IN THE SUPREME COURT OF THE STATE OF NEVADA

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

APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction)

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vs.)	
THE STATE OF NEVADA,)	
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APPELLANT'S OPENING BRIEF

JURISDICTIONAL STATEMENT

The appellant, Steven Turner ("Turner"), appeals from his judgment of conviction pursuant to **NRAP 4(b)** and **NRS 177.015**. Steven's judgment of conviction was filed on July 2, 2018. (Appellant's Appendix Vol. III:701-703).[1] This Court has jurisdiction over Turner's appeal, which was timely filed on July 18, 2018. (III:704-06). See **NRS 177.015(1)(a).**

ROUTING STATEMENT

This case is not presumptively assigned to the Court of Appeals because Turner went to trial and was convicted of three B felonies: two counts of attempt murder with use of a deadly weapon, and one count of

[1] Hereinafter, citations to the Appellant's Appendix will start with the volume number, followed by the specific page number. For example, (Appellant's Appendix Vol. III:701-703) will be shortened to (III:701-703).

battery with use of a deadly weapon resulting in substantial bodily harm. See **NRAP 17(b)(2)**.

ISSUES PRESENTED FOR REVIEW

I. A JOINT TRIAL VIOLATED TURNER'S DUE PROCESS AND FAIR TRIAL RIGHTS.

II. THE COURT ADMITTED UNNOTICED AND UNQUALIFIED EXPERT TESTIMONY IN VIOLATION OF TURNER'S CONSTITUTIONAL RIGHTS.

III. IT WAS UNDULY PREJUDICIAL FOR UNIFORMED POLICE OFFICERS TO PACK THE COURTROOM DURING CLOSING ARGUMENTS.

IV. PROSECUTORIAL MISCONDUCT TAINTED THE TRIAL.

V. CUMULATIVE ERROR REQUIRES REVERSAL.

STATEMENT OF THE CASE

On September 23, 2015, Turner was indicted along with co-defendant Clemon Hudson on six charges: (1) conspiracy to commit burglary, (2) attempt burglary while in possession of a firearm or deadly weapon, (3) attempt murder with use of a deadly weapon, (4) attempt murder with use of a deadly weapon, (5) battery with use of a deadly weapon resulting in substantial bodily harm, and (6) discharging firearm at/into an occupied structure. (I:1-6).

At his initial arraignment on October 5, 2015, Turner pled not guilty and waived the 60-day rule. (III:710). Over the next two years, the trial date

was continued multiple times while the parties attempted to negotiate a plea deal. (III:712,716,717). Turner was prepared to accept the State's offer to plead guilty to one count of attempt murder with use of a deadly weapon and one count of conspiracy to commit burglary. However, that offer was contingent on Hudson *also* accepting the State's offer. (IV:726). When Hudson refused the State's offer on March 22, 2018, the offer was withdrawn and Turner was forced to stand trial. (IV:726).

Before trial, Hudson filed a motion to sever pursuant to **Bruton v. United States**, 391 U.S. 123, 135-37 (1968), on the basis that Turner had given statements to police that incriminated Hudson and Hudson would not have an opportunity to cross-examine Turner about those statements at trial. (XI:2247-52). Turner joined the motion, arguing that Hudson's statements to police incriminated Turner and that he, too, would be unable to cross-examine Hudson about those statements at trial. (II:276-472). The district court denied the joint motion without prejudice, believing that the incriminating statements could be adequately redacted to avoid prejudice to the parties. (III:718). Thereafter, Turner proposed numerous redactions and the court accepted some, *but not all*, of those requests. See Court Exhibit A, November 30, 2017.

On April 16, 2018, Turner and Hudson's joint trial commenced. (IV:730). On the first day of trial, the State filed an Amended Indictment in open court, dismissing count 6: discharging a firearm at/into an occupied structure. (III:558-62;IV:730). In their opening statements, both Turner and Hudson conceded they were guilty of count 1 (conspiracy to commit burglary) and count 2 (attempt burglary) but challenged the remaining charges. (VII:1271-72). After a ten-day trial, on April 27, 2018, the jury found both Turner and Hudson guilty of all five charges. (III:618-19;IV:739).

On May 4, 2018, Turner moved for a new trial based, in part, on the court's failure to sever the co-defendants' trials. (III:620-26). The State opposed Turner's motion on May 8, 2018. (III:654-57). At a hearing on June 19, 2018, the court denied Turner's motion. (IV:741).

On June 21, 2018, Turner was adjudged guilty of counts 1-5 and given an aggregate sentence of 14-40 years with 1022 days credit for time served and was ordered to pay restitution in the amount of $9,099.98, jointly and severally with Hudson. (IV:742). Turner's judgment of conviction was filed on July 2, 2018. (III:701-703). Turner timely appealed his convictions on July 18, 2018. (III:704-05).

STATEMENT OF THE FACTS

Eric Clarkson lived with his best friend and roommate, Willoughby Potter de Grimaldi, in a house located at 6729 Oveja Circle, in Las Vegas. (VII:1302,1304).

At around 3:30 a.m. on September 4, 2015, Clarkson was in his bedroom playing on his phone, watching TV, and getting ready for bed. (VII:1304). After Clarkson turned out the lights and got into bed, he heard the sound of his steel outdoor patio chairs being moved across the bricks. (VII:1306). Clarkson sat up in his bed and looked out his window. (VII:1307). Clarkson saw a figure walk by and, after taking a closer look, he determined it was a young black man. (VII:1308).

Clarkson grabbed his phone, alerted his roommate to the situation and called 911 to report a prowler in his backyard. (VII:1308). When Clarkson's roommate Grimaldi went to the back window, which was directly to the right of the back door, he saw the silhouette of a black man with a billed cap on his head, cocking what appeared to be a shotgun. (VII:1311,1338). Grimaldi relayed this description to Clarkson so he could share it with the 911 operator. (VII:1340).

Shortly thereafter, Clarkson and Grimaldi heard somebody beating on their front door. (VII:1311,1340). Grimaldi went to the living room and

looked out the front window to see who it was. (VII:1312,1340). Out the window, Grimaldi saw a tall (6'1"), shirtless black man with a round, two-inch afro and black basketball shorts. (VII:1342,1344,1358).

After seeing the second man at the front door, Grimaldi saw a third person out of the corner of his eye, running past his bedroom window. (VII:1341-42,1359). Grimaldi rushed over to his bedroom window, where he saw a black man with a "wild and spiky" afro that was approximately 1-2 inches in length. (VII:1345,1359). Grimaldi did not recognize any of the three prowlers. (VII:1347).

When Grimaldi went back to the front window, he saw the shirtless man with the two-inch afro bolt away from the front door and cross the cul-de-sac in front of the house. (VII:1345). Shortly thereafter, Officers Malik Grego-Smith and Jeremy Robertson arrived at the home. (VII:1314,1348;VIII:1598,1650).

