

In the
Supreme Court of the United States

STEPHEN JOSEPH JOHNSON,
Petitioner,

v.

THE STATE OF MONTANA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MONTANA

**BRIEF IN OPPOSITION OF
THE STATE OF MONTANA**

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COUNTER-STATEMENT TO QUESTION PRESENTED

In *Maryland v. Craig*, 497 U.S. 836 (1990), this Court addressed the situations in which a live witness can testify in court remotely via closed-circuit television. It held that remote testimony is constitutionally permissible if (1) it is necessary to further a public policy interest, and (2) the testimony is reliable because it is subject to oath, cross-examination, and jury observation of the witness's demeanor. *Id.* at 850. In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court addressed fundamentally different situations in which out-of-court hearsay can be admitted. It held that testimonial out-of-court statements are inadmissible, unless the witness is unavailable to testify and the defendant had a prior opportunity for cross-examination. *Id.* at 53-54.

The question presented is: Whether *Crawford's* holding as to out-of-court hearsay implicitly overruled *Craig's* test for in-court remote testimony that is subject to cross examination.

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INTRODUCTION

This case is a poor vehicle to address the question presented, which is not worthy of certiorari even in a proper vehicle. Petitioner asks this Court to hold that *Crawford v. Washington*, 541 U.S. 36 (2004), *sub silentio* overruled *Maryland v. Craig*, 497 U.S. 836 (1990), and that the former now provides the standard for in-court testimony delivered remotely. But *Crawford* dealt with a fundamentally different constitutional issue than *Craig*—namely, out-of-court testimony that is not subject to oath, cross-examination, or jury observation of the witness. *Crawford* did not mention, nor did it need to mention, *Craig*.

For that reason, there is no real split or confusion amongst lower courts: the overwhelming majority of courts continue to apply *Craig* to remote in-court testimony, and last year a unanimous Court confirmed *Craig*'s vitality in *Pitts v. Mississippi*, 607 U.S. 1 (2025). Only two state courts and no federal courts have gone the other way, whereas the courts of appeal of twenty-five States and eight federal courts of appeal that continue to follow *Craig*. Beyond that, there is some academic chatter and a few concurring opinions noting possible tension between the two. But that does not render the question worthy of certiorari given the lack of a split amongst courts.

Most importantly, Petitioner did not raise the question in the court below: he invited the Montana Supreme Court to apply *Craig* to the facts of his case, not to apply *Crawford* as the governing precedent. This Court does not grant certiorari when the lower court did not address the issue because the litigant did not present.

The question presented is also not case-dispositive because any error was harmless in light of Petitioner's own testimony which confirmed what the remote witness testified to live via two-way video—that Petitioner entered the witnesses' garage without permission. There was more than substantial testimony to support the verdict beyond a reasonable doubt. And, finally, Petitioner's own flight from justice is what caused the trial delay that led the witness having to testify remotely. For those reasons, the case is a poor vehicle for a question that this Court need not address.

This Court should deny the Petition.

STATEMENT OF THE CASE

On April 26, 2021, Petitioner went on a crime spree in Helena, Montana. App. 2a-3a. He stole a truck, crashed it through a fence into a residential yard, and then broke into Eugene Maw's garage to hide from police. App. 4a.

Petitioner was charged with several crimes, including burglary, which in Montana occurs when someone "knowingly enters or remains unlawfully in an occupied structure and . . . has the purpose to commit an offense in the occupied structure." MCA 45-6-204(1). The State filed charges in May 2021, but Petitioner failed to appear for multiple court appearances, delaying the trial until January 2023. App. 4a. In the interim, Mr. Maw moved from Montana to Burbank, Washington. App. 4a.

The State moved to permit Maw to testify remotely because he was 86 years old, had burdensome caretaking obligations for his adopted children and 79 year old wife on dialysis who had medical needs and appointments three times per

week, and would need to travel 450 miles. App. 4a. The district court held that these circumstances were adequate justification and let Maw “testif[y] by live, two-way video.” App. 4a-5a; *Montana v. Johnson*, 584 P.3d 77, 80 (Mont. 2026). There were no “communication difficulties during his testimony.” App. 5a. Mr. Maw was subject to cross examination. *Id.* Maw testified that he did not give Johnson permission to be in his home and described discovering Johnson crouched behind a moving box in the garage. App. 5a.

At trial, Petitioner testified in his own defense. As the Montana Supreme Court recognized, his testimony directly confirmed Mr. Maw’s testimony that he entered Mr. Maw’s garage without permission. App. 5a. Specifically, Petitioner testified that:

So at that point, I know he is chasing, and I know that he knows that I’m jumping fences. So I try the door. It opens. I run in, and I crouch behind a box, and I slide the box over and I’m crouched down.

. . .

The garage door luckily to me, luckily, was open. I went in, got behind a box, slid the box in front of me between the box and a refrigerator.

Supp.App. 47a–48a (362:17–21; 363:11–14).

He also testified that an elderly gentleman slid the box out of the way, “looked at [him] and turned around and walked away from [him].” *Id.* at 49a–50a (364:20–365:3).

On cross-examination, Petitioner testified:

“Q. You broke into Mr. Maw’s house, right?

A. No. I went into his open garage.

Q. *So he didn’t give you permission to go in his house, right?*

A. No, he did not.

Q. Okay. So you had no — you had no business being in his house, right?

A. (Makes noise.) *No, I had no business being in his house.*

Q. Okay. So you shouldn’t have gotten in his house because you weren’t supposed to go in there, right?

A. That’s — I would say that that’s fair.

Q. No one gave you permission to hide in that garage, right?

A. Correct.”

Id. at 55a (381:9–24) (emphases added)

Petitioner further testified that he hid, knowing that law enforcement was outside the house and looking for him. *Id.* at 57a–58a (383:8–384:13); 50a–51a (365:24–366:7); 61a (407:6–8). After Maw walked away, Petitioner followed him into the house. *Id.* at 50a–51a (366:23–367:5).

The jury found Petitioner guilty on three counts, including burglary. App. 5a. He was sentenced to five years and two years for bail jumping, running concurrently. App. 5a.

Petitioner argued on appeal to the Montana Supreme Court that his Sixth Amendment right to confrontation was violated by Maw’s remote

testimony because Montana had not satisfied the two *Craig* elements, as applied by the Montana Supreme Court in *State v. Strommen*, 547 P.3d 1227, 1236 (Mont. 2024). See Supp.App. 10a–11a, 14a. Petitioner did not argue that *Craig* was no longer good law under *Crawford*, and that the standard was unconstitutional. He argued only that the facts did not meet the *Craig* test. See generally *ibid.* The State, by contrast, argued that the district court applied *Craig* correctly. *Id.* at 29a–33a.

The Montana Supreme Court affirmed under the two-part test from *Craig*, as Petitioner invited it to apply. Petitioner now seeks certiorari, presenting the question “What is the appropriate standard for assessing whether the Confrontation Clause of the Sixth Amendment permits a prosecution witness to testify by two-way video?” Pet. i.

REASONS FOR DENYING THE WRIT

I. The Case Is a Poor Vehicle for Certiorari Because the Question Presented Was Not Preserved and Is Not Case Dispositive

A. The question presented was not preserved in proceedings below

Petitioner asks this Court to address whether *Craig* or *Crawford* supplies the appropriate standard for whether the Confrontation Clause permits a prosecution witness to testify by two-way video. But Petitioner did not raise this argument in the Montana Supreme Court; to the contrary, he argued that the Court should apply the *Craig* standard but that it was not satisfied. Supp.App. 10a–14a. Petitioner’s failure to raise this issue in state court is, itself, a sufficient reason to deny the Petition.

This Court’s jurisdiction over cases decided by State supreme courts is limited to decisions on: (1) the validity of federal laws; (2) conflicts between federal and State laws, and, as relevant here, (3) “[f]inal judgments or decrees . . . in which a decision could be had . . . where any . . . right . . . is *specially set up or claimed* under the Constitution or the treaties or statutes of . . . the United States.” 28 U.S.C. § 1257(a) (emphasis added). Thus, this Court has “almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim ‘was either addressed by or properly presented to the state court that rendered the decision [it has] been asked to review.’” *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (quoting *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (*per curiam*)).

The Court has articulated two bases for this rule: (1) “comity”—not “disturb[ing] the finality of state judgments on a federal ground that the state court did not have occasion to consider”; and (2) “practical considerations” such as “avoid[ing] unnecessary adjudication in this Court” and “assist[ing] [it] in [its] deliberations by promoting the creation of an adequate factual and legal record.” *Adams*, 520 U.S. at 90–91; cf. *Cutter v. Wilkinson*, 544 U.S. 709, 719 n.7 (2005) (“Because these defensive pleas were not addressed by the Court of Appeals, and mindful that we are a court of review, not of first view, we do not consider them here.”).

The analysis is straightforward: did the State high court “expressly address the question on which we granted certiorari [or certiorari is sought]?” *Adams*, 520 U.S. at 86. If not, the Court “assume[s] that the issue was not properly presented,” and the petitioner must show that it was properly presented

to proceed. *Ibid.* A petitioner may do so by establishing that he “presented the particular claim at issue . . . with ‘fair precision and in due time.’” *Id.* at 87 (quoting *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928)). Presenting a claim with “fair precision,” meanwhile, has meant that the litigant must “squarely argue” the point later raised in his petition for certiorari. *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 464 (1993). A review of what Petitioner argued and the Montana Supreme Court decided below makes clear that the issue was neither addressed nor properly presented below.

The Montana Supreme Court did not expressly address below whether the *Crawford* standard overruled or replaced the one from *Craig*. It discussed *Crawford* only in the context of refining its Confrontation Clause precedents to more closely align with *Craig*, noting that its prior grafting of “unavailable” and “good faith” requirements onto the two-element *Craig* test had been borrowed from *Crawford* and another factually distinct case that both “involved the admission of testimonial *hearsay* of a witness who could not testify at trial due to *physical or legal unavailability*.” App. 11a. Because the Montana Supreme Court did not expressly address a perceived tension or conflict between the *Craig* and *Crawford* standards, the issue is preserved only if Petitioner properly presented it.

He did not. Petitioner never suggested that *Crawford* should govern the propriety of Mr. Maw’s testimony. To the contrary, he focused his argument *solely* on why the *Craig* standard was not satisfied. Specifically, in his brief to the Montana Supreme Court, he advised the court that “limitations on the right of confrontation is [sic] governed by two

requirements”—the two *Craig* elements as applied by the Montana Supreme Court in *Strommen*, 547 P.3d at 1236. Supp.App. 10a. He further represented that “[t]he Craig [sic] *supra* requirements now must be applied.” *Id.* at [Br. Appellant 14]. Petitioner then mapped the facts of his case onto the two *Craig* elements, arguing that “the ruling of the trial court [was] error for failing to meet both requirements.” *Id.* at [Br. Appellant 17].

Meanwhile, *Crawford* makes only the most fleeting of appearances, on the separate issue of what evidence is considered testimonial. See *id.* at 13. This is about as far as Petitioner can get from “squarely argu[ing]” the point he now seeks certiorari on. *TXO Prod. Corp.*, 509 U.S. at 464.

Because the question presented was neither addressed nor properly presented below, the Court should, consistent with its long-standing practice, refuse to consider it.

