IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN TURNER, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	NO. 76465

APPELLANT'S REPLY BRIEF

(Appeal from Judgment of Conviction)

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEF.
309 South Third Street, #226
Las Vegas, Nevada 89155-2610
(702) 455-4685

Attorney for Appellant

STEVEN B. WOLFSON
CLARK COUNTY DIST. ATTY.
200 Lewis Avenue, 3rd Floor
Las Vegas, Nevada 89155
(702) 455-4711

AARON D. FORD
Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

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AARON D. FORD
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100 North Carson Street
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APPELLANT'S REPLY BRIEF

ARGUMENT

I. CUMULATIVE ERROR

The State claims that Steven Turner's "entire opening brief is a pointless argument" because he conceded at trial that he was guilty of conspiracy to commit burglary and attempt burglary. Respondent's Answering Brief ("RAB") at 47. The State further claims that once the jury found Turner guilty of conspiracy to commit burglary, "he was liable under that conspiracy for *all acts committed in furtherance thereof, until that crime was concealed*." RAB at 47 (emphasis added). That is a gross misstatement of the law.

The State fails to appreciate that Turner was convicted of two counts of attempt murder, which is a specific intent crime, and which required proof

that Turner acted "[w]ith the deliberate intention to unlawfully kill the victim", no matter which theory of liability the jury applied. (III:585,618-19); see also **Sharma v. State**, 118 Nev. 648, 655 (2002) ("in order for a person to be held accountable for the specific intent crime of another under an aiding or abetting theory of principal liability, the aider or abettor must have knowingly aided the other person *with the intent that the other person commit the charged crime*") (emphasis added); **Bolden v. State**, 121 Nev. 908 (2005) (extending the specific intent requirement of aiding and abetting to the charge of conspiracy), receded from on other grounds by, **Cortinas v. State**, 124 Nev. 1013, 1026–27 (2008).

Turner's involvement in a conspiracy to commit burglary would not make him liable for an attempt murder that occurred in furtherance of that conspiracy unless he also possessed the specific intent to kill. (III:585). At trial, the State conceded that Turner and Hudson "didn't go there with the intent to kill a cop." (X:2106). Therefore, in order to convict Turner of attempt murder, the State had to prove that Turner actually fired a weapon at the police. See Appellant's Opening Brief ("AOB") at 62-63. In closing, the State argued that both men possessed and fired their own individual weapons, and that each man's specific intent to kill was formed when the door opened and they each opened fire:

> These guys did not go over there that day with the intent to murder a police officer. They didn't. They went over to rob, with high-powered weapons that were loaded, a couple of harmless people.
>
> **They formed the intent to kill when that door started to open.** And instead of going, This is a bad idea, or, Oh, this is about to get crazy, or, Give me your weed, **they chose to almost end that man's life.** By the grace of God, they missed his artery. He fell. The shotgun blast missed him. Does not change their intent. **Their intent was to kill. Both of those shots were kill shots, and both of those men made their decisions.**

(X:2100) (emphasis added).

> No single person fired both these weapons. **Both of the people who fired those weapons had one intent when they pulled the trigger.** Not the intent going to the house, not even the intent when they went into the backyard, maybe not the intent for the 15 minutes they tried to break into the house to rob people with guns; but **when that door opened, the intent is clear: Rounds through the house, rounds at the bodies of human beings.**

(X:2107) (emphasis added).

The State's only evidence of "intent to kill" was that the weapons were fired when the door opened. But unless Turner actually fired one of those weapons, the State could not prove that he, personally, had the specific intent to kill. See, e.g., **Sharma**, 118 Nev. at 657-58 (to convict defendant of attempt murder, jury had to find that he "aided or abetted with the specific intent to kill"); **Bolden**, 121 Nev. at 922 (to hold defendant liable for a

specific intent crime as a coconspirator, defendant's specific intent must be proven).

Turner's theory of defense was that a third individual (*i.e.*, someone other than Hudson or Turner) possessed and fired the SKS rifle that shattered Officer Robertson's leg. See AOB at 13-14, 63. Evidence at trial supported Turner's "third person" defense:

- Willoughby Potter de Grimaldi saw **three** distinct individuals circling his home on the morning in question, but none of those individuals matched Turner's description. (VII:1362-63;XI:2359-62;State's Exhibit 28).

- Grimaldi's roommate Eric Clarkson had been friends with Turner for several years (VII:1300-01), but did not see Turner at his house that night. (VII:1332-33).

- Turner did not match the description of the shirtless individual in basketball shorts that Officer Grego-Smith saw on the back patio, and Officer Grego-Smith confirmed that Hudson was not that individual either, indicating a **third person** was present at the scene. (VIII:1623).

- Turner had not changed his clothing after being shot in the leg; when arrested, he was wearing bright orange pants with holes in them that were covered in his blood, not basketball shorts, like the shooter identified by Grego-Smith. (X:2050;State's Exhibits 28-32).