When Clarkson let the officers inside, the house was completely dark. (VII:1314;VIII:1606). Clarkson made both officers aware of a person on the back patio and the officers proceeded to the back of the house. (VII:1314;VIII:1606-07).

At trial, both officers testified that when Robertson looked out the back window to see if there was anyone in the back yard, Robertson did not

see anyone there. (VIII:1608,1652). At that point, the officers decided to "clear the back yard" – meaning they would search to see if there was anyone there. (VIII:1608). They decided that Robertson would open the back door, and as he opened the door, Grego-Smith would go through and Robertson would follow. (VIII:1609).

Grego-Smith took out his weapon: a Glock 17 with .9 mm bullets. (VIII:1609-10). As Robertson unlocked the door and Grego-Smith took a step to go outside, "two shots" came in from outside on the patio. (VIII:1612-13). Clarkson testified that one of the bullets looked like "[m]olten metal, red and blue" and the other bullet looked "like a giant sparkler had gone off in my living room." (VII:1318).

A bullet pierced Robertson's upper thigh, fracturing his femur. (VIII:1656). Robertson fell to the ground behind Grego-Smith. (VIII:1612). Grego-Smith took one step back behind cover, dropped to one knee, and returned fire toward the patio, ultimately firing 12 shots.[2] (VIII:1612-14).

Grego-Smith turned his flashlight on right when he started shooting and saw "a light-skinned black male with no shirt and purple basketball

[2] Police recovered 12 Speer .9 mm cartridge casings from the dining room area where Grego-Smith fired his gun. (VIII:1550-51).

shorts" on the patio. (VII:1614,1617,1633).[3] Grego-Smith yelled out, "Don't move, keep your hands up, don't move or I'll fucking shoot you." (VIII:1616). Then, Grego-Smith radioed dispatch to tell them that shots had been fired, that an officer was down and that they needed units there. (VIII:1616).

Within 4 ½ minutes, the other units began to arrive. (VIII:1616). The officers took Robertson out in front of the house to perform an "officer down rescue". (VIII:1617). Then, K-9 officers arrived and went into the back yard. (VIII:1618). Police found Hudson lying on the ground with a shotgun between his legs and a rifle[4] immediately where he was lying. (VIII:1514). Police also found a small Beretta handgun nearby. (VII:1452).

Grego-Smith followed K-9 and officers into the back yard where he saw Hudson being taken into custody. (VIII:1618). At trial, Grego-Smith confirmed that Hudson was not the shirtless black man in basketball shorts that he had seen in the back yard when he turned on his flashlight. (VIII:1623).

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[3] At preliminary hearing, Grego-Smith testified that he saw a "black male with no shirt and basketball shorts." (I:30). The shorts did not become "purple" until trial.

[4] The rifle was described in the indictment as an "SKS" rifle, and the weapon that shot Officer Robertson. (III:568-69;V:872). At trial, witnesses described it as an "SKS rifle" (VII:1449,1456), an "AK-47" (IX:1692-94), and a "Yugo long rifle". (IX:1705).

In addition to securing the crime scene itself, Metro set up a large perimeter around the crime scene which ran a mile-and-a-half east-to-west and a mile north-to-south. (VIII:1524). Detective Jeremy Vance spent three-and-a-half hours driving around the inside of this perimeter looking for the suspect that Grego-Smith had seen in the back yard. (VIII:1524). Yet, instead of finding a shirtless man in basketball shorts, Vance came across Turner, who was wearing a purple shirt, a pair of bright orange pajama bottoms, and white converse shoes. (VIII:1528 & State's Exhibit 28).

Vance and his partner got out of their vehicle, identified themselves, and began asking Turner some basic questions. (VIII:1528). Turner told the officers his name was "Devonte Turner". (IX:1770). Vance noticed that Turner was injured when he saw blood on his pants trickling down his leg into his shoe area. (VIII:1529). When Vance asked Turner about his leg, Turner pulled up his pant leg and said, "I jumped over a wall at my friend's house and caught my leg on the fence." (VIII:1529). However, Vance thought it looked like a gunshot wound, not a tear from going over a fence. (VIII:2639).

Next, Turner was interviewed by Detective Eduardo Pazos. (IX:1767-68). Turner again identified himself as "Devonte Turner." (IX:1767). When Pazos asked Turner about the injury to his leg, Turner told him he got the

injury from "hopping over a fence", not from the police. (IX:1770). Turner told Pazos that "the wrong people pulled up and influenced me to go on a ride with them." (IX:1772). Turner initially claimed that he was outside the whole time anything at the house was going on. (IX:1772). Turner explained that when he was outside, he "hears shit go off, hears guns go off, and runs." (IX:1772).

Turner explained that they were in the house to "do a lick", which he described as, "[s]omebody trying to come up on somebody." (IX:1773). Turner said that "someone[5] came to pick him up" around midnight and there were just "two people" in the car. (IX:1773,1775). Turner said he sat in the front seat of the car. (IX:1773). Turner said he recognized an SKS weapon that "looked like" his uncle's and was "brown with, like, a green handle and brownish-tannish". (IX:1773). Turner said he "believed" the rifle was loaded. (IX:1774). Turner said he didn't see any guns until they got to the residence. (IX:1775). That's when Turner said he saw the "shotty or shotgun in the back of the vehicle." (XI:1775).

Detective Pazos interviewed Turner a second time at UMC hospital. (IX:1781). During the second interview, Turner admitted that he had given

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[5] Turner identified the "someone" he was with as "Lamar" or "Mar" (III:416) but all references to "Mar" were redacted because they identified Hudson.

Pazos an incorrect name and that his real name was Steven Turner. (IX:1776). Turner told Pazos he had given him the wrong information because "he was scared" and "didn't know the seriousness of what had happened." (IX:1776). Turner told Pazos that he had been "chilling" at his house and that someone called him and told him they were going to go for a ride. (IX:1776). Turner told Pazos that when he got in the car, there were two guns in the back of the car. (IX:1776). Turner told Pazos that one of the guns looked like his uncle's gun, the SK. (IX:1777). Turner later confirmed that the SK rifle was his uncle's rifle and that he'd seen it before. (IX:1782).

Turner told Pazos that when they got to the house, the person he was with "hopped over the wall first" and that he "hopped over the wall afterwards." (IX:1777).

Turner told Pazos that when he got to the backyard, shots started being fired. (XI:1777). Turner told Pazos that when the shots were fired, he hopped over the back wall of the house. (IX:1777). Turner told Pazos that after he hopped over the back wall, he sat on a couch for a while in the neighborhood and then started walking to a friend's house. (IX:1777). Turner told Pazos that as he was walking to his friend's house, he ran into police. (IX:1777).

Turner told Pazos that there were no white guys there, and "there was nobody in the car with us." (IX:1778). Pazos asked Turner, "No other guys with you?" and Turner indicated, "No." (IX:1778).

