IN THE SUPREME COURT OF THE STATE OF NEVADA

VERNON NEWSON JR.,	)	NO. 83335
	)	
Appellant,	)	
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction)

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TABLE OF CONTENTS

PAGE NO.

TABLE OF AUTHORITIES ..... iii, iv

JURISDICTIONAL STATEMENT..... 1

ROUTING STATEMENT..... 1

ISSUES PRESENTED FOR REVIEW..... 2

STATEMENT OF THE CASE..... 2

STATEMENT OF THE FACTS..... 4

SUMMARY OF THE ARGUMENT..... 11

ARGUMENT..... 13

I. The District Court Violated Newson's Fundamental Constitutional Right to Confront Witnesses Against Him. 13

A. The district court committed reversible error by allowing witnesses to testify *via* video..... 14

1. Witness convenience is not necessary to further an important public policy..... 17

2. Administrative Order 21-04 did not broadly authorize testimony *via* alternative means. 20

B. The State Must Prove the District Court's Error was Harmless. 25

CONCLUSION..... 26

CERTIFICATE OF COMPLIANCE 27

CERTIFICATE OF SERVICE 29

TABLE OF AUTHORITIES

PAGE NO.

Cases

Belcher v. State, 136 Nev. 261, 267 (2020). 25

C.A.R.A. v. Jackson County Juvenile Office, ___ S.W.3d ___, ___ 2022 WL 106134, *13 (Sup. Ct. Mo. January 11, 2022). 21

California v. Green, 399 U.S. 149, 189 (1930) 18

Chapman v. California, 386 U.S. 18, 24 (1967) 25

Chapparo v. State, 497 P.3d 1187 (Nev. 2021). 21

Chavez v. State, 125 Nev. 328, 339 (2009) 14

Coy v. Iowa, 487 U.S. 1012, 1016 (1988) 12

Haggard v. State, 612 S.W.3d 318, 328 (Ct. App. Tex. 2020) 18

Lipsitz v. State, 135 Nev. 131 (2019). 14

Maryland v. Craig, 497 U.S. 836, 850 (1990). 12

Medina v. State, 122 Nev. 346, 355 (2006) 12

Newson v. State, 135 Nev. 381 (2019) 2

Pointer v. Texas, 380 U.S. 400, 404 (1965) 13

State v. Camacho, 960 N.W.2d 739, 755-56 (Neb. 2021). 21

State v. Rogerson, 855 N.W.2d 495, 507 (Iowa 2014) 18

State v. Tate, ___ N.W.2d ___, ___ (Ct. App. Minn. 2022) 21

State v. Thomas, 376 P.3d 184, 195 (N.M. 2016) 18

U.S. v. Carter, 97 F.3d 1199, 1208 (9th Cir. 2018) 18

U.S. v. Casher, 2020 WL 3270541, *3 (D. Mont. June 17, 2020) 22

U.S. v. Kail, 2021 WL 1164787, *1 (N.D. Cal. March 26, 2021) 22

U.S. v. Yates, 438 F.3d 1307, 1316 (11th Cir. 2006) 19

Valdez v. State, 124 Nev. 1172, 1189 (2008) 25

Misc. Citations

<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> 24

NRAP 17 2

U.S. Const. amend. VI 13

Statutes

NRS 171.1975 17

NRS 172.138 17

NRS 177.015 1

NRS 414.060 20

NRS 50.330 17

NRS 50.520 17

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APPELLANT'S OPENING BRIEF

JURISDICTIONAL STATEMENT

Appellant, VERNON NEWSON JR. ("Newson"), appeals from a final judgment under Nevada Rule of Appellate Procedure 4(b) and NRS 177.015. The district court filed the Amended Judgment of Conviction on August 3, 2021. Appellant's Appendix ("AA") Vol. I 177. Newson filed his Notice of Appeal on August 5, 2021. Id. at 181.

ROUTING STATEMENT

Newson's case is presumptively assigned to the Nevada Supreme Court because Newson was convicted of one (1) category A felony after jury trial. Id. at 177-80. Convictions involving category

A felonies after jury trial are not within the original jurisdiction of the Court of Appeals. See NRAP 17(b)(2)(A).

