Williams was unavailable to testify at trial. (T. 1734-35.)

[4] On appeal to the court of appeals, Trifiletti did not challenge the trial court's determination that Severin was unavailable to testify because the introduction of the transcript of Severin's testimony was likely harmless error. Unlike Monae Williams's testimony, Severin did not claim to have witnessed the crucial moments preceding the shooting or the shooting itself.

C. Evidence presented at trial.

1. The evening of May 1, 2020.

On the evening of May 1, 2020, Trifiletti and three of his friends—Travis Anderson, Evan Wiebusch, and Nick Moritz—drove from the Shakopee area to Minneapolis to spend time at the Stone Arch Bridge. (T. 1420, 1481, 1483; ex. 345.) The four men, all in their early twenties, each drank a beer while taking in the views from the bridge. (T. 1423, 1483; ex. 345.) Trifiletti possessed his firearm, which he had a permit to legally carry. (T. 1484-85, 2007-08, 2013; ex. 245.)

At around 9:00 p.m., the group left the bridge to drive to a friend's house in Cottage Grove. (T. 1427, 1486.) Trifiletti drove his truck while Anderson, Moritz, and Wiebusch rode in Wiebusch's truck. (T. 1426.)

2. The traffic accident.

While Wiebusch followed Trifiletti as they drove on Eastbound I-94, a Ford Edge SUV driven by Doug Lewis cut off Wiebusch's truck and moved into the small space between Wiebusch's truck and Trifiletti's truck. (T. 1427-28, 1463, 1491.) Wiebusch hit the brakes "pretty heavily" when Lewis cut him off to avoid hitting Lewis's vehicle. (T. 1428.) The severity of how Lewis cut off Wiebusch's truck, and how aggressive Lewis was driving, caught the attention of the three men in Wiebusch's truck. (T. 1428, 1463, 1489-90.)

Trifiletti also noticed that Lewis's vehicle was weaving aggressively in and out of traffic. (T. 2015-16.) After Lewis's vehicle cut off Wiebusch's truck, and was directly behind Trifiletti's truck, Trifiletti stepped on the brakes. (T. 1430, 1494, 2016.) Trifiletti and Lewis went back and forth accelerating and slowing down until Lewis rear-ended Trifiletti's truck near the southbound exit onto Highway 61. (T. 1252-53, 1430, 1432-33, 1493, 1495, 1560, 2016.) After Lewis hit Trifiletti's truck, Lewis and Trifiletti exited Highway 61 onto Burns Avenue. (T. 1496, 2017.)

Lucas Popp, who was not associated with Trifiletti, Trifiletti's friends, or Lewis, was also driving on I-94 on May 1st. (T. 1261, 1264, 1267.) Prior to Lewis hitting Trifiletti's truck, Popp observed Lewis's driving and described it as "aggressive," "erratic," and "scary." (T. 1282-83, 1285.) After Popp noticed that something took place between Lewis's vehicle and Trifiletti's truck, Popp decided to follow them off the freeway to provide Trifiletti with information about Lewis's erratic driving. (T. 1272-76.)

3. The shooting.

Lewis, Trifiletti, Popp, and Trifiletti's three friends all exited Highway 61 onto Burns Avenue. (T. 2018; exs. 1-5, 28-32.) Lewis parked his Ford Edge on Burns Avenue, Trifiletti parked his truck behind Lewis, Popp parked his vehicle behind Trifiletti, and Wiebusch parked his truck behind the other

vehicles, but on Etna Street, which is perpendicular to Burns Avenue. (T. 1273-74, 1437, 2018; exs. 1-5, 33-39.)

After Trifiletti parked his vehicle, he put his firearm in his waistband, exited his truck, and looked at the damage to the back of his truck. (T. 2018.) Trifiletti was not happy about the damage, but he knew it could be fixed. (T. 2017.) Trifiletti took a photograph of the damage. (Ex. 346.)

As Trifiletti was standing near his truck, Popp approached Trifiletti and provided Trifiletti with his phone number in case Trifiletti needed information regarding Lewis's erratic driving. (T. 1277, 2018-20.) When Popp and Trifiletti interacted, Trifiletti was not yelling, screaming, or acting crazy; and it did not seem like Trifiletti was going to act out because of the accident. (T. 1275, 1278, 1287, 1387.) Although Popp and Lewis did not interact, Lewis also appeared to be calm and unagitated. (T. 1278.) Popp waited to see if Trifiletti and Lewis would interact, but became impatient and left the scene. (T. 1278.)

Trifiletti called his dad and told him he had been in an accident. (T. 1928, 2027.) Trifiletti explained to his dad that he was okay, and his truck had just been "banged up in the back a little bit." (T. 1929.) Trifiletti's demeanor was calm during the phone call. (T. 1943, 1953.)

After Trifiletti ended the call with his father, Trifiletti approached Lewis and asked Lewis for his insurance information. (T. 2027.) Lewis

responded to Trifiletti by stating, “give me your f-ing insurance information.” (T. 2028.) Trifiletti was confused by Lewis’s response, so he took a step back from the situation. (T. 2028.) Trifiletti walked around Lewis’s vehicle and took photographs of the front of the vehicle. (T. 1563, 2028-29; exs. 347, 348, 403.)

After looking at Lewis’s vehicle, Trifiletti noticed that his three friends were observing the damage to his truck, so he walked back to his truck to speak with them. (T. 1563, 2029.) Trifiletti’s friends noticed that Trifiletti seemed frustrated that his truck was damaged, but they did not observe Trifiletti make any threatening statements about Lewis. (T. 1464, 1470-71, 1536.)

As Trifiletti and his friends were talking, they noticed that Lewis was standing next to his vehicle, and appeared to be arguing with someone on the phone. (T. 1440.) After Lewis got off the phone, Trifiletti reapproached Lewis and asked him for his insurance information a second time. (T. 2030.) Lewis seemed agitated. (T. 2031.)

Lewis then turned away from Trifiletti, walked back to his vehicle, and “rummaged” through items inside his vehicle. (T. 1564, 2031.) Trifiletti assumed Lewis was getting his insurance information and that the situation would soon be over. (T. 2030-31.)

Lewis looked back at Trifiletti and his friends like he was trying to "scare" them away by getting something from his vehicle. (T.1518, 1565.) At that point, Anderson walked away and returned to Wiebusch's truck. (T. 1440.) Anderson explained that he left because the environment was "tense" and he felt "uncomfortable." (T. 1440.)

Moritz and Wiebusch started to walk to Wiebusch's truck when they heard Trifiletti say "hey!" in a "loud" and "affirming" voice. (T. 1508-09.) Moritz thought Trifiletti was yelling at Lewis to stop him from driving away from the scene.[5] (T. 1510-11.) Moritz and Wiebusch returned to Trifiletti's truck. (T. 1510.)

When Moritz and Wiebusch reached Trifiletti's truck, they could not see Lewis, but they assumed he was in the driver's seat of his vehicle. (T. 1510.) While Lewis was still inside his vehicle, Trifiletti was standing in front of his truck, Moritz was standing near the sidewalk by the front tire of Trifiletti's truck, and Wiebusch was standing ten-to-fifteen feet behind Moritz near the back of Trifiletti's truck. (T. 1511, 1516, 1517, 1570.)

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[5] There was no witness testimony that Lewis drove his vehicle forward after he got back inside his vehicle, but the photographs introduced at trial establish that Lewis's vehicle moved a few feet at some point after Trifiletti took the photographs of Lewis's vehicle. (Exs. 92, 348.) Lewis's vehicle was running when police arrived at the scene. (T. 1085-86.)

Lewis exited his vehicle, approached Trifiletti, and the two began to argue. (T. 1512-13, 1518, 2031.) Lewis seemed "even more agitated," which made Trifiletti think that the situation was going downhill. (T. 2031.)