Turner told Pazos that he knew who lived in the house and had been there before. (IX:1780).[6] Turner told Pazos that the person who lived in the house "sells dope" or "weed" (IX:1780). Turner told Pazos that this was "going to be a dope rick." (IX:1781). Turner admitted he was there to "get weed" and that if there was any money at the house he would get that too. (IX:1782-83).

Despite his admissions, Turner *adamantly denied* having a gun in his hand during the incident. (IX:1788-89). Turner told Pazos in no uncertain terms, "I didn't shoot nobody. I ran out and left." (IX:1789). Turner told Pazos, "They just started shooting through the house, and I – that's when I took off like a bat out of Hell. I just started running." (IX:1789). When Pazos asked Turner point blank, "At no point did you have any of those firearms?" Turner said, "No". (IV:1789-90). At no point during either statement did Turner admit to having a gun in the back yard. (IX:1790).

At trial, Turner conceded that he was guilty of conspiracy to commit burglary and attempt burglary because he and Hudson had gone to the house

[6] Turner admitted he had been to the house "like, twice, three times before". (XII:1782).

on Oveja Drive intending to steal weed. (VII:1268-71). However, Turner asked the jury to find him "not guilty" of possessing a firearm during the attempt burglary, and "not guilty" of attempted murder with use of a deadly weapon and battery with use of a deadly weapon causing substantial bodily harm. (X:2069).

Turner's theory of defense was that a third individual (*i.e.*, someone other than Turner or Hudson) was holding the SKS rifle that shot Officer Robertson, and that Turner was standing farther away when he was shot in the leg by Officer Grego-Smith's gun. (X:2047-51;2057-58;2061-63). Evidence presented at trial supported Turner's defense:

- Grimaldi saw three distinct individuals circling his home on the morning in question, but none of those individuals matched Turner's description. In fact, when defense counsel showed Grimaldi a photograph of Turner that had been taken on the day in question, Grimaldi acknowledged that he did not recognize Turner as one of the individuals he saw at the house. (VII:1362-63;XI:2359-62;State's Exhibit 28).

- Although Clarkson testified that he had known Turner for several years and that the two had been friends, (VII:1300-01), he did not see Turner at his house that night either. (VII:1332-33).

- Turner did not match the description of the shirtless individual in basketball shorts that Grego-Smith saw on the back patio, and Grego-Smith confirmed that Hudson was not that individual either. (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. (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).

- The State never recovered the bullet fragment from Turner's leg to determine which gun it came from. See (IX:1781).

Unfortunately, as a result of multiple, highly prejudicial trial errors, the jury convicted Turner of all charges against him.

SUMMARY OF THE ARGUMENT

After a trial that was plagued by constitutional violations, Turner was wrongfully convicted of counts 3 and 4 (attempt murder with use of a deadly weapon), count 5 (battery with use of a deadly weapon causing substantial bodily harm) and count 2 (the possession of a firearm enhancement).[7] First, Turner's confrontation clause rights were violated when he was forced to go to trial with a co-defendant who made inculpatory statements to police that were not subject to cross-examination and where the State relied on that evidence to secure his conviction. Second, Turner's rights to due process and a fair trial were violated when the State failed to notify Turner that it would introduce expert testimony to connect him with the weapon that shattered

[7] Turner is **not** challenging his convictions for conspiracy or the underlying attempt burglary, which he conceded at trial.

Officer Robertson's leg. Third, Turner's right to a trial by an impartial jury was violated when uniformed police officers packed the courtroom during closing argument. Fourth, the State engaged repeated and sustained prosecutorial misconduct. Finally, whether considered alone or together, the aforementioned errors violated Turner's right to a fair trial and require reversal.

ARGUMENT

I. A JOINT TRIAL WITH HUDSON VIOLATED TURNER'S DUE PROCESS AND FAIR TRIAL RIGHTS.

A. Factual & Procedural History Relevant to Severance.

On August 28, 2017, Hudson filed a motion to sever his trial from Turner's trial pursuant to **Bruton v. United States**.[8] (III:628-633). Hudson argued that severance was required because Turner had made statements to police that incriminated him, the State intended to introduce those statements

[8] In **Bruton v. United States**, 391 U.S. 123 (1968), the Supreme Court held that in a joint trial of two defendants, it was reversible error to admit a co-defendant's confession that implicated the defendant in the commission of a crime. The Supreme Court reversed Bruton's conviction because his co-defendant's confession "added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination" and denied Bruton his Sixth Amendment right of confrontation. **Id**. at 128-29. After **Crawford v. Washington**, 541 U.S. 36 (2004), **Bruton** only applies to testimonial hearsay. See **Burnside v. State**, 352 P.3d 627, 643 (2015). Since the statements at issue in this case were "made to law enforcement in the course of interrogation", they were testimonial statements. **Id.** As a result, **Bruton** applies to the instant case.

at trial, and he would be unable to cross-examine Turner about those statements. (III:628-633).

On September 13, 2017, Turner filed a joinder to that motion because Hudson's statements to police also incriminated Turner and because he, too, would be unable to cross-examine Hudson about the statements at trial. (II:276-472;III:635-638).

The State opposed the parties' joint motion to sever, arguing that it could simply "redact" any references to the co-defendants and replace their names with "neutral pronouns" pursuant to **Richardson v. Marsh**, 481 U.S. 200 (1987),[9] and **United States v. Enrique-Estrada**, 999 F.2d 1355 (9th Cir. 1993).[10] (XI:2253-62).

At a hearing on October 12, 2017, the court denied the co-defendants' joint motion to sever without prejudice and ordered the State to redact the co-defendants' statements to police in order to resolve any **Bruton** issues. (III:640). The court told the parties they could renew their motions to sever

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[9] In **Richardson**, 481 U.S. at 211, the Supreme Court held that "the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence."

[10] In **Enrique-Estrada**, 999 F.2d at 1359, the Ninth Circuit extended **Richardson** to permit the defendant's name to be replaced by a neutral word, such as "individual."

if, after reviewing the proposed redactions, they did not believe they would receive a fair trial. (III:640).

On November 2, 2017, the parties discussed the State's proposed redactions in open court. (III:721). Hudson objected to the State's proposed redactions and renewed his motion to sever, while Turner submitted additional proposed redactions. (III:721). The court denied Hudson's motion to sever without prejudice and took the proposed redactions under advisement. (III:721).

On November 16, 2017, the court again considered the parties' proposed redactions in open court. (IV:722). The court said it was more inclined to go with Turner's proposed redactions than the State's proposals, and that it would be submitting its own more extensive version of redactions for consideration. (IV:722). The court again denied Hudson's renewed motion to sever without prejudice. (IV:722).

On November 30, 2017, the court provided the parties with color-coded copies of the co-defendants' statements, with the State's proposed redactions in grey, Turner's proposed redactions in green, and the court's redactions in yellow. (IV:834;XI:2363-65).