ISSUES PRESENTED FOR REVIEW

I. The District Court Violated Newson's Fundamental Constitutional Right to Confront Witnesses Against Him.

STATEMENT OF THE CASE

Newson was originally convicted after jury trial for one count First Degree Murder with Use of a Deadly Weapon, two counts Child Abuse, Neglect or Endangerment, and one count Possession of a Firearm by a Prohibited Person. See Newson v. State, 136 Nev. 181 (2020). On direct appeal this Court reversed Newson's murder conviction and affirmed his other convictions *via* published decision.[1] Id. This Court issued the remittitur on May 27, 2020. AA I 1.

Upon remand the district court scheduled Newson's retrial on the Murder charge for January 4, 2021. Id. at 187. Due to scheduling

[1] This Court originally issued an Opinion reversing and remanding Newson's murder conviction on October 10, 2019. See Newson v. State, 135 Nev. 381 (2019). However, Newson petitioned for rehearing. After the panel denied rehearing, Newson petitioned for *en banc* reconsideration. Although this Court did not grant the specific relief requested in his *en banc* petition, the Court nevertheless withdrew the original Opinion and issued a superseding Opinion on April 30, 2020. Newson v. State, 136 Nev. 181, 182 (2020).

conflicts and trial backlogs resulting from the coronavirus pandemic the court eventually rescheduled trial for July 12, 2021. Id. at 191-93.

Newson's trial began on July 13, 2021 and ended on July 19, 2021. Id. at 198, 204. At the trial's conclusion the jury found Newson guilty of First Degree Murder with Use of a Deadly Weapon. Id. at 138. At his sentencing hearing on July 30, 2021,[2] the court sentenced Newson to 20 years to life in prison with a consecutive 96 to 240 months for the deadly weapon enhancement. Id. at 178. The court also sentenced Newson to 24 to 72 months on counts 2 and 3 – the Child Abuse, Neglect, and Endangerment counts – concurrent to each other but consecutive to the murder count, and 24 to 72 months on count four – Possession of a Firearm by a Prohibited Person – to run consecutive to count 2.[3] Id. The court announced Newson's total aggregate sentence as life in prison with parole eligibility after 384

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[2] The parties filed a Stipulation and Order on July 13, 2021, agreeing to allow the court to sentence Newson in the event the jury found Newson guilty. See AA I 174-75.

[3] This Court affirmed Newson's child abuse convictions on his original direct appeal. See Newson, 136 Nev. at 190. Newson did not challenge his conviction for possession of firearm by prohibited person during that appeal.

months.[4] Id. at 179. Newson timely filed his notice of appeal on August 5, 2021. Id. at 181.

STATEMENT OF FACTS

According to Newson, on December 13, 2015, around 9 pm, his girlfriend Anshanette McNeil ("McNeil") – who had been Christmas shopping with a friend – and her son Brandon[5] returned to the weekly apartment she shared with Newson and advised she needed to pick up her 15-year-old daughter Zay[6] in North Las Vegas. AA IV 904-05. Newson drove while McNeil sat in the passenger seat. Id. at 905. Brandon was seated in the back seat directly behind McNeil. Id. Newson and McNeil's son Major was seated in the middle, next to Brandon. Id. There were two guns in the vehicle, one in the center console and one in McNeil's purse. Id. at 906.

Upon arrival, McNeil exited the vehicle and entered the house where Zay had been staying. Id. at 907. A few minutes later Zay exited the residence, opened the rear passenger door, kissed Major on his head, and asked Newson to open the trunk so she could remove her bag. Id. at 907-08. After removing her bag from the trunk, Zay re-

[4] This is the same sentence Newson received after his first trial.
[5] Newson is not Brandon's father. AA IV 902.
[6] Newson is not Zay's father. AA IV 905.

entered the residence. Id. at 908. Approximately 10 minutes later McNeil exited the residence and discussed with Newson whether Zay could spend the night with her friend. Id. at 909. Eventually Newson and McNeil agreed to allow Zay to stay with her friend and McNeil re-entered the car. Id. at 910. McNeil seated herself in the backseat directly behind Newson. Id.