**B. Resolving the question presented
would not change the outcome of the
case**

1. Petitioner invited any error

Petitioner’s own unlawful acts and omissions invited any error he complains of, meaning it cannot be a basis for reversal. Under the invited error doctrine, a party “may not complain on review of errors below for which he is responsible.” *Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1270 (9th Cir. 2002) (citation omitted). “It applies where a party introduced, or directly set in motion, the error of which he complains.” *Hunter v. U.S. Dep’t of Educ.*, 115 F.4th 955, 963–64 (9th Cir. 2024) (cleaned up,

citation omitted). Here, even assuming error, Petitioner invited it for two reasons.

First, Petitioner’s crime spree took place in April 2021. The State filed charges within two weeks, but he “failed to appear for several court appearances,” prompting the State to add a Bail Jumping charge. App. 4a. Due to his evasions, Petitioner was not arraigned until June 2022, over a year later. Maw, the State’s witness, moved out of state during the delay caused by Petitioner hiding out from the law. And the reason Maw could not testify in person at trial in January 2023 was that he was residing 450 miles away by then. To the extent permitting Maw to testify remotely was error (it was not, *infra*), the error was invited because Petitioner was responsible for occasioning such means of testimony.

Second, Petitioner asked the Montana Supreme Court to apply *Craig*. Petitioner argued that “limitations on the right of confrontation is [sic] governed by two requirements”—the two *Craig* elements—and that “[t]he *Craig* [sic] *supra* requirements now must be applied.” Supp.App. 11a. A party who persuades a court to apply a legal standard cannot then seek certiorari complaining that the court did what he asked. See *Johnson v. United States*, 520 U.S. 461, 466 (1997) (“[A]s a general rule, if a party does not raise an objection . . . he may not raise that objection on appeal.”).

2. Any Constitutional Error Was Harmless

Even to the extent it was constitutional error to admit Maw’s remote testimony, such error would be harmless because substantial evidence other than

Maw’s allegedly tainted testimony clearly established the elements of the burglary charge.

Under Montana and federal law, an error is harmless based on the “cumulative evidence” test, which looks to “whether the fact-finder was presented with admissible evidence that proved *the same facts as the tainted evidence proved.*” *Montana v. Van Kirk*, 32 P.3d 735, 745 (Mont. 2001) (citing *Harrington v. California*, 395 U.S. 250, 254 (1969)).

Here, Petitioner’s own testimony aligns entirely with Mr. Maw’s testimony regarding the relevant element of burglary—that Petitioner entered Mr. Maw’s house without permission. *Supra* pp. 4–5; Supp.App. 55a (381:9-24). Additionally, the jury was presented with evidence that Petitioner was seen and arrested inside a home that did not belong to him: Trooper Villa testified that he had encountered Petitioner running inside Maw’s house and arrested him there. Supp.App. 46a, 48a (321:2–22; 323:1–9).

Absent Mr. Maw’s testimony, the other testimony provides ample evidence to prove beyond a reasonable doubt that Petitioner “knowingly enter[ed] or remain[ed] unlawfully in an occupied structure,” the relevant element of the statute he was convicted of. MCA 45-6-204(1). Thus, any error was harmless beyond a reasonable doubt and Petitioner’s conviction would be sustained regardless.¹

¹ The parties briefed harmless error below (Supp.App. 3a, 13a–16a, 19a, 37a–39a), but the Montana Supreme Court did not reach it because it held that *Craig* easily disposed of the case.

II. The Question Presented Is Not Worthy of Certiorari

Although a petition may, “abstractly considered . . . present an intellectually interesting and solid problem . . . this Court does not sit to satisfy a scholarly interest in such issues.” *Rice v. Sioux City Mem’l Park Cemetery*, 349 U.S. 70, 74 (1955). Here, the question presented is not worthy of certiorari because the Montana Supreme Court was right to apply *Craig* instead of *Crawford* and there is no meaningful conflict or confusion in the lower courts on that point.

A. The decision below is correct

Petitioner argues that *Crawford* implicitly overruled *Craig*. But *Craig* remains binding precedent because *Crawford* did not even mention, let alone expressly overrule it. See *Arthur C. v. Frame*, 928 S.E.2d 419, 429 (W. Va. 2026). As the Court has long instructed, if one of its precedents “has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower court] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.” *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (citation omitted). That is the case here.

There is no reason to infer that *Crawford* impliedly overruled *Craig* because the two cases addressed fundamentally different scenarios and constitutional concerns. *Crawford* involved the admission of a tape-recorded, *out-of-court* testimonial statement where the defendant had no opportunity for cross-examination whatsoever. 541 U.S. at 38, 40. By contrast, *Craig* addressed the manner in which a live witness may testify remotely *in court*—subject to

oath, cross-examination, and observation by the jury. 497 U.S. at 851–52; *Minnesota v. Tate*, 985 N.W.2d 291, 300 (Minn. 2023) (“*Crawford* simply did not address the face-to-face aspect of confrontation and whether . . . a full, virtual cross-examination[] can satisfy a defendant’s right to confrontation under certain narrow circumstances.”).

This distinction is not a mere technicality, it renders the two cases distinct at a constitutional level. The core evil that *Crawford* addressed was the use of ex parte, untested testimonial statements as a substitute for live, cross-examined testimony. 541 U.S. at 50–51. As the Montana Supreme Court and several other state high courts have noted, in-court remote testimony under *Craig* preserves the “hallmarks of confrontation”—testimony “under oath” and “subject to cross-examination[] and . . . assessment of the witness’s veracity by the factfinder.” *Montana v. Mercier*, 479 P.3d 967, 974 (Mont. 2021); see also, e.g., *New Mexico v. Thomas*, 376 P.3d 184, 195 (N.M. 2016); *Arthur C.*, 928 S.E.2d at 428–29. Thus, *Craig* does not disturb the safeguards that *Crawford* identified as essential to the Confrontation Clause right. And to the extent physical, face-to-face confrontation with a witness represents a component of the right, *Craig* instructs that it is not indispensable but can be foregone upon a case-specific, factual finding of necessity. *Pitts v. Mississippi*, 607 U.S. 1 (2025).

Because *Craig* and *Crawford* address different applications of the Confrontation Clause, they are not in conflict and can coexist harmoniously. As the Montana Supreme Court explained, “*Crawford* did not involve two-way videoconferencing where the witness *is* available to testify” but rather “involved

the admission of testimonial hearsay of a witness who could not testify at trial due to physical or legal unavailability.” App. 11a. *Crawford* governs the admissibility of out-of-court hearsay, while *Craig* continues to govern the manner in which in-court testimony may be presented.

The Montana Supreme Court faithfully followed this approach (as Petitioner invited it to do). So have the vast majority of state and federal courts to consider the issue, as set forth below.

B. There Is No Confusion or Split in the Lower Courts

Crawford was decided over twenty years ago. During that time, most State high courts have had occasion to consider whether to revisit their *Craig* precedents in light of *Crawford*. Petitioner identifies only two that have held that *Crawford* impliedly overruled *Craig*: Missouri and Michigan. See *Missouri v. Smith*, 636 S.W.3d 576 (Mo. 2022); *Michigan v. Jemison*, 952 N.W.2d 394 (Mich. 2020).

Yet the vast majority of State appellate courts to consider the issue (twenty-five by Respondent’s count) treat them as distinct precedents controlling different issues. See *Bragg v. Alabama*, 390 So. 3d 578 (Ala. Crim. App. 2023); *California v. Gonzales*, 281 P.3d 834, 863 (Cal. 2012); *Colorado v. Phillips*, 315 P.3d 136, 151 (Colo. 2012); *Connecticut v. Arroyo*, 935 A.2d 975, 991–92 (Conn. 2007); *J.T.B. v. Florida*, 345 So. 3d 927, 932 (Fla. Dist. Ct. App. 2022); *In re E.T.*, 804 S.E.2d 725, 731 n.7 (Ga. Ct. App. 2017); *Illinois v. Franklin*, 229 N.E.3d 364, 380–81 (Ill. App. Ct. 2023); *Kansas v. Blanchette*, 134 P.3d 19, 29 (Kan. Ct. App. 2006); *Johnson v. Kentucky*, 718 S.W.3d 597, 612 (Ky. 2025); *Minnesota v. Trifiletti*, 6 N.W.3d 79 (Minn.

2024); *Stevenson v. Mississippi*, 357 So. 3d 1141, 1151 n.9 (Miss. Ct. App. 2023); *Montana v. Mercier*, 479 P.3d 967, 975–76 (Mont. 2021); *Lipsitz v. Nevada*, 442 P.3d 138 (Nev. 2019); *New Mexico v. Thomas*, 376 P.3d 184, 193–94 (N.M. 2016); *New York v. Beltran*, 110 A.D.3d 153, 162 (N.Y. App. Div. 2013); *North Carolina v. Jackson*, 717 S.E.2d 35, 39 (N.C. Ct. App. 2011); *Ohio v. Carter*, 238 N.E.3d 87, 94–95 (Ohio 2024); *Pennsylvania v. Tighe*, 184 A.3d 560, 569 n.4 (Pa. Super. Ct. 2018), *aff'd*, 224 A.3d 1268 (Pa. 2020); *South Carolina v. Anderson*, 776 S.E.2d 76, 78–79 (S.C. 2015); *Tennessee v. McCoy*, 459 S.W.3d 1, 13 (Tenn. 2014); *Utah v. Henriod*, 131 P.3d 232, 237–38 (Utah 2006); *Roadcap v. Virginia*, 653 S.E.2d 620 (Va. Ct. App. 2007); *Washington v. D.K.*, 507 P.3d 859 (Wash. Ct. App. 2022); *Arthur C v. Frame*, 928 S.E.2d 419, 429–30 (W. Va. 2026); *Wisconsin v. Vogelsberg*, 724 N.W.2d 649, 654 (Wis. Ct. App. 2006). In short, there is no real split worthy of certiorari, nor are the state courts confused.

Petitioner’s invocation of federal courts of appeals is even less persuasive. He cannot identify a single circuit that has applied *Crawford* instead of *Craig* as to live remote testimony at trial—but he acknowledges that five circuits have continued to apply *Craig* post-*Crawford*. Pet. 8–10. At least three others have done so. See *United States v. Maynard*, 90 F.4th 706, 711–12 (4th Cir. 2024); *United States v. Cotto-Flores*, 970 F.3d 17, 39 n.17 (1st Cir. 2020); *United States v. Bordeaux*, 400 F.3d 548, 553–54 (8th Cir. 2005). Petitioner instead latches onto a single concurring opinion from the Sixth Circuit and a Second Circuit precedent that distinguishes *Craig* as governing testimony by *one-way* closed-circuit TV—in order to impose a *more* lenient standard for *two-way*

video. See *United States v. Cox*, 871 F.3d 479, 492–94 (6th Cir. 2017) (Sutton, J., concurring); *United States v. Gigante*, 166 F.3d 75, 80–81 (2d Cir. 1999). This is hardly the ferment in the lower courts an irreconcilable conflict between *Craig* and *Crawford* would engender.

Most importantly, just last year a unanimous Court confirmed *Craig*’s continuing vitality in a ruling in *Pitts v. Mississippi*, 607 U.S. 1 (2025). Thus, despite some academic chatter and a few concurrences, dissents, and outlier state court decisions, there is no need to grant certiorari to test *Craig*’s good health.