The court agreed to redact Hudson's descriptions of Turner's location next to him on the back patio, along with *virtually all* references to Turner's

alleged possession and use of guns during the incident. See, e.g., Court Exhibit A, November 30, 2017 (clemon ct redactions 1) at pp. 6, 7, 12, 20, 28. Unfortunately, the court failed to redact *every* reference to Turner's alleged possession and use of guns. Although Turner asked the court to redact the following inculpatory statements by Hudson, the court refused to do so, ruling the following statements admissible:

- "I didn't have the shotgun at the time **when both of us fired** – when the fire was going on." Court Exhibit A, November 30, 2017 (clemon ct redactions 1) at p. 12 (emphasis added).

- "And we were getting blasted, you know, through the mirror. I fell on the ground and **I see him shoot to the right side of me**." Court Exhibit A, November 30, 2017 (clemon ct redactions 1) at p. 13 (emphasis added).

- "**And he had the SK**." Court Exhibit A, November 30, 2017 (clemon ct redactions 2) at p. 13 (emphasis added).

In addition, although the court agreed to remove Turner's nickname "Chubz" from the following question and answer, the court refused to redact the remainder of the Hudson's statement to police:

> CJ: . . . . How many shots does Ch-Chubz shoot?
>
> CH: I have no idea."

Court Exhibit A, November 30, 2017 (clemon ct redactions 2) at p. 13.

On December 14, 2017, the court held a status check regarding the redactions. (IV:837-840). Turner did not challenge the court's redactions at

that time but reserved the right to re-raise the **Bruton** issue at a later time. (IV:839) ("And based on Your Honor's redactions, we have no challenge to the statements on those grounds, at this point. On Brutton grounds as opposed to -- we may have some additional motion practice in the case.").

At trial, the State introduced Hudson's statements about Turner while questioning former Metro Detective Craig Jex. (IX:1730-35). Prior to the introduction of Hudson's statements, the court read the following limiting instruction: "you are about to hear testimony regarding statements made by Clemon – shucks – Clemon Hudson to detectives. These statements are to be considered by you as evidence against Clemon Hudson only." (IX:1735).

Although Hudson's statements were only supposed to be considered as evidence against him, the State introduced a variety of inculpatory statements that would necessarily have been understood by the jury as accusations about Turner:

Initially, the State had Jex confirm – repeatedly – that Hudson told him that he and an unnamed accomplice were the **only two people** involved in the incident at Oveja Drive. (IX:1737,1739,1746-47,1750,1752).

Then, the State asked Jex about a diagram he drew based on his conversation with Hudson which showed Hudson's sole accomplice

standing **right next to him** on the patio during the shooting. (IX:1744;XI:2315-16).

> Q And just to be clear, on this diagram, these stars indicate people, correct?
> A That's correct.
> Q Okay. And there were only two stars?
> A Correct.

(IX:1744).

Then, the State introduced Hudson's inculpatory statements to Jex that his sole accomplice not only **held** a gun, but actually **fired that gun** at the police:

> Q Okay. And did he specifically tell you, I didn't have the shotgun at the time **when both of us fired**?
> A Yes.

(IX:1740) (emphasis added).

. . . .

> Q Okay. Did he specifically tell you that, We were getting blasted?
> A Yes.
> Q Okay. And blasted by -- meaning gunfire; is that correct?
> A That's correct.
> Q Okay. And that he fell on the ground?
> A Yes.
> Q Okay. And then did he specifically tell you, **I see him shoot to the right side of me?**
> A Yes.

(IX:1740) (emphasis added).

Finally, the State introduced Hudson's inculpatory statements that his accomplice both held – *and fired* – the SKS assault rifle that shot a bullet into Officer Robertson's leg:

> Q Did he 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).

At the close of evidence, the jury was given a packet of 50 jury instructions. (III:565-617). However, the jury was never reinstructed that it could not consider Hudson's inculpatory statements as evidence against Turner, or vice-versa. (III:565-617).

In its closing argument, the State asked the jury to consider the co-defendants' inculpatory statements against one-another by highlighting the fact that there were only "two people" involved in the crime:

- "What else do we know? Remember that diagram? You'll have this map to take back with you as well. **Two stars right up against that window. Two people**." (X:2040).

- "What does Mr. Hudson say? **Both are standing by the window** when the shots come out, **when they start shooting**. Okay." (X:2040)

- "**There's two confessions; both of them said two people**. There's two stars on the diagram. Turner said it. Hudson said it. I could go on" (X:2092).

- There's two cell phones that come back to them in those -- in that car, and **they said so**. There's no third person ever in the car. There's two defendants, **they told you**, they were [in] that car." (X:2093-94).

- "**They told** you they were going to do armed robbery. **Hudson said so.** Turner minimized. He kind of distanced himself from the gun when he realized that he put a round through an officer." (X:2094).

- "All the witnesses said they opened fire without warning. **Hudson claimed the other guy, who I submit to you is Turner, shot before him**." (X:2095).

In addition, the State's closing PowerPoint included an unredacted version of Jex's diagram stating that "Chubz fired". (XI:2394).

After Turner was convicted, he filed a motion for a new trial on the basis that the court should have severed the co-defendants before trial. (III:620-26). Turner argued that the court's redactions could not cure the prejudice to him where the State argued that only "two people" were involved in the crime, which meant that each defendant's confession necessarily implicated his co-defendant (as opposed to some other person). (III:621). The court denied Turner's motion for a new trial. (IV:741).

B. Legal Authority Governing Severance vs. Redactions with Limiting Instructions.

NRS 174.165 provides that: "if it appears that a defendant or the State of Nevada is prejudiced by a joinder... of defendants in an indictment... the

court may… grant a severance of defendants or provide whatever other relief justice requires." While courts must consider possible prejudice to the government resulting from expensive, duplicate trials, the decisive factor in any severance analysis remains prejudice to the defendant. **Marshall v. State**, 188 Nev. 642, 645 (2002).

"The district court's duty to consider the potential prejudice that may result from a joint trial does not end with the denial of a pretrial motion to sever." **Chartier v. State**, 124 Nev. 760, 765 (2008). District courts have a "continuing duty" to sever a joint trial *whenever* prejudice becomes apparent. **Id**. (quoting **Marshall**, 188 Nev. at 646).

To establish that joinder was sufficiently "prejudicial" to require reversal, an appellant must show that the misjoinder of co-defendants had "a substantial and injurious effect on the verdict." **Marshall**, 188 Nev. at 646. Severance is required whenever "'there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.'" **Id.** (quoting **Zafiro v. United States**, 506 U.S. 534, 539 (1993)) (emphasis added).