Lewis and Trifiletti were in each other's faces and argued in loud voices. (T. 1033-35, 1042, 1121-22, 1513, 1520, 2031, 2043.)[6] Moritz thought Lewis was trying to intimidate them through his aggressive and threatening actions. (T. 1539-40, 1572.)

During the argument, Lewis stated "I'm GD gang." (T. 2033; ex. 361 7:40.) Although Trifiletti did not know what "GD" meant, Moritz believed "GD" stood for Gangster Disciples. (T. 1514, 1539.) Moritz interpreted the statement "GD" as a threat, no matter what its meaning was. (T. 1539.) Wiebusch also heard Lewis say something to the effect of "you really want to do this?" (T. 1573.) Wiebusch took Lewis's statement as a threat. (T. 1573.)

Trifiletti and Moritz then observed Lewis reach under his shirt toward his waist. (T. 1516, 2035.) Moritz and Wiebusch did not see a weapon in Lewis's hand, but they thought Lewis was armed with a gun. (T. 1516, 1525.) Trifiletti also thought Lewis was armed and knew that they needed to get out of the situation. (T. 2035.)

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[6] At some point during the interactions between Trifiletti and Lewis, Lewis took a "burst" photograph of the ground. The resulting photographs show that Trifiletti's feet and Lewis's feet were next to each other. (T. 2032-33; exs. 352-60, 304, 333.)

Trifiletti yelled at his friends to leave. (T. 2035.) Moritz and Wiebusch began to leave because they thought Lewis was armed and perceived Lewis as a threat. (T. 1521, 1574-75.) Moritz was afraid for his safety and the safety of others. (T. 1523.)

After Moritz and Wiebusch started to leave, Trifiletti followed Moritz down the passenger side of his truck. (T. 2036, 2043-44.) Because Trifiletti was on the passenger-side of his truck, he thought the best way for him to get inside the driver's-side door of his truck and drive away was to walk down the passenger side of his truck and loop around the back of the truck to the driver's-side door. (T. 2036, 2043-44.)

After Trifiletti reached the back of his truck, he quickly called his dad to tell him what was taking place and that the situation "got bad." (T. 2036; ex. 404; ex. 109.) Trifiletti was on the phone with his dad as he went from the tailgate of his truck to the driver's-side of the truck. (T. 2037, 2044.)

As Trifiletti reached the driver's-side of his truck, he saw Lewis turn around, approach him, reach under his shirt, and draw his hand "straight up" from his waistband. (T. 2036-37, 2044.) Over the phone, Trifiletti's dad heard Trifiletti say,

> papa, papa, papa, this guy's going to shoot me. Papa, papa, papa, this guy's going to shoot me

(T. 1930-31, 1954-55, 2037.) Trifiletti's dad then heard three gunshots. (T. 1930-31, 1954-55, 2037.)

Trifiletti explained that, while still on the phone with his dad, he had put his phone in his pocket, drew his gun, and fired six shots at Lewis. (T. 2037.) Trifiletti fired his gun because he thought Lewis had a gun and was going to kill him. (T. 2037.)

Moritz, Wiebusch, and Anderson heard the gunshots as they were waiting near Wiebusch's truck. (T. 1445,1521-22, 1567.) Because they could not see what happened, they did not know who fired the shots. (T. 1446, 1521-22, 1567.) Wiebusch, Anderson, and Moritz drove away in Wiebusch's truck. (T. 1446-147.)

After Trifiletti fired the shots, he still thought Lewis had a gun and could harm him. (T. 2037-38.) Trifiletti got inside his truck and drove toward Highway 61. (T. 2037-38.) While Trifiletti was driving, he spoke with his dad on the phone. (T. 1932-33, 1953-54.) Trifiletti's dad told him to turn around and return to the scene. (T. 1932-33, 1953-54.)

Trifiletti followed his dad's advice, turned around, and drove back to the scene. (T. 1932-33, 1953-54; ex. 361.) Trifiletti parked his truck up the street from where the incident took place and waited outside his truck to speak with law enforcement. (T. 1932-33, 1953-54; ex. 361.) Trifiletti felt terrible about what had happened. (T. 2040.)

4. Law enforcement's investigation.

Following the incident, Trifiletti was very cooperative with law enforcement. (T. 1339-42, 1353; ex. 361.) Trifiletti immediately told police that he shot Lewis in self-defense, provided police with his phone and the passcode to his phone, and told police that he put his firearm inside the truck's glove box. (T. 1339-42, 1353; ex. 361 7:40, 1:10.) Trifiletti's blood was tested later that night and the results were negative for alcohol and drugs. (T. 1363, 1367-68, 1369-70.)

Law enforcement did not find a weapon on Lewis's person or inside Lewis's vehicle. (T. 1080.) Lewis's blood was tested for alcohol and drugs and the results indicated that he had marijuana in his system. (T. 1667-68.)

The autopsy of Lewis revealed that Lewis had two gunshot wounds to the front of his abdomen and two gunshot wounds on his legs. (T. 1673-74; ex. 390.) There were no wounds on the back of his body. (T. 1673.)

5. Law enforcement's interview of Trifiletti and Trifiletti's recorded jail call with his father.

Investigators interviewed Trifiletti at the police station at 1:30 a.m. on May 2, 2020, which was four hours after the incident. (T. 1885, 1894-95; ex. 400, 400A.) During the interview, Trifiletti provided law enforcement with the following description of what took place:

> I had walked around, and I said, "Can I please just get your insurance information?" And he started yelling at me. He said, "I'm GD," or something something, part of a gang. And at that point I walked around to the side truck, and I was like, I'm not doing this. I'm-I'm going home. I said to my friends, "Just leave." And I walked around to my truck. My-my pistol- I have a sig Sauer 365 that is tucked between my console and my right leg. At that point I put on my pistol onto my waistband in my waistband holster. And I saw him jump into his car and then turn around. And he had like almost like a flash moment like doing this. And I said—I yelled to my friends, I said, "Get the fuck outta here. Get the fuck outta here." And I –I hopped in my truck. And he hopped in his car. And I put it in drive. And he—as he was pulling away, I was following—I—guess I was kind of following him. But I didn't mean to follow him. I was just trying to get out of the path. He threw it back in park, and he got out of the car. I opened my door and you saw him turn around and go like this. And at that point I draw my weapon. I fire three to four times, and I got back in my truck, turned around, and tried to leave the scenario because I didn't want—just in case, I did not, ah, extinguish the threat.

(Ex. 400A 7-8.)

On May 4, 2020, three days after the incident, and while Trifiletti was in jail, Trifiletti had a conversation with his dad over the jail phone, which was recorded. (T. 1379, 1889; ex. 283.) During the phone call, Trifiletti admitted that part of the statement he gave to police was false. (Ex. 283.) Specifically, Trifiletti explained that, because he already had his gun on him, he did not go back to his truck to get his gun. (Ex. 283.) During the call, Trifiletti admitted that he did not provide police with an exact recollection of what happened because, at the time of the interview, he was not thinking clearly, was freaked out about what had happened, and thought it sounded

better to claim that he did not have his gun on him. (Ex. 283.) Trifiletti told his dad that he wanted to "talk to someone" to clarify his original statement. (Ex. 283.)

6. Transcripts of witness testimony from Trifiletti's first trial.

Because the trial court determined that Monae Williams and Sean Severin were unavailable to testify at Trifiletti's second trial due to possible COVID-19 exposure, the trial court allowed the State to read to the jury the transcripts of their testimony from the first trial. (T. 1734-35.)[7]

i. The transcript of Severin's testimony.

On the evening of May 1st, Severin was riding in the passenger seat of a vehicle that Williams was driving. (T. 1772-73.) They were probably going twenty-five-to-thirty miles per hour when they heard a "pop," which sounded like fireworks. (T. 1774-75.) After Severin heard the "pop," he looked to his left and saw Lewis "turning away" and "falling." (T. 1782.) Severin saw Trifiletti "kind of in a squatting position with his hands on the gun[.]" (T. 1782.) Severin did not see Trifiletti fire the shots or see the moments that preceded the shooting. (T. 1790-93.)

[7] Trifiletti objected to the State's request to introduce the transcript of Williams's testimony. (T. 1412-13, 1640-47, 1734-35.) Trifiletti argued that the State failed to establish that Williams was unavailable to testify. (T. 1412-13, 1640-47, 1734-35.)

ii. The transcript of Williams's testimony.

On the evening of May 1st, Williams was driving a vehicle eastbound on Burns Avenue toward Highway 61 with Severin in the passenger seat. (T. 1798-1802.) Williams saw Trifiletti and Lewis talking outside their vehicles on the side of the road. (T. 1802.) Williams then observed Trifiletti go to his truck, grab a gun out of his truck, shut the door, and then fire his gun at Lewis. (T. 1802.) Williams thought Lewis was walking away from Trifiletti when Trifiletti shot him. (T. 1803.) Williams then saw Trifiletti go back inside his truck and drive away from the scene. (T. 1804.)

D. THE JURY'S VERDICT AND TRIFILETTI'S SENTENCE.

Following the second trial, the jury acquitted Trifiletti of second-degree intentional murder and found Trifiletti guilty of both second-degree unintentional murder and the lesser-included offense of second-degree culpable-negligence manslaughter. (T. 2173-75.) The district court sentenced Trifiletti to 150 months in prison. (6/2/2021 T. 47.)[8]

E. THE MINNESOTA COURT OF APPEALS' DECISION REVERSING TRIFILETTI'S CONVICTIONS AND REMANDING FOR A NEW TRIAL.

On direct appeal, the Minnesota Court of Appeals reversed Trifiletti's convictions after concluding that the State did not meet is burden of establishing that Williams was unavailable to testify under the Sixth

[8] "6/2/2021 T." refers to the transcript from the sentencing hearing.

Amendment of the United States Constitution. (*State v. Trifiletti*, A21-1102 *6 (Minn. App. Sept. 12, 2022.) Specifically, the court concluded that because possible[9] exposure to a contagious virus was not recognized as an exception by the founding-era common law, the State failed to prove that Williams's possible exposure resulted in her being unavailable to testify. (*Trifiletti*, A21-1102 at *6.)

The court further concluded that, even if possible exposure to COVID-19 was an exception because of a potential public-health risk to others in the courtroom, the State did not meet its burden of showing that Williams posed such a risk. (*Trifiletti*, A21-1102 at *16.) The court cited multiple reasons for its conclusion, including:

- The State did not provide any medical information regarding Williams's health condition. The State did not make Williams available to the court, even remotely, to provide direct information to

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[9] The court of appeals framed the district court's decision to find Williams unavailable as follows:

> We emphasize that the district court's decision was based on the *possibility* that M.W. had contracted the virus from someone with whom she *may* have had "close contact," and the *possibility*, if M.W. did actually contract the virus, that others in the courtroom and courthouse would be exposed to the virus if she were to testify in person.

(*Trifiletti*, A21-1102 at *19 (emphasis in original).)

the court related to her condition and the nature and extent of her alleged exposure.

- William's cough had since dissipated before trial, a doctor did not think that her symptom warranted a COVID-19 test, and Williams never took a COVID-19 test to confirm that she had the virus.
- Dr. Ogawa, a Ramsey County public-health official, advised the district court that it would be "reasonable" for Williams to testify in court if she remained masked, notwithstanding her possible exposure to COVID-19.
- The State did not establish that Williams had "close contact" with anyone who tested positive for COVID-19 and therefore did not establish that Williams could not be within six feet of others in a courtroom. Even if the State established "close contact," Williams could have testified in compliance with the Chief Justice's restrictions for in-person criminal trials because the courtroom was modified to allow for everyone, including jurors, to be at least six feet apart and everyone was masked in the courtroom.
- The State did not establish that Williams was instructed to quarantine, or would have been in quarantine when she was to provide testimony.

- Even if Williams was in quarantine, the State did not provide any medical information to identify and confirm her health condition.

(*Trifiletti*, A21-1102 at *16-21.)

After the court of appeals found that the trial court violated Trifiletti's right to confrontation, the court concluded that the State did not meet its burden of proving that the error was harmless beyond a reasonable doubt. (*Trifiletti*, A21-1102 at *21-23.) Specifically, the court found that the State did not meet its burden of proving that Williams's testimony that Trifiletti returned to his truck, grabbed his gun, and fired shots at Lewis did not affect the jury's verdict where Williams was the only eyewitness to the shooting and her testimony corroborated the State's theory that Trifiletti could have retreated and therefore did not act in self-defense. (*Trifiletti*, A21-1102 at *21-23.)

F. THE STATE'S PETITION FOR REVIEW.

The State sought review by the Minnesota Supreme Court review of a single issue:

> Was a witness who was recently exposed to COVID-19 constitutionally unavailable when she was supposed to be quarantined per the Minnesota Health Department?

(State's 10/7/22 petition for review.) Over Trifiletti's objection, the supreme court granted the petition. (Respondent's 10/27/22 response.)

SUMMARY OF THE ARGUMENT

The issue in this case is not whether the trial court should have allowed Williams, who had possibly been exposed to COVID-19, to appear in court and testify at Trifiletti's trial. Rather, the issue concerns whether the trial court violated Trifiletti's right to confrontation by allowing the State to introduce the transcript of Williams's prior testimony without the State presenting sufficient evidence to meet its burden of establishing that Williams was unavailable to testify under an exception to the Confrontation Clause.

In other words, the trial court had options outside of the binary choice of deciding whether or not to allow Williams to appear in court and testify. The trial court could have ordered Williams to not testify and denied the State's request to introduce the transcript of Williams's prior testimony until the State provided more evidence related to Williams's possible COVID-19 exposure. Doing so would have allowed the trial court to make informed decisions regarding whether it was safe for Williams to testify as scheduled, whether it was safe for Williams to testify on a later date, and whether Williams was unavailable to testify according to an exception to the Confrontation Clause. Had the court demanded more information from the State, the court would have protected the public from possible COVID-19 exposure *and* protected Trifiletti's constitutional right to confrontation.

ARGUMENT

THE STATE FAILED TO MEET ITS BURDEN OF PROVING THAT WILLIAMS WAS UNAVAILABLE TO TESTIFY UNDER AN EXCEPTION TO THE CONFRONTATION CLAUSE.

This Court should affirm the Minnesota Court of Appeals' holding that the State did not meet its burden of proving that Williams was unavailable to testify under an exception to the Confrontation Clause of the Sixth Amendment of the United States Constitution. The court of appeals properly found that *potential* exposure to a contagious virus is not a valid exception to the confrontation clause because potential exposure to a contagious virus did not result in a witness being unavailable during the founding era of the Sixth Amendment. Moreover, the court correctly concluded in the alternative that, if there was a public health risk exception to the confrontation clause during the founding era, the State did not meet its burden of proving that Williams testifying at trial created a public health risk. Because the State cannot meet its burden of establishing that the constitutional error of allowing the State to introduce the transcript of Williams' testimony was harmless beyond a reasonable doubt, this Court should affirm the court of appeals' decision to reverse and remand for a new trial.

A. STANDARD OF REVIEW.

"[W]hether the admission of evidence violates a criminal defendant's rights under the Confrontation Clause is a question of law" reviewed de novo. *State v. Caulfield*, 722 N.W.2d 304, 308 (Minn. 2006); *State v. Tate*, 985 N.W.2d 291, 298 (Minn. 2023).

A constitutional error in the admission of evidence requires reversal and a new trial unless it is harmless beyond a reasonable doubt—that is, only if the verdict was "surely unattributable" to the error. *Caulfield*, 722 N.W.2d at 314 (citing *State v. Juarez*, 572 N.W.2d 286, 291-92 (Minn. 1997)); *Chapman v. California*, 386 U.S. 18, 24 (1967) ("before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt").

B. THE CONSTITUTIONAL RIGHT TO CONFRONTATION.

One of the bedrock constitutional protections afforded to criminal defendants is the Confrontation Clause of the Sixth Amendment—like its counterpart in the Minnesota Constitution—which states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI; Minn. Const. art. I, § 6; *Hemphill v. New York*, 142 S.Ct. 681, 690 (2022); *see Samia v. United States*, 143 S.Ct. 2004, 2012 (2023) ("The Sixth Amendment's Confrontation Clause

guarantees the right of a criminal defendant to be confronted with the witnesses against him" (internal citation omitted)).

The Supreme Court has held that the Sixth Amendment right of confrontation is a categorical right to assess the credibility of witness accounts in a particular way: through the crucible of cross-examination and physical confrontation at trial. *See Crawford v. Washington*, 541 U.S. 36, 61, 67 (2004) (describing confrontation right as a "categorical constitutional guarantee"); *State v. Tate*, 985 N.W.2d 291, 304 (Minn. 2023) ("Testimony is generally reliable under the Confrontation Clause if a witness testifies in the physical presence of the defendant, is sworn under oath, is subject to cross-examination, and can be properly observed by the trier of fact").

Importantly, the "text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by

the courts."[10] *Crawford*, 541 U.S. at 54. Instead, a criminal defendant's "right to be confronted with the witnesses against him" set forth in the Sixth Amendment "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." *Id.* (internal quotation marks and ellipses omitted); *Giles v. California*, 554 U.S. 353, 358 (2008) ("We held in *Crawford* that the Confrontation Clause is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding" (internal quotation omitted)); *see also Salinger v. United States*, 272 U.S. 542, 548 (1926) ("The right of confrontation did not originate with the Sixth Amendment, but was a common-law right having recognized exceptions"). In short, the Sixth Amendment codified the common-law right of confrontation as it existed at

[10] Minnesota Rule of Evidence 804(a) establishes that a witness is unavailable for hearsay purposes if the witness is unable to be present because of "death or then existing physical or mental illness or infirmity." Minn. R. Evid. 804(a)(4). But this rule-based definition of unavailability is not applicable to testimonial statements that are introduced in violation of the Confrontation Clause. *Crawford*, 541 U.S. at 51, 61 ("Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices. . . . Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence"). Even if the rule did apply, the State did not meet its burden of establishing that Williams was unavailable under the rule because, at the time of trial, Williams was not dead or suffering from physical or mental illness or infirmity.

the time of the founding. *Crawford*, 541 U.S. at 42-49; *Giles*, 554 U.S. at 358.[11]

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[11] Unlike other constitutional questions related to COVID-19 that have recently been before this Court that involve balancing tests that provide trial courts with a degree of flexibility when holding trials during the COVID-19 pandemic—*see State v. Paige*, 977 N.W.2d 829, 843 (Minn. 2022) ("Having carefully balanced these factors, we conclude that the State brought Paige to trial quickly enough so as not to endanger the values that the right to a speedy trial protects"); *State v. Bell*, A20-1638, 2021 WL 6110117 (Minn. App. Dec. 27, 2021) *review granted* (Mar. 15, 2022) (issue currently pending before this Court is whether the trial court violated the Sixth Amendment's right to a public trial where two-way video observation was not provided to public); *State v. Tate*, 985 N.W.2d 291 (Minn. 2023) (allowing district courts the opportunity to balance necessity and reliability when considering whether the use of live two-way video violates the confrontation clause)—the analysis for determining whether the introduction of prior testimony violates the Confrontation Clause under *Crawford* is rigid and only allows courts to consider a single question: whether the State established that the claimed exception to the Confrontation Clause existed during the founding-era of the constitution. *Giles*, 554 U.S. at 358-68 ("We held in *Crawford* that the Confrontation Clause is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." (internal quotation omitted); *See also Samia*, 143 S.Ct. at 2012 ("The Sixth Amendment's Confrontation Clause guarantees the right a criminal defendant to be confronted with the witnesses against him. As we have explained, this Clause *forbids* the introduction of out-of-court testimonial statements unless the witness is unavailable and the defendant has had the chance to cross-examine the witness previously." (internal citations omitted)(emphasis added)).

At common law, out-of-court testimony could be introduced against a criminal defendant at trial only if the defendant was confronted with the witness at the time the out-of-court statement was made *and* the witness was unavailable to testify at trial. *See Giles*, 554 U.S. at 358; *see also Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309 (2009); *Crawford*, 541 U.S. at 57 ("Even where the defendant had such an opportunity [to cross-examination], we exclude the testimony where the government had not established unavailability of the witness." (citations omitted)). The State bears the burden of proving these two preconditions. *Melendez-Diaz*, 557 U.S. at 324-25 ("[T]he Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defense to bring those adverse witnesses into court."); *Ohio v. Roberts*, 448 U.S. 56 74-75, 100 (1980) ("the prosecution bears the burden of establishing" that a witness is unavailable); *State v. Cox*, 779 N.W.2d 844, 852 (Minn. 2010) ("The State bears the burden" of establishing that a witness is unavailable).

C. THE RECORD RELATED TO WILLIAMS'S POSSIBLE EXPOSURE TO COVID-19.

a. The April 12, 2021, record.

On April 12, 2021, which was the first day of trial testimony, the court indicated that it had received information from the State that Williams self-reported to the State that she had previously experienced potential COVID-

19 symptoms, but the symptoms had dissipated. (T. 1200.) The court explained that a doctor at the emergency room had informed Williams that it was not necessary for her to take a COVID-19 test. (T. 1200.) Because the doctor told Williams that it was not necessary for her to take a COVID-19 test, the court concluded: "I guess that's telling me anecdotally that perhaps that wasn't a concern from a medical doctor." (T. 1200.) The court instructed the State to make an additional inquiry into Williams's medical condition before she appeared to testify at trial. (T. 1200.)

b. The April 13, 2021, record.

The following day, April 13th, the court explained to the parties that the court spoke with public health officials about whether it would be safe for Williams to testify. (T. 1212.) The court stated:

> I talked to Dr. Lynne Ogawa, who I have referenced before, last night. I provided her with—by reading her the exact information from the e-mail that was sent to me by the State concerning Ms. Williams and her condition. . . . She indicated that it would be reasonable—and reasonable was her word—for Williams . . . to testify, as long as [she] remain masked and we enforce the other public health protocols that we had put into place during trial.
> . . .
>
> [A]nd I think that the sentiment that she expressed was really related—with regard to Williams was related to the topic that we talked about yesterday, you know, the fact that she did seek care and treatment and that the medical advice that she received was not to get tested.

(T. 1212-13.)

After the court provided the parties with the information from the public health professional, the State explained that it had received information from Williams that she no longer had a cough and was "no longer symptomatic at all." (T. 1213.)

With this information, the court concluded that Williams was available to testify. (T. 1213-14.) The court instructed the State that Williams would be required to stay outside the courthouse until she was called to testify, would be required to wear a mask and social distance, and would be required to leave the courthouse immediately after she testified. (T. 1214.)

Later that same day, the court received information from the State that Williams had reported to the State that her sister tested positive for COVID-19 the previous day, April 12th, Williams last had "contact" with her on April 6th, and that Williams would coordinate with her healthcare provider to take a COVID-19 test. (T. 1314-16.) Williams reported to the State that the cough she previously experienced had resolved. (T. 1315.)

The court stated that it did not "appear appropriate in light of the contact that Ms. Williams has had with her sister" to appear at the court to testify. (T. 1316-17.) The court indicated that it made sense for Williams to take a COVID-19 test. (T. 1316-17.) The court concluded that it would not make a "definitive call" until the court received more information from the State related to Williams's situation. (T. 1317)

c. The April 14, 2021, record.

The next day, April 14th, Williams provided information to the State that she was going to take a COVID-19 test. (T. 1638-39.) With this information, the State clarified that it would be "satisfied" that Williams was available to testify in person if Williams tested negative for COVID-19, and she testified on a date outside of a required quarantine period. (T. 1639.) While the State indicated that Williams's last exposure was on April 6th, the State did not provide any information regarding the type of contact Williams had, whether Williams was required to quarantine, or the required length of a quarantine period. (T. 1639.)

Trifiletti responded by arguing that the State had failed to meet its burden of establishing that Williams was unavailable to testify. (T. 1412-13, 1640-46.) Specifically, Trifiletti argued:

> [b]ut one of the things that's troubling me greatly is that all of the information we have to assist you in making that decision, to assist the defense in taking a position, it's all self-reported . . . . We have not one bit of medical opinion, documentation that really puts the issue in perspective.
>
> I would feel much more comfortable, and I think the Court would, too, if we have something more than saying, well, I talked to [a witness] or the advocate. It's just not the type of data that I think a decision should be based on.
>
> So I think at a minimum and as a threshold, we need to get some hard medical—medical opinion, other than just a phone conversation, that really determines the status of [her]situation, the potential risk to the public, the potential risk to the people in

> this courtroom. Because I think that's part of the inquiry the Court has to make; are their circumstances that justify following a particular path? And I don't think we're there; at least that's the defense position. It's been secondhand information, no medical documentation, so I think that puts everybody at a disadvantage.

(T. 1640-41.)

> I think there are two factors you have to consider: Confrontation and due process. And, I think, I don't have to articulate our position. I think we're absolutely entitled to face our accusers in open court, absent a finding by the Court that I may even disagree with, but absent a finding that there are extraordinary circumstances that would militate against that.
>
> And I do not think we're there as I sit here today on the afternoon of April 14th, I believe. I just don't think we're at that particular juncture. And I don't know, quite frankly, how you could make a decision in that area we find ourselves in. I think there's a vacuum and a paucity of hardcore medical data. I think it's unfortunate, but I mean, they're asking—

(T. 1640-41.)

> I'm not going to tell you you can't do anything, but my point is, I really feel we need more information. And especially, especially with Ms. Williams in taking into account we are all in this courtroom, having her there and her visible reaction to some of my examination, and her attitude was, I think, extremely important to the defense.
>
> And another thing with her, there are at least—I have a folder with at least, last count, I think I'm up to seven where there's been prior instances where she has talked about what she saw, and most of them are different. That's the extent—and that's part of my cross-examination. And I am not in a position where I want to send those to her ahead of time, have her look at them. There's a logistical nightmare there, too.

> So that's all I have to say at this point. It's not like she's just some regular old witness. She, for lack of a better description, even though I don't agree with it, is the State's only purported eyewitness. We're not talking about some peripheral player here.

(T. 1643-44.)

At the close of the hearing, the court asked the State to gather more information regarding Williams's condition. (T. 1646-47.) The court specifically requested that the State find out if Williams had taken a COVID-19 test, the results of the test, what Williams had been told by public health officials, if Williams was in quarantine, and, if so, when her quarantine began. (T. 1646-47.) The court stated:

> I don't know any of those things necessarily. Because this is an important decision, and I think that medical unavailability piece demands something more.
>
> This may be something that I would consider exploring doing a voire dire, for example, under oath . . ., with an opportunity to have both sides ask questions, and me deferring a decision until I have that opportunity.
>
> Let's see what information you can find out and what the record looks like in the morning. And again, I am going to defer making a decision until I get some additional information about that.

(T. 1647.)

d. The April 15, 2021, record.

The following day, April 15th, the State failed to provide the court with any new information regarding Williams's condition, including any of the information that the court had specifically requested the day before. (T.

1722-23.) Without receiving any new information from the State regarding her status, including a possible test result, and without speaking with a health care professional regarding the length of time Williams would potentially be required to quarantine, the court concluded that Williams was unavailable to testify. (T. 1738.) The court made the following findings:

> Here, I think that state court administration guidance, local guidance and state guidance, and national guidance prohibits . . . Williams from coming into the courthouse to testify in person due to [her] exposure or quarantine due to COVID. Accordingly, I am drawing the conclusion that [she is] unavailable as [a] witness[]. And again, this is a twofold concern. One is that—relates specifically to [Williams], and the other relates to a public health issue and concern about exposure to anyone else in the courtroom. Just as witness Anderson was unavailable due to COVID, Williams [is] likewise unavailable due to COVID.

(T. 1734-35.)

Following the court's ruling, Trifiletti asked the court if it would grant a request for a continuance. (T. 1741.) The court responded: "my inclination would not be to continue the trial." (T. 1741-42.) The court then allowed the State to introduce the transcript of Williams's prior testimony on April 15th, nine days after Williams was possibly exposed to COVID-19. (T. 1795) [12]

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[12] Although Trifiletti adamantly objected to the State introducing the transcript of Williams's testimony and objected to Williams testifying remotely over Zoom, both Trifiletti and the State preferred the introduction of Williams's prior testimony over her testifying remotely over Zoom. (T. 1633-5, 1741-42.) The court acknowledged that Trifiletti objected to both the introduction of the transcript and Williams testifying remotely over Zoom. (T. 1633-34, 1730, 1741-42.)

D. THE VIOLATION OF TRIFILETTI'S RIGHT TO CONFRONTATION WAS A DIRECT CONSEQUENCE OF THE TRIAL COURT FAILING TO REQUIRE THE STATE TO PROVIDE THE INFORMATION REQUESTED BY THE COURT REGARDING WILLIAMS'S POSSIBLE EXPOSURE TO COVID-19.

It is unclear why the trial court determined that Williams was unavailable to testify on April 15th without first obtaining the information it had requested from the State the day before related to Williams's possible exposure to COVID-19. Indeed, without obtaining the requested information, the court did not know: (1) if Williams had close contact with someone who was contagious with COVID-19; (2) if Williams tested positive for COVID-19; or (3) if Williams was ordered by a medical professional to quarantine, and if so, the date Williams would complete her quarantine and be able to testify safely in court. In short, without obtaining the requested information from the State, the trial court only had information that Williams was *possibly* exposed to COVID-19.

If the court had required the State to provide the requested information before deciding that Williams was unavailable, the court could have made an informed decision that would have resulted in the following constitutionally acceptable outcomes:

- First, if the State presented evidence that Williams was not exposed to COVID-19, was not required to quarantine, and could safely testify at trial, then Williams could have testified at trial as scheduled.
- Second, if the State presented evidence that established that Williams was actually exposed to COVID-19, and was required to quarantine for a specific amount of time, then Williams could have quarantined and then testified outside the required quarantine period.
- Third, if the State presented evidence that Williams was symptomatic or tested positive for COVID-19, and was required by a medical provider to quarantine for a specific amount of time, then the court could have ordered a continuance to allow Williams to testify outside the required quarantine period.
- Finally, if the State presented evidence that Williams tested positive for COVID-19 and was unable to testify for an indefinite amount of time due to severe illness, then the court could have concluded that the Williams was constitutionally unavailable to testify under an exception to the Confrontation Clause and then allowed State to introduce the transcript of her prior testimony.

Because the trial court failed to require the State to provide the requested information before the court declared Williams unavailable and then allowed

the State to introduce the transcript of Williams's prior testimony, the trial court violated Trifiletti's right to confrontation.

E. THE STATE FAILED TO PROVE THAT WILLIAMS WAS UNAVAILABLE TO TESTIFY ACCORDING TO AN EXCEPTION TO THE CONFRONTATION CLAUSE.

For two reasons, the State failed to establish that Williams was unavailable to testify at trial according to an exception to the confrontation clause. First, the State did not establish that Williams's potential COVID-19 exposure resulted in her being unavailable under a founding-era exception to the confrontation clause. Second, and alternatively, if this Court adopts a public-health exception related to the COVID-19 pandemic—even though no such exception existed during the founding era—the limited information the State provided to the court did not establish that Williams testifying at trial created a public health risk.

a. The State failed to prove that potential exposure to a contagious virus was an exception to the confrontation clause at the time the Framers enacted the Sixth Amendment.

The State failed to meet its burden of establishing that Williams was unavailable to testify because the unavailability exception that the trial court relied on—possible exposure to a virus—did not exist when the Framers enacted the Sixth Amendment. Indeed, the Supreme Court has never concluded that illness, let alone possible exposure to an illness, is an

exception to the Confrontation Clause. And, importantly, the State has not cited to a single case stating that possible exposure to a contagious virus resulted in a witness being unavailable under the Confrontation Clause. [13] As such, this Court should reject the State's argument and affirm the court of appeals' decision.

In fact, such authority simply does not exist. (App.'s brf 7-13.) Rather, Supreme Court caselaw interpreting the Sixth Amendment, which is binding on this Court, establishes that the common-law right to confrontation was overcome only "upon proof being made to the satisfaction of the court that the witness was, at the time of the trial, dead, insane, too ill *ever* to be expected

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[13] This Court should take note that the State cited to only one Supreme Court case that discussed the Confrontation Clause—*Maryland v. Craig*, 497 U.S. 836 (1990). (App.'s brf. at 13-14.) The State did not mention *Crawford*, any Supreme Court caselaw discussing *Crawford*, or any Supreme Court caselaw discussing founding-era exceptions to the Confrontation Clause. (App.'s brf. 7-18.) In sum, it is difficult to believe that the State can meet its burden of establishing an exception to the Confrontation Clause under *Crawford* without the State even mentioning *Crawford* within the brief it filed with this Court.

to attend the trial, or kept away by the connivance of the defendant." [14] *West v. Louisiana*, 194 U.S. 258, 262 (1904) (emphasis added), *overruled on other grounds by Pointer v. Texas*, 380 U.S. 400, 406 (1965); *State v. Brist*, 812 N.W.2d 551, 54-55 (Minn. 2012) ("The Supreme Court of the United States is the final arbiter of the meaning *and* application of the United States Constitution.. . . As a result, Supreme Court precedent on matters of federal law, including the interpretation and application of the United States Constitution, is binding on this Court" (internal quotation and citation omitted); *see also Arizona v. Evans*, 514 U.S. 1, 8 (1995) (stating that Court has "final authority" over interpretation of the United States Constitution).

Moreover, in *Crawford*, the supreme court cited to seven cases for the existence of a former testimony exception. *See* 541 U.S. at 50. All seven of those cases state unequivocally that the former testimony exception only

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[14] Unlike the issue in this case, which concerns a witness who has been located and is willing and able to testify, the Supreme Court has deemed unlocatable and unwilling witnesses physically unavailable to testify under the Confrontation Clause. *See Ohio v. Roberts*, 448 U.S. 56, 74 (1980) (witness is unavailable if witness has unexpectedly gone missing and the prosecution cannot find the witness, "despite good faith efforts undertaken prior to trial to locate and present that witness."); *Mancusi v. Stubbs*, 408 U.S. 204, 208 (1972) (a witness is unavailable if a witness is permanently or at least indefinitely beyond the court's jurisdiction and "the state [i]s powerless to compel his attendance . . . either through its own process or through established procedures"); *Barber v. Page*, 390 U.S. 719, 722-25 (1969) (if the government has not undertaken reasonable attempts to produce the witness, then the witness is not unavailable); *Motes v. United States*, 178

applies where the declarant is deceased. *See United States v. Macomb*, 26 F.Cas. 1132, 1134 (No. 15,702) (C.C.D. Ill. 1851) (applying the common law rule "that if the defendant were present at the taking of the deposition, and the witness were dead, it might be read on the trial as evidence"); *State v. Houser*, 26 Mo. 431, 435–36 (1858) (examining the question of whether "the deposition of a witness, taken in the presence of the accused" can be admitted "where the witness has died since the examination"); *Kendrick v. State*, 29 Tenn. 479, 485–88 (1850) (stating that "if there has been a previous criminal prosecution between the same parties, and the point in issue was the same, the testimony of a deceased witness, given upon oath at the former trial, is admissible on the subsequent trial" (citations omitted)); *Bostick v. State*, 22 Tenn. 344, 345–46 (1842) (admitting the deposition of a deceased declarant); *Commonwealth v. Richards*, 35 Mass. 434, 437 (1837) ("We think it to be very clear, that testimony of what a deceased witness did testify on a former trial between the same parties on the same issue, is competent evidence"); *State v. Hill*, 20 S.C.L. 607, 608–10 (Ct. App. 1835) (stating that a deposition can be admitted "if the deponent be dead at the time of the trial"); *Johnston v. State*,

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U.S. 458, 470-71 (1900) (witness not unavailable when governmental negligence allowed witness it was holding in custody to abscond).

10 Tenn. 58, 59 (1821) (holding that a deposition can only be admitted "if it be proved on oath to the satisfaction of the court, that the witness is dead").[15]

In sum, there is no support for the conclusion that potential exposure, or even exposure, to a contagious virus resulted in a witness being unavailable under the confrontation clause during the founding era. And, importantly, the State does not allege that such an exception exists. (App.'s brf. 7-18.) Because it is black letter constitutional law that exceptions to the Confrontation Clause must have existed at common law, and courts cannot create exceptions to the confrontation clause that did not exist at common law, this Court must conclude that possible exposure to a contagious virus does not result in a witness being unavailable under the conformation clause. *See Crawford*, 541 U.S. at 54 (the "text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts").[16]

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[15] *See also Le Baron v. Crombie*, 14 Mass. 234, 236 (1817) ("We believe that in *England* the proof of such declarations has been limited to the case where the principal witness is dead; for we find no case where such evidence has been admitted, when the testimony of the principal witness has been lost by any other cause"); *McLain v. Commonwealth*, 99 Pa. 86, 96-98 (1881) ("The admission of the evidence did not rest on any temporary disability, but on their death, and the sworn testimony of the coroner as to the correct taking of the evidence offered"); *Jones on Evidence* § 341 (2d ed. 1908) (stating that at common law, former testimony was inadmissible "except in the case of his death").

[16] The *amicus* claims that because witnesses at common law were considered unavailable to testify if they were unable to travel, witnesses in quarantine

In this case, Williams had not died, was not deemed insane, and was not too ill to *ever* testify at trial. Therefore, under the former testimony exception to the Confrontation Clause, as it was understood at the time the Sixth Amendment was enacted, Williams was not unavailable, and the transcript of her prior testimony was therefore inadmissible.

b. The State failed to prove that Williams testifying would create a public health risk.

Alternatively, if this Court considers adopting a public health exception—an exception that did not exist at the time of the enactment of the Sixth Amendment—the State still did not establish that Williams testifying created a public health risk.

