No. 129133

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- MICHAEL D. CHATMAN, Defendant-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 4-21-0716. There on appeal from the Circuit Court of the Sixth Judicial Circuit, Champaign County, Illinois, No. 20-CF-156. Honorable Randall Rosenbaum, Judge Presiding.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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ARGUMENT

The trial court erred in finding Dominique Collins to be an unavailable witness, where the State failed to make good-faith efforts to secure Collins's presence at trial as it failed to subpoena him, secure a warrant for him, or make other reasonable efforts to find him. This denial of Michael Chatman's right to confrontation was not harmless beyond a reasonable doubt. A new trial should occur.

In his opening brief, Michael Chatman asked this Court to remand the matter for a new trial because the trial court erred in finding the State made good-faith efforts to secure Dominique Collins's presence at trial and that the confrontation clause violation was not harmless beyond a reasonable doubt. In response, the State asserts its agent, Detective Jeremiah Christian, made good-faith efforts in visiting a few old addresses, posting information to a hyper-local police database, and contacting Iowa authorities. (St. Br. 28-29) Thus, the State asks this Court to conclude, as the appellate court did, that the trial court did not err. (St. Br. 26) Alternatively, the State argues that any violation of Chatman's right to confront Collins was harmless beyond a reasonable doubt. (St. Br. 36-41) As will be shown *infra*, the State's arguments lack merit in light of the facts and law. Where the trial court violated Chatman's right to confront his accuser and where that grave error was not harmless beyond a reasonable doubt, a new trial should occur.

B. This Court should adopt the Fourth District's holding that the State must demonstrate its good-faith efforts to procure a witness's attendance where the witness is allegedly unavailable due to the opposing party's wrongdoing.

Chatman asked this Court to adopt the Fourth District's holding that a proponent seeking to admit evidence under the forfeiture by wrongdoing doctrine (Illinois Rule of Evidence 804(b)(5)), and assuming none of the other four unavailability provisions of Rule 804(a) apply, must make good-faith efforts to secure the witness's presence at trial as explained in Illinois Rule of Evidence 804(a)(5). (Def. Op. Br. 25-29); *see also People v. Chatman*, 2022 IL App (4th) 210716, ¶51. The State makes no argument that this Court should adopt the opposite

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standard espoused in *People v. Golden*, 2021 IL App (2d) 200207, ¶¶70-76, which held that no good-faith effort need be made. (St. Br. 23-42) Thus, the State has forfeited its ability to assert in oral argument or in a petition for rehearing that this Court should adopt the *Golden* standard. Ill.S.Ct. R. 341(h)(7), (i) (West 2023) ("Points not argued are forfeited and shall not be raised. . . in oral argument, or on petition for rehearing."). Chatman rests on his opening brief's argument as to why the Fourth District's standard is the correct one and should be adopted by this Court.

C. The State failed to make a showing of good-faith efforts in securing Dominique Collins's presence at trial where it failed to subpoena him, secure a warrant for him, or make other reasonable efforts to find him.

Because a defendant's confrontation right is at stake, this Court has severely constricted the circumvention of that right through a witness's unavailability. *See People v. Johnson*, 118 Ill.2d 501, 509 (1987) ("'[U]navailability' is a narrow concept, subject to a rigorous standard."). And the United States Supreme Court has similarly held that the "unavailability" exception to the confrontation right is only triggered after the State meets that exacting standard. *See Ohio v. Roberts*, 448 U.S. 56, 74 (1980) ("The law does not require the doing of a futile act. . .[b]ut if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith *may* demand their effectuation.") (emphasis in original). Thus as a starting point, the State could only pierce Michael Chatman's fundamental right to confront Dominique Collins if it established by a preponderance that no good-faith efforts could have possibly secured Collins's presence at trial. *Chatman*, 2022 IL App (4th) 210716 at ¶54. As will be shown, the State failed to do so, and the trial court erred in allowing Collins's video-recorded statement into evidence.

Addressing its failure to locate Collins, the State claims "there were not obvious steps the [State] could have taken to locate Collins," and that Chatman "does not suggest any promising

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avenues for investigation." (St. Br. 36) As more fully explained in the opening brief, however, Detective Christian and the State could have taken numerous "affirmative measures" that "might [have] produce[d] the declarant" and thus the "obligation of good faith" dictated that the State take those actions here. (Def. Op. Br. 39-43) And contrary to the State's argument, Chatman's suggested potential actions that Christian should have but did not take were "obvious" as well as "promising."

To begin, the State offers a terse response to Chatman's argument that Christian was derelict in failing to investigate whether Collins still owned and/or used the phone number Christian had previously used to contact Collins. (St. Br. 33; Def. Op. Br. 40-41) Based on Christian's testimony that "[t]he last time [he] dialed the number. . .I had a person answer, did not recognize the voice to be Dee Collins, and he told me I had the wrong number," (R. 496), the State claims "[i]t was reasonable to conclude that repeated calls to the same number were unlikely to lead to additional information." (St. Br. 33) Putting aside the State's failure to grapple with its forfeiture by wrongdoing motion *in limine* that contradicted Christian as to this October 2020 contact,[1] Chatman has not argued that Christian should have continued calling the phone number *ad nauseam*. Instead, Chatman contended Christian should have "determine[d] whether Collins still owned that number, who currently possessed Collins's phone number if he did not, and where those phone calls occurred from in either instance." (Def. Op. Br. 40-41) As the State has not addressed those arguments, it has forfeited the ability to answer those contentions. *See* Ill.S.Ct. R. 341(h)(7), (i) (West 2023); *supra*, p. 1.

Similarly, the State's averment below belies its appellate argument that the "police could not enter Collins's name in the LEADS database" as a missing person. (St. Br. 32; Def.

[1] "On October 9, 2020, Detective Christian sent a text message to a telephone number known to belong to Collins. Collins did not initially respond, but finally did and indicated that Detective Christian had the wrong number." (C. 109)

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Op. Br. 40) As the State's motion *in limine* claimed, there were reasonable concerns for Collins's safety. (C. 108; R. 95) Because LEADS allows for the input of a person where there is a reasonable concern for their safety, the State's argument that Collins was "not 'missing'" as defined by LEADS lacks merit. (St. Br. 33) And the State's argument that "[t]here is no evidence that Collins's family had reported him missing" begs the question: if the State is correct that Collins was not a colloquially a "missing person," did Collins's family have information about his whereabouts that the State failed to follow up on? (St. Br. 33) Either way, the State's failure to even try to include Collins in LEADS is another strike against the State's claim of good-faith efforts.

Much of the State's remaining discussion of Chatman's proposed areas of additional investigation engages in circular logic. (St. Br. 30-32, 35) The State contends that there was no need to subpoena Collins, seek a warrant for him, ask the trial court to declare Collins a material witness, or engage the "Uniform Act" for an out-of-state witness because the State "did not know where to find Collins." (St. Br. 35); *see also* (St. Br. 32) ("[T]hey did not know where to find him.") But the State "did not know where to find Collins" because it failed to take the above actions. Christian's efforts were limited to phone calls, door knocks, and posts on a local messaging board. These were cursory steps that should have formed the basis for a more vigorous investigation. It employed none of the many, many tools uniquely available to law enforcement engaged in a good faith search of a key witness in a murder case. And whether any or all of these actions would have undoubtedly produced Collins is immaterial to the good-faith efforts analysis; the pertinent question is whether approving the "introduction of [Collins's out-of-court statement] under these facts would encourage laxity rather than diligence and desultory searches rather than systematic and coordinated efforts by the prosecution and whatever investigative arms it employs." *People v. Payne*, 30 Ill.App.3d 624, 630 (1st Dist.

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1975); *see also Roberts*, 448 U.S. at 74("if there is a possibility, albeit remote, that affirmative measures *might produce* the declarant") (emphasis added). In light of legal precedent demonstrating the deficiency of such investigative steps, the only answer to that question is "Yes."

Attempting to excuse its failure to serve Collins via mail, the State claims it did not have "a current mailing address for [Collins]" to serve process. (St. Br. 31) But the State exposes the elephant in the room: if Christian's visits to old addresses of Collins were good enough to demonstrate good faith, how was the State operating in good faith by not serving a subpoena by mail at these addresses after Christian failed to connect with Collins in person? Either the addresses were valid enough to use for a good-faith demonstration or not. The State does not provide this Court an answer other than that such service "would have been futile because there was no realistic prospect that he could be located for service." (St. Br. 30) But again such circular argument should be rejected by this Court.

Acknowledging Chatman's authority finding a lack of good-faith efforts in similar situations as the instant case (Def. Op. Br. 34-39), the State counters that its efforts here "stand in stark contrast to the cases [Chatman] cites." (St. Br. 33) Beginning with *Payne*, the State is simply wrong that it "bears little resemblance to this case." (St. Br. 33) While the State believes there is a difference between Christian's hearing testimony here and that of the police officer and the prosecutor in *Payne*, an objective comparison of the cases should lead this Court to the same conclusion as the *Payne* Court: that the State failed to make good-faith efforts to secure its witness's presence at trial. *See* (Def. Op. Br. 34-36, 39-43, comparing the testimony in *Payne* to Christian's testimony)

Responding to federal authority cited in Chatman's opening brief (Def. Op. Br. 38-39), the State argues those cases show Christian's efforts to be reasonable. (St. Br. 29-30) But *U.S.*

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v. Smith, 928 F.3d 1215 (11th Cir. 2019), and *U.S. v. Thomas*, 705 F.2d 709 (4th Cir. 1983), are easily distinguishable. In *Smith*, good-faith efforts were only found where the witness "had no phone or address," left the jurisdiction, "was in hiding," and yet the government still served process on the witness via a boyfriend and former attorney. 928 F.3d at 1230-31. Unlike *Smith*, the State here had a phone number for Collins and did not attempt to serve process on him where it could have in several ways. (Def. Op. Br. 42)

Thomas similarly does not help the State. There, the witnesses were unavailable where the prosecution was in direct contact with one witness and a lawyer for the other witness; when the witnesses "vanished," the government "attempted in vain to locate them by service of process." 705 F.2d at 712. Contrary to *Thomas*, there was no attempt by the State in this case to serve process on Collins. The State also relies on the Illinois case of *People v. Smith*, 275 Ill.App.3d 207 (1st Dist. 1995); but the efforts there, including but not limited to thrice-trying to serve the witness at two different addresses, far exceeded the meek efforts by Detective Christian. (St. Br. 30)

Given our state's authority as well as the persuasive out-of-jurisdiction case law when applied to the facts of this case, the trial court erred in finding that the State made good-faith efforts to locate Collins and thus that he was unavailable as defined via Illinois Rule of Evidence 804(a)(5). Collins's video-recorded statement should not have been admitted into evidence, and the trial court erred in allowing this to occur.

D. The trial court's error violated Chatman's constitutional right to confront a witness against him, and this preserved error was not harmless beyond a reasonable doubt.

Assuming *arguendo* that the trial court erred in finding good-faith efforts by the State to secure Collins's presence at trial (and therefore that the appellate court erred in holding as such, *Chatman*, 2022 IL App (4th) 210716 at ¶¶55-64), the State admits it has the burden on appeal to demonstrate that the preserved error was harmless beyond a reasonable doubt

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under any of the three analyses for that doctrine. (St. Br. 36-37) As will be shown *infra*, the State is wrong as to each, and a new trial should occur.

Starting with the cumulative evidence standard for harmless error (St. Br. 40-42), the State misconstrues the question of whether Collins's video-recorded statement was duplicative of other trial evidence. The State wants this Court to link Collins's statement, alleging Chatman confessed to him shortly after the incident to the years-later inculpatory statement Chatman allegedly gave to jailhouse informant Dennis Griham. This Court, however, has explained, "Evidence is considered cumulative *when it adds nothing* to what was already before the jury." *People v. Ortiz*, 235 Ill.2d 319, 335 (2009) (emphasis added). Of course Collins's video-recorded statement added something what was before the jury as no other evidence provided a just-after-the-shooting purported confession by Chatman. And this is why the State did not charge Chatman with murdering the decedent *until after* the State had secured the video-recorded statement from Collins. (Def. Op. Br. 24) This evidence was decidedly not cumulative and therefore the State has failed to satisfy its heavy burden of harmless beyond a reasonable doubt.

Next, the State contends that the error was harmless "because the admission of Collins's statement could not have contributed to [Chatman's] conviction." (St. Br. 39-40) But this Court long ago recognized that a confession, if believed by the jury, is some of the most, if not the most, damaging evidence possible against a defendant. *People v. R.C.*, 108 Ill.2d 349, 356 (1985); *see also People v. St. Pierre*, 122 Ill.2d 95, 114 (1988) ("Confessions carry 'extreme probative weight'"). While the State focuses on Chatman's testimony to demonstrate why the purported trial error "could not have contributed to [Chatman's] conviction," the State chooses not to address Chatman's cited authority demonstrating the power of a defendant's confession on a jury. (Def. Op. Br. 45) In fact, the State's argument merely highlights the power of Chatman's alleged confession to Collins as it severely undercuts Chatman's trial testimony

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that he did not intend to rob the decedent. Similarly, the State admits that the prosecutor devoted one-sixth of its closing argument to discussing the Collins evidence–a substantial proportion that negates its assertion that this evidence could not have contributed to the conviction. (St. Br. 39-40) Thus, the State has not carried its burden under this harmlessness analysis.

Finally, the State contends the evidence at trial was overwhelming even excluding the Collins evidence. (St. Br. 37-38) While the State acknowledges the "only dispute was whether [Chatman] shot Green during the course of a robbery," the State omits the powerful effect Collins's video-recorded statement had on this element of the offense, given that Chatman allegedly admitted that he planned to and did rob Green. Further, the State seemingly operates under a sufficiency-of-the-evidence analysis in explaining the evidence produced against Chatman. (St. Br. 37-38) While some evidence implicates Chatman, the issue here is not whether a rational trier of fact could have found him guilty. Rather, the salient point is that some considerable amount of doubt existed, warranting reversal in light of the trial court's error that violated Chatman's confrontation right. *See*, *e.g.*, *People v. Lerma*, 2016 IL 118496, ¶33 ("And while such evidence is certainly sufficient to support defendant's conviction, we cannot say that it does so 'overwhelmingly.'"). The evidence against Chatman was not overwhelming, and thus the State has failed to meet its burden under that portion of the harmless error doctrine.

For these reasons, the State cannot demonstrate that the trial court's violation of Michael Chatman's confrontation right was harmless beyond a reasonable doubt. Where the trial court's finding of good-faith efforts by the State (and its finding Dominique Collins to be unavailable) was against the manifest weight of the evidence, where this error violated Chatman's right to confrontation, and where said error was not harmless, this Court should reverse Michael Chatman's conviction and remand the case for a new trial.

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CONCLUSION

For the foregoing reasons, Michael Chatman, Defendant-Appellant, respectfully requests that this Court reverse his conviction and remand the matter for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 9 pages.

/s/Christofer R. Bendik
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NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On October 5, 2023, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

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