The admission of a non-testifying co-defendant's testimonial statement against another co-defendant generally violates the Sixth

Amendment right to confrontation. See **Lord v. State**, 107 Nev. 28, 43 (1991) (citing **Bruton**, 391 U.S. at 137). As a result, in cases where co-defendants have given out-of-court testimonial statements inculpating one another, severance *may* be required, depending on whether those statements can be adequately redacted to protect both co-defendants' Sixth Amendment rights to confrontation. Compare **Lisle v. State**, 113 Nev. 679 (1997),[11] with **Ducksworth v. State**, 113 Nev. 780 (1997), and **Stevens v. State**, 97 Nev. 443 (1981). This Court reviews a district court's decision denying a motion to sever for abuse of discretion. See **Lisle**, 113 Nev. at 693.

Severance is not required when there is overwhelming direct evidence of a defendant's guilt, apart from the redacted statements that are admitted. For example, in **Lisle**, 113 Nev. at 693, this Court ruled that a redaction, coupled with limiting instructions, was adequate to protect the defendant's rights because he confessed in the presence of four other witnesses that he committed the murder. 113 Nev. at 693. In the face of such overwhelming direct evidence, the admission of a single redacted statement from Lisle's codefendant that he "saw the 'other guy' shoot Justin" did not violate Lisle's constitutional rights. 113 Nev. at 692-93.

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[11] **Lisle** was overruled on other grounds by **Middleton v. State**, 114 Nev. 1089, 1117 n.9 (1998).

By contrast, severance generally is required when the evidence of a defendant's guilt is "largely circumstantial" and it is likely that jurors would "read the appellant's name into the blanks" of any co-defendant statements that are admitted at trial. This concept is best illustrated in **Ducksworth v. State**, 113 Nev. at 794-96, a decision that came out one month after **Lisle**.

Co-defendants Ducksworth and Martin were tried jointly for multiple crimes, including sexual assault and murder. Before trial, Ducksworth told several witnesses that he killed a man and was present while an accomplice raped and sodomized that man's wife.[12] During the joint trial, Ducksworth did not testify and the witnesses were permitted to tell the jury about Ducksworth's out-of-court statements. Although the witnesses did not expressly name Martin as Ducksworth's accomplice, and although the district court gave limiting instructions both before *and after* their testimony, this Court found that it was error not to sever the defendants' trials. As this Court explained,

> Ducksworth's confessions referred to another unnamed person, and it is likely that the jury deduced that this other person was Martin. This conclusion is bolstered by the fact that 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.

[12] "Ducksworth's confession implicated Martin" but the witnesses "tailored their testimony to avoid any explicit reference to Martin." **Ducksworth v. State**, 114 Nev. 951, 953 (1998) (hereinafter, "**Ducksworth II**").

> We conclude that because Ducksworth did not testify, the introduction of his confession, which probably inculpated co-defendant Martin, violated Martin's right of cross examination secured by the Confrontation Clause of the Sixth Amendment.

113 Nev. at 795.

After this Court reversed Martin's conviction in **Ducksworth**, the State petitioned for rehearing, arguing that the Court had failed to address either **Lisle v. State** or **Richardson v. Marsh**, which permitted redactions with limiting instructions. See **Ducksworth II**, 114 Nev. at 953. In response, this Court issued a second published decision (**Ducksworth II**) to explain why Martin was *still* entitled to a new trial, despite the reactions and limiting instructions:

First, this Court pointed out that in **Richardson**, even though the Supreme Court said it was okay to *admit* certain redacted statements with a limiting instruction, it *still* "reversed Marsh's conviction and remanded the case because the prosecutor attempted to undermine the limiting instruction by utilizing [the codefendant's] statements against her." **Id**. at 955. Therefore, even if a redacted statement is admissible, the State cannot actually use that statement to convict a co-defendant at trial.

Next, the court distinguished **Lisle** by pointing out that "the evidence presented against Lisle was overwhelming" whereas "[t]he evidence against Martin was largely circumstantial." **Id.** at 954.

Finally, the Court announced a new test for evaluating **Bruton**/severance issues post-trial:

> 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 II, 114 Nev. at 955.

C. Turner is entitled to a new severed trial pursuant to Ducksworth and Richardson.

Turner is entitled to a new trial because Hudson's inculpatory statements to police were relied on by the State and the jury to convict him of two counts of attempt murder with use of a deadly weapon, one count of battery with use of a deadly weapon causing substantial bodily harm, and possession of a deadly weapon during the attempt burglary. See **Ducksworth**, 113 Nev. at 794-95; **Ducksworth II**, 114 Nev. at 955; **Richardson**, 481 U.S. at 211. Because Hudson did not testify, this error violated Turner's Sixth Amendment Confrontation Clause rights and requires reversal because it was not harmless beyond a reasonable doubt. See **Ducksworth**, 113 Nev. at 795.

This case is substantially similar to **Ducksworth,** where references to Ducksworth's unnamed accomplice clearly implicated his co-defendant. See **Ducksworth**, 113 Nev. at 794-96. At trial, the jury heard Hudson's statements that there were only two people involved in the incident on Oveja Drive. (IX:1737,1739,1746-47,1750,1752). The also jury heard Hudson's statement that his sole accomplice was standing right next to him on the patio during the shooting. (IX:1744;XI:2315-16). Finally, the jury heard Hudson's statements that his sole accomplice both possessed and fired the SKS rifle that shattered Officer Robertson's leg. (IX:1740,1749). Because the State argued that there were only two individuals involved in this case, and because each defendant's confession referenced the involvement of one other person, the jury would necessarily fill in the blanks in Hudson's statements with Turner's name.

Additionally, just as in **Ducksworth**, evidence of Turner's guilt as to the attempt murder, battery, and weapons use & possession charges was "largely circumstantial". See **Ducksworth**, 113 Nev. at 794. Without Hudson's inculpatory statements to police, there was no "direct evidence" that Turner ever possessed or fired a gun during the incident at Oveja Drive. In his two statements that were admitted at trial, Turner adamantly denied possessing or firing a gun. (IX:1788-90). None of the three eye-witnesses

identified Turner as a participant in the crime or placed a gun in Turner's hand. (VII:1332-33,1362-63;VIII:1623). When Officer-Grego Smith turned on his light during the firefight, he saw a shirtless man in basketball shorts on the back patio who was neither Hudson nor Turner. (VIII:1623;X:2050;State's Exhibit 28). Although Hudson's fingerprints were found on the shotgun (VIII:1696), Turner's fingerprints and DNA were not found on the SKS rifle. (VIII:1699).

Although the jury heard a limiting instruction before the admission of Hudson's statements (IX:1735), the jury was not reinstructed before closing arguments. (III:565-617). Then, in rebuttal, the State asked the jury to consider both co-defendants' inculpatory statements as proof that there were only two people involved in the crime (X:2040,2092-94), refuting Turner's argument that a third person was the shooter. The State reminded the jury that Hudson told police they were "standing by the window . . . when **they** start[ed] shooting." (X:2040) (emphasis added). The State showed jurors a PowerPoint slide with Hudson's statement that they were "**both** standing by the window" when the shots were fired. (XI:2395) (emphasis added). The State also jurors a PowerPoint slide indicating that "Chubz fired". (XI:2394). The State even reminded the jury that Hudson told police "the other guy, who I submit to you is Turner, shot before him." (X:2095).