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are therefore unavailable to testify because they cannot travel. (MCAA *amicus* brf. at 3-13.) This extreme leap of logic must be rejected because the State and *amicus* have not cited to a single case in the history of the United States—pre-founding era, founding era, or modern era—where a court has concluded that a witness is unavailable to testify under the Confrontation Clause because the witness was ordered to quarantine for a set period of time and therefore could not travel. (App.'s brf at 7-18; MCAA *amicus* brf. at 3-13.) Indeed, a witness like Anderson—the witness who testified in this case after being in quarantine—was not constitutionally unavailable to testify because he could testify after his quarantine period lapsed. In other words, at common law, a witness was unavailable only if the witness was so ill that she could *never* testify at trial. *See West*, 194 U.S. at 262 (a witness was unavailable "upon proof being made to the satisfaction of the court that the witness was, at the time of the trial, dead, insane, too ill *ever* to be expected to attend the trial, or kept away by the connivance of the defendant." (emphasis added)). A such, there is no support for the conclusion that an individual ordered to quarantine for a limited time-period is unavailable to testify at trial under the Confrontation Clause.

There are five reasons why the State failed to establish that Williams testifying at trial would have created a public health risk First, the State did not prove that Williams was ever infected with COVID-19. The State did not present evidence that Williams tested positive for COVID-19 and the State did not present any other evidence that would have indicated that she was infected with COVID-19 at the time she was scheduled to testify. Indeed, the State Health Department believed it was reasonable for Williams to testify and a doctor at the emergency room told Williams that there was no need for her to even take a COVID-19 test.

Second, the State did not establish that Williams had symptoms of COVID-19 at the time she was scheduled to testify. Instead, the only information the State presented to the court was that Williams's only symptoms—a cough and congestion—had entirely dissipated at the time she was scheduled to testify.

Third, the State did not prove that Williams ever had close contact with someone infected with COVID-19.[17] Williams self-reported that she had contact with her sister on April 6, 2021, and her sister tested positive six days later, on April 12th. But the State did not present evidence that Williams had "close"[18] contact with her sister, that her sister was infected with COVID-19 on April 6th, or that her sister was contagious on April 6th. In other words, there is no evidence that Williams's sister was even infected with the virus when Williams had contact with her.

Fourth, even assuming Williams's sister was infected and contagious on April 6th, and Williams had close contact with her sister that same day, the State did not establish that Williams was unable to testify ten days later—on

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[17] Below, the State did not introduce any evidence into the record to meet its burden of proving an exception to the Confrontation Clause. On appeal, the State now asserts that Trifiletti has the burden to supplement the record with the evidence that the State failed to introduce below. (App.'s brf. at 8-9.) This argument is nonsense. The State clearly had the burden to prove that Williams was unavailable to testify, including introducing evidence into the record to support its argument. *Melendez-Diaz*, 557 U.S. at 324 ("[t]he Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defense to bring those adverse witnesses into court."). And, on appeal, Trifiletti has no burden to supplement the record with the evidence that the State failed to introduce below. This Court should expressly reject this absurd argument.

[18] While it is true the court mentioned that Williams had "close" contact with her sister in its findings, (T. 1723), that was an erroneous interpretation of the record because the State did not present any evidence that Williams had "close" contact with her sister, or that her sister was infected with COVID-19 at the time of the contact.

April 16th—or even fourteen days later—on April 20th. The State presented evidence that healthcare providers required other witnesses with COVID-19 exposure to quarantine for ten days, and the court indicated that the guidelines included both ten-day and fourteen-day quarantine periods.[19] (T. 1724, 1727-28.) But the State did not present any evidence that established that Williams was unavailable to testify ten days after her exposure–April 16th—or fourteen days after her exposure—April 20th. And the court did not make any findings as to why Williams was unavailable to testify after ten or fourteen-day quarantine periods.[20] Importantly, the court allowed another witness, Anderson, who was symptomatic and tested positive for COVID-19

[19] When framing the issue before this Court, both the State and the *amicus* incorrectly claim that Williams was "supposed to quarantine." (App.'s brf. at 1, 7, 8, 9, 10, 14; MCAA *amicus* brf. at 2.) The State did not present any evidence that Williams was supposed to quarantine, that a medical professional instructed her to quarantine, or if a medical professional instructed her to quarantine, how long of a time-period she was required to quarantine.

at the time of trial, to testify after he completed his quarantine period. As such, the State failed to establish that Williams could not testify safely outside a quarantine period.

Finally, the State did not request a continuance or establish that Williams could not testify on a later date if the State had requested a continuance. *Melendez-Diaz*, 557 U.S. at 324-25 ("[T]he Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defense to bring those adverse witnesses into court"). Without establishing that a short continuance would not have allowed Williams to safely testify at trial, the State did not establish that Williams created a public health risk and was therefore unavailable to testify. *See e.g. Pulczinski*, 972 N.W.2d at 352 ("On the first day . . . the parties learned that an essential witness for the State was exposed to COVID-19. . . . [T]he

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[20] If Williams was required to quarantine until April 16th—ten days—Trifiletti's trial would not have experienced any delay because the State presented evidence until it rested on April 16th. If Williams was required to quarantine until April 20th—fourteen days—Trifiletti's trial would have experienced a minimal delay because April 17th and April 18th fell on the weekend and the jury began deliberating on April 19th. Indeed, other courts have been willing to continue portions of trials due to a COVID-19 diagnosis to protect the constitutional rights of defendants. *See Pulczinski v. State*, 972 N.W.2d 347, 352 (Minn. 2022) (trial court continued trial so quarantined witness could testify safely at trial); Rochelle Olson and Andy Mannix, Trial of ex-Minneapolis cops postponed by COVID diagnosis, Star Tribune, Feb. 2, 2022, available at https://www.startribune.com/civil-rights-trial-against-ex-minneapolis-cops-postponed-until-monday-because-defendant-has-covid/600142250/.

parties agreed to postpone the trial for two weeks to accommodate the witness who had to quarantine. Defense counsel expressed his client's preference for in-person testimony. After discussion, the district court agreed to start the trial on September 14, 2020, so the witness could 'safely come into the courthouse and testify.'").

In sum, if this Court decides to carve out a new "unavailability" exception related to a possible COVID-19 public health risk, the State did not meet its burden of establishing that such an exception existed in this case. The State did not prove that Williams was infected with the COVID-19 virus, had close contact with someone who was infected and contagious with the COVID-19 virus, had symptoms of the COVID-19 virus, was unable to testify outside of a required quarantine period, or could not testify safely if the State requested a short continuance. As such, the State failed to prove that Williams testifying created a public health risk and was therefore unavailable to testify under the Confrontation Clause.

c. This Court's recent decision in *State v. Tate* is not relevant to the issue in this case.

State v. Tate is not relevant to the issue in this case because it only concerned the narrow issue of whether testimony over live, two-way, remote video technology violated the Confrontation Clause under *Maryland v. Craig*, 497 U.S. 836 (1990) and did not consider the unavailability requirement for the introduction of prior testimony under *Crawford.* *Tate*, 985 N.W.2d at 294. Indeed, *Tate* expressly held that the issue it considered is different than the issue presented in this case because *Craig*, and not *Crawford*, controlled the outcome in *Tate*:

> *Crawford* does not undermine the holding of *Craig* because the cases address different Confrontation Clause issues. *Crawford* discussed whether the Confrontation Clause is violated by the admission at trial of a testimonial out-of-court statement. *Crawford*, 541 U.S. at 68. Before such a hearsay statement is admissible, *Crawford* held that the witness must be unavailable and the defendant must have had a prior opportunity for cross-examination. *Id.* at 68-69.

Tate, 985 N.W.2d at 300.

In sum, because the admissibility of live, two-way, testimony presents a different issue than the issue presented in this case—the State introduced a transcript of prior testimony without the witness providing live testimony—*Tate* is not relevant. As such, this Court must follow *Crawford* and conclude that the State failed to prove that Williams was unavailable to testify under an exception to the Confrontation Clause. *Crawford*, 541 U.S. at 57 ("Even

where the defendant had such an opportunity [to cross-examination], we exclude the testimony where the government had not established unavailability of the witness" (citations omitted)).

F. TRIFILETTI MUST RECEIVE A NEW TRIAL BECAUSE THE STATE CANNOT ESTABLISH THAT THE VIOLATION OF HIS CONSTITUTIONAL RIGHT TO CONFRONTATION WAS HARMLESS BEYOND A REASONABLE DOUBT.

This Court should affirm the court of appeals' determination that the State cannot establish that the trial court's constitutional error was harmless beyond a reasonable doubt.

a. The harmless beyond a reasonable doubt standard.

Because Trifiletti's federal constitutional right to confrontation was violated, he must receive a new trial unless the State can establish that the error was harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24 ("before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt"); *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988) (stating that under the *Chapman* harmless error rule, the error is harmless and the verdict may stand only "if the prosecution can prove beyond a reasonable doubt that a constitutional error did not contribute to the verdict"); *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993) (stating that the *Chapman* standard is that on direct review, the State bears the burden of proving that a constitutional

error is harmless beyond a reasonable doubt); *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (prosecution has burden of demonstrating that admission of confession did not contribute to conviction).

To determine whether the State has met its burden, "[t]he question is whether there is a reasonable possibility that the evidence complained of *might have* contributed to the conviction." *Chapman*, 386 U.S. at 23 (internal quotations omitted)(emphasis added). To carry this burden, the prosecution must demonstrate that "there is [no] reasonable possibility that the evidence complained of might have contributed to the conviction." *Id.* at 24 (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963)). The *Chapman* standard calls upon this Court not to "become in effect a second jury," but to determine "whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Neder v. United States*, 527 U.S. 1, 19 (1999).

Under the *Chapman* standard, "[a]n error in admitting plainly relevant evidence which possibly influence the jury" adverse to the defendant cannot be considered harmless. *Chapman*, 386 U.S. at 23-24. The conviction can be sustained only if the improperly admitted evidence is "so unimportant and insignificant," *id.* at 22, that the guilty verdict "was surely unattributable to the error." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993).

The focus of the appellate court is on "the guilty verdict actually rendered in *this* trial." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (emphasis in original). Additionally, the assessment of harmlessness of a confrontation clause violation cannot include "whether the witness' testimony would have been unchanged or the jury's assessment unaltered, had there been confrontation." *Coy v. Iowa*, 487 U.S. 1012, 1021 (1988). Rather, this Court must evaluate the effect of the improperly introduced evidence against other evidence "the jury considered on the issue in question, as revealed in the record." *Yates v. Evatt*, 500 U.S. 391, 403 (1991); *See Richardson v. Marsh*, 481 U.S. 200, 208 & n.3 (1987) (even if evidence is not inculpating "on its face," it still "harm[s] the defendant where it is incriminating when linked with other evidence at trial).

b. The State misstates the harmless beyond a reasonable doubt standard for violations of the constitutional right to confrontation.

In two ways, the State misstates the harmless beyond a reasonable doubt standard for violations of the constitutional right to confrontation. First, the State claims that the question this Court must answer is whether the introduction of the transcript of Williams's prior testimony created a different outcome than if Williams would have testified at trial. (App.'s brf. at 7, 16) The State is wrong. The question is whether the introduction of the inadmissible evidence—the transcript of Williams' testimony—was harmless

beyond a reasonable doubt. In other words, because the introduction of the transcript was the constitutional violation, this Court must consider whether the introduction of the transcript affected the jury's verdict, not whether the outcome would have been different had Williams testified subject to cross-examination at trial. *Coy*, 487 U.S. at 1021. (The assessment of harmlessness of a confrontation clause violation cannot include "whether the witness' testimony would have been unchanged or the jury's assessment unaltered, had there been confrontation").

Second, the State claims that the harmless beyond a reasonable doubt standard is "essentially" a "but-for" test. (App.'s brf. at 16 n.15.) This claim must be rejected. Whether a constitutional error is harmless beyond a reasonable doubt requires this Court to consider whether the introduction of the inadmissible evidence affected the jury's verdicts, not whether a hypothetical jury would have reached the same result but-for the inadmissible evidence. *See Fahy*, 375 U.S. at 86-87 ("We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."); *Juarez*, 572 N.W.2d at 291 ("The question is whether there is a reasonable possibility that the evidence

complained of might have contributed to the conviction." (internal quotations and citations omitted)).

c. The State has not established that the introduction of the transcript of Williams's testimony was harmless beyond a reasonable doubt.

There are four reasons why the State has not satisfied its burden of proving that the admission of the transcript of Williams's testimony was harmless beyond a reasonable doubt. First, and simply put, Williams's testimony was the most important piece of evidence that the State presented at Trifiletti's trial. *Chapman*, 386 U.S. at 22 (The conviction can be sustained only if the improperly admitted evidence is "so unimportant and insignificant"). Indeed, the State admitted below that Williams's testimony was important to its case. (T. 1320.) Williams was the State's only witness who claimed to have seen the critical moments preceding the shooting along with shooting itself. As such, because Williams's testimony is the only evidence corroborating the State's theory of what happened immediately before the shooting, the State failed to prove beyond a reasonable doubt that her testimony did not affect the jury's verdicts.

Second, Williams's testimony supported the State's position that Trifiletti did not act in self-defense. Trifiletti testified that he was unable to

get inside the passenger door of his truck and leave because Lewis approached him and reached for what Trifiletti thought was a gun. But Williams testified that she saw Trifiletti walk away from Lewis, grab his gun from inside his truck, and then shoot Lewis as Lewis turned away from Trifiletti. Indeed, Williams's testimony directly conflicted with Trifiletti's testimony that he acted in self-defense because Williams's testimony supports the State's theory that Trifiletti could have retreated. As a result, Williams's testimony certainly affected the jury's decision to find that Trifiletti did not act in self-defense and was therefore guilty of the charges.

Third, Williams's testimony completely undercut Trifiletti's credibility. The State attempted to establish that Trifiletti's trial testimony was not believable because it conflicted with his original statement to police. Because Williams's testimony was more consistent with Trifiletti's original statement than with Trifiletti's trial testimony, Williams's testimony supported the State's attempt to undermine Trifiletti's credibility. As a result, Williams's testimony likely affected the jury's decision to find Trifiletti's testimony that he acted in self-defense not credible.

Finally, this was a close case. Trifiletti's first trial ended in a deadlocked jury. As such, given that the State did not present overwhelming evidence of Trifiletti's guilt, the State cannot establish that Williams's testimony did not affect the jury's verdict.

In sum, Trifiletti's trial would have looked dramatically different without Williams's testimony. Williams's testimony was important to the State's case, was persuasive, undercut both Trifiletti's substantive claim of self-defense and his credibility, and likely swayed the jury to reject Trifiletti's self-defense claim. Because the State cannot meet its burden of proving that the verdicts in this close case were surely unattributable to the admission of Williams's testimony, the court's error was not harmless beyond a reasonable doubt. This Court should affirm the court of appeals' decision to reverse Trifiletti's convictions and remand for a new trial.

CONCLUSION

For the above-stated reasons, Trifiletti requests that this Court affirm the decision of the Minnesota Court of Appeals.

Dated: July 25, 2023

Respectfully submitted,

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