- After examining 16 separate lab items, **including the three firearms that allegedly belonged to the two suspects in this case**, the State was unable to connect **any** of those items to Turner using either DNA or fingerprint analysis. (IX:1722).

- In his two statements that were admitted at trial, Turner denied having or firing a gun during the incident. (IX:1788-90).

Apart from the inculpatory statements made by Hudson, there was no direct evidence that Turner possessed or fired any weapon during the underlying conspiracy to commit burglary. See AOB at 27-30. And without the improperly admitted "stippling" evidence, there was no corroborative physical evidence indicating that Turner was holding the SKS rifle that shot Officer Robertson. See AOB at 40-41, 49-50. Turner's statements to police (*i.e.*, that he was present at the scene, that he knew there were guns, and that there were only two guys *in the car with them*)[1] were insufficient on their own to establish that Turner fired a weapon with the intent to kill. Where the issue of guilt was close, the errors at trial were serious and constitutional in nature,[2] and the State concedes that the crimes charged were grave,[3] this Court should reverse Turner's contested convictions for cumulative error. See **Valdez**, 124 Nev. at 1195-96; see also **Parle v. Runnels**, 505 F.3d 922, 926 (9th Cir. 2007) ("combined effect of multiple trial court errors violates

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[1] Although the State claims that Turner "admitted there was only himself and one other person ***in that backyard***", Turner told police that there was nobody else "***in the car with us***". Compare RAB at 47 (emphasis added) with (IX:1778) (emphasis added). It was ***Hudson's*** statement to police (as memorialized in Detective Jex's diagram) which indicated that there were only two people in the backyard. (VIII:1741,IX:1743-44). Turner's statement did not prevent the jury from finding that a third person met them at the house. It was only when Hudson's statements were added to the mix that Turner's "third person" defense was weakened. See fn. 7, infra.

[2] AOB at 62; see also pp. 6-31, infra.

[3] RAB at 48.

due process where it renders the resulting criminal trial fundamentally unfair"). See also, **CONCLUSION**, infra.

II. BRUTON ERROR

The most serious trial error occurred when the State used Hudson's statements to police to prove that Turner both held and fired the SKS rifle at Officer Robertson, without affording Turner the ability to cross-examine Hudson about those statements, in violation Turner's Sixth Amendment right of confrontation. See AOB at 15-30.

A. The Bruton error was not waived.

The State contends that this error was "waived" because Turner did not challenge the court's redactions prior to trial and because he did not object when Hudson's statements were introduced. RAB at 8-9. However, the State ignores the fact that Turner filed a motion to sever on **Bruton** grounds *prior to* the court's redaction ruling, which preserved his **Bruton** objection. See **People v. Archer**, 99 Cal.Rptr.2d 230, 233 (Cal. App. 2000) (after defendant's motion to sever was denied, although defendant "did not then raise any specific objection to the redaction proposed by the prosecution", court deemed **Bruton** objection preserved); **United States v. Sarracino**, 340 F.3d 1148 (10th Cir. 2003) (where defendant unsuccessfully moved for severance prior to trial and court ordered redactions instead,

severance issue was not waived on appeal by failure to object to the redactions).

In addition, despite the State's argument to the contrary, at the time of the court's ruling, Turner expressly reserved the right to re-raise the **Bruton** issue at a later point in time. See AOB at 18-19 (citing IV:839) ("And based on Your Honor's redactions, we have no challenge to the statements on those grounds, *at this point. On Bruton grounds as opposed to – we may have some additional motion practice in the case.*") (emphasis added).

Finally, although the State minimizes the importance of Turner's timely-filed motion for a new trial (RAB at 9), that motion certainly preserved the **Bruton** error for this Court's consideration. See, e.g., **United States v. Peterson**, 140 F.3d 819, 820 (9th Cir. 1998) (where State and defendant *agreed* to redact co-defendant's statement prior to trial to replace defendant's name with "person X", after the State argued in closing that "person X" was the defendant, defendant's motion for new trial on **Bruton** grounds preserved the issue for appeal). Turner's motion for a new trial challenged the way the redactions were "used at trial" to establish that there were only two people present, such that Hudson's statements necessarily referred to him. (III:621). By challenging how the redacted evidence was *actually used*, Turner preserved his objection that the State violated **Bruton**.

See **Richardson v. Marsh**, 481 U.S. 200, 211 (1987) (recognizing that a prosecutor may not "undo the effect of the limiting instruction by urging the jury to use [a co-defendant's] confession in evaluating [defendant's] case"); see also AOB at 27-30.