Where the jury was never reinstructed not to consider Hudson's statements as evidence against Turner, and 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; accord **Richardson**, 481 U.S. at 211 (remanding where "prosecutor sought to undo the effect of the limiting instruction by urging the jury to use Williams' confession in evaluating respondent's case" which was error). Because it is not clear beyond a reasonable doubt that the State's improper use of Hudson's statements was harmless error, Turner's convictions must be reversed. **Ducksworth**, 113 Nev. at 795.

II. THE COURT ADMITTED UNNOTICED, UNQUALIFIED EXPERT TESTIMONY IN VIOLATION OF TURNER'S CONSTITUTIONAL RIGHTS.

NRS 174.234 governs the disclosure of witnesses and information regarding expert testimony in criminal case. If the State intends to call an expert witness at trial, it must provide the defense with the following information *at least 21 days before 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).

A. The State's Expert Notices.

Before trial, the State filed four notices of witnesses and/or expert witnesses pursuant to **NRS 174.234**, including an original notice on April 14, 2016 (I:192-202), a supplemental notice on April 19, 2016 (I:218-26), a second supplemental notice on November 8, 2016 (II:261-271), and a third (and final) supplemental notice on April 4, 2018. (III:545-555). All told, the State identified more than 200 lay witnesses and expert witnesses who might testify in this case. (III:545).

Among those hundreds of witnesses, the State identified Anya Lester as a "firearms/toolmark" expert who would testify as follows:

> LESTER, ANYA "SANKO" – LVMPD P#13771 (or designee): FIREARMS/TOOLMARK EXAMINER with the Las Vegas Metropolitan Police Department. She is an expert in the field of firearm and toolmark comparisons and is expected to testify thereto.

(III:550). The State provided Turner with a copy of Lester's CV, indicating that she was a "forensic scientist II" with experience in "Toolmarks" and "Firearms" and that she had previously testified in the area of "Firearms Identification". (II:272-275). However, nothing in the State's expert disclosures indicated that Lester had experience with, or would testify about, stippling on clothing or skin caused by gunpowder.

The State gave notice that the "Custodian of Records; UMC Hospital" would testify as a lay witness. (III:547). The State also gave a vague notice that "UMC Trauma Doctors" would give medical expert testimony regarding *Officer Robertson's* injuries:

> UMC TRAUMA DOCTORS - Will testify as a medical expert and to his/her observations, treatment, diagnosis and prognosis of the injuries sustained by the victim Officer Jeremy Robertson on September 9, 2015.

(III:553).

However, the State never identified any medical expert witnesses from UMC who would testify regarding injuries sustained by *Turner, himself.* (I:218-26;II:261-271;III:545-555). In addition, the State never notified the defense that Dr. Amy Urban would testify as an expert witness on stippling as a medical diagnosis, *or on any other subject matter*, nor did the State provide the defense with a copy of Dr. Urban's CV prior to trial. (I:192-202,218-26;II:261-271;III:545-555).

Although the State never notified the defense that it would be presenting expert testimony on "stippling", the court allowed it to do so via two different witnesses: Anya Lester and Dr. Amy Urban.

(IX:1885;X:1980).[13] Their trial testimony regarding stippling, and Turner's objections thereto, are set forth below:

B. Anya Lester's Testimony.

At trial, the State offered Lester as an expert in the area of "firearms and toolmarks" and referred to her as a "firearms analyst". (IX:1860-61). Lester explained that a firearms analyst "examine[s] firearms, also 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) (emphasis added). Turner agreed that Lester could testify to matters within this area of expertise. (X:1860).

However, the State soon began asking Lester questions about "stippling" that exceeded the scope of her expertise. First, the State asked Lester, "What is stippling, ma'am?" (IX:1866). Lester replied that "Stippling is small marks that you could get on your skin if – if you're shot, you have a gunshot wound. And powder stippling in particular is if that powder hits

[13] The State also failed to designate crime scene analysts Stephanie Fletcher and Robbie Dahn as experts. (II:263-64). Both were subsequently permitted to testify in as expert witnesses over repeated defense objections. (VII:1408; 1460-73, 1477, 1480-85; VIII:1543-46, 1559-74). Although these errors were not, by themselves, grounds for reversal, they establish bad faith on the part of the State and should be considered as evidence of cumulative error. See pp. 46-48 and 61-63, infra.

your skin." (IX:1866). As a follow-up, the State asked Lester about the "range or distance that stippling is associated with" and whether Lester had "ever seen a case of stippling in an object that's been struck by a bullet from more than 24 inches away." (IX:1867). When Lester replied that she had only "limited experience with stippling", Turner objected and moved to strike Lester's testimony because she was unqualified to discuss the topic and because Turner was not given prior notice of this testimony, which was "nowhere in her report" or in "anything we've been provided". (X:1867-68).

The court permitted *voir dire*, during which Lester admitted that:

- she had never testified about stippling before;
- the last training she had on stippling was "2009-ish";
- she had not published anything about stippling;
- when preparing her expert report she was not asked to look into stippling;
- It was "just yesterday" that the DA first asked Lester to look into the issue of "stippling";

(IX:1879). At that point, Turner renewed his objection to Lester's testimony about stippling because she was not disclosed as an expert on stippling, because her expert report did not address stippling, and because she was unqualified to discuss that subject matter. (IX:1883-84). The court overruled Turner's objections. (IX:1885).

Next, Turner explained to the court why he believed the unnoticed expert testimony would prejudice his defense:

> And the State's going to argue that there is stippling, I believe. Obviously, I'm not putting words in their mouth. But I would believe that the State would 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). The court indicated that it understood Turner's concern, and that the court's "biggest concern, quite frankly . . . is the notice issue. I do have concern about the notice issue." (IX:1899). However, the court ultimately determined that the subject matter of stippling was covered by the State's notice that Lester was a "firearms/toolmark" expert and denied Turner's request:

> Okay. She's been accepted -- based on her qualifications, she's been accepted to give an opinion regarding firearms and tool marks. So to the extent that her testimony is going to fall within that, okay, then she can establish pattern of stippling for purposes of distance determination of gunshot residue.

(IX:1902).

Next, citing **Burnside v. State**,[14] Turner requested a stay or a continuance of one week so that he could consult with or retain an expert to address the issue of stippling. (IX:1903;1907). Turner explained that he

[14] 31 Nev. Adv. Op. 40, 352 P.3d 627, 636-37 (2015) (declining to grant relief for State's violation of **NRS 174.295(2)** because defense "has not explained what he would have done differently had proper notice been given, and he did not request a continuance").

would have prepared a more thorough cross-examination of Lester's qualifications, or hired and consulted with a rebuttal expert in the area of stippling had he known what the State would be arguing. (IX:1907). Yet, the court denied Turner's requests. (IX:1908).

After the court overruled Turner's objections, the State elicited the following testimony:

> BY MR. GIORDANI:
>
> Q Ma'am, what is stippling?
>
> A Stippling from powder is small abrasions or scratches that you get on your skin that would be around a gunshot wound.
>
> Q Okay. And that powder that you referenced, is that the stuff that you were describing earlier is behind a bullet and inside a case?
>
> A Yes.
>
> Q Cartridge case? In general, what range is associated with stippling?
>
> A *There are many variables that would go into that. It would depend on the type of gun, the length of the barrel, the type of ammunition, and the caliber. So I wouldn't be able to give an exact number.*
>
> Q Understood. What is the furthest distance you have seen associated with stippling?
>
> A *Again, I would not be able to give you an exact number.*
>
> Q Okay. Are we talking more than 3 feet? Less?

A *I have -- I -- because there are so many variables, I would not be able to attest to an exact number. Normally, stippling would be seen at a -- more of a close-to-intermediate range.*

Q Okay. What do the terms close to intermediate mean to you?

A *Again, I would have a very difficult time giving you a number.*

Q Okay. Could it be 25 feet away?

A I would say 25 feet would be too far.

(IX:1910) (emphasis added).

When defense counsel cross-examined Lester, she did not ask ANY questions about stippling. (IX:1931-35). Instead, defense counsel established that:

- the presence or absence of gunpowder on clothing or skin demonstrates whether gunshot was close, intermediate or distant;
- to determine distance, a gun must be test fired with the same ammunition to make an accurate comparison; and
- Lester did not do any such ballistics testing in this case.

(IX:1932).

Although defense counsel did not ask a single question about stippling on cross-examination, on redirect, the State tried to clean up Lester's original vague testimony, using leading questions to get her to say she had never "seen stippling from a distance greater than 3 feet." (IX:1940-43).

Although defense counsel objected to the leading questions, the court allowed the State to ask Lester about the shortest and longest distances where she had seen stippling:

> Q Based upon your experience with stippling, what is the shortest and furthest distances you have seen yourself?
>
> A *I would say, approximately, from a near-contact shot out to approximately 36 inches.*

(IX:1944-46) (emphasis added).

C. Dr. Amy Urban's Testimony.

Turner's medical records indicated the presence of some "stippling" on his back left leg. (XI:2317-58). Defense counsel knew that the State would try to connect Lester's testimony on stippling to the medical records that were in evidence in order to argue that Turner had fired a bullet-fragment into his own leg (instead of being shot by Grego-Smith). (X:1956-57). In order to minimize the damage caused by the State's unnoticed expert testimony on stippling, defense counsel asked the court to take judicial notice of the medical dictionary definition of "stippling", which differed from the ballistics definition proffered by Lester. (X:1956-57). The medical definition proffered by the defense was as follows: "Stippling is a spotted condition." (X:1959).

When the court indicated that it was leaning toward granting the defense request, 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). After a break, the State indicated that it had spoken to Dr. Amy Urban and proffered an alternative definition of stippling caused by "gunshot wounds or ricochet wounds." (X:1964). Turner objected to the State's definition, but acknowledged that if the State had already noticed an expert witness in this area, they would be able to present that witness at trial. (X:1964) ("We provided a medical definition. Obviously, the State is able to bring their medical expert if they want to today, right -- ***I mean, if they -- they called her.***").

The State again represented in open court that they had noticed Dr. Urban as a witness in this case, and in reliance upon that representation, defense counsel agreed:

> MR. GIORDANI: So we're not going to rest until this issue is resolved. We can't rest. ***We -- we have our doctor, she's noticed***. So if this is going to be an issue, then we'll call our doctor.
>
> MS. MACHNICH: Okay. They should call their doctor.

(X:1967). However, the State had never actually noticed Dr. Urban (or any other UMC doctor) to testify about Turner's injuries, so the State's

representations to defense counsel and to the court were false. (III:545-555).[15]

Dr. Urban testified that when she treated Turner, she observed "an open wound on the leg that looked like a laceration or open wound, and then there was stippling around it." (X:1984). Dr. Urban described stippling as "little black marks that go around the skin of a wound from a gunshot wound. It's from high-pressure gas and debris." (X:1984). On cross-examination, Dr. Urban admitted that the State had first contacted her "yesterday" to ask her about references to stippling in Turner's medical records. (X:1987).

D. The State's rebuttal closing focused on stippling.

The State's rebuttal closing emphasized the importance of the unnoticed expert testimony regarding stippling:

> **Now, you obviously picked up on the fact that that's a big deal and that stippling's a big deal. It is.** You see that stack of Officer Robertson's medical records? Pretty big. And you saw earlier the little stack of Mr. Turner's records? It's, like, this big. Stippling's referenced four times in there and not once in there. That's because the muscle was far enough away, more than 36 inches, to not leave stippling on Robertson.
>
> Now, it was closer to Turner, because he was shooting it. When he fired into that chair and that piece of shrapnel that looks just

[15] The State later admitted they did not have Dr. Urban under subpoena but claimed they "can put her under subpoena right now" because "this is now at this point rebuttal", and the court agreed. (X:1968-69).

> like all the other shrapnel in that chair hit him in the leg. And that soot, the same way the shrapnel bounced off that chair, the soot ended up on his leg. And there are two medical doctors who concurred in that opinion in those medical records.
>
> Now, I believe Ms. Machnich questioned Dr. Urban -- I can't recall exactly what she said about her, **but unless those two officers are lying, that guy's up on that patio and firing that SKS.** That's where the stippling comes from. It does not -- does not -- come from the rounds that struck the back wall that came out of Officer Grego-Smith's weapon. Common sense dictates that. Common sense tells you that the gunpowder only goes 36 inches. It can deflect off a surface just like the shrapnel can.

(X:2102). The State used the unnoticed expert testimony on stippling to refute the defense theory that Turner had been shot in the leg by one of Grego-Smith's 12 bullets. The State argued that Turner could not have been shot in the leg by Grego-Smith because he was too far away from Grego-Smith's gun to have stippling on his leg:

> These shrapnel, from 25 feet away or whatever that backyard is – you'll have the diagram with the ruler on it – there's no gunpowder left to go in – on his leg. **So that's why stippling is a big deal.**

(X:2104). The stippling evidence was used to place a gun in Turner's hand where he denied possessing or firing that gun.

E. The court abused its discretion by permitting expert testimony regarding stippling.

"Whether expert testimony will be admitted, as well as whether a witness is qualified to be an expert is within the district court's discretion,

and this court will not disturb that decision absent a clear abuse of discretion." **Mathews v. State**, 134 Nev. Adv. Op. 63, 424 P.3d 634, 637 (2018) (quoting **Mulder v. State**, 116 Nev. 1, 12-13 (2000)). Pursuant to **NRS 50.275**, an expert must satisfy three requirements before he or she can testify as an expert at trial:

> (1) He or she must be qualified in an area of scientific, technical or other specialized knowledge (the qualification requirement); (2) his or her specialized knowledge must assist the trier of fact to understand the evidence or to determine a fact in issue (the assistance requirement); and (3) his or her testimony must be limited to matters within the scope of [his or her specialized] knowledge (the limited scope requirement).

Mathews, 134 Nev. Adv. Op. 63, 424 P.3d at 637 (quoting **Hallmark v. Eldridge**, 124 Nev. 492, 498 (2008)). In addition to satisfying the three **Hallmark** requirements, the State must timely disclose all expert witnesses no later than 21 days before trial, along with copies of their CVs, any reports they prepared, and a statement of the "substance of the testimony" they will give. See **NRS 174.295 (2)**. Under **NRS 174.234(3)**, if the State, in bad faith, fails to satisfy these requirements, the district court must not allow the witness to testify and must also bar the State from introducing any evidence the expert would have produced. **Mitchell v. State**, 124 Nev. 807, 819 (2008). In addition, if the State fails to provide notice of an expert witness, "the court in its sound discretion may prohibit the expert witness from

testifying; grant a continuance . . . or enter such other order as it deems appropriate under the circumstance." **Grey v. State**, 124 Nev. 110, 119-20 (2008).

1) The State's expert disclosures were deficient.

Because "stippling" is a discrete area of expertise, expert witnesses must have specialized knowledge about stippling to testify about it at trial. See e.g., **People v. Huddleston**, 176 Ill. App. 3d 18, 32, 530 N.E.2d 1015, 1024 (Ill. App. 1988) (presence of stippling on body or clothing of shooting victim and determination of range at which gun causing stippling was fired, are matters which require expert testimony because they are "beyond the realm of common experience"); **State v. Felton**, 204 Wis.2d 110, 552 N.W.2d 838, *2 (Ct.App.1996) (trial court properly excluded expert witness who lacked "specialized knowledge . . . regarding stippling patterns"); **People v. Mayfield**, 14 Cal.4th 668, 766, 928 P.2d 485 (Cal. 1997) (expert testimony required to establish whether victim's fatal wound could have been inflicted in the manner described by the defendant without leaving tattooing or stippling around the wound); **State v. Foulk**, No. E200700944CCAR3CD, 2009 WL 47346, at *13 (Tenn. Crim. App. Jan. 8, 2009) (lay witness should not have been permitted to testify about stippling wound on defendant's face unless/until qualified as an expert).

In this case, the State's expert disclosures failed to notify Turner that the State would present expert testimony about stippling. Although the State generally identified Anya Lester as a "firearms/toolmark examiner", the State failed to notify Turner that the "substance of [Lester's] testimony" would involve stippling on skin caused by gunpowder. (III:550).

Likewise, although the State generally identified "UMC Trauma Doctors" who would testify about their "observations, treatment, diagnosis and prognosis of the injuries sustained by the victim Officer Jeremy Robertson on September 9, 2015", the State never identified any UMC doctor who would testify about Turner's injuries, or about stippling on skin caused by gunpowder. (I:218-26;II:261-271;III:545-555) (emphasis added). In addition, Dr. Amy Urban was never identified anywhere in the State's expert disclosures, nor was her CV provided. (I:218-26;II:261-271;III:545-555).

2) Lester was not qualified to testify about stippling.

The court abused its discretion by finding that Lester was qualified to give expert testimony about stippling. See **Matthews**, 424 P.3d at 637 (expert "testimony must be limited to matters within the scope of [his or her specialized] knowledge"). While Lester may have been generally qualified as a "firearms/toolmark examiner", she admittedly lacked specialized

knowledge in the area of stippling: Lester had never testified about stippling before, the last training she had on stippling was "2009-ish", Lester had not published anything about stippling, and when preparing her expert report in this case she was not even asked to look into stippling. (IX:1879). More importantly, when the State initially questioned Lester about the distances where stippling would appear, Turner stated four different times that she could not answer the State's questions! (IX:1910). Because the subject matter of stippling was not within the scope of Lester's specialized knowledge, she should not have been permitted to testify about it. See **Felton**, 204 Wis.2d 110, at *2 (trial court properly excluded expert witness who lacked "specialized knowledge . . . regarding stippling patterns").

3) The State should not have been permitted to clean up Lester's testimony with leading questions on redirect.

Pursuant to **NRS 50.115(3),** "Leading questions may not be used on the direct examination of a witness without the permission of the court." A question is leading when it is framed in a way that suggests the desired answer to the witness. 98 C.J.S. Witnesses § 473 (2013). Leading questions are restricted to prevent counsel from testifying via witness "as to material facts in dispute and to prevent shaping and creating evidence – whether inadvertently or intentionally – that conforms to the interrogator's version of the facts." 98 C.J.S. Witnesses § 472 (2013).

Here, the State used leading questions on redirect in order to clean up Lester's prior testimony that she couldn't give the State a specific distance where stippling would occur. The State suggested to Lester that the distance was "three feet"[16] and, after hearing the State's leading question, Lester responded that she had never seen stippling occur outside of 36 inches from the weapon fired. (IX:1944-46).

4) The State acted in bad faith.

The State acted in bad faith by failing to notify Turner that any of its expert witnesses would testify about the subject matter of "stippling". **NRS 174.295(2)** required the State to disclose the "substance of the testimony" that its experts would give. However, the State admitted that it had not, and would "never" have told defense counsel that its experts would testify about stippling because it did not have to reveal its "trial strategy" to the defense:

> the general idea of stippling falls within the purview of firearms, ammunitions, ballistics, etcetera. . . . **There is no other notice we could possibly have given, other than saying, this is our trial strategy. Here you go. We cannot, and will never, do that. It's not required by law**.

(IX:1904) (emphasis added). In addition, although Dr. Amy Urban's name appeared nowhere in the State's expert disclosures (and although the UMC doctors generally noticed as experts were only designated to discuss Officer

[16] (IX:1940-41).

Robertson's injuries), the State falsely represented to both the court *and* defense counsel that Dr. Urban had been noticed as a witness. (X:1961,1967). In reliance upon the State's false representations, defense counsel did not object to Dr. Urban testifying at trial. (X:1964,1967).

As further evidence of the State's bad faith in failing to notify the defense about its expert testimony, the State presented two lay witnesses to testify about bullet trajectories without ever noticing them as experts in the subject matter. See **Mortinsen v. State**, 115 Nev. 273, 282 (1999) (recognizing that expert testimony was required to address bullet trajectories and ruling "it is undisputed that Johnson was an expert in firearms examination and that he was competent to give testimony regarding bullet trajectories"). Although the State identified crime scene analysts Stephanie Fletcher and Robbie Dahn as *lay witnesses* (II:263-64), the court allowed the State to introduce trajectory evidence through both witnesses at trial, including photographs and diagrams of trajectory rods and testