IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

vs.

SHAUN LEFLEUR,

Defendant-Appellant.

No. S-1-SC-40965
Direct Appeal from the
Twelfth Judicial District Court
No. D-1215-CR-2024-00133
The Honorable John P. Sugg

DEFENDANT-APPELLANT'S REPLY BRIEF

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Oral Argument Is Requested

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STATEMENT OF COMPLIANCE

Pursuant to Rule 12-318(G) and (F)(3), the body of this Reply Brief contains 4,274 words, according to Microsoft Word's Word Count feature.

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ARGUMENT

The trial in the case violated Mr. LeFleur's rights both because depositions are today categorically inadmissible in criminal cases (outside of a narrow context not implicated here) in New Mexico, *see* Part II, *infra*, and because, even if/back when they were admissible, the standards for their use—most notably the intractable unavailability of the witnesses under federal and state standards that go well beyond Rule 11-804(A)—have not been met here, *see* Part III, *infra*. But before moving to the merits of this case, Mr. LeFleur will address the scope and significance of the limited waiver of personal appearance at the depositions that the State makes so much hay out of. *See* Part I, *infra*.

I. Mr. LeFleur waived only his right to be present at the depositions, not his right to face-to-face confrontation at trial, and, in any event, the right to face-to-face confrontation is not the gravamen of this appeal.

The State leans heavily into the Brief-in-Chief's "factual omission[]" of the fact that Mr. LeFleur waived his right to be physically present at the depositions themselves, **[Ans. Brief 2]**, bringing it up at least 11 times, **[Ans. Brief 2, 9, 10, 12 (3x), 13 (2x), 14, 15 (2x)]** The Brief-in-Chief did not bother to mention the physical-presence waiver, nor did it even mention (let alone argue as an appellate issue) Mr. LeFleur's physical absence from the depositions. It did so because the issue is irrelevant to this appeal.

First, all that Mr. LeFleur waived was his right to be present at the deposition, not any of his trial rights. As his trial counsel stated at the relevant hearing, in response to discussions between the District Court and the State about the mechanics of a transport order for the depositions:

> Just to clarify in regards to the transport order, Mr. LaFleur has indicated to me that he's willing to waive his appearance. He doesn't need to appear, so we could simplify that. He has indicated to me, and he can indicate on the record, that he's comfortable with me appearing in his stead and then just letting him know what takes place.

[7-29-24 FTR 13:37:10-34] In the subsequent colloquy between Mr. LeFleur and the District Court, the District Court did reference Mr. LeFleur "hav[ing] the right to be present during [the depositions], and [that] he's essentially waiving a face-to-face confrontation right if he chooses not to be there"—a number of times using the Confrontation Clause-like argot—but it did so in the same breath as it acknowledged that it was "not saying [it would actually be] admitting it in lieu of live testimony, [as] obviously there would need to be a showing of unavailability." **[7-29-24 FTR 13:37:43-38:01]** The tip-of-the-spear verbiage confirming the waiver was as follows:

> The Court: Okay. And you still wish to waive the right to be in person at the deposition?
>
> Mr. LaFleur: Yes, sir. Absolutely.

The Court: Okay. And you understand that it's possible that this testimony from the depositions, they might ultimately become used in your trial and you'd not have the opportunity later to have face-to-face confrontation with these witnesses?

Mr. LaFleur: I understand. Yes, sir.

[7-29-24 FTR 13:39:16-36 & 13:40:09-30] The District Court repeatedly and correctly described the waiver as being one of physical presence at the deposition,[1] and that the *effect* of that waiver might be, if the depositions ended up being used in lieu of live testimony at trial, that he would end up never having a face-to-face confrontation with the witnesses.

Consider the choice that Mr. LeFleur was actually being given: face-to-face confrontation at the depositions (if he did not waive), or no confrontation at all (if he did waive); it is not like the right to *in-trial* face-to-face confrontation was on the menu here, and thus it makes no sense to say that that right was being waived, since it was never on offer. That these options are the two options available was contingent upon the depositions being used at trial in lieu of live testimony, sure, but if the

[1] The State opines that there is no right of the defendant to be physically present at a deposition, **[Ans. Brief 13]**, but for purposes of evaluating the scope and meaning of Mr. LeFleur's waiver, the rights he actually had available to him to waive are irrelevant if the colloquy, fairly read, only waives (knowingly, intelligently, and voluntarily) a right or set of rights that the defendant did not actually possess. By way of analogy, if a district judge conducts a carefully worded colloquy with a criminal defendant in order to obtain a knowing and voluntary waiver of the right to a bench trial, the fact that defendants actually have no constitutional right to a bench trial is not a basis to retroactively recast the waiver as, say, a guilty plea or a waiver of a jury trial; it would just be an ineffective waiver.

depositions ended up not being used at trial, then would it make sense to say that Mr. LeFleur had waived, way back in July 2024, his right to face-to-face confrontation of the witnesses' live testimony? Of course not.

Second, even if the above colloquy is deemed to have been a waiver of Mr. LeFleur's right to face-to-face confrontation at trial, Mr. LeFleur is not presently arguing that the face-to-face-confrontation aspect, specifically, of the Confrontation Clause was violated here. This aspect—which applies in cases where, *e.g.*, a defendant is required to watch live cross-examination by CCTV from another room, or a screen is placed between the defendant and the witness—has its own specialized line of cases, like *Coy v. Iowa*, 487 U.S. 1012 (1988), and *Maryland v. Craig*, 497 U.S. 836 (1990), none of which were relied upon or even cited in the Brief-in-Chief.[2]

In actuality, there are a suite of reasons that live testimony is superior to playing canned deposition testimony, including fully prepared and judge-monitored cross-examination, face-to-face confrontation between defendant and witness, and the superficially similar but distinct concept of face-to-face evaluation of the witness by the jury[3] (a benefit of live testimony that, obviously, is equally lacking whether the defendant is physically present at the deposition or not, since the jury is not there

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[2] Although *Coy* was cited by a case cited in the Brief-in-Chief. **[BIC 25-26]**

[3] Even the State acknowledges the importance of this aspect of confrontation. **[Ans. Brief 28** ("The central purpose of the Confrontation Clause, to ensure the reliability of evidence, is served by the combined effect of physical presence, oath, cross-examination, and *observation of demeanor by the trier of fact*." (emphasis added) (quoting *Thomas*, 2016-NMSC-024, ¶ 23))**]**

with him). These benefits all go together—and so Mr. LeFleur is not going to say that he is not complaining *at all* about not being afforded face-to-face confrontation of his accusers at trial—but this case is not fundamentally about the distinct right to face-to-face confrontation.

II. The State does not address Mr. LeFleur's arguments—or this Court's repeated holdings, all but one of which post-date the Rules of Evidence—that compliance with Rule 804(A) & (B)(1) is not enough to justify admission of a deposition in a criminal trial, and that the now-defunct Rule 5-503(N) must be independently satisfied.

Somewhat unusually, three of the four most-cited and -discussed cases in the Brief-in-Chief—*State v. Mann*, *McGuinness v. State*, and *State v. Cordova*—are not cited at all, let alone grappled with, in the Answer Brief. **[BIC iii-iv]** Instead, the State pounces on the last of the top four, *State v. Berry*, 1974-NMCA-018, 86 N.M. 138, 520 P.2d 558, for the sole reason that it arose from a trial that took place right before the adoption of the New Mexico Rules of Evidence. **[Ans. Brief 27-29]**

While it is true that *Berry* predates the Rules of Evidence, **(1)** the Rules of Evidence did not create or even codify for the first time the prior-testimony exception, which long existed at common law and in statute, *see*, *e.g.*, *State v. Moore*, 1936-NMSC-044, ¶ 4, 40 N.M. 344, 59 P.2d 902 ("1929 Comp. St. § 45-407, authorizes the testimony of any witness taken in any court in this state to be used in a subsequent trial when after diligent effort has been made to ascertain the whereabouts of the witness, he cannot be found. Section 45-407 is merely

declaratory of the common law. The testimony was therefore admissible either under the statute or under the common law." (citation omitted)); and, more importantly, **(2)** the rest of this line of cases all came after the adoption of the Rules, and *McGuinness v. State*, 1979-NMSC-006, 92 N.M. 441, 589 P.2d 1032, *specifically* dealt with the intersection of Evidence Rule 804(B)(1) and (the predecessor to) Criminal Rule 503(N).

> We agree with the Court of Appeals that once Vigil was permitted to claim his privilege against self-incrimination, he became unavailable as a witness under N.M.R. Evid. 804(a)(1). As a result of this unavailability, the deposition would not be excluded because of the hearsay rule. N.M.R. Evid. 804(b)(1). However, the fact that the deposition was not to be excluded as hearsay does not authorize its admission if it is excludable on other grounds. We find the deposition was excludable because of N.M.R. Crim. P. 29 [now-Rule 5-503].

McGuinness, 1979-NMSC-006, ¶ 13 (citations omitted). In short, Rule 29(n), like Rule 1-032 today, deemed a previously deposed witness unavailable only if they were *wholly* unavailable—dead, ill and unable to attend, or unable to be subpoenaed for jurisdictional or practical reasons—and had no provision for the question-by-question unavailability[4] allowed under Rule 11-804(A). *See* Rule 11-804(A)(1)-(3)

[4] With the exception of impeachment, which is typically not considered to be a hearsay use of a prior statement, as it is considered to be admitted in order to illustrate a discrepancy in the witness' statements for purposes of evaluating their credibility, rather than for the truth of the matter asserted. *See McGuinness*, 1979-NMSC-006, ¶ 8. The Confrontation Clause analysis has imported the hearsay rule's definitional requirement that hearsay "[m]eans a statement that . . . a party offers in evidence to prove the truth of the matter asserted in the statement." Rule 11-801(C)(2); *see Orlando v. Nassau Cnty. Dist. Attorney's Office*, 915 F.3d 113, 121 (2d Cir. 2019)

(deeming a witness, who may in fact be present and testifying at the trial,[5] "unavailable" on a question-by-question or subject-by-subject basis if "a privilege applies," the witness "refuses to testify," or they "testif[y] to not remembering the subject matter"). Where a previously deposed witness was unavailable for Rule 11-804 purposes but not Rule 29(n) purposes, the deposition was inadmissible in a criminal trial, because, as this Court has repeatedly held, "[i]n New Mexico, the only authority for the use of a deposition in a criminal proceeding is N.M.R. Crim. P. 29(n)." 1979-NMSC-006, ¶ 7.

The State complains that Rule 5-503(N) (the successor to Rule 29(n)) no longer exists, but that is no cause for dramatically reinterpreting *other* rules (like 11-804) that still do exist in the exact same form as they existed at the time of the *Berry-Mann-McGuiness-Cordova* line of cases. Rather, it puts us all back to where we were before Rule 29(n) was adopted, which is that there is no longer any "statute nor

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("To implicate the Confrontation Clause, the statement must be used to prove the truth of the matter asserted, and the statement must be 'testimonial.'" (citations omitted)).

[5] Because such a witness is in fact present and subject to cross-examination at trial, these exceptions do not implicate the Confrontation Clause, unless the witness first testifies about a subject matter and then subsequently refuses to be cross-examined on that same subject—in which case the proper remedy would be to strike the testimony, which may or may not be adequate to remedy the prejudice, depending upon the circumstances. *See, e.g.*, *United States v. Owens*, 484 U.S. 554 (1988) (holding that even severe memory loss regarding a subject of direct-examination testimony does not violate the Confrontation Clause if the defendant is permitted to cross-examine the witness on that subject); 30 Wright & Miller, *Federal Practice & Procedure* § 6487 (2d ed.) ("When the witness's Fifth Amendment right collides with a defendant's Sixth Amendment right to confrontation, the courts will not compel the witness to answer incriminating questions, but will likely strike the witness's testimony to that point." (footnote omitted)).

any rule of court which authorizes" the use of depositions in criminal trials. *State ex rel. Hanagan v. Armijo*, 1963-NMSC-057, ¶ 7, 72 N.M. 50, 380 P.2d 196. This is not some exotic idea, but rather the way things work in basically every context: this Court issues a holding of law (*e.g.*, "a motorist is under no obligation to identify himself to a police officer who stops him"); the Legislature abrogates the holding by enacting positive law to the contrary (*e.g.*, "It shall be a petty misdemeanor for any person to refuse to identify himself upon the lawful request of a peace officer, upon making a valid traffic stop."); the Legislature later repeals the statute; and the pre-enactment judicial holding is once again effective. *See Carrillo v. My Way Holdings, LLC*, 2017-NMCA-024, ¶ 22, 389 P.3d 1087 ("'Statutes are not presumed to make any alterations in the common law further than is expressly declared, and the rules of the common law are not to be changed by doubtful implication, nor overturned except by clear and unambiguous language.'" (cleaned up) (quoting *Guiterrez v. Gober*, 1939-NMSC-008, ¶ 14, 43 N.M. 146, 87 P.2d 437)); *State v. Polsky*, 1971-NMCA-011, ¶ 17, 82 N.M. 393, 482 P.2d 257 ("'In New Mexico, we have no statute nor any rule of court which authorizes the taking of depositions in a criminal case, and, therefore, the common law is still in effect on this subject.'" (quoting *Armijo*, 1963-NMSC-057, ¶ 7)). Just so here. It should again be noted that the prior-testimony hearsay exception *did* exist back when the *Armijo* and *Polsky* courts made their statements—so it is not like it is some doctrinal innovation that provides a new

basis for criminal depositions that was not available to those courts—and it was codified into the Rules for three-fourths of the *Berry* line. The State talks a little about Rule 5-613(B), in which the Rules of Criminal Procedure adopt the Rules of Evidence, **[Ans. Brief 25 & 28]**, but that rule, too, has existed in its present form since the passage of the Rules of Evidence in 1973, *see* Rule 5-613 cmte. cmt'y, and was around for *Mann*, *McGuinness*, and *Cordova*.

While New Mexico has a respectable body of case law, it is not California, New York, or the federal system; it means something when our courts issue 4 opinions in a row squarely holding that there is no legal basis—expressly including Rule 11-804—for admitting a deposition in a criminal trial, other than (now) Rule 5-503(N). Back when Rule 5-503(N) (and Rule 29(n)) did not exist, but the prior-testimony exception did, the Court repeatedly held that criminal depositions were inadmissible; when Rule 5-503(N)/29(n) eventually came into being, it repeatedly held that only that rule, and specifically not Rule 11-804, could justify introduction of a deposition in a criminal case. Now that Rule 5-503(N) is again gone, this Court has never held that criminal depositions (outside of a few narrow contexts) are admissible.

And why would it? The law of criminal depositions now, post-503(N), is back where it was pre-503(N), since nothing else of relevance has changed.[6] Otherwise (and the State obviously contends otherwise), what does the *Berry-Mann-McGuiness-Cordova* line *mean*? Does it mean nothing? (That's certainly the position the Answer Brief takes. Tacitly.)

This result is not just compelled by legal formalism—textualism and *stare decisis*—but is also completely consistent, on a purposive/functional level, with New Mexico's unmistakable-but-unusual historical treatment of criminal depositions as discovery. In the federal courts and most state courts, depositions are emphatically not a discovery tool; they are for the limited purpose of preserving testimony for trial. *See* Robert M. Cary et al., *Federal Criminal Discovery* § 5.E, at 280 (ABA 2011) ("Courts uniformly hold that a Rule 15 deposition is not a discovery device but rather a vehicle for preserving testimony for trial." (citing, *e.g.*, *United States v. Troutman*, 814 F.2d 1428, 1453 (10th Cir. 1987))). This conceptualization has a number of practical corollaries, including that parties are "entitled to depose only a witness that a party would call as a part of its case, not an adverse witness"—a rule

[6] The State writes that, "if this Court were to return this State to its 1963 jurisprudence, that would require this Court to turn a blind eye to *Crawford* and its progeny." **[Ans. Brief 28]** No, it wouldn't. No one is claiming that the repeal of Rule 5-503(N) turns back the clock on *all law everywhere*—and that we must also no longer have the one-person-one-vote rule for elections, or remote testimony by videoconference—just that the specific legal effect of Rule 5-503(N) itself is no longer. This Court was never remotely unclear about what that effect was: it was the sole legal basis for the use of criminal depositions.

with absolutely no precedential pedigree in New Mexico law. *Id.* (citing, *e.g.*, *United States v. Kelley*, 36 F.3d 1118, 1125 (D.C. Cir. 1994)); *see also* note 1, *supra*. In New Mexico, however, and in Florida, after whose deposition rule New Mexico's is modeled,[7] depositions are for discovery. **[BIC 20]** The State actually concedes this point. **[Ans. Brief 13** ("Depositions are a discovery mechanism under the New Mexico Rules of Criminal Procedure." (citation omitted)) **& 25** ("[A deposition under] Rule 5-503 is a discovery mechanism.")**]** So the *taking* of a deposition remains perfectly allowable and useful—forcing under-oath answers to questions, and giving parties a path to a Rule 11-801(D)(1)(a) impeachment-with-substantive-use—while their use at trial in lieu of live testimony is not allowed. This would also explain the current Rule 5-503's lack of procedural safeguards, **[Ans. Brief 13** ("Notably, Rule 5-503 does *not* require a criminal defendant to be present at the

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[7] The State criticizes Mr. LeFleur for his "reliance on Florida's Rules of Criminal Procedure." **[Ans. Brief 29]** To be clear, it is both acceptable and desirable to cite to another jurisdiction's interpretation of a statute or rule that New Mexico adopted from that jurisdiction, as is the case with Rule 5-503. The other jurisdiction's *prior* (*i.e.*, pre-New Mexico adoption) case law interpreting the statute is strongly (albeit rebuttably) presumed to be incorporated into New Mexico law under a well-worn corollary of the prior-construction canon, *see Smith v. Meadows*, 1952-NMSC-030, ¶ 17, 56 N.M. 242, 242 P.2d 1006 ("[T]he legislature of the State of New Mexico having adopted the Connecticut statute verbatim, is presumed to have adopted the prior construction and interpretation of such statute by the highest court of Connecticut. This presumption is strong and should be recognized unless it is overthrown by stronger reasons or evidence that prior construction was not adopted by New Mexico." (collecting citations)), but even the other jurisdiction's subsequent (post-New Mexico adoption) case law is deemed "highly persuasive" in New Mexico, *In re Estate of Sumler*, 2003-NMCA-030, ¶ 18, 133 N.M. 319, 62 P.3d 776 ("[T]he operative rule of construction is not the principle of adopted construction, but rather the principle that interpretations by the courts of another jurisdiction subsequent to New Mexico's adoption of statutory language from that jurisdiction are to be considered 'highly persuasive.'" (citing *Ickes v. Brimhall*, 1938-NMSC-036, ¶ 12, 42 N.M. 412, 79 P.2d 942)).

deposition."[8] (emphasis in original))], which are unnecessary in depositions taken purely for discovery.[9]

III. The State ignores the Confrontation Clause's unavailability analysis and the well-established requirements of exceptional circumstances and necessity.

On the issue of unavailability—and the inextricably intertwined and analytically non-distinct issue of the prosecution's efforts to secure the witness's presence—the State again refuses to accept any standard but Rule 11-804(A). **[Ans. Brief 15-17]** "[W]hen the 'unavailability' issue is raised, the understandable temptation is to turn to Rule 804(a) and assume it adequately addresses the question for both hearsay and confrontation purposes. It does not." 30 Wright & Miller,

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[8] The federal rule and most state rules provide the defendant with a right to be physically present at any depositions. *See* Fed. R. Crim. P. 15(c). The most prominent outlier state against the general pattern of providing a right to physical presence—self-evidently a desirable, if not constitutionally necessary, feature for a testimony-preservation deposition—is Florida, which *prohibits* the defendant's presence. *See* Fla. R. Crim. P. 3.220(h)(7) ("A defendant shall not be physically present at a deposition except on stipulation of the parties or as provided by this rule."); *see also* note 7, *infra*.

[9] Although the State does not argue the point, there is also a perfectly good functional basis for the disparate treatment of depositions and preliminary-hearing testimony (which is admissible upon satisfaction of Rule 11-804(A) and (B)(1)). First, "[o]ne purpose of the preliminary hearing in New Mexico is to preserve testimony." *State v. Massengill*, 1983-NMCA-001, ¶ 4, 99 N.M. 283, 657 P.2d 139. "Discovery, however, is not the object of a preliminary hearing." *State v. Burk*, 1971-NMCA-018, ¶ 7, 82 N.M. 466, 483 P.2d 940. Second, and relatedly, the parties are actually doing the exact same thing at a preliminary hearing that they will do at trial—proving/disputing the elements of each crime charged—just against a dramatically different standard of proof (probable cause versus proof beyond a reasonable doubt), meaning that the motive for cross-examination will be extremely similar. Third, a preliminary hearing is presided over by a judge, who applies the Rules of Evidence, adjudicates disputes in a way that ensures a legally effective cross-examination, and serves as the in-person factfinder that *the witness* has a motive to persuade that is similar to the motive they will have at trial.

Federal Practice & Procedure – Evidence § 6486 (2d ed.) ("Compliance with Rule 804(a) is no guarantee that the standard required by the Confrontation Clause has been met."). "Rule 804 applies in both civil and criminal cases, which means it is necessarily more expansive than whatever the Sixth Amendment demands." *Id.* Both the federal and New Mexico courts have weighed in, albeit sporadically and incompletely, on what this standard requires.

A. The Federal Case Law on Unavailability Under the Confrontation Clause

The U.S. Supreme Court has long made clear that a strong showing of unavailability is an essential prerequisite to the use of prior testimony at trial consistent with the Confrontation Clause, although it has not clearly defined the contours of this requirement. "None of the Supreme Court's post-*Crawford* cases have addressed the unavailability issue," 30 Wright & Miller, *supra* § 6487, but four pre-*Crawford* cases spread across the Court's history have:

> In *Mattox v. United States* the declarants had died between the two trials, an obviously adequate reason. In *Motes v. United States* the government had "negligently" allowed the declarant to slip away from the courthouse just an hour before his scheduled testimony—an obviously inadequate reason. In *Barber v. Page* the declarant was sitting in a federal penitentiary in a neighboring state; the government knew where he was but had made no effort to produce him. Again, this was a wholly inadequate showing. And in *Mancusi v. Stubbs*, the declarant had returned to his native Sweden in the ten years that separated the first murder trial in which he testified and a second retrial in which his prior testimony was read to the jury. Although here too the

> government had made no apparent effort to produce him for trial, the government lacked any legal mechanisms [(no treaties or legal process existed for obtaining his presence)] to compel his return from Sweden regardless.

Id. § 6486 (discussing *Mattox*, 156 U.S. 237 (1895), *Motes*, 178 U.S. 458 (1900), *Barber*, 390 U.S. 719 (1968), and *Mancusi*, 408 U.S. 204 (1972)). In *Mancusi*, the Court issued an equivocal decision, noting that "the predicate of unavailability was sufficiently stronger here than in *Barber*," but declining to hold that the facts actually *met* constitutional minimums, instead merely determining that "federal *habeas* [relief] was not warranted in upsetting the determination of the state trial court as to [the witness's] unavailability." 408 U.S. 212-13.

> Reviewing the little historical research that has been done, [Ninth Circuit] Judge O'Scannlain observed that both English and American courts took a strict approach to unavailability. Death always qualified; some cases also supported missing witnesses or those beyond the court's jurisdiction in admitting former testimony or depositions. Others insisted on death alone. . . .
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> . . . .
>
> . . . "[T]he scope of unavailability at common law appeared to be defined by circumstances outside the prosecution's control—the death of the witness, for example, or the prosecution's inability to procure his attendance due to jurisdictional limitations."

30 Wright & Miller, *supra* § 6486 (quoting *United States v. Shayota*, 934 F.3d 1049, 1055 (9th Cir. 2019) (O'Scannlain, J., concurring)).

There are strong policy reasons to limit (either mostly or entirely) the concept of unavailability to death: the unavailability created by death is definitely ascertainable, indisputable, and not subject to the gamesmanship of situationally varied prosecutorial efforts. The reality of finding and/or securing the presence of a missing witness is that it is an undertaking in which the defendant is almost entirely at the mercy of the prosecution: the defendant has few resources to find a witness (at most a few investigators), while the prosecution has the near-infinite resources of government itself—the ability to put out an all-points bulletin, launch manhunts, employ networks of informants and other community contacts, and a run a "hard-target search of every gas station, residence, warehouse, farmhouse, henhouse, outhouse, and doghouse in the area"[10]—available to it to find a witness that it *really wants to find.*

When it doesn't really want to find a witness—for example, if the prosecution is perfectly satisfied with the testimony it has in the can from an earlier deposition, and/or it's worried that the previously deposed witness is acting squirrely, proto-recanting, or looking like a liability on the stand—the prosecution will reduce its efforts correspondingly, working to satisfy the standard, rather than actually find the witness. What makes this issue so invidious is that it isn't really unethical at all: the prosecution is just allocating its resources in a way that it genuinely believes to be

[10] *The Fugitive* (1993) (Tommy Lee Jones as Deputy U.S. Marshal Sam Gerard).

in the best interests of the public; the myriad little decisions that take place over time and that, in the aggregate, dictate the lump-sum efforts actually made by the prosecution to find and secure the presence of the witness are of course affected, likely both consciously and unconsciously, by the extent to which the prosecution wants to find what it's ostensibly looking for. This is a serious structural problem inherent in a broad unavailability standard, and a strong reason to interpret the Confrontation Clause's standard (which applies only to criminal prosecutions) much more stringently than the 11-804(A) standard.

B. New Mexico's Criminal-Case-Specific Standards for Unavailability

Unsurprisingly given the discovery-oriented purpose of our deposition rules, the New Mexico courts have long grafted the requirements of "exceptional circumstances" and "necessity" onto the use of depositions at a criminal trial: "While depositions are allowable in criminal cases, the circumstances permitting their use must be exceptional. The necessity must be clearly established, and the burden of showing that necessity is on the prosecution." *McGuinness*, 1979-NMSC-006, ¶ 6 (citation omitted); *see also State v. Barela*, 1974-NMCA-016, ¶ 15 ("In criminal cases, depositions are to be used only in exceptional circumstances.").[11]

[11] These are old cases (which appears to be the standard applied by the State when determining whether it will deign to address them), but Rule 5-503's committee commentary—still to this day—says the same thing. Rule 5-503 cmte. cmt'y ("Depositions are to be used in criminal cases only in exceptional circumstances.").

The following is literally the Answer Brief's *only* reference to the concepts of necessity or exceptional circumstances:

> In discussing witness unavailability, Defendant mentions "[t]he burden of showing necessity and exceptional circumstances[.]" This is not the correct standard for *determining unavailability*. *See* Rule 11-804(A)(5)(a). Defendant ostensibly concedes the proper analysis for evaluating witness unavailability is contained in Rule 11-804(A).