CONCLUSION

This Court should deny the petition for the writ of certiorari.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

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IN THE SUPREME COURT OF THE
STATE OF MONTANA

No. DA 23-0581

STATE OF MONTANA,

Plaintiff and Appellee,

v.

STEVEN JOESPH JOHNSON,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana First Judicial District
Court, Lewis & Clark County, the Honorable Kathy
Seeley Presiding.

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STATEMENT OF ISSUES

ISSUE 1: Was the Appellant's right under the 6th., and the 14th., amendment of the United States Constitution and as enshrined in Art. II Sec. 24 of the Montana constitution to confront witnesses against him in open court denied when the trial court allowed a substantial and meaningful witness for the Appellee to testify by video conferencing at trial over the objection of the Appellant?

ISSUE 2: Was the trial courts violation of the Appellant's constitutional right to confront his accusers by its allowance of a critical state witness to testify by video conferencing harmless error?

STATEMENT OF THE CASE

On or about May 5th., 2021 the Appellant was charged by information with: Theft, a felony, Possession of Drug Paraphernalia, a misdemeanor, Failure to Notify Owner after Accident resulting in property damage to property upon Highway (1st offense) a misdemeanor, Failure to Give Notice of an Accident by Quickest Means/Apparent Damage over \$1,000.00, Leave Scene of Accident Resulting in Property Damage over \$1,000.00 Without Permission, a misdemeanor, Reckless Driving, a misdemeanor, Driving a Motor Vehicle While Privilege to do is Suspended or Revoked, a misdemeanor. Dist. Ct. Doc. #1

By subsequent first and second amended information the Appellant was in additionally charged with Criminal Mischief, a felony, Burglary, a felony, and Bail Jumping, a felony. Dist. Ct. Doc. #9 & 34

All of the new charges were extension of the facts from the original incident, except for the Bail Jumping. As a condition of release, the appellant was ordered to appear at all subsequent hearings. The Appellant allegedly failed to appear at a final pretrial hearing and as a result was charged with the Bail Jumping Count, as alleged in the State's supporting affidavit. Dist. Ct. Doc. #32

Prior to trial, the State sought permission to allow the owner of the home alleged burglarized by the Appellant to testify via video conferencing in support of the allegations of the burglary and other facts of the prosecution's case. The Appellant counsel objected in writing by filing a written response on the 29th., day of December 2022 that was dated the 28th., which was prior to the hearing on the state's motion. (Dist. Ct. Doc. #79). The motion hearing was scheduled for January 5, 2023 by minute entry dated December 28, 2022. Dist. Ct. Doc. #79 On the 5th of January a hearing was held. The parties had a brief discussion and argument on the issue of using Zoom testimony with both parties referring to their respective briefs. The trial court subsequently issued an order granting the state's motion allowing for Zoom testimony. Dist. Ct. Doc. #84 The reasoning of the Court for granting the motion orally stated from the bench and then subsequently stated in the published order are different in content and reasoning.

For trial purposes the State reduced the number of counts against the Appellant to 5 after dismissing all of the misdemeanor counts. This matter then proceeded to a three-day jury trial. On the 11th., day of January 2023 the jury returned a verdict of not guilty on the count of Theft and guilty on the 3 counts

remaining of the information as amended. Prior to trial, the trial court dismissed one more misdemeanor count. Dist. Ct. Docs. # 89 & 90.

At a sentencing hearing held on April 13, 2023, the Appellant was sentenced to a total of 10 years to the Department of Corrections with 5 of those years suspended with conditions and restitution in the amount of \$8,402.74. This sentence was reduced to writing and signed by the Court on the 22nd day of May, 2023 and it is from this sentence and judgment of the court that the Appellant appeals. Dist. Ct. Doc. # 109.

STATEMENT OF THE FACTS

The Appellant and the initial victim KM had a causal relationship starting about April 24, 2021. About that time KM had just purchased a new to her vehicle, a 2013 GMC Terrain. The Appellant was allowed to stay at the residence of KM at the time of the purchase. See Dist. Ct. Doc.#2 at P. 2.

The purchase was completed from a private party that retained title to the vehicle and a contract for purchase that allowed for payments but possession of the vehicle be placed in KM, the purchaser. Trial Ct. Trans. P. 250 line, 12.

At trial a disputed fact was whether the Appellant had permission to have use of the vehicle on April 25, 2021. Trial. Trans. P.352 line 25. The Jury resolved this issue by finding the Appellant not guilty of the charge of theft at trial. Dist. Ct. Doc.#89 & 90.

The day after she purchased the vehicle, KM determined that the vehicle was missing from her property and called law enforcement and her son Travis to report the theft. Travis after some searching

discovered the vehicle parked at an establishment in Lewis and Clark County, Montana. Dist. Ct. Doc. 2. The Appellant left the establishment where the vehicle was parked, and Travis attempted to chase the Appellant for a short distance. Trial Trans. P.169 -174.

During the chase, the vehicle left the roadway and plowed through a yard damaging a fence, shed, swing set and a motorcycle that was parked in the shed. Dist. Ct. Doc.# 2 P3. The Appellant believed he was endangered given the pursuit of him by Travis, abandoned the vehicle and ran away on foot. He went over fences and into several back yards. He finally sought refuge in a garage located a little distance from the abandoned vehicle. Trial Trans. P. 361 line 19 – P. 362 line21. He was discovered there by the homeowner, one Mr. Eugene Maw. Trial Trans. P. 364 line 14-25.

The homeowner alerted law enforcement and even though the facts are disputed, the Appellant was arrested on the main floor of the home. Trial Trans. P.366 line 8-16.

After his arraignment and as part of the terms and conditions of his bond release, the Appellant was required to appear at all subsequent court hearings. Dist. Ct. Doc.#23. Even though he had attended all hearings in this matter as ordered by the court, he failed to appear at the final pretrial conference that was scheduled for February 17, 2022. Dist. Ct. Doc.# 29 As a result, the Appellant's bond was revoked and he was charged with the additional charge of "Bail Jumping". Dist. Ct. Doc.# 34

During the lapse of time between the original trial and the actual trial date, one of the chief witnesses for the State, the homeowner, Mr. Eugene

Maw moved from Helena, Montana to west central Washington. Mr. Maw is a man in his eighties, with a sick wife but had recently adopted two children under the age of 10. As trial approached, the State sought permission to have their central witness to its burglary charge appear by video conferencing/ZOOM. Dist. Ct. Doc.# 74 The pleadings indicate that the State reached out to the Appellant's trial counsel by phone and because of that call it filed a motion to allow the video conferencing testimony. Dist. Ct. Doc.# 74 P.3 line16. The Court scheduled a hearing Dist. Ct. Doc. 78 and defense counsel filed a response to the motion Dist. Ct. Doc.#79 in which the defense argued for the Appellant's constitutional right to confront in open court and in person his adversaries. The State filed a subsequent pleading further explaining its position. Dist. Ct. Doc. #76 After the hearing the Court issued a order allowing the State's witness to testify by video conferencing. Dist. Ct. Doc. # 84. The Court in its order outlined the bases for it order, as follows: As to public policy: "...allowing the State to prepare its case where the defense has been silent." As to reliability, that can be assured through cross examination. Finally, "due to the witness living in another state" etc. Dist. Ct. Doc. #84.

The matter finally went to a three-day trial on the beginning on January 9th., 2023. Testimony was presented on 5 counts of the amended information, as the State dismissed the other 5 counts. The Court granted a verdict in favor of the Appellant on the charge of Possession of Drug Paraphernalia during the resolution by the Court of jury instructions and upon verbal motion of the Appellant's attorney as the Court determined that there was no evidence offered by the State sufficient on the charge as to allow it to go to the jury. Trial Trans. P.421 line23 – P. 422 line

11 A verdict was rendered by the jury finding the Appellant not guilty on the theft charge but guilty on the remaining 3 charges. Dist. Ct. Doc. #89.

SUMMARY OF ARGUMENT

The Appellant's argument is focused on the denial of his constitutional right to confront his accuser by meeting the accuser in open court for testimony purposes. Said right of Confrontation was infringed upon by the trial court accepting inconvenience and expense as a basis for allowing this witness to testify by two-way communication and by the trial court failure to articulate an acceptable important public policy purpose to allow the rights of the Appellant to be denied. The trial court's infringement on the rights of the Appellant was not a harmless error as the State cannot show beyond a reasonable doubt that the denial of the Appellant's right did not compromise the evidence in such a way as to have had an effect on the conviction of the Appellant.

STANDARDS OF REVIEW

This Supreme Court under their authority for plenary review will review a lower court's conclusions and applications of constitutional law including the alleged violations of the fundamental right of the criminally accused to confront an adverse witness under the U.S. Const. amends. VI and XIV and under the constitution of the State of Montana Art. II sec. 24 de novo for correctness. *State v. Strommen* 2024 MT 87 P.11, 416 Mont. 275; 547 P3d. 1227, *State v. Mercier* 12; 403 Mont.34; 479 P3d. 967.

Even though an error has occurred and unless that error has been found to be structural in nature, an error that is not prejudicial to or harmful, the

Appellant's conviction cannot be reversed. 46-20-701(1) MCA, *State v. Van Kirk*, 2001 MT 184 P.40; 306 Mont. 215; 32 P3d. 735. Further, In order to prove that trial error was harmless, the State must demonstrate that there is no reasonable possibility that the error might have contributed to the conviction. *Van Kirk*, P42 Supra.

ARGUMENT

One of the fundamental rights of the accused is being able to confront his accusers in open court. This right is so important that it was enshrined in the 6th., amendment and 14th., amendment of the United State's Constitution. It was subsequently made fundamental law in the State of Montana in Article II, Sec. 24 of the Montana Constitution.

With the advent of modern technology, the confrontation right of the accused in an open court begins to become fuzzy. The issue takes on a definitional arch as to what historically has always been a right exercised personally in a face to face confrontation in front of the tier of fact. *Coy v. Iowa*, 487 U.S. 1012, 108 S.Ct. 2798; 101 L.Ed. 857 1988, *State v. Mercier* 12; 403 Mont.34; 479 P3d. 967 .

The United States Supreme Court in various opinions, has been quoted as stating that "It is always more difficult to tell a lie about a person 'to his face' than behind his back" even if a lie is told, it will often be ... less convincing" *Mercier* P. 16 Supra.

This Court recognized two exceptions to this right of face to face confrontation in the case of *City of Missoula v. Duane*, 2015 MT 232; 380 Mont.290; 355 P3d. 729 P.15. This Court in the *Missoula* case Supra evaluated and analyzed the United States Supreme Court' ruling in *Maryland v. Craig*, 497 U.S. 836

which allowed for the use of two-way conferencing as a recognition of public policy and necessity. This Court in *Mercier* P.17,18 supra and in *Missoula* supra recognized and adopted the requirements articulated by the United States Supreme Court in *Craig* Supra.

The limitations on the right of confrontation is governed by two requirements both of which must be a separate finding by the trial court and stated in the trial court's order: "(1) The witness is 'unavailable for the personal face to face cross-examination in the courtroom, and (2) denial of such personal face to face cross examination is 'necessary to further an important public policy' with the reliability of the testimony otherwise assured." *State v. Strommen*, 2024 MT 87 P.19, 416; Mont.275, 547P.3d.1227 P.290.