Newson and McNeil called a friend, Zarharia Marshall ("Marshall"), who agreed to babysit Brandon and Major so Newson and McNeil could go out for the evening. Id. However, while Newson drove to Marshall's house McNeil began arguing with him about the mother of one of Newson's other children. Id. at 911. Newson decided to return to their weekly apartment as he no longer wanted to spend the evening with McNeil. Id.

Newson made a U-turn and drove towards the I-15 freeway. Id. Suddenly, while Newson entered the freeway on-ramp McNeil choked Newson from behind. Id. at 911-12. Newson steered the car to the side of the road and pulled McNeil's arms away from his neck. Id. at 912. McNeil told Newson that "he was dead" and began rummaging through her purse. Id. at 913. Newson retrieved his gun from the center console, turned around, and pointed the gun at McNeil. Id.

Newson noticed McNeil pulling something from her purse and believing it was her firearm, he closed his eyes and began firing.[7] Id. Newson heard the back door close but blacked out and did not remember what happened afterwards. Id. at 914.

Janei Bailey ("Bailey") and her then-husband Bruce were driving to dinner and stopped at a red light at the I-15 and Lamb Blvd. intersection. AA III 617. While waiting at the light, Bailey heard six to seven gunshots in rapid succession coming from the I-15 on-ramp.[8] Id. at 618. Immediately after the shots ceased, Bailey heard a car door shut and a car speed off. Id. at 626. Bailey told Bruce they needed to "turn around and go see if anyone needed help." Id. at 618. As Bailey and her husband approached, they saw McNeil lying on her back gasping for air. Id. at 619. Bailey exited her vehicle while two other persons who had also stopped rendered aid to McNeil. Id. at 620. Another person present was on the phone with police. Id.

Paramedics eventually responded as bystanders attempted to perform CPR on McNeil. Id. at 630-32. Paramedics loaded McNeil into an ambulance while continuously administering CPR. Id. at 635.

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[7] Marshall confirmed that McNeil owned a firearm and carried it with her regularly. AA IV 804.

[8] According to Bailey, the gunshots were without pause. Id.

Notwithstanding their efforts McNeil died before reaching the hospital. Id. at 636.

North Las Vegas police officer Boris Santana ("Santana") responded after paramedics left. Id. at 640. Santana secured the scene and collected evidence. Id. Santana located six spent bullet casings on the ground near where McNeil had been lying. Id. at 641. The casing came from a 9mm handgun. Id. at 642. Santana also noticed four indentations in the ground within a pool of blood where McNeil had been lying. Id. Finally, Santana located McNeil's cell phone which appeared to have been damaged by a bullet. Id. at 643. Santana interviewed witnesses and relayed his findings to arriving North Las Vegas detectives. Id. at 643-44.

Meanwhile, Newson arrived at Marshall's house. AA IV 809. Marshall was waiting outside for Newson and McNeil to arrive. Id. When Newson arrived he exited the vehicle, removed Major from the back seat and handed him to Marshall. Id. at 810. Newson then removed Major's swing and diaper bag from the trunk. Id. Newson went to the other side of the car and removed Brandon. Id. at 811. Meanwhile, Marshall noticed McNeil's purse and sandals inside the car as well as dark spots in the backseat. Id. at 811-12. Marshall

noticed that Newson appeared, "frantic," irritated, amped up, and hurried. Id. at 818-19. Moreover, Newson became frustrated while removing Major from the car seat. Id. at 819.

After removing the children from the vehicle, Newson, Marshall, and the children entered Marshall's house. Id. at 820. Marshall noticed Newson's emotions were inflamed and he was full of adrenaline. Id. Newson kissed Major on the forehead and asked Marshall to accompany him outside. Id. Newson told Marshall to tell Major that Newson will "always love him." Id. at 821.

Marshall and Newson exited the house and had a conversation in front of the vehicle in the driveway. Id. at 812. As they talked, Newson put bullets into a clip. Id. While doing so some fell to the ground. Id. When Marshall asked Newson about McNeil's whereabouts Newson replied, "just know motherfuckers took me to the point where I can't take it no more."[9] Id. at 821, 825. After Newson left, Marshall retrieved the bullets from the driveway and put them on the washing machine in her house. Id. at 814. Marshall called McNeil but there was no answer. Id. Marshall then contacted police. Id. at 815.

[9] Newson testified that he told Marshall, "Just another mother fucker's pushed me too far where I couldn't take it no more." AA IV 938.

After Newson left Marshall's house he decided to go to his cousin's house. AA V 916. While *en route* Newson pulled over and put his gun to his head and contemplated suicide. Id. Unable to pull the trigger Newson abandoned the vehicle and walked to a friend's house. Id. Two days later Newson travelled to California to see his children. Id. at 917.

North Las Vegas detective Benjamin Owens ("Owens") responded to the I-15 on-ramp to supervise evidence collection. AA IV 855-56. While there Owens learned that McNeil had been transported to the hospital. Id. at 857. Additionally, Owens received a call from police dispatch advising someone filed a missing person report regarding McNeil. Id. After receiving this information Owens proceeded to Marshall's residence. Id. Once there, Owens spoke with both Marshall and McNeil's mother Tyra Adkins ("Adkins"). Id. at 859. Marshall showed Owens apparent blood on Major's car seat and gave Owens the bullets she had collected from the driveway. Id. at 860.

Clark County Medical Examiner Dr. Elaine Olsen ("Olsen") conducted McNeil's autopsy.[10] According to Olsen, McNeil suffered seven (7) gunshot wounds to her body. AA III 704, 723. At least one wound appeared to be from close range. Id. at 712. Olsen concluded that McNeil died due to multiple gunshot wounds. Id. at 726. Olsen also noted that McNeil had both methamphetamine and hydrocodone in her system when she died.[11] Id. at 724.

On December 22, 2015, Owens obtained a warrant for Newson's arrest. AA IV 862-63. Later that day, officers with the Claremont, California police department encountered Newson during a suspicious person investigation. Id. at 863. After running a records check, officers noticed the arrest warrant from Nevada and took Newson into custody. Id. The next day Owens traveled from Las Vegas to Claremont to interview Newson and retrieve potential evidence seized during Newson's arrest. Id. These items included a

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[10] Dr. Lisa Gavin ("Gavin"), the current medical examiner for Clark County Nevada, reviewed Olsen's autopsy report and testified at Newson's trial as Olsen retired before Newson's trial. AA III 698, 703.

[11] McNeil's methamphetamine level was 1600 nanograms per gram. This is eighty (80) times the minimum threshold necessary to be discernable in a toxicology screen. Id. at 730-31. Gavin acknowledged that methamphetamine is a stimulant that can cause aggressive behavior and hallucinations. Id. at 730.

black duffel bag, miscellaneous clothing and paperwork, 18 rounds of 9 mm ammunition, and a watch with an apparent blood stain on the wristband.[12] Id. at 864-66.

SUMMARY OF THE ARGUMENT

The District Court committed reversible constitutional error by denying Newson his right to in-person confrontation. Prior to trial the State filed a motion asking that two witnesses, Marshall and Santana, be allowed to appear and testify at trial *via* video. AA I 46. The State's explicit justification was that it would be more convenient for Marshall and Santana to testify remotely. Id. at 50. In opposition Newson noted the State had not offered any argument that allowing Marshall and Santana to testify via video was necessary to further an important public policy. Id. at 56. Nevertheless, the district court summarily granted the State's request. Id. at 240.

At trial, Newson renewed his objection and requested a mistrial. AA IV 826-28. In response, the State once again merely cited convenience as justification for the video testimony. Id. at 828-29. The district court overruled Newson's objection, again without making

[12] DNA testing confirmed the wristband contained a DNA mixture with a major profile belonging to McNeil. AA IV 764.

a case-specific finding that video testimony was necessary to further an important public policy. Id. at 829-31.