[Ans. Brief 16 (emphasis in original)**]** With genuine respect (and it may well be the undersigned's fault), Mr. LeFleur does not fully understand what the second sentence above means, but he certainly does not concede the inapplicability of these well-established prerequisites for the use of depositions at a criminal trial. It also seems unlikely that the State has carried its "burden" of "clearly establishing" these showings, when it does not acknowledge they even exist.

To the extent that the State appears to argue that the necessity and exceptional-circumstances standards do not relate to the issues of unavailability or prosecutorial efforts—what else would they relate to? The prior testimony's indicia of reliability, the procedural safeguards attendant to the forum in which it was given, and other factors relating to the *giving of the prior testimony*? That makes no sense linguistically (the "circumstances" being referred to in the exceptional-circumstances standard are clearly the circumstances *of the trial*, and the definition of "necessity" just does not jibe with an evaluation of the prior testimonial experience). The prosecution's need for the testimony at trial to prove its case? That

isn't a bad fit linguistically, for the necessity standard at least, but it would sure seem to be at tension with the philosophy of *Crawford*. The only thing that really makes sense is that these standards inquire—at least to some extent, probably for the most part, and possibly exclusively—into the intractability and unavoidability of the witness's nonappearance at trial.

C. The State's Efforts, and Its Showing of the Witnesses' Unavailability, in This Case

The State's efforts in this case, to be blunt, were designed to satisfy the unavailability standard (specifically the Rule 11-804(A) standard), not to actually find and secure the presence of the witnesses. They may have even been designed (consciously or not) specifically to *not* find them.

One step that must always be taken—even under the federal standard—is that the prosecution must subpoena the witness as soon as it has a chance to (or, at the very latest, when it first reasonably recognizes the risk of unavailability):

> A prosecutor's failure to subpoena any witness, much less a critical witness, falls far short of a good faith effort. There is simply no good reason not to subpoena any witness, regardless of how cooperative or committed they appear to be prior to trial.
>
> . . . .
>
> Some cases turn on whether the government is partly to blame for the declarant's disappearance, particularly when the government may have no strong incentive to have the declarant testify before the jury. When this occurs, the cases call for "greater exertions" on behalf

> of the government. Some cases go so far as to say "that the duty to use reasonable means to procure a witness's presence at trial includes the duty to use reasonable efforts to prevent a witness from becoming absent in the first place." . . . [A] 'promise to appear' by a seemingly cooperative witness is not enough. Subpoenas should be used as a matter of course if only because there is usually no valid reason not to subpoena a witness.

30 Wright & Miller, *supra* § 6487 (quoting *United States v. Burden*, 934 F.3d 675, 686 & 689 (D.C. Cir. 2019)).

The State knew at the point it sought the depositions that the witnesses presented a risk of unavailability, and yet it never subpoenaed them. The State's lead witness testified that his *goal* was to serve them with subpoenas, but that no one had ever actually given him a subpoena, so if he ever found them, he would have to leave, obtain subpoenas, and find them again at least one more time to even create a *legal obligation* for them to appear. **[BIC 4-7]** There is nothing in the record suggesting that the State even talked to the witnesses, around the time of the depositions (or ever), about their upcoming obligation to appear at trial. In short, the State knew from the get-go—or at least as early as when it was setting up the depositions—that the likely plan was to play these witnesses' depositions at trial, rather than have them testify live. The Confrontation Clause and this Court's case law demands much, much more.

CONCLUSION

The Court should vacate Mr. LeFleur's convictions and remand this case for further proceedings—including a trial by live testimony, in compliance with the Confrontation Clause—consistent with its opinion. In the alternative, the Court should remand the case to the District Court to make findings under the appropriate standards and determine whether vacatur is appropriate.

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of March 2026, I submitted the foregoing Brief in Chief electronically via the Court's Odyssey filing system, and when doing so I selected the option for automated electronic service of the certified document, which will, on the date that the clerk's office formally accepts the document for filing, cause a certified copy of the document to be served via email upon all counsel of record.

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By: */s/ Carter B. Harrison IV*
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