The type of evidence that the accused is entitled to confront in person is described as testimonial evidence. The United States Supreme Court defines that type of evidence as a statement is testimonial: (1) it is offered as evidence adverse to a criminally accused at trial. *Crawford v. Washington*, 541 U.S. 36, 2011P. 68-69; 124 S.Ct. 1354; 158 Ed. 2d. 177 (2003) P. 1354,1369, 1374 and when its primary purpose of the testimony is to establish, report or prove relevant factual matters to aid in the criminal prosecution of another. *Davis v. Washington*, 547 U.S. 813 P. 822, (2006).

In the case at bar, the State minimizes the testimony of the witness it sought to have testify by video(herein referred to as Mr. Maw) by simply saying that other witnesses will testify about the facts of arrest and that the witness will testify for less than 30 minutes. Dist. Ct. Doc. 75 P3 Lines 5-10. The opposite is true, as without this witness's testimony all the key elements cannot be established by the

State on the charge of burglary that the appellant was accused of. When applying the *Davis* supra definition the only reason for the testimony of this witness was to establish, report and prove factual matters to aid the prosecution. The Appellant in this matter sought and offered a different set of facts than the State, as presented by the witness, Maw. (Trial Trans. P363 – 369). Maw’s disputed testimony went to the “crime” that was required to be proven by the State as part of the burglary charge.

The testimony of Mr. Maw is obviously testimonial in nature being offered by the State is established certain relevant facts. His testimony was not of secondary importance and not offered only for context or other limited purposes.

Having established that the testimony of Mr. Maw is the type contemplated by the long establish legal precedent to be confronted by the Appellant in open court and on a personal basis, The *Craig* supra requirements now must be applied. Those requirements can be summarized as “witness availability” and “important public policy”.

The issue of availability is addressed in *State v. Bailey*, 404 Mont. 384; 489 P3d. 889 and described in *Strommen* P.19 Supra. Those cases require specific showing by the State and a finding by the trial court that the presence of the witness is impossible or impractical because of extraordinary distance, expense or health considerations. This Court also requires a good faith effort on the part of the State to acquire the witness for trial. Other than a letter to the State, there is no showing of any good faith effort to arrange for the appearance of the witness at trial.

In a letter to the prosecution, the witness outlines what his duties are at home. Dist. Ct. Doc.76

Yes, he cares for a sick wife, and two children, but none of it is out of the ordinary in any family or that suitable arrangements could not be made for. There is some distance between the home of the witness in Washington and Helena, Montana. The journey can be made in less than an average day of travel.

This Court in *Strommen* Supra stated clearly this court had rejected showings of more amounts of assertions and findings in order to protect the fundamental Montana and U.S. constitutional right to personal face to face courtroom cross-examination from diminution in the face of ever-advancing video conferencing technology. *Strommen* supra at page 21.

The *Strommen* Court went on to cite the case of *State v. Martell*, 2021 MT 318; 406 Mont.488; 500 P3d. 1233 pp. 3,13,15 &27 which stated that the State's position that requiring a witness to travel from the State of Washington for only a few minutes of testimony would be overly burdensome and unnecessarily expensive as insufficient (emphasis added) to justify non-harmless denial of defendant's right to face to face confrontation. The facts in the case at bar are the same.

The second prong or requirement to abrogate the Appellant's rights is one that requires the furthering of an "important public policy". *Bailey* P. 42 supra. *Bailey* goes on to say that judicial economy standing alone does not satisfy the definition of an important public policy when it stands alone. see *Bailey* P.42 and *Mercier* P.26 supra.

The trial court in its order in this case stated the following finding as to public policy: "2. The requested video appearance is supported by the important public policy of allowing the State to prepare its case where the defense has been silent." Dist. Ct. Doc. #84

The District Court record contradicts the finding of the court in that the State, after contact with the defendant's counsel as a matter of course filed its motion to get court permission. The Defendant's counsel files a response and a hearing is held. The State in its motion alleges that the defendant's counsel has not responded and the defendant's counsel states otherwise. Dist. Ct. Doc #79. A motion and response timely filed and then followed by a hearing is hardly consistent with a finding that the defendant's counsel has been silent.

It can be argued that a component of judicial economy is allowing the State to prepare its case. As earlier ruled, this is not sufficient to meet the second prong or requirement of the law. Being placed in a position, assuming even if the State's position is correct as to lack of response, to have the State do what the rules require is hardly a violation of an important public policy. It is the public policy of the Court to ensure that all parties to an action abide by and follow all the rules of court and laws of this State. From this, the State had a duty to get the Court's permission by filing a motion and being granted an order.

From the above argument it is clear that the Appellant argues that the position that the ruling of the trial court is error for failing to meet both requirements to deny the Appellant in court, face to face confrontation as guaranteed by both the United States and the State of Montana constitutions.

The next phase of the argument is whether or not the error on the part of the trial court is harmless error or structural error.

The *Strommen* Court P.29 Supra, defines structural error is typically of constitutional

dimensions and undermines the fairness of the trial. The Court cites and quotes *State v. Van Kirk*, 2001 MT 184. The Court goes further to say that structural error is thus presumptively prejudicial and reversible. This Court distinguishes other trial court errors that are those that do not undermine the fundamental fairness of the entire trial process, subject to the “harmless error” analysis. These errors are subject to, as the *Van Kirk* court, P.43 *supra* said qualitative assessment of the prejudicial impact of the error as it relates to the untainted trial evidence. Again, this Court citing *Van Kirk*, *supra*.

Strommen P.29 *supra* defines “Non-Structural Error” as harmless only if there is no reasonable probability that the erroneously admitted evidence contributed to the conviction.

In the *Mercier* case *supra*, the *Bailey* case, *supra* and others, this Court has viewed violations of Sixth Amendment rights as to the Confrontation cause as subject to the “harmless error” standard of review. The *Strommen* Court determined that the issue of face-to-face violations should be treated the same. *Strommen* *supra* at P.43.

The burden of proof of harmless error falls upon the State as stated by the *Van Kirk* Court *Supra* at P. 47. It is clear from that opinion that the State must show that there is no reasonable possibility that the error might have contributed to the conviction of the Appellant. The *Bailey* Court used the language of “the state bears the burden of proving beyond a reasonable doubt (emphases added) that the error was harmless. “*Bailey*, *Supra* at P. 46.

The Federal Appeals Court of the Sixth Circuit in the case of *United States v. Taylor*, 2025 Fed. App. 0028P echoes the same factors of review that this

Court stated in *Bailey*, supra at P. 46. Those factors include whether or not the evidence was cumulative, the importance of the testimony in the State's case, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points.

The *Bailey* court P.46 supra goes on to state that we do not look to the quantitative effect of the other admissible evidence but rather to whether the factfinder was presented with admissible evidence that proved the same facts as the tainted evidence that proved. Citing cases, *Mercier*, P. 31 supra.

The *Mercier* court, supra, P. 31, indicated that the determination of harmlessness cannot include consideration of whether the witness' testimony would have been unchanged, or the jury's evaluation unaltered, had there been confrontation as constitutionally guaranteed. Instead, harmlessness must be determined based on the remaining evidence, as indicated in the United State Supreme Court cases cited in its opinion.

As to the State's case on the burglary charge, even though the State tried to minimize Mr. Mau's testimony in its description to the trial court, it was essential to this charge. No one could directly testify to what Mr. Mau saw, did or what the Appellant did or said at the time of the Mr. Mau discovery of him. There was contradictive evidence as to where the Appellant was and what he was doing at the time of his arrest. All of which is the basis of the State's claim that the Appellant was committing a crime on the premises, which allowed for the charge of burglary.

It is important to note that the *Bailey* court P.46 supra, quoting the *Van Kirk* court Supra, stated that there will be cases in which there is no other

admissible evidence proving the same facts that the tainted evidence proved, thus making the burden of proving cumulative evidence of the fact in question impossible. If the only evidence tending to prove an element of the crime is tainted, then reversal will be compelled. (emphasis added).

Mr. Mau testimony is key to the burglary charge. The Appellant should have the opportunity in open court to challenge that testimony.

CONCLUSION

There was error in the granting of the State's motion to allow for testimony to be given by two-way communication technology. The right of the Appellant to meet his accuser in open court, eye to eye and face to face is a right that cannot be put aside easily. All levels of federal courts have placed the burden on the State in the issue of harmlessness and with the standard of proof beyond a reasonable doubt, not the Appellant. A burden that the State did not meet.

The trial court error in accepting inconvenience and distance to play into its decision, which is another manner of describing judicial economy, a United States Supreme Court declared as an unacceptable reason for allowing this kind of denial of right. As stated in its order on this matter, the trial court also relied upon a factually contradicted public policy to allow this infringement of the Appellant's rights to occur. The error is not harmless as the most rigorous charge of burglary could not be sustained without the testimony of the witness accommodated and proof that a crime occurred would not have been possible with other evidence. From all of the above, this conviction must be overturned and remanded to the trial court for a new trial.

Respectfully submitted this 20th, day of
February 2025.

By: /s/ Gregory E. Paskell

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* * *

IN THE SUPREME COURT OF THE
STATE OF MONTANA

No. DA 23-0581

STATE OF MONTANA,

Plaintiff and Appellee,

v.

STEVEN JOSEPH JOHNSON,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana First Judicial District
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STATEMENT OF THE ISSUE

Whether the district court erred by allowing a witness to testify via two-way video and, if so, whether the error was harmless.

STATEMENT OF THE CASE

On April 26, 2021, Appellant Steven Joseph Johnson crashed a reportedly stolen vehicle into the fence, shed, and swing set outside the Belcourts' residence, before fleeing the scene and hiding in the attached garage of Eugene Maw's house without permission. (1/09/2023—1/11/2023 Tr. (Trial Tr.) at 135-36, 150, 155, 171, 173, 178-80, 220, 231, 236, 259, 263, 293.)

The State ultimately proceeded to trial on the following charges against Johnson: Theft, a felony, in violation of Mont. Code Ann. § 45-6-301(1)(a), (7)(b)(ii); Criminal Possession of Drug Paraphernalia, a misdemeanor, in violation of Mont. Code Ann. § 45-10-103; Criminal Mischief, a felony, in violation of Mont. Code Ann. § 45-6-101(1)(a); Burglary, a felony, in violation of Mont. Code Ann. § 45-6-204(1)(b); and Bail Jumping, a felony, in violation of Mont. Code Ann. § 45-7-308. (Docs. 12, 34; 1/05/2023 Tr. at 15.)

Before trial, the district court, over Johnson's objection, granted the State's motion to allow Maw to testify at trial via two-way video. (Docs. 74, 79, 84; 1/05/2023 Tr. at 12-13.) After the jury convicted Johnson of Criminal Mischief, Burglary, and Bail Jumping,¹ the district court committed Johnson to the Department of Corrections for a term of ten years

¹ Before deliberations, the district court granted Johnson's motion to dismiss the Criminal Possession of Drug Paraphernalia charge. (Trial Tr. at 422.) The jury found Johnson not guilty of Theft. (*Id.* at 486.)

with five suspended for his Criminal Mischief conviction; five years, none suspended, for his Burglary conviction;² and two years, all suspended, for his Bail Jumping conviction. (Docs. 89; 109 at 1-2.) The district court ran each sentence concurrently. (Doc. 109 at 2.) Johnson now appeals the district court's grant of the State's motion to allow Maw to testify by two-way video.