The district court clearly erred in allowing Marshall and Santana to testify *via* video. The U.S. Constitution's confrontation clause demands in-person testimony. Coy v. Iowa, 487 U.S. 1012, 1016 (1988). While this right is not absolute, a court may only dispense with in-person confrontation after making a case specific finding that testimony *via* alternative means is necessary to further an important public policy and that the reliability of the testimony is otherwise assured. Maryland v. Craig, 497 U.S. 836, 850 (1990). Mere witness convenience is universally recognized as insufficient justification for testimony *via* alternative means. Accordingly, Newson's district court committed constitutional error which can only be harmless if the State proves beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. See Medina v. State, 122 Nev. 346, 355 (2006).

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ARGUMENT

I. The District Court Violated Newson's Fundamental Constitutional Right to Confront Witnesses Against Him.

The Sixth Amendment's Confrontation Clause states "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. Pointer v. Texas, 380 U.S. 400, 404 (1965). The right to confrontation is "a fundamental right essential to a fair trial in a criminal prosecution." Id. Indeed, "the Confrontation Clause guarantees the defendant **a face-to-face meeting** with witnesses appearing before the trier of fact." Coy, 487 U.S. at 1016 (emphasis added). "[T]he Sixth Amendment's right of an accused to confront the witnesses against him is ... made obligatory on the States by the Fourteenth Amendment." Pointer, 380 U.S. at 403.

Nevertheless, "rights conferred by the Confrontation Clause are not absolute and may give way to other important interests." Coy, 487 U.S. at 1020. Specifically, "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy **and** only where the

reliability of the testimony is otherwise assured." Craig, 497 U.S. at 850 (emphasis added).[13] "The requisite finding of necessity must of course be a case-specific one." Id. at 855. This Court reviews whether evidentiary rulings violated the defendant's rights under the Confrontation Clause *de novo*." Lipsitz v. State, 135 Nev. 131, 136 (2019) (citing Chavez v. State, 125 Nev. 328, 339 (2009)).

A. The district court committed reversible error by allowing witnesses to testify *via* video.

Prior to trial, the State filed a motion requesting witness Marshall and witness Santana testify at trial *via* video. AA I 50. The State cited page four (4) of district court Administrative Order (AO) 21-04, which the chief judge issued in response to the coronavirus (covid19) pandemic. Id. Pertinently, AO 21-04 directed district courts conducting trials "to the extent possible, accommodate requests to appear by alternative means for any attorney, party or witness **who is considered a vulnerable person under current CDC guidelines**." Id. at 62 (emphasis added). In particular, the order noted "[t]his includes persons who are over 65, pregnant, or suffering from an underlying health condition." Id.

[13] Nevada applies the Craig test to confrontation claims as noted in Lipsitz v. State, 135 Nev. 131 (2019).

Notwithstanding its reference to AO 21-04, the State's explicit justification for Marshall and Santana to appear *via* video was not the coronavirus pandemic addressed by AO 21-04. Rather, the State asserted that Marshall "[] has explained to the State that she works every day but the occasional Monday and cannot afford to appear for trial other than by video." Id. at 62." Additionally, "[Marshall] currently lives in Phoenix, Arizona. Id. Regarding Santana, the State asserted, "[h]e had explained to the State that he started a new job and has mandatory training scheduled to begin on July 12 and running through mid-August. He currently lives in Pasadena, California." Id.

Newson opposed the State's motion. Id. at 53. First, Newson argued the State failed to explain whether Marshall or Santana had coronavirus vulnerabilities which would necessitate allowing them to testify *via* alternative means pursuant to AO 21-04. Id. at 55. Second, Newson argued absent a covid19 vulnerability, mere inconvenience to witnesses does not qualify as an exception to the in-person confrontation requirement under Craig. Id. at 55-56.

The district court heard argument on the State's motion on June 28, 2021. AA I 239. At the hearing the court summarily granted the State's motion without explanation. Id. at 240-41. Indeed, the court

did not mention AO 21-04 and made no case-specific finding that Marshall and Santana's video appearance was necessary to further an important public policy. See Id. at 239-42.

At trial Newson renewed his objection several times during Marshall's testimony. See AA IV 806, 807, 813. After Marshall finished testifying – outside the jury's presence – Newson expanded upon his objections and requested a mistrial. Id. at 828. In support, Newson noted that Marshall's testimony had audio difficulties, a smoke alarm "kept chiming," Marshall was "moving around the house," and Marshall held a baby while testifying and the baby could be heard making noises. Id. at 827. Newson also reiterated that the State never argued that it desired video testimony due to covid19. Id. at 828.

The state acknowledged the difficulties with Marshall's testimony but responded, "I mean we're dealing with someone who's in a different state, who didn't want to travel. She's a new mother. She has children. She had work responsibilities. And under the rules, it's appropriate for the Court to allow those types of witnesses to testify via video means." AA IV 828-29.

The court overruled Newson's objection. The court explained:

> Well, I mean this is the situation we're in. While it's not ideal to have any witnesses testifying via audio/visual technology, it's a different time that we're living in, and we have people under different circumstances. And in light of everything that has happened in the last year,[14] the Court has specific orders[15] that are in place by our chief judge that allows for this type of audio/visual testimony as well as there are statutes that allow for this.[16] This issue has been brought before the legislature, and that is absolutely allowed."
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> Id. at 829-30.

1. Witness convenience is not necessary to further an important public policy.

As previously noted, "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face

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[14] Although not clear, the court was most likely referencing the covid19 pandemic.

[15] It appears the court was referring to AO 21-04.

[16] The court did not cite a single statute which allows unrestricted audio-visual testimony at criminal trials due to covid19 or otherwise. While there are statutes authorizing testimony *via* alternative means, none apply to criminal trials, and all require explicit findings prior to authorization. See NRS 171.1975 (preliminary hearings); NRS 172.138 (grand jury); NRS 50.330 (affidavits in DUI prosecutions at preliminary hearing, administrative proceeding, or grand jury), NRS 50.520 (Uniform Child Witness Testimony by Alternative Methods Act); Nev. Rule Civil Pro. 16.215 (child witnesses in custody proceedings). In fact, only Nevada Supreme Court Rule 4 specifically addresses testimony *via* alternative means by witnesses at criminal trials. Significantly however, Rule 4(1) requires the district court comply with Maryland v. Craig before authorizing appearance *via* alternative means.

confrontation at trial **only** where denial of such confrontation is necessary to further an important public policy **and** only where the reliability of the testimony is otherwise assured." Craig, 497 U.S. at 850 (emphasis added). Importantly, "[t]he requisite finding of necessity must of course be a case-specific one." Id. at 855.

Not surprisingly, courts have almost unanimously recognized that witness convenience is not a sufficient reason to dispense with in-person confrontation. See e.g., State v. Thomas, 376 P.3d 184, 195 (N.M. 2016) ("Inconvenience to the witness is not sufficient reason to dispense with this constitutional right."); Haggard v. State, 612 S.W.3d 318, 328 (Ct. App. Tex. 2020) ("[] the right to physical, face-to-face confrontation lies at the core of the Confrontation Clause, and it cannot be so readily dispensed with based on the mere inconvenience to a witness."); U.S. v. Carter, 97 F.3d 1199, 1208 (9th Cir. 2018) ("[] a criminal defendant's constitutional rights cannot be neglected merely to avoid 'added expense or inconvenience.'") (quoting California v. Green, 399 U.S. 149, 189 (1930) (Harlan, J., dissenting)); State v. Rogerson, 855 N.W.2d 495, 507 (Iowa 2014) ("There is also a general consensus among courts that mere convenience, efficiency, and cost-saving are not sufficiently important

public necessities to justify depriving a defendant of face-to-face confrontation."); U.S. v. Yates, 438 F.3d 1307, 1316 (11th Cir. 2006) ("[T]he prosecutor's need for the video conference testimony to make a case and to expeditiously resolve it are not the type of public policies that are important enough to outweigh the Defendants' rights to confront their accusers face-to-face.").

Here, the district court clearly allowed Marshall and Santana to testify *via* video due to convenience. Indeed, the State – notwithstanding reference to AO 21-04 – explicitly requested that Marshall and Santana be allowed to testify *via* video because it was inconvenient for them to travel to Las Vegas to testify in person. See AA I 50. Later, during trial, the State reiterated it was simply more convenient for Marshall to testify *via* video. AA IV 828-29. The court agreed and justified the use of video due to "the circumstances of this witness." Id. at 829-30.

Based upon the above record, it is clear the court allowed Santana and Marshall to testify *via* video because it would be more convenient for them to do so. This justification directly violates Craig and its progeny. Accordingly, the district court explicitly violated Newson's confrontation right.

2. Administrative Order 21-04 did not broadly authorize testimony *via* alternative means.

During 2020 and 2021 the Eighth Judicial District Court issued numerous administrative orders related to the coronavirus pandemic. See AA I 60. The district court updated its orders periodically due to changing CDC guidelines and Governor Steve Sisolak's various public health orders, issued ostensibly pursuant to NRS 414.060 and 414.070. Id. When Newson's trial began the Eighth Judicial District Court was operating under AO 21-04, which the chief judge issued on June 4, 2021.[17] Id. at 85. The order purportedly sought to mitigate covid19's spread by advising, "District Court Judges should, to the extent possible, accommodate requests to appear by alternative means for any attorney, party or witness, **who is considered a vulnerable person under current CDC guidelines**. This includes persons **who are over 65, pregnant, or suffering from an underlying health condition**."[18] Id. at 62 (emphasis added). However, the order also advised, "[a]ttorneys, parties, and witnesses are reminded that alternative means still constitutes a court appearance and attire should

[17] This Court endorsed AO 21-04. AA I 85.

[18] It is worth noting that when the district court issued AO 21-04 on June 4, 2021, three different covid19 vaccines had been available to every person over the age of 16 in Nevada since April 5, 2021.

remain professional and court appropriate. **Appearance should be made from a quiet place free of distractions**."[19] Id. (emphasis added).

Although this Court has not addressed the impact of covid19 mitigation orders on a defendant's confrontation right at trial, many other courts have.[20] For example, the Missouri Supreme Court has held, "generalized concerns about the virus may not override an individual's constitutional right to confront adverse witnesses in a juvenile adjudication proceeding." C.A.R.A. v. Jackson County Juvenile Office, ___ S.W.3d ___, ___ 2022 WL 106134, *13 (Sup. Ct. Mo. January 11, 2022). Likewise, Nebraska recognizes that covid19 does not broadly justify testimony *via* alternative means. See State v. Camacho, 960 N.W.2d 739, 755-56 (Neb. 2021). Additionally, the Minnesota Appellate Court expressly held that covid19 alone does not satisfy the necessity requirement under Craig. State v. Tate, ___ N.W.2d ___, ___ (Ct. App. Minn. 2022), 2022 WL 16575, * 8 (Minn.

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[19] Marshall's behavior during her testimony – wandering about the room, attending to a baby, and allowing a fire alarm to "chirp" – hardly complied with AO 21-04's requirement that video testimony resemble a court appearance and be free from distractions.

[20] This Court did address use of audio/visual technology in response to covid19 and a defendant's right to be present at his sentencing hearing in Chapparo v. State, 497 P.3d 1187 (Nev. 2021).

January 3, 2022) ("we hold that a generalized concern regarding the COVID-19 pandemic is not a sufficient furtherance of an important public policy to dispense with a defendant's right to confront a witness face-to-face."). Indeed, to comply with Craig, the Minnesota court advises "witness-specific findings of a particular risk associated with COVID-19, such as having an underlying health condition or testing positive for COVID-19 during the time period the testimony is set to occur, are required to meet the necessity prong." Id. Other courts are in accord. See U.S. v. Kail, 2021 WL 1164787, *1 (N.D. Cal. March 26, 2021) (notwithstanding covid19, "[w]hat is 'necessary' to allow witnesses to appear by videoconference is a high bar to meet."); U.S. v. Casher, 2020 WL 3270541, *3 (D. Mont. June 17, 2020) ("While the Court is sympathetic to those witnesses who must travel during these times, the potential risks COVID-19 poses do not present a necessity to forego Mr. Casher's confrontation rights.").

Here, the State cited page 4 of AO 21-04 in its Motion requesting permission for Marshall and Santana to testify *via* video. AA I 50. However, the State did not claim Marshall or Santana had to testify *via* video due to covid19 concerns. Likewise, in the granting the State's motion the district court never mentioned covid19. See Id.

at 240-41. However, upon Newson's renewed objection at trial, the court appeared to erroneously believe that AO 21-04 – and certain non-existent statutes – broadly authorized testimony *via* alternative means due to covid19. See AA IV 829-30 ("While it's not ideal to have any witnesses testifying via audio/visual technology, it's a different time that we're living in, and we have people under different circumstances."). This is absolutely incorrect.

Newson steadfastly maintains the district court authorized Marshall and Santana to testify *via* video solely due to convenience. Nevertheless, To the extent the record could plausibly suggest the district court allowed Marshall and Santana to testify *via* video due to covid19, the court still erred. AO 21-04 did not broadly allow testimony *via* alternative means for witnesses in criminal trials due to covid19. Rather, AO 21-04 merely suggested the district courts could authorize testimony *via* alternative means for witnesses who were particularly vulnerable to coronavirus "under current CDC guidelines." AA I 62. "Vulnerable" persons under CDC guidelines include: Older adults; persons with cancer; chronic kidney disease; chronic liver disease; chronic lung disease; dementia or other neurological conditions; diabetes (both type 1 and 2); down syndrome;

certain heart conditions; HIV infection; immunodeficiency; obesity; pregnancy; sickle cell disease or thalassemia; current or former smokers; solid organ or blood stem cell transplant; stroke or cerebrovascular disease; substance abuse; and tuberculosis. See, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>, last accessed January 21, 2021.

To the extent the court relied upon covid19 broadly when allowing the video testimony, the court violated Newson's confrontation right. Additionally, the district court made no case-specific finding that either Marshall or Santana were over 65 years of age, pregnant or considered a "vulnerable person" pursuant to the CDC guidelines. Rather, the court appears to have arbitrarily violated Newson's confrontation right based upon nothing more than its belief that, "it's a different time we're living in." AA IV 829.

Absent a finding that the witnesses were vulnerable to covid19, the virus itself was not sufficient justification to allow testimony *via* alternative means. Thus, having failed to satisfy Craig's first prong, this Court need not concern itself with Craig's second prong – whether "the reliability of the testimony is otherwise assured." See Yates, 438

P.3d at 1318 ("[b]ecause we find that denial of Defendants' Sixth Amendment rights to face-to-face confrontation was not necessary to further an important public policy in this case, we proceed no further with the Craig analysis.").

B. The State Must Prove the District Court's Error was Harmless.

Confrontation clause errors are subject to constitutional harmless error analysis. Medina, 122 Nev. at 355. Under this standard, "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." Id. (citing Chapman v. California, 386 U.S. 18, 24 (1967)). Essentially, reversal is not required "if the State could show beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Medina, 122 Nev. at 346. See also Valdez v. State, 124 Nev. 1172, 1189 (2008); Belcher v. State, 136 Nev. 261, 267 (2020). "In the context of the denial of physical confrontation, the harm analysis cannot include consideration of whether the witness' testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation because such an inquiry would obviously involve pure speculation." Coy, 487 U.S. at 1021-22.

As the State bears the burden to prove that the district court's erroneous denial of Newson's right to confrontation was harmless, Newson will address any argument the State makes regarding harmlessness in his Reply Brief.

CONCLUSION

Based upon the foregoing arguments, Newson respectfully requests this Court reverse his convictions.

Respectfully submitted,

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DATED this 3rd day of February, 2022.

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