B. Turner is entitled to a new, severed trial.

The State's Answering Brief relies on a dozen or so Federal cases from the 1970's and 1980's which advocate replacing a defendant's name with "neutral pronouns" (and in some cases, nicknames and physical descriptions),[4] as an alternative to severance. RAB at 13-18. Citing **Richardson v. Marsh**, 481 U.S. 200 (1987), the State argues that **Bruton** does not prohibit "inferential incrimination" that occurs when a redacted confession is considered in light of the evidence in the case. RAB at 14-15. The State insinuates that these ancient cases are still good law, because **Richardson** "express[ed] no opinion on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun." RAB at 16. Yet, the State fails to mention that the Supreme Court subsequently answered that question in **Gray v. Maryland**, 523 U.S. 185,

[4] See **United States v. Follette**, 430 F.2d 1055, 1057 (2d Cir. 1970) (finding no **Bruton** error even though co-defendant's statement identified his accomplice as "'Oliver' who was described as being 'about six feet two, about 175 pounds, 170 pounds, wearing a goatee" and who "more or less fit the physical description [of the defendant] at the time of trial.").

192 (1998). And **Gray** calls into question virtually all of the outdated legal authority relied upon in the State's Answering Brief.[5]

In **Gray**, the Supreme Court held that redactions that replace a name with an obvious blank space, a word such as "deleted", a symbol, *or which "similarly notify the jury that a name has been deleted"* are insufficient to protect the defendant's confrontation clause rights. 523 U.S. at 195 (emphasis added). As the Supreme Court explained, these types of "obviously redacted" confessions are "directly accusatory" in nature, and can be understood by the jury to refer specifically to the defendant, particularly when combined with a limiting instruction. **Gray**, 523 U.S. at 194. **Gray** also recognized that where the redactions clearly refer to "someone" (even if that "someone" is not named), the court can consider the context of the trial in evaluating the **Bruton** error:

> We concede that *Richardson* placed outside the scope of *Bruton's* rule those statements that incriminate inferentially. We also concede that the jury must use inference to connect the statement in this redacted confession with the defendant. But inference pure and simple cannot make the critical difference, for if it did, then *Richardson* would also place outside of *Bruton's* scope confessions that use shortened first names, nicknames, descriptions as unique as the "red-haired bearded, one-eyed man-with-a-limp" . . . and perhaps even full names of defendants who are always known by a nickname. This Court

[5] The State's outdated argument is a near carbon-copy of the argument made in its Opposition to Hudson's Motion to Sever. Compare RAB at 10-20 with (XI:2253-61).

> has assumed, however, that nicknames and specific descriptions fall inside, not outside of *Bruton's* protection.

523 U.S. at 195-96.

One of the main arguments advanced by the State in its Answering Brief is that this Court should ignore the context of the trial when determining whether Hudson's redacted statement violated Turner's Sixth Amendment Rights. RAB at 17-18. Relying mostly on 1970's legal authority, the State claims that "Circuit Courts" have "rejected" contextual inculpation arguments, and will not consider anything other than the redacted statement itself. See RAB at 17-18 (citing cases from the Second, Sixth and Seventh Circuits). But after **Gray**, most of these Circuits reached the opposite conclusion.[6] As the Seventh Circuit explained in **United States v. Hoover**, 246 F.3d 1054, 1059 (7th Cir. 2001):

> the proposition that replacing a name with a pseudonym is proper unless the identity of the alias can be deduced within the four corners of the confession is incompatible with *Gray*. . . . Very little evidence is incriminating when viewed in isolation; even most confessions depend for their punch on other evidence. To adopt a four-corners rule would be to undo *Bruton* in practical effect.

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[6] The State's authority from the Second circuit is unpersuasive. **United States v. Trudo**, 449 F.2d 649 (2d Cir. 1971), is not a "neutral pronoun" case, but a case where the State redacted all references to the co-defendants. To the extent the State relies on **United States v. Follette**, 430 F.2d 1055 (2d. Cir. 1970), that case was overruled by **Gray**, which prohibited the use of nicknames and physical identifiers.

The Sixth Circuit reached a similar result in **Stanford v. Parker**, 266 F.3d 442, 456-57 (6th Cir. 2001):

> the district court was correct that the replacement of "Stanford" with "the other person" in Buchanan's confession did not prevent a *Bruton* violation. Merely substituting the term "other person" for "Stanford" would not have prevented the jury from drawing the natural conclusion that the "other person" and Stanford were indeed one and the same.

The State cites **U.S. v. Vasquez**, 874 F.2d 1515, 1518 (11th Cir. 1989) and **United States v. Enriquez-Estrada**, 999 F.2d 1355 (9th Cir. 1993), to suggest that the "neutral pronoun" approach will solve any and all potential **Bruton** problems. See RAB at 16-17. However, these cases were severely limited by **Gray**. As the Ninth Circuit explained in **Peterson**,

> *Gray* clarifies that the substitution of a neutral pronoun or symbol in place of the defendant's name is not permissible if it is obvious that an alteration has occurred to protect the identity of a specific person. Therefore, *Enriquez-Estrada*, to the extent it suggests the contrary, has been overruled by *Gray*.

140 F.3d at 822 (emphasis added). Likewise, in **United States v. Schwartz**, the Eleventh Circuit retreated from its pre-**Gray** case law and held that "a defendant's confrontation right is violated when the court admits a codefendant statement that, *in light of the Government's whole case*, compels a reasonable person to infer the defendant's guilt." 541 F.3d 1331, 1351 (11th Cir. 2008) (emphasis added). As such, the Eleventh Circuit has

adopted the very "contextual inculpation" argument denounced by the State in its Answering Brief.

Most Federal courts now recognize that the context of the trial is very important when evaluating redacted statements for **Bruton** violations. Some circuits ask whether the redacted statement provides "critical" evidence for the State – if so, its admission violates **Bruton**. See **United States v. Sarracino**, 340 F.3d 1148, 1160 (10th Cir. 2003) ("*Bruton* does apply, even if the co-defendant's statement is not facially or directly inculpatory, *when the statement is evidence of a fact critical to the prosecution's case*") (emphasis added).

Other circuits consider whether the redacted statement allows jurors to draw a one-to-one comparison between the number of defendants at the defense table and the number of individuals referenced in the statement. See **United States v. Hernandez**, 330 F.3d 964, 973-74 (7th Cir. 2003) ("since *Gray* and *Richardson*, we have used this one-to-one correspondence as a factor to determine if the redacted confession too obviously refers to the co-defendants."); accord **Vasquez v. Wilson**, 550 F.3d 270, 281 (3d Cir. 2008) (finding **Bruton** error because "[t]he fact that there were only two possible shooters under Santiago's statement should have made clear to the trial court that . . . [the jury] was almost certain to conclude that the individual Santiago

described in his redacted statement as 'my boy' or 'the other guy' as the shooter was Vasquez because Rivera was not on trial and the Commonwealth argued that Vasquez fired the final shot").

Still other circuits consider whether, within the context of the trial, it was obvious who the redacted confession referred to. See **United States v. Payne**, 923 F.2d 595 (8th Cir. 1991) (finding **Bruton** error where "McCormick's redacted confession indicated that he was planning to help 'someone' escape from federal custody. As counsel for the government admitted at oral argument, everyone at the trial knew who the 'someone' was").

Like most Federal courts, the Nevada Supreme Court has already rejected the argument made in the State's Answering Brief that the context of the trial is irrelevant when evaluating a redacted statement. See, e.g., **Ducksworth v. State**, 113 Nev. 780 (1997) (severance required where evidence of the defendant's guilt was "largely circumstantial" and it was likely that jurors "read the appellant's name into the blanks" of any co-defendant statements admitted at trial). As this Court later explained,

> In determining whether admission of a co-defendant's statement violates *Bruton*, the central question is whether the jury likely obeyed the court's instruction to disregard the statement in assessing the defendant's guilt.

Ducksworth v. State, 114 Nev. 951, 55 (1998) (hereinafter "**Ducksworth II**"). To answer this question, a reviewing court has to consider the context of the trial. How else could a court evaluate whether the evidence against a defendant was "largely circumstantial" or whether the jury likely "read the appellant's name into" the redacted statement? See **Ducksworth**, 113 Nev. at 794-95 (finding it "likely" that the jury understood the unnamed person in Ducksworth's confession to be Martin based on the following contextual information: "Martin and Ducksworth sat together at trial, and testimony had indicated that Martin and Joey were friends and that Martin, Joey, and Ducksworth all drove from California together.").[7]

Additionally, this Court has *already rejected* the State's claim that neutral pronouns are always sufficient to protect a defendant from **Bruton** error. See **Sitton v. State**, No. 73014, 2019 WL 1772439 (Nev. April 19, 2019) (unpublished) (recognizing "exceptions" where redactions with neutral pronouns will not satisfy *Bruton*), citing with approval, **Vasquez**, 550 F.3d at 282 ("'it is an unreasonable application of clearly established Federal law under the decisions of the Supreme Court of the United States to

[7] To the extent the State relies on **Lisle v. State**, 113 Nev. 679 (1997), to suggest that this Court may not consider "other evidence introduced at trial" when evaluating a redacted statement for **Bruton** error, **Lisle**'s precedential value is questionable because it was decided a year before **Gray**. In addition, **Lisle** relied heavily on **Enriquez-Estrada**, which was "severely limit[ed]" by **Gray**. See **Peterson**, 140 F.3d at 821.

hold that [the] use [of generic terms] *always* will be sufficient' to satisfy *Bruton*").

In this case, it was obvious that Hudson's statement was redacted to protect Turner. See (VIII:1734-IX:1754) (setting forth the State's Q and A with Detective Jex). The awkward questions asked by the State made it clear that Turner's name had been redacted and that he was the "one other person" who had been with Hudson that night:

> Q Okay. Did you specifically ask [Hudson] where **he and another person met up?**
>
> A Yes, I did.
>
> Q And did [Hudson] tell you that they met up in an alley off Lake Mead and Jones?
>
> A Yes
>
> Q When you were asking [Hudson] about what was happening prior to the incident **and he told you that he met up with someone on Lake Mead and Jones, did he indicate it was just one other person he met up with?**
>
> **A Yes, he indicated just one person.**

(VIII:1739) (emphasis added).

> Q **Did you ask [Hudson] what he and the one other person that was back there were doing in the backyard?**
>
> A Yes, I did.

(IX:1747) (emphasis added).

> Q **Did [Hudson] then tell you he, being this other person, had the SK?**
>
> A Yes, he did.
>
> Q **Did you ask him how many shots the other person fired?**
>
> A Yes, I did.

Q Did he say I have no idea?
A Yes, he did.

(IX:1749) (emphasis added).

These redactions violated **Bruton** because they "notif[ied] the jury that a name has been deleted", as prohibited by **Gray**, 523 U.S. at 195. See **State v. Johnson**, 199 Or.App. 305, 313 (Or. App. 2005) ("although [the jury] never heard defendant's name, they heard a variety of other 'obvious indications of alteration'" including repeated references to "two of them" and "the other person"); accord **Sitton**, 2019 WL 1772439 at *2 (recognizing that the manner of the State's questions "invited jurors to infer that the generic term was being used as a placeholder for [defendant's] name, making it likely that jurors would fill his name in throughout the rest of the statements").

It became even more obvious that Turner's name had been deliberately replaced with neutral pronouns when the State allowed Hudson to identify the *other* people he had interacted with that evening by name, while referencing Turner with neutral pronouns. See **Johnson**, 199 Or.App. at 313 (alteration was obvious where all other individuals in the confession were named, "with one conspicuous exception, and the fact of that individual's anonymity [was] reemphasized with every use of some anteceedentless pronoun or generic term"). For example:

Q Did [Hudson] tell you that he had the shotgun for about a week prior to this incident?

A Yes, he did.

Q **And that he got it from a friend named T?**

A Yes.

(IX:1749) (emphasis added).

Q **Does he specifically tell you that prior to this incident happening, they had met up at a person by the name of Big John's house?**

A Yes.

Q Okay. And the decision was made to go hit the house?

A Yes.

Q **Does he specifically say, Big John didn't come with us?**

A Yes, he did.

(IX:1753) (emphasis added).

In addition, the State asked Detective Jex multiple questions to establish that there were only two people involved in the crime (VIII:1737,1739;IX:1745-47,1750,1752), in a case where there were only two defendants sitting at counsel table. As the Eleventh Circuit recognized, "[t]he rational underlying the Supreme Court's decision in *Gray* requires finding a *Bruton* violation on facts such as these, where a redacted confession implicates a precise number of the confessor's codefendants." **U.S. v. Gonzalez**, 183 F.3d 1315, 1322 (11th Cir. 1999), superceded by regulation on other grounds as stated in **U.S. v. Diaz**, 248 F.3d 1065 (11th Cir. 2001). Here, Hudson's redacted statements allowed jurors to draw a

one-to-one comparison between the number of defendants at the defense table and the number of individuals referenced in the statement, in violation of **Bruton**. See **Gonzalez**, 183 F.3d at 1322; **Hernandez**, 330 F.3d at 973-74; **Vasquez**, 550 F.3d at 281.[8]

The State did not completely excise all references to Turner either. As the State concedes, it "included a diagram in its closing argument wherein testifying Detective Craig Jex had written 'Chubz fired'." RAB at 22, n. 4. Although the State relies on **Follette** to argue that such nicknames are permissible, **Follette** is longer good law. See **Gray**, 523 U.S. at 195-96 ("nicknames and specific descriptions fall inside, not outside of *Bruton's* protection"); see also **Sitton**, 2019 WL 1772439 at *2 (finding **Bruton** violation where "the State did not completely redact [defendant's] name from [co-defendant's] statements.").

Finally, any confusion about the identity of the Hudson's "unnamed" co-conspirator would have been cleared up by the State's improper closing

[8] The interlocking nature of Hudson and Turner's confessions rendered the **Bruton** error even more harmful. See **Pabon v. Mahanoy**, 654 F.3d 385 (3d Cir. 2011) (where prosecutor argued that the both co-defendant's confessions corroborated one another, it was less likely that a curative instruction would solve the **Bruton** problem); **Cruz v. New York**, 481 U.S. 186 (1987) (when a defendant's confession substantially "interlocks" with a non-testifiying co-defendant's confession, it increases the potential for a **Bruton** violation).

argument, when the State told the jury that there were only two people involved in the shooting and that Hudson told police, "the other guy, who I submit to you is Turner, shot before him." (X:2095). Where the State actually used Hudson's statements against Turner at trial, it is unlikely that the jury "disregard[ed] the statement[s] in assessing the defendant's guilt." **Ducksworth II**, 114 Nev. at 955. The **Bruton** error in this case is clear and unmistakable.

The error is also reversible. Because evidence of Turner's guilt was entirely circumstantial (particularly as to the attempt murder counts), the **Bruton** error was not harmless beyond a reasonable doubt. See AOB at 28-30; see pages 4-6, supra; **Ducksworth**, 113 Nev. at 795; **Sitton**, 2019 WL 1772439 at *3.

Even if this Court applies plain error analysis, reversal is *still* required because the **Bruton** error affected Turner's substantial rights by causing "actual prejudice or a miscarriage of justice." See **Valdez**, 124 Nev. at 1190 (quoting **Green v. State**, 119 Nev. 542, 545 (2003). On habeas review, under similar circumstances, courts have found actual prejudice and reversible error. For instance, in **Vasquez**, 550 F.3d at 281, the Third Circuit reversed a defendant's first degree murder conviction where the defendant "never confessed to being a shooter, and there was no witness at trial who

said that he saw [him] fire a weapon" apart from his co-defendant's improperly-admitted statement. Under those circumstances, the Third Circuit found that the **Bruton** error had a "substantial and injurious effect" on the trial.

Likewise, in **Rueda-Denvers**, 359 F.Supp.3d 973, (D. Nev. 2019), the U.S. District Court for the District of Nevada reversed an appellant's convictions for first degree murder, attempt murder, and other crimes where the only direct evidence that defendant knew his co-defendant had placed a bomb in a coffee cup came from his co-defendant's improperly-admitted statement, and defendant denied such knowledge. The court found "actual prejudice" from the **Bruton** error in that case as well.

Like in **Vasquez** and **Rueda-Denvers**, there was no direct evidence of Turner's guilt on the attempt murder, weapons possession and battery charges. See AOB at 28-30; see pages 4-6, supra. Turner denied holding or firing any weapon. As a result, when the State improperly used Hudson's statement to police to establish that Turner shot Officer Robertson, the error caused actual prejudice and a miscarriage of justice requiring reversal.

III. EXPERT ERROR

In order for the State to present expert testimony at trial, it had to provide Turner with the following information at least 21 days prior to trial:

(a) A brief statement regarding the subject matter on which the expert is expected to testify ***and the substance of the testimony***;
(b) A copy of the curriculum vitae of the expert witness; and
(c) A copy of all reports made by or at the direction of the expert witness.

NRS 174.234(2) (emphasis added).

In this case, the State should not have been allowed to present expert testimony about stippling because that topic was never disclosed in any of the State's pretrial expert disclosures. See AOB at 30-50; (III:545-55).

The State acknowledges that testimony about stippling must come from an expert, but claims that its notice was sufficient because "stippling can be classified as a form of gunshot residue" and Anya Lester was a firearms expert. RAB at 26. This argument completely misses the point. Even if stippling is a "form of gunshot residue", there was nothing in the State's disclosure to suggest that Lester would actually testify about stippling.

Instead of notifying Turner that Lester would testify about stippling, the State disclosed the "substance" of Lester's testimony as follows: "She is an expert in the field of firearm and toolmark comparisons and is expected to testify thereto." (III:550) (emphasis added). Based on the State's disclosure, Turner had notice that Lester might compare or contrast the markings made by the different types weapons involved in the case (*e.g.*, the SKS rifle,

Hudson's shotgun, and Officer Grego-Smith's Glock 17).[9] However, Turner did not have any notice that Lester would discuss the distances at which stippling might appear on human skin or clothing. See AOB at 33-36.

At trial, Turner explained to the court exactly why this lack of notice was so prejudicial:

> [T]he State [will] argue that my client had stippling on his leg. And based on this witness testifying that there was no stippling beyond 2 feet, which is an area she's not been disclosed in, they're going to use that in their closing arguments to say he had to have been within 2 feet of a firearm when it was discharged for that pattern to have happened, and thus, the defense theory is incorrect.

(IX:1898-99). Turner moved to strike the testimony or, in the alternative, for a one week continuance so that he could retain his own expert to refute the State's anticipated argument. (X:1867-68;IX:1903,1907). Yet, the court denied Turner's reasonable request, and he suffered prejudice when the State used the unnoticed stippling evidence in closing to argue that Turner had fired the SKS rifle. See AOB at 40-41.[10]

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[9] When asked to describe her expertise, Lester confirmed that her job was to examine "firearms . . . ammunition, ammunition components, any other firearms-related evidence, including microscopic comparisons of bullets, cartridge cases, and ammunition components to determine if they were fired from a particular firearm." (X:1861).

[10] The State argues that its rebuttal was "permissible comment on evidence". RAB at 31. However, the State would not have been able to make such an argument had the stippling testimony been excluded or the continuance been granted.

In addition, Lester was unqualified to testify about the distances at which stippling appears on skin. See AOB at 34. Lester had never testified about stippling before, she had never published anything about stippling, she had not been asked to look into stippling when preparing her expert report, and she never even *spoke* to the prosecutor about stippling until the day before her testimony. (IX:1879). The State argues that Lester was "qualified" to discuss stippling based on some training she received nearly a decade earlier, in 2009 and 2011. RAB at 27-28. Yet, the State fails to explain why, if Lester was so "qualified", she could not answer any of the State's questions about stippling distances until after it improperly fed her the answer on redirect with a leading question. Compare RAB at 27-28 with AOB at 36-38. On direct examination, Lester repeatedly said that there were too many "variables" for her to answer the State's questions about stippling distances. (IX:1910). It was only after the State fed Lester the "3 feet" distance on redirect that she testified that she had seen stippling "from a near-contact shot out to approximately 36 inches". (IX:1944-46).

The State argues that Turner "waived" any possible notice argument regarding Dr. Urban by "inviting" Dr. Urban to testify. RAB at 29-30. Yet, the State ignores the fact that it repeatedly represented in open court that Dr. Urban had been "noticed" as a witness. (X:1961) ("we have medical doctors

noticed"); (X:1967) ("we – we have our doctor, she's noticed"). Turner never "invited" the State to call Dr. Urban until after State represented, on the record, that she had been noticed:

- First, the State informed the court "we have medical doctors ***noticed*** so we might need to call somebody now. This is brand new to us." (X:1961) (emphasis added).

- After a break, defense counsel acknowledged that if the State had noticed an expert, it was entitled to call him/her to testify. (X:1964) ("Obviously, the State is able to bring their medical expert if they want to today, right -- ***I mean, if they -- they called her***.") (emphasis added).

- A little while later, the State represented "We – we have our doctor, ***she's noticed***. So if this is going to be an issue, then we'll call our doctor." (X:1967) (emphasis added).

- Immediately after the State represented that their doctor had been noticed, defense counsel responded, "Okay. They should call their doctor." (X:1967).

In a case where the State disclosed more than **two hundred witnesses** (III:545-55), Turner reasonably relied on the State's representations that Dr. Urban was included in that notice. Where the State's representations were demonstrably false, it is the *State's* waiver argument that "falls flat." Cf. RAB at 30.

The State claims that Dr. Urban's testimony was permissible as a "rebuttal of the defense's proffered definition" of stippling. RAB at 30. However, in **Grey v. State**, 124 Nev. 110 (2008), this Court held that the

State was required to disclose its intent to call an expert rebuttal witness prior to trial, and it is undisputed that Dr. Urban was never disclosed.

When Turner originally objected to Anya Lester's testimony about stippling, he made it abundantly clear that he was unprepared to address that subject matter at trial as a result of the State's failure to give proper notice. (IX:1903,1907-08). Had the court granted Turner's original motion to strike, Turner would not have needed to offer a medical definition of stippling, and the State would not have needed Dr. Urban to "rebut" that definition. As such, Turner's original objection to Lester's testimony about stippling preserved the notice issue as to Dr. Urban's testimony.

Although the State failed to notice any experts who would testify about Turner's medical records pursuant to **NRS 174.234(2)**,[11] and although the subject of "stippling" appeared nowhere in the State's expert disclosures,[12] the State claims that Turner had notice that it would discuss "stippling" because his defense team had access to his medical records where the word "stippling" was mentioned several times. RAB at 31. Unfortunately, **NRS 174.234(2)** requires actual notice, not constructive notice.

[11] (III:545-55).
[12] (III:545-55).

The State suggests that Turner's stipulation to admit his own medical records was "a tacit admission that the 'stippling' Dr. Urban speaks of in her medical reports was an appropriate subject for presentation to the jury." (RAB at 31). This argument also fails. When Turner originally stipulated to admit his medical records on Day 6 of the trial (IX:1798-99), he was unaware that stippling was an issue in the case, since the State's expert disclosures failed to mention stippling and the State had not yet questioned Lester about that subject.[13]

The State fails to respond to Turner's argument that it acted in bad faith by refusing to disclose that its experts would testify about stippling in order to conceal its "trial strategy". AOB at 46. The State fails to explain why it was not bad faith to falsely represent that Dr. Urban had been "noticed" as an expert. The State also fails to explain why it believed it could introduce unnoticed expert trajectory testimony,[14] telling the jury in opening statement that based on trajectory analysis, "the detectives and the crime scene analysts . . . knew it was Mr. Turner who actually shot himself based on accounting for all of – the bullets in this case and all the shots in

[13] Lester was questioned on Day 7 of the trial. (IX:1801-03).

[14] Although the State claims that Fletcher and Dahn were "both notified (sic) in the first Expert Notice" (RAB at 32), the document to which the State refers was a notice containing *both* experts *and* lay witnesses, and both were designated as lay witnesses. (II:261-64).

this case." (VII:1267). It was bad faith for the State to make such a representation without noticing any experts who could testify about trajectories. See **Garner v. State**, 78 Nev. 366, 371 (1962) (prosecutor has a duty "to state facts fairly, and to refrain from stating facts which he will not be permitted to prove").

What happened at Turner's trial was nothing less than a trial by ambush. See **Land Baron Inv., Inc. v. Bonnie Springs Family Ltd. P'ship**, 356 P.3d 511, 522 n.14 (Nev. 2015). Turner could not adequately prepare a defense to the State's stippling argument without consulting an expert of his own. See AOB at 35-36, 49-50. Turner could not effectively cross-examine the State's experts about stippling where the issue of stippling only became apparent in the middle of trial. Id. The court abused its discretion by failing to strike the State's unnoticed expert testimony and by failing to grant Turner's reasonable request for a continuance. Without the improperly admitted stippling testimony, there was no physical evidence indicating that Turner was holding the SKS rifle that shot Officer Robertson. See AOB at 40-41, 49-50. The introduction of unnoticed, unqualified expert testimony about stippling violated Turner's constitutional rights to due process and a fair trial, requiring reversal. See **U.S. Const. amend. V, XIV;**

Nev. Const. Art. 1 § 8; see also **Grey**, 124 Nev. at 117-20; **Wardius v. Oregon**, 412 U.S. 470, 474-75 (1973).

IV. PROSECUTORIAL MISCONDUCT

"Prosecutors are subject to constraints and responsibilities that don't apply to other lawyers." **U.S. v. Kojayan**, 8 F.3d 1315, 1323 (9th Cir. 1993). Their "job isn't just to win, but to win fairly, staying within the rules." **Id**. Although a prosecutor "may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.'" **Garner v. State**, 78 Nev. 366, 370 (1962). Here, the State struck many foul blows. See AOB at 53-61.

The prosecutor invited jurors to imagine themselves sitting at a bar, drinking whiskey, listening to a story about an "officer-involved shooting", and then saying "Good, I'm glad you caught the two guys who shot the cops." (X:2086-87). This argument was an improper emotional appeal to jurors based on the identity of the victims, who were both cops. See **United States v. Young**, 470 U.S. 1, 9 n.7 (1985); **Floyd v. State**, 118 Nev. 156, 173 (2002). The argument was not a fair response to Turner's defense that a third person fired the weapon that struck Officer Robertson. Cf. RAB at 37. If the State wanted to argue that only two people were involved, it could

have done so without trying to inflame jurors' righteous anger over a cop shooting.

The State engaged in additional misconduct when it told jurors that it *could have* charged Turner and Hudson with four counts of attempt murder, but did not do so because it could not "prove" the two other counts. AOB at 56-57. By implication, the jury would understand that the State had charged Hudson and Turner with two counts of attempt murder because it believed they were guilty. The State concedes that it would "obviously be improper" if the State argued it "would not have charged Turner with the two Attempt Murder counts if he was not guilty." RAB at 40. However, the State fails to show that the argument it made is meaningfully different from such an argument.

V. REMAINING ARGUMENTS

Turner is satisfied that his Opening Brief adequately addresses all remaining issues and incorporates by reference all arguments made in his Opening Brief.

CONCLUSION

The State violated Turner's Sixth Amendment Rights by using Hudson's statement to police to refute Turner's defense that a third person met them at the house on Oveja Drive and fired the SKS rifle that struck

Officer Robertson. The State seems to be operating under a misconception that once a redacted confession is admitted into evidence, it has carte blanche to "argue the evidence" to the jury and connect that confession to an "unnamed" co-defendant. See RAB at 12-13 (acknowledging that "the State intended to use, and did in fact use, Hudson's statement to police against Turner" but claiming this was permissible because "redaction solved any Bruton issue in the State's use of Hudson's statement"); see RAB at 35 (no prosecutorial misconduct because "the State is permitted to comment on the evidence"). Yet, the State forgets the key holding from **Richardson**, 481 U.S. at 211, that it may not "undo the effect of a limiting instruction by urging the jury to use [a co-defendant's] confession in evaluating [defendant's] case". The State was not allowed to argue that Hudson's confession undermined Turner's theory of defense when Turner never had a chance to cross-examine him. The State did it anyway. That was reversible error under any standard of review.

In addition to the blatant Sixth Amendment violation, Turner's rights to due process and a fair trial were violated when the State failed to notify him that it would introduce expert testimony on stippling and bullet trajectories in order to place the SKS rifle in his hand. Turner's right to a trial by an impartial jury was violated when uniformed police officers

packed the courtroom during a closing argument that was filled with prosecutorial misconduct. Whether considered alone or together, these errors require reversal.

For all the foregoing reasons, Turner's convictions for attempt murder with use of a deadly weapon, battery with use of a deadly weapon resulting in substantial bodily harm, and the possession of a firearm enhancement must be reversed and the case remanded for a new severed trial.

Respectfully submitted,

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

By: */s/ Deborah L. Westbrook*
DEBORAH L. WESTBROOK, #9285
Chief Deputy Public Defender
309 South Third Street, #226
Las Vegas, Nevada 89155-2610
(702) 455-4685

CERTIFICATE OF COMPLIANCE

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the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 15 day of May, 2019.

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

By: */s/ Deborah L. Westbrook*
DEBORAH L. WESTBROOK, #9285
Chief Deputy Public Defender
309 South Third Street, #226
Las Vegas, Nevada 89155-2610
(702) 455-4685

CERTIFICATE OF SERVICE

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NDOC No. 1200863
c/o Warm Springs Correctional Center
P.O. Box 7007
Carson City, NV 89702

BY *_/s/ Carrie M. Connolly_*
Employee, Clark County Public Defender's Office