STATEMENT OF THE FACTS

I. Relevant facts of the offenses

Kim McWhiney entered into a contract for title of a 2013 White GMC Terrain with Jon Herrin on Friday, April 23, 2021. (Trial Tr. at 146, 162, 248, 250-52, 255-56.) On Sunday, April 25, 2021, McWhiney reported the vehicle stolen to law enforcement, alleging that Johnson, who had access to her apartment the day before, was the likely culprit. (*Id.* at 135-36, 150, 155, 259.)

On September 26, 2021, McWhiney's son, Travis Stewart, learned that the Terrain was parked at the Libation Station. (*Id.* at 165-66.) Stewart drove to that location, confirmed the vehicle was McWhiney's, and called law enforcement while he sat parked across the road. (*Id.* at 166.) Stewart then attempted to park near Johnson to prevent him from pulling out of the parking lot until law enforcement arrived. (*Id.* at 170.)

Johnson, however, was able to leave the area. (*Id.* at 171.) Stewart followed him "[t]o keep an eye on the vehicle." (*Id.*) While on the phone with law enforcement, Stewart observed Johnson drive at a

² Because Johnson is not challenging his bail jumping conviction on appeal, the State does not address the facts in support of that offense below.

high rate of speed and then attempt “to hang a left,” miss the turn, and then go through a fence. (*Id.* at 173, 196, 265.) Johnson also crashed into a children’s swing set and clipped a storage shed. (*Id.* at 220, 263, 293.) Johnson fled to the east on foot while Stewart remained at the crash site. (*Id.* at 178-80, 209-10.)

Responding law enforcement officers conducted a “door-to-door search throughout the neighborhood” for Johnson. (*Id.* at 215.) When Maw arrived at his house, he was greeted by several law enforcement officers’ vehicles parked outside. (*Id.* at 230.) Law enforcement informed Maw that they were looking for Johnson, who had run away after wrecking a vehicle. (*Id.*)

Upon going downstairs in his residence, Maw immediately noted “there was a gallon jar of distilled water that had been opened and a drink taken out of it.” (*Id.*) And, in the laundry room, he noticed that “one of the windows was ajar and the door that leads up to the garage from there was partially open.” (*Id.* at 230-31.) At that point, Maw “thought something was wrong.” (*Id.* at 231.)

In the garage, Maw noticed that there was a large box by the freezer that had been moved out of place. (*Id.*) Maw “pushed the box back where it was supposed to be, and as soon as [he] did that” he saw Johnson crouched on the floor. (*Id.*) In response, Maw left the garage to inform law enforcement. (*Id.*) When law enforcement opened Maw’s front door, they saw Johnson “running towards the living room.” (*Id.* at 321.) Law enforcement ultimately apprehended Johnson in Maw’s kitchen, which was located on the upstairs level of his home. (*Id.* at 232.)

Maw had not given Johnson permission to enter his home. (*Id.* at 236.) And, at trial, Johnson admitted

that he entered Maw's garage without his permission. (*Id.* at 363-64, 381.) Johnson also admitted he knew law enforcement would come eventually because he had crashed a vehicle into a fence. (*Id.* at 383.) Johnson further admitted to hearing police outside Maw's house when he was in the garage. (*Id.* at 366, 368.)

II. Motion to allow two-way video testimony at trial

On December 16, 2022, the State moved for an order from the district court to allow Maw to appear by two-way video for Johnson's January 9, 2023 trial. (Doc. 74.) Maw wished to participate in the proceedings to hold Johnson accountable. (1/05/2023 Tr. at 11.) However, by the time of trial, Maw, then 86 years old, had moved from Helena to Burbank, Washington, which is 450 miles away. (Doc. 75 at 2.) In normal driving conditions, the drive from Burbank to Helena would take 7 hours one way. (*Id.*) And, by plane, it would require over half a day of travel through multiple airports. (*Id.*) Distance aside, it would also be difficult for Maw to testify in person in Helena because he is responsible for driving his wife, then 79 years old, to dialysis three times a week. (Doc. 75 at 2.) Maw also is often the primary caregiver for the couple's two adopted children, both under the age of 10, making it necessary for him to be in Burbank to help the children get ready for school by 6:45 a.m., and be home to care for them when school is done at 3:20 p.m. (Doc. 76 at 3.)

Thus, the State argued "that requiring Mr. Maw to travel this distance is both impractical and overly burdensome for Mr. Maw given the time of year (and winter driving conditions); his age and health; the age and health of his wife; as well as the needs of his

young adopted children.” (Doc. 75 at 3.) Johnson disagreed that Maw’s appearance was impossible or impractical, arguing that Maw had moved to Washington in order to be closer to family, who Johnson “presumed [would] be able to provide for [Maw’s] wife and adopted children.” (Doc. 79 at 2.)

The district court conducted a hearing on the State’s motion on January 5, 2023. (1/05/2023 Tr. at 3.) At the hearing, the State represented the facts from its motion, and further articulated the State’s understanding that a storm would be coming through the area where Maw resided in the few days between the motions hearing and Johnson’s trial.³ (*Id.* at 6-7.)

The State further argued that the reason for several months delay in proceeding to trial on an offense that occurred in April 2021 was because Johnson “was in the wind for a number of months.” (*Id.* at 10.) Johnson failed to appear at a hearing on February 17, 2022, and was not arrested on the warrant until June 28, 2022. (Docs. 29, 35.) The State ultimately asserted that the public policy of “holding people accountable” supported allowing Maw, who wanted to participate in the trial, but could not physically appear because of his wife’s health, his own age, and his caregiving of two young children, being able to testify by two-way video. (*Id.* at 10-11.) To the State, “forc[ing] Mr. Maw to travel that distance given his life circumstances [would] exclude[] him from participating in a criminal process” that he wanted to participate in to hold Johnson accountable. (*Id.* at 11.)

³ By the time of the trial, Maw also had a family member pass away, which would have further prevented Maw from physically appearing. (Trial Tr. at 227.)

After hearing from the State and Johnson, the district court granted the State's motion, reasoning, in part:

I think given that the witness is 86 years old, and that it is a seven-hour drive to Burbank, Washington, that his wife is having to be dialyzed three times a week, and that there are small children in the home, that there's a necessity to allow him to testify by Zoom where we can see and hear each other at the same time. I think there is a public policy here of getting this, being able to try this case. I do note I think the state is correct that the delay in this case has been caused by Mr. Johnson not being available for trial, which during that time Mr. Maw moved.

(*Id.* at 12.) The following day, the district court entered its written order granting the State's motion for leave to allow Maw to testify by two-way video. (Doc. 84.)

SUMMARY OF THE ARGUMENT

The district court properly allowed Maw to testify via two-way video from Burbank, Washington. During the delay in proceeding to trial, which was caused by Johnson, Maw had moved from Helena to Burbank, Washington. Maw is 86 years old, and cares for his 79-year-old wife, who attends dialysis 3 times a week, and his 2 children, both under the age of 10. To have Maw travel for trial, in winter, for more than 1 day would have posed a significant burden on him, his wife, and his 2 children. The district court did not err when it concluded that Maw's circumstances, along with Johnson causing the delay in his trial and holding Johnson accountable for his actions,

constituted public policies that supported allowing Maw to testify by two-way video at trial.

However, even if the district court erred in allowing Johnson to testify by two-way video, any error was harmless. Maw's testimony was solicited only in support of the burglary charge against Johnson. And, specifically, Maw's testimony was used to establish that Johnson had entered Maw's attached garage without permission to do so. At trial, Johnson admitted he entered Maw's garage and that Maw did not give him permission to do so. Moreover, circumstantial evidence also supported that Johnson did not have permission to be in Maw's home. The evidence presented supported that Johnson had fled the scene of the car accident and was apprehended inside a home in the neighborhood. Because the evidence presented at trial was either identical to Maw's testimony or provided compelling circumstantial testimony that was similar to Maw's testimony, even if Maw's testimony is disregarded, there was sufficient evidence for the jury to conclude that Johnson did not have permission to enter Maw's house and attached garage.

STANDARD OF REVIEW

This Court exercises plenary review of constitutional questions and applies de novo review to a district court's constitutional interpretation of the Sixth Amendment of the United States Constitution and article II, section 24, of the Montana Constitution. *State v. Strommen*, 2024 MT 87, ¶ 15, 416 Mont. 275, 547 P.3d 1227.

ARGUMENT

The district court did not violate Johnson’s right to confrontation when it allowed Maw to testify via two-way video and, even if the district court did commit error, such error was harmless.

Relying on *Strommen*, Johnson argues that the district court violated his right to confrontation when it allowed Maw to testify by two-way video because the record did not support that (1) Maw was unavailable for face-to-face cross-examination in the courtroom and (2) “denial of such personal face to face cross examination [was] necessary to further an important public policy with the reliability of the testimony otherwise assured.” (Appellant’s Br. at 12, 17 (citing *Strommen*, ¶ 19 (internal quotations omitted).) Johnson next argues the State cannot prove beyond a reasonable doubt that the error, if committed, was harmless. (Appellant’s Br. at 17-21.) As set forth below, the district court correctly found, under *Mercier*, that Maw’s video testimony was necessary to further important public policy. However, even if the district court erred, such error was harmless.

A. Maw’s testimony via two-way video did not violate Johnson’s rights under the Confrontation Clause.

The Confrontation Clause of the United States Constitution guarantees a criminal defendant the right to “be confronted with the witnesses against him.” U.S. Const. amend. VI. Similarly, the Montana Constitution guarantees a criminal defendant the right “to meet the witnesses against him face to face” Mont. Const. art. II., § 24. The purpose of the Confrontation Clause is to ensure reliability of

testimony by “subjecting it to rigorous testing in the context of an adversary proceeding” *State v. Mercier*, 2021 MT 12, ¶¶ 15, 17-21, 26-28, 403 Mont. 34, 479 P.3d 967 (quoting *Maryland v. Craig*, 497 U.S. 836, 844 (1990)). Both the United States Supreme Court and the Montana Supreme Court have recognized that “face-to-face” confrontation is not an absolute right, though it should not “easily be dispensed with[.]” *Craig*, 497 U.S. at 850; *see also State v. Stock*, 2011 MT 131, ¶ 28, 361 Mont. 1, 256 P.3d 899.

1. The district court correctly applied the *Craig* test as adopted by this Court in *Mercier*.

As an initial matter, the State requests, based on Johnson’s recitation of the law in his brief and this Court’s cases following its decision in *Mercier*, that this Court clarify that the applicable test to Johnson’s confrontation claim is the *Craig* test as adopted by this Court in *Mercier*. In his argument, Johnson correctly provides that this Court in *Strommen* stated that:

[T]he trial testimony of a prosecution witnesses is admissible via two-way video conferencing under the *Craig* exception upon an affirmative case-specific prosecutorial showing, and corresponding trial court findings, that (1) the witness is “unavailable” for personal face-to-face cross-examination in the courtroom, and (2) denial of such personal face-to-face cross-examination is “necessary to further an important public policy” with “the reliability of the testimony . . . otherwise assured.”

Strommen, ¶ 19 (citing *Mercier*, ¶¶ 15, 17-21, 26-28; *City of Missoula v. Duane*, 2015 MT 232, ¶¶ 14-16, 20-

21, 380 Mont. 290, 355 P.3d 729; *Craig*, 497 U.S. at 847-50, 855-59).

However, this Court’s recitation of the *Craig* test in *Strommen*, which added an “unavailability” factor, does not comport with the test set forth in *Craig*, itself, as adopted by this Court in *Mercier*. In *Craig*, the issue before the United States Supreme Court was whether the Sixth Amendment’s Confrontation Clause “categorically prohibit[ed] a child witness in a child abuse case from testifying against a defendant at trial, outside the defendant’s physical presence, by one-way closed circuit television.” *Craig*, 497 U.S. at 840. The Court answered in the negative, concluding that “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.

Approximately three decades after the Court’s decision in *Craig*, this Court, in *Mercier*, was faced with whether a defendant’s right to confront witnesses against him, under the United States and Montana Constitutions was violated when the State presented a foundational witness’s testimony via two-way video. *Mercier*, ¶ 1. To answer the issue presented in *Mercier*, this Court adopted verbatim *Craig*’s two-pronged test. *Mercier*, ¶ 19. And, since *Mercier*, but before its decision in *Strommen*, this Court has notably applied, as written, *Craig*’s two-pronged test in *State v. Bailey*, 2021 MT 157, ¶ 42, 404 Mont. 384, 489 P.3d 889, *State v. Walsh*, 2023 MT 33, ¶ 10, 411 Mont. 244, 525 P.3d 343, and *State v. Mountain Chief*, 2023 MT 147, ¶ 29, 413 Mont. 131, 533 P.3d 663.

However, in *Strommen*, this Court, without explanation, added an “unavailability” prong into the *Craig* test that had never existed before. Then, after applying the *Craig* test as adopted in *Mercier* in *State v. Whitaker*, 2024 MT 255, ¶ 21, 418 Mont. 501, 558 P.3d 741, this Court reverted back to the *Strommen* version of *Craig* in *State v. Hogues*, 2024 MT 304, ¶ 28, 419 Mont. 322, 561 P.3d 1. Notably, neither *Strommen* nor *Hogues* concerned a witness who was “unavailable” for trial. See *Strommen*, ¶¶ 5-6; *Hogues*, ¶ 7.

Indeed, the *Strommen* Court seemingly derived the unavailability prong addition to *Craig* from the United States Supreme Court decision in *Ohio v. Roberts*, 448 U.S. 56 (1980) (overruled in part by *Crawford v. Washington*, 541 U.S. 36 (2004)). See *Strommen*, ¶ 19. The discussions of witness “unavailability” in *Roberts* and in *Crawford*, however, are not akin to whether a witness testifying via two-way video at trial violates the Confrontation Clause.

In *Roberts*, the State subpoenaed the victim’s daughter, Anita, five times to appear at Roberts’s trial. *Roberts*, 448 U.S. at 59. None of Anita’s family knew where she was located. *Roberts*, 448 U.S. at 59-60. Because Anita could not be produced for trial, the trial court allowed the State to admit the transcript of Anita’s testimony from a preliminary hearing. *Roberts*, 448 U.S. at 58-60. The United States Supreme Court held that the admission of out-of-court statements of an unavailable witness do not violate the Confrontation Clause so long as the statement “bears adequate indicia of reliability.” *Roberts*, 448 U.S. at 66 (internal quotations omitted).

In *Crawford*, Crawford’s wife, Sylvia, submitted to a recorded interrogation in relation to Crawford’s

criminal charges. *Crawford*, 541 U.S. at 38-41. At trial, Sylvia could not be compelled to testify due to spousal privilege. *Crawford*, 541 U.S. at 40. The trial court ultimately allowed the State to admit Sylvia's statements to law enforcement at trial. *Crawford*, 541 U.S. at 40-41. In reversing Crawford's conviction, the United States Supreme Court overruled *Roberts*, holding that "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford*, 541 U.S. at 60, 68-69.

In sum, *Roberts* and *Crawford* both dealt with whether the Confrontation Clause precluded out-of-court statements being admitted when a witness was either physically or legally unavailable to testify. In stark contrast, the issues raised in *Craig*, *Mercier*, and subsequent cases did not revolve around whether the witnesses were unavailable. In fact, all of the witnesses were available to testify at trial, the witnesses simply were not able to be personally present in the courtroom for their testimony for various reasons. Because "unavailability" does not factor into whether remote testimony by two-way video violates the Confrontation Clause, the State requests this Court discontinue adding the "unavailability" prong to the *Craig* test as this Court did in *Strommen* and *Hogues*.

Likewise, the State requests this Court clarify that the State does not have to satisfy the "good faith requirement" to ensure a witness is unavailable for trial when requesting a trial court allow the witness to testify by two-way video pursuant to *Mercier*. Because the *Strommen* Court introduced the "unavailability" prong into *Craig*, the *Strommen*

Court stated that “[i]mplicit in the required showing under the first *Craig* exception element is an affirmative showing of a good faith prosecutorial effort to obtain the witness’s presence at trial.” *Strommen*, ¶ 19 (internal quotations, citation, and emphasis omitted). Again, the “good faith requirement” relied upon by the *Strommen* Court is derived from *Roberts* and is tethered to a truly unavailable witness, and not to a witness who is requesting permission to testify via two-way video. As such, the State should not be required to show that it has made a good faith effort to obtain a witness’s physical presence at trial.

In sum, this Court’s simultaneous departure from the *Craig* test in *Strommen* and *Hogues*, while relying on the United States Supreme Court’s *Craig* test in several other cases, has created unnecessary confusion that the State requests this Court resolve by clarifying that, for purposes of two-way video challenges under the Confrontation Clause, it is relying on the *Craig* test as adopted by this Court in *Mercier*. That said, because *Strommen* and *Hogues* appear to be outliers, the State responds below to Johnson’s confrontation claim under *Mercier*.

2. Maw’s testimony via two-way video satisfied the *Craig* test as articulated in *Mercier*.

“[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.’” *Mercier*, ¶ 17 (quoting *Craig*, 497 U.S. at 850).

The *Craig* test sets forth a two-pronged analysis. *Mercier*, ¶ 18. First, the prosecutor proposing video testimony must show the “denial of physical face-to-face confrontation is necessary to further an important public policy.” *Mercier*, ¶ 18. Second, the prosecutor must show the “reliability of the testimony is otherwise assured.” *Mercier*, ¶ 18. This Court has adopted the rationale set forth in *Craig* as it applies to witnesses appearing via two-way video technology. *Mercier*, ¶ 22 (see also *Duane*, ¶ 21; *Stock*, ¶ 30). Here, Johnson only challenges the district court’s analysis under *Craig*’s public policy prong. (See Appellant’s Br. at 11-17.)

Under the first prong, the district court must make “more than generalized findings’ of policy concerns.” *Mercier*, ¶ 19 (quoting *Coy v. Iowa*, 487 U.S. 1012 (1988)). A witness may testify via video if the prosecution makes an “adequate showing” that the “personal presence of the witness is impossible or impracticable to secure due to considerations of distance or expense.” *Bailey*, ¶ 42 (citing *Duane*, ¶ 25).

However, showing that procuring the witness at trial is “impossible” or “impracticable” does not obviate the State’s burden to also demonstrate that dispensing with face-to-face confrontation will be “necessary to further an important public policy.” *Bailey*, ¶ 42. “[J]udicial economy, added expense, or inconvenience alone are not important public policies sufficient to preclude the constitutional right of a defendant to face-to-face confrontation at trial.” *State v. Martell*, 2021 MT 318, ¶ 12, 406 Mont. 488, 500 P.3d 1233 (citing *Mercier*, ¶ 26; *Bailey*, ¶ 45). Although judicial economy, the expense of the witness attending in-person, and inconvenience to the witness, standing alone, cannot justify video

testimony, all three remain important factors in determining whether video testimony violates the confrontation clause. *See Mercier*, ¶ 20 (affirming the holding in *Duane*).

In *Duane*, the defendant was one of three individuals that the State prosecuted for cruelty to animals. *Duane*, ¶ 5. Each of the defendants requested a separate trial in the Missoula Municipal Court, which would have required one of the witnesses to travel from California to the three separate trials. *Duane*, ¶ 6. The *Duane* Court focused primarily on the reliability prong of the *Craig* test but also found that requiring the witness to travel from California to Montana for three trials would “impose a prohibitive expense on the City and a significant burden on” the witness. *Duane*, ¶ 21.

Although the *Duane* Court did not specifically reference the necessity prong of the *Craig* test, the two-member plurality opinion in *Mercier* clarified that the holding in *Duane* left the necessity prong of *Craig* “unaltered.” *Mercier*, ¶ 20; *see also Bailey*, ¶ 42 n.5. In reference to the *Duane* holding, the *Mercier* Court stated that “[t]he substantial impracticality of the out-of-state witness’s physical appearance in three misdemeanor trials satisfied the requirement of *Craig* that use of video was necessary to further an important public policy.” *Mercier*, ¶ 20.

In sum, *Mercier*, *Bailey*, and *Martell* make it clear that expense and inconvenience alone do not constitute “important public policy.” *Mercier*, ¶ 26; *Bailey*, ¶ 45; *Martell*, ¶ 12. However, *Duane* and *Mercier* distinguish that proposition and hold that causing a witness a “significant burden” and avoiding “extraordinary expense” do constitute “important public policy.” *Duane*, ¶ 21; *Mercier*, ¶ 20.

Here, the district court did not err when it found that several public policies supported allowing Maw to testify via two-way video at Johnson's trial. During the time between Johnson being charged and his trial occurring, Maw had moved from Helena to Burbank, Washington. The cause of the delay in trial was largely due to Johnson's conduct. Burbank, Washington, is a day of travel by car one way or more than a half day of travel by plane one way to Helena. Maw could not be away from his family because he is needed to help get his young children ready for school early in the morning and to be there when they get home in the late afternoon. In addition, Maw transports his wife to dialysis three times a week and is needed to contribute more to chores at home when she is feeling ill. (Doc. 76 at 3.) Finally, the distance becomes more complicated for Maw, an 86-year-old man, to travel, particularly in the winter when a storm was expected to hit his area in the few days between the motions hearing and Johnson's trial.

The district court accordingly did not err when it concluded that Johnson's actions in delaying his trial had contributed to the need for the State to present testimony via video instead of in person by delaying his trial. Nor did the district court err when it concluded that public policy supported allowing Maw to testify by two-way video due to his age, the health and age of his wife, and his role as a primary caregiver to their two young children.

Finally, the district court correctly found that public policy favors criminal prosecutions. Although this is undoubtedly an important public policy, standing alone it cannot justify dispensing with face-to-face confrontation. Using this public policy alone as justification for video testimony would render the

Craig analysis meaningless as the policy exists in all criminal cases. Therefore, the policy of adjudicating criminal cases must be coupled with other important public policies to satisfy the necessity prong. Here, as articulated above, the district court did not exclusively rely on the public policy of the State adjudicating criminal cases.

Finally, although the district court's finding that Maw's two-way video appearance "is supported by the important public policy of allowing the State to prepare its case where the defense has been silent," is not supported by the record that does not undermine that the district court correctly allowed Maw to testify by two-way video. (*See* Doc. 84; Appellant's Br. at 16.) This Court "will affirm the district court when it reaches the right result, even if it reaches the right result for the wrong reason." *State v. Fredericks*, 2024 MT 226, ¶ 16, 418 Mont. 220, 557 P.3d 32 (internal quotations and citation omitted). Accordingly, this Court should affirm the district court's order granting the State's motion to allow Maw to testify at trial via two-way video because the district court correctly applied *Craig* as adopted by this Court in *Mercier* to correctly conclude that the denial of personal face-to-face cross-examination of Maw was necessary to further several important public policies.

B. Any error caused by Maw testifying by two-way video was harmless because at trial Johnson admitted that he was in Maw's garage without his permission.

"A constitutional deprivation of the defendant's confrontation right is a trial error and is subject to harmless error review." *Mercier*, ¶ 31. The State bears the burden to show, beyond a reasonable doubt, that the error was harmless. *Mercier*, ¶ 31.

To determine whether the error was harmless, the Court must apply the “cumulative evidence” test. *Mercier*, ¶ 31 (citing *State v. Van Kirk*, 2001 MT 184, ¶ 43, 306 Mont. 215, 32 P.3d 735). The “cumulative evidence” test “looks not to the quantitative effect of other admissible evidence, but rather to whether the fact-finder was presented with admissible evidence that proved the same facts as the tainted evidence proved.” *Van Kirk*, ¶ 43 (emphasis in original). “If the tainted evidence goes to an element of the crime charged and is the only evidence tending to prove that element,” then the Court will be “compelled to reverse.” *Martell*, ¶ 17 (citing *Van Kirk*, ¶ 45). However, “[i]f there is admissible evidence on the same element, the State must demonstrate ‘that the quality of the tainted evidence was such that there was no reasonable possibility that it might have contributed to the defendant’s conviction.’” *Martell*, ¶ 17 (quoting *Van Kirk*, ¶ 44) (emphasis omitted). To meet its burden, the State must “direct [the Court] to admissible evidence that proved the same facts as the tainted evidence.” *Van Kirk*, ¶ 44.

The State solicited Maw’s testimony only in support of the Burglary charge against Johnson. “A person commits the offense of burglary if the person knowingly enters or remains unlawfully in an occupied structure and: (a) the person has the purpose to commit to an offense in the occupied structure; or (b) the person knowingly or purposely commits any other offense within that structure.” Mont. Code Ann. § 45-6-204(1).

Maw’s testimony regarding the burglary charge went only to the element of whether Johnson entered Maw’s attached garage unlawfully. Johnson, himself, testified that he entered Maw’s home and garage

without permission to do so. Moreover, significant circumstantial evidence supported that Johnson had entered Maw's house without permission to do so. Stewart observed Johnson driving at a high rate of speed before crashing into the fence, shed, and swing set at a residence. Johnson then fled the scene of a car accident on foot and was subsequently seen and apprehended inside of a home that did not belong to him. Because evidence other than Maw's testimony established that Johnson was inside Maw's house and garage without permission, any Confrontation Clause violation was harmless.

CONCLUSION

This Court should affirm Johnson's convictions and sentence.

Respectfully submitted this 19th day of August, 2025.

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MONTANA FIRST JUDICIAL DISTRICT COURT	
COUNTY OF LEWIS AND CLARK	
* * * * *	
STATE OF MONTANA,	)
PLAINTIFF,	)
VS.	)
STEVEN JOSEPH JOHNSON,	) CAUSE NO. CDC-2021-202
DEFENDANT.	)

TRANSCRIPT OF PROCEEDINGS
TRIAL

Before the Honorable Kathy Seeley,
Judge Presiding

Date: January 9-11, 2023

Place: Lewis and Clark County Courthouse
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Helena, MT 59601

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1 you entered the residence.

2 A. When we opened the door, at the top of
3 the stairwell we could see Mr. Johnson running
4 towards the living room. We then commanded him
5 to get down, which he complied, then we placed
6 him under arrest and he was placed in the back of
7 a deputy's patrol car.

8 Q. Okay. So you said that he was he was
9 running in a direction in the house. Can you
10 sort of direct -- can you come up here and direct
11 which direction he was running?

12 A. So we saw him at the top of the stairs
13 here and it appeared that he was running this
14 way. And back over this way is an exit to the
15 back area where the sliding door was on the top
16 of the deck.

17 Q. Okay. Thank you, Trooper. Do you see
18 the person that you saw in the residence on April
19 26th in court today?

20 A. I do.

21 Q. Okay. Where is he?

22 A. Mr. Johnson over there.

23 Q. Okay. Can you describe something that
24 he's wearing?

25 A. Today?

1 Q. Yes.

2 A. Oh, a white shirt.

3 Q. Okay. Thank you. So at the time that
4 you learned that the suspect had been potentially
5 located in this residence, did you receive
6 information that he had been located in the
7 garage area of the residence?

8 A. I don't recall. I know that the
9 homeowner was already outside with two other
10 troopers when we responded, and they had
11 establish he was in the residence. And at that
12 point, I don't think his whereabouts within the
13 residence were known.

14 Q. Okay.

15 A. Just that he was inside the residence.

16 Q. Certainly. When you returned to the
17 residence to take these photographs, was it
18 represented to you by Mr. Maw that he saw him in
19 the garage area?

20 A. Correct. So when I later on met with Mr.
21 Maw that's when I gained information that Mr.
22 Johnson was initially found in the garage.

23 Q. Okay. But when you responded to the
24 residence on April 26th and made entry into the
25 residence, when you first saw the defendant, Mr.

1 Johnson, where was he within the residence, if
2 you remember?

3 A. He was on the top of the stairwell there.

4 Q. Okay. So you didn't see him in the
5 garage?

6 A. No.

7 Q. You saw him at the stairwell area?

8 A. Correct. Within the residence on the top
9 of the stairwell, correct.

10 Q. Okay. And so, how much time do you think
11 would have passed between when you received
12 information that he had been located and seeing
13 him within the residence?

14 A. We were fairly close, and I think it
15 would have been within a matter of two to three
16 minutes.

17 Q. Okay. So between two to three minutes is
18 how long it takes you to get to the residence, at
19 which point the defendant is now at this point of
20 the residence?

21 A. Correct. I believe the troopers Mr. Maw
22 talked to were very close, so he led them over
23 and by that point set up a perimeter, so we were
24 fairly confident he was still in the house.

25 Q. Okay. And so, based on your walkthrough

1 but while it was happening I felt like I was
2 going over an oak, like I thought that I launched
3 up into the air. I was scared. I thought I
4 launched into the air. I hit -- I don't know --
5 I don't know if I clipped the shed first or hit
6 the swing set, but as soon as I hit that swing
7 set my heart broke, my heart broke.

8 So I jump out of the car. I did put it
9 in park. I don't think it was in drive. I
10 remember putting it in park, but that may just
11 be, you know, I feel like I put it in park. It
12 may not have happened. It may not of, but I feel
13 like I put it in park because of the swing set.
14 I jumped out, and my first thought -- my first
15 thought is the swing set. I have four kids, you
16 know, young ones. I love children. I love
17 children. I jump out. My first -- my first
18 thing is the swing set.

19 I get out of the vehicle. The door is
20 still open. I'm looking at the swing set. I
21 hear a noise behind me. I turn around, and this
22 dude is charging me, on foot charging me, flat
23 out fast as he could go after me. Again, I have
24 no clue who this dude is, none. I take off
25 running, and I'm scooting boots unmoving. I'm

1 running. I have no idea who -- and he's chasing
2 me.

3 I'm jumping fences, and they're tall
4 fences. And I'm trying to set a land speed
5 record for sure. I'm jumping fences, jumping
6 fences, and those pictures show I got a -- I got
7 a pretty good distance away. He was chasing me.
8 I don't know how far he chased me. I didn't turn
9 around it to check because I don't want to get
10 tackled or something like that. He was chasing
11 me. I ran.

12 I got to the backyard of Mr. Maw's
13 residence. I jumped that fence into his
14 backyard. I'm running. I know for sure that I'm
15 getting chased. There's a garage door, like a --
16 not like the -- not like the car entrance door,
17 just a regular door. So at that point, I know he
18 is chasing, and I know that he knows that I'm
19 jumping fences. So I try the door. It opens. I
20 run in, and I crouch behind a box, and I slide
21 the box over and I'm crouched down.

22 Q. Stop for a second, Steven.

23 A. Before you went in the garage door, did
24 you at any time attempt to open a window that was
25 underneath that wooden deck you saw on the

1 photographs?

2 Q. Absolutely not. I didn't have time. I
3 was running. I didn't have time to dilly dally
4 with windows and screens. You know, I wasn't
5 trying every window of the house. That's not
6 what we're doing. I'm being chased. I don't
7 want him to know where I am. I'm not trying to
8 be caught. I'm not messing with windows. I
9 tried that garage door just on a chance that
10 would be open so he thought I kept going and
11 jumped another fence. The garage door luckily to
12 me, luckily, was open. I went in, got behind a
13 box, slid the box in front of me between the box
14 and a refrigerator.

15 Q. Now, what was the sole reason you were
16 running from the -- when you went through the
17 fence? After you went through the fence, you
18 said you got out of the vehicle and you started
19 running.

20 A. Yes.

21 Q. Why were you running?

22 A. Because when I heard noise behind me and
23 I turned around, this dude was -- he was charging
24 me. He was charging me full speed. His truck was
25 still in the road. His driver's door was open,

1 and he was coming straight at me. I'm already
2 kind of like -- I'm stunned because the whole
3 thing that just happened.

4 Q. Are you referring to the individual who
5 chased you and forced you off the road?

6 A. Yes, yes.

7 Q. So he was out of his truck and --

8 A. Out of his truck and running right at me.

9 Q. Okay. So you got in Mr. Maw's backyard
10 and into his garage?

11 A. Correct.

12 Q. Did Mr. Maw eventually -- did you two
13 have a contact together?

14 A. Yes. I don't know how much time had
15 passed. I really don't. Adrenaline was high.
16 My heart was pounding in my ears. I don't know
17 how long I was in there. I really don't. But at
18 some point, I heard a noise in the garage and my
19 heart sank and jumped into my throat at the same
20 time. I thought, man, this dude found me, this
21 dude found me, okay.

22 So the box slides over, and it's an
23 elderly gentleman. I can only assume it was the
24 homeowner. It turns out it was, but it
25 definitely was not the person who was chasing me.

1 At that point, he didn't say a word to me. He
2 didn't say a word. He just kind of looked at me
3 and turned around and walked away from me.
4 Q. Did you say anything to him?
5 A. No. No.
6 Q. Did you threaten him in any way --
7 A. No.
8 Q. -- either by word or action by --
9 A. No, not at all.
10 Q. Okay. What happened after he turned
11 around and left?
12 A. Okay. At this point, I'm hearing sirens
13 in the background like a ways -- a distance away,
14 not where I was. I'm hearing them a distance
15 away, so I know that the police are at the crash
16 site at this point or at least getting there.
17 And I don't know how far I've come from the site.
18 I don't know that because I was just running. So
19 he turns around. He takes about three steps.
20 And --
21 Q. He being who?
22 A. Mr. Maw, yeah.
23 Q. Thank you.
24 A. And at this point, I'm hearing I'm
25 hearing the bleeps and bloops of police radios,

1 like their radio. So I'm hearing (makes noise)
2 and you know, whatever. He had taken about four
3 steps. And at this point, I stood up and went
4 behind him, right behind him because at this
5 point I know for sure that the police were
6 outside because I can hear them. I can hear the
7 police. I know that they're outside.

8 Now, I've never been in a split-level
9 house. I don't remember having to go downstairs
10 to go upstairs. I don't remember that stuff. It
11 was just a bunch of going on. What I do remember
12 is walking straight up the stairs behind Mr. Maw,
13 who told you guys who was not scared. I was not
14 being aggressive. He wasn't worried about it at
15 all. I wasn't running. I wasn't chasing him. I
16 wasn't aggressing him at all. I was relieved
17 that it wasn't Travis in the garage to do
18 whatever was going to happen, which I have no
19 clue what that might have been.

20 So I don't remember like -- I don't
21 remember a laundry room. I don't remember having
22 to go downstairs to go upstairs. I don't -- I
23 don't remember that. All I remember is the
24 police are here now. That's all I remember. I
25 followed Mr. Maw. What I do remember clearly is

1 following him up a flight of stairs. That's what
2 I did. I followed him up the stairs to an open
3 front door. The front door was already open.
4 And just like he told you guys, I was seconds
5 behind him on the staircase. I wasn't two or
6 three minutes away from an arrest, four minutes
7 away from a -- I was seconds behind him, steps,
8 just enough time to -- for that he knew I wasn't
9 trying to chase them or do anything. I wasn't
10 there for anything malicious at all.

11 I come up the steps right behind Mr. Maw
12 with my hands up, hands first out the front door.
13 I didn't continue up the stairs to a kitchen.
14 They didn't catch me at the top of the stairs.
15 That did not happen. I produced myself to law
16 enforcement because I was relieved that they were
17 there. That's what happened. I would -- they
18 didn't come in the house. They didn't come in
19 guns drawn. That didn't happen. If Mr. Maw had
20 been at the front door with the front door open
21 and the police were right there, as they've all
22 said, they would have seen me go behind him
23 because the only other place to go is right
24 behind him. I wasn't running. He already -- he
25 already said that. I was not running.

1 Q. Steven, stop for a second. At what point
2 in time during this entire situation did you
3 realize the police were present?

4 A. When he moved the box and looked at me
5 and walked off. And at this point I'm like my --
6 the blood rushing in my ears kind of like -- kind
7 of dissipated a little bit because now I know
8 it's not whoever this was chasing me. At this
9 point, like I said, I'm hearing the bleeps and
10 bleeps of radios outside because there were quite
11 a bit of police, I guess, looking for me. So I'm
12 hearing -- I'm hearing the radio -- radio
13 chatter, I guess you would call it, and all the
14 other chirps and all that go along with that.
15 That's how I knew the police were there.

16 Q. Why were you glad to see the police?

17 A. Because I was being chased. I'd just
18 been run off the road, and I was being chased by
19 someone who I'd never seen before.

20 Q. At what point in time, if ever, did you
21 realize that the individual in truck behind you
22 was Travis Stewart?

23 A. I didn't know until after the fact, until
24 I was already in jail.

25 Q. So while you were at the scene, no one

1 after I turned left on to Applegate, I started
2 accelerating.

3 Q. So you left skid marks, though, didn't
4 you?

5 A. I have no clue. I have no clue.

6 Q. So how do you leave skid marks, if you're
7 going fast, right?

8 A. Yeah, if you're peeling out. I didn't
9 peel out of Libation Station.

10 Q. So you heard Travis today -- or yesterday
11 say you left skid marks in the parking lot?

12 A. Sure did. I also heard him say that he
13 dropped Kim off at John Herrin's house, and then
14 I heard John Herrin say that I was with Kim, not
15 Travis.

16 Q. Okay. So we should believe you?

17 A. Absolutely.

18 Q. Okay.

19 A. I didn't lie.

20 Q. You would agree that you're pretty lucky
21 you didn't kill somebody that day, right?

22 A. I was lucky I wasn't killed, yes. But
23 yes, I agree, I'm very lucky that no one was
24 injured, very lucky.

25 Q. Little kids that use that swing set?

1 A. Yes.

2 Q. You didn't seem to care about that,

3 though, did you?

4 A. I was ran off the road. I didn't have a

5 choice. I didn't intentionally crash into a

6 swing set, Mr. Downs.

7 Q. Okay. We'll get to that.

8 A. Okay.

9 Q. You broke into Mr. Maw's house, right?

10 A. No. I went into his open garage.

11 Q. So he didn't give you permission to go in

12 his house, right?

13 A. No, he did not.

14 Q. Okay. So you had no -- you had no

15 business being in his house, right?

16 A. (Makes noise.) No, I had no business

17 being in his house.

18 Q. Okay. So you shouldn't have gotten in

19 his house because you weren't supposed to go in

20 there, right?

21 A. That's -- I would say that that's fair.

22 Q. No one gave you permission to hide in

23 that garage, right?

24 A. Correct.

25 Q. Okay. And no one gave you permission to

1 run through his house, right?

2 A. I didn't run through his house.

3 Q. Okay. So Trooper Villa today talked
4 about how she saw you running on the top floor
5 after you walked by the front door --

6 A. Correct.

7 Q. -- right?

8 A. But Mr. Maw said something different,
9 exactly what I said, correct?

10 Q. Trooper Villa testified today that she
11 saw you running after you passed by the front
12 door, right?

13 A. Yes, sir. That's what she said.

14 Q. Okay. So you're calling Trooper Villa a
15 liar?

16 A. No. I'm not calling Trooper Villa a
17 liar. I'm saying that's not exactly what
18 happened. Just like you said at the beginning of
19 this thing, we don't remember all the details,
20 you know, high -- high -- high intensity
21 situation. Mr. Maw testified that he was not
22 afraid of me and that I was literally steps
23 behind him. He did not say that I was running.
24 He did not say that. The police were there. The
25 door was open. Had I gone past Mr. Maw, I

1 wouldn't -- I couldn't have made it past Mr. Maw
2 without the police like, hey, stop right now,
3 stop right now. I produced myself to the police.

4 Q. You were arrested on the top of those
5 stairs, right?

6 A. Incorrect. I was arrested at the front
7 door.

8 Q. And you would agree you were trying not
9 to get caught, right?

10 A. By Travis, correct.

11 Q. Okay. And you knew law enforcement was
12 going to look for you, right?

13 A. I did not know that at the time.

14 Q. Okay. And so, you hid. That's why you
15 hid. You were waiting for law -- law enforcement
16 is coming because you just smashed into a fence,
17 right?

18 A. Correct.

19 Q. Okay. So you knew law enforcement would
20 come?

21 A. Eventually, yes.

22 Q. Okay. And you heard testimony today and
23 yesterday that they were looking for you for
24 about an hour, right?

25 A. Yes. Yes.

1 Q. Okay. And that's about -- so you were
2 hiding for one hour, right?

3 A. I don't know. I don't know. I ran a
4 long way. I ran a long way. I hid in a garage.
5 My adrenaline was thumping. I have no clue how
6 long I was in that garage. It could have been
7 one minute. It could have been ten. It could
8 have been three and a half hours. I don't -- I
9 don't recall. I don't remember.

10 Q. So you didn't make any effort at any
11 point to contact anybody about what was going on,
12 right?

13 A. Correct.

14 Q. Okay. You didn't go knock on a door?

15 A. I didn't have time. I was being chased.

16 Q. What about the Libation Station, why
17 didn't you use your phone to call 911?

18 A. Like I just told you guys, I was going
19 for my phone. We were right down the street,
20 literally right down the street when he pulled up
21 to the right side of me and starts easing me off
22 the road. I don't have time to get my -- when
23 someone's chasing you in a vehicle and swerving
24 me off the road, I'm not like, oh, hey, where's
25 my phone, you know. That's not what's happening.

1 I'm looking for my phone, but I'm not getting it.

2 I'm not getting my phone.

3 Q. You testified earlier that you had just
4 called Kimberly to go drop the car off, right?

5 A. No, I did not -- I did not say that.

6 Q. That's what you said.

7 A. I said I'd gotten annoyed that Kimberly
8 had not called me yet, so I was going back to her
9 house.

10 Q. Okay. So you had your phone on you,
11 and --

12 A. Yes.

13 Q. -- you see this person coming at you
14 aggressively --

15 A. Yes.

16 Q. -- and instead of doing anything with
17 your phone, getting out and say, hey, what's
18 going on, you didn't do any of that, right?

19 A. No.

20 Q. Okay.

21 A. No.

22 Q. You didn't go back into Libation Station
23 and --

24 A. No.

25 Q. -- tell somebody?

1 A. Days before, yes.

2 Q. And you think you have permission to take
3 this 50 something year old's brand new car? You
4 think you had permission to do that?

5 A. Sure do when she gave me permission.
6 That's exactly what I think.

7 Q. Who's your friend on Green Meadow?

8 A. I'd rather not say her name her. Her
9 name is Shawna.

10 Q. Is Shawna here today?

11 A. No, she is not.

12 Q. Okay. So she could verify your story?

13 A. No, because I never went to Shawna's
14 house. I was on the way to Shawna's house. I
15 went by the first time to get my tools. I don't
16 know. She may have still been asleep. I don't
17 know. She didn't answer the door. That's when I
18 went to Libation Station.

19 Q. Okay. So you testified that you went to
20 your friend's house, but now you're saying she
21 wasn't there?

22 A. No, I said that earlier. I went to get
23 my tools. She wasn't there, or didn't answer the
24 door. I don't know what was going on. But from
25 Shawna's house I went to Libation Station.

1 Q. So you're --

2 A. At no point did I speak with Shawna. I
3 didn't call or text Shawna before I went over
4 because I've known Shawna for years. She's one
5 of my dear friends, and I just show up.

6 Q. You heard the cops -- cop radio while you
7 were in the garage, right?

8 A. Yes.

9 Q. Okay. And that's when you moved up to
10 the top floor by the kitchen, right?

11 A. I did not move up to the top floor by the
12 kitchen, incorrect.

13 Q. Trooper Villa is lying?

14 A. I'm not going to say Trooper Villa is
15 lying. I'm just saying that that is incorrect.
16 I'm saying that I was arrested at the front door.

17 Q. Where's your family?

18 A. In Texas.

19 Q. The four kids?

20 A. I have two kids in Texas. I have a child
21 here. I have a child in Washington.

22 Q. Could you live with any of your kids?

23 A. Do I live with any of my kids? Not at
24 the moment.

25 Q. Okay. But you're hanging out with a 55

1 year old woman from -- that lives in low income
2 housing?

3 A. What does it have to do with my children?

4 Q. I'm just asking.

5 A. What does that have to do with my
6 children?

7 Q. I'm just wondering, you're spending your
8 time with people you hardly know, borrowing their
9 cars.

10 A. When you meet someone and make friends
11 with someone, you hang out with them, that's how
12 you become friends. I'm not judgmental where she
13 lives. That's not -- it's none of my business
14 her income or where she lives. I don't judge
15 people on the amount of money they have or what
16 they have. I'm not -- should I not be friends
17 with her because she was in low income housing?

18 Q. Why didn't you ask Eugene Maw for help?

19 A. I didn't have to, the police were there.

20 Q. He moved the box, and you're sitting
21 there --

22 A. Uh-huh.

23 Q. -- right by the fridge, right?

24 A. Uh-huh.

25 Q. You didn't say, oh, thank God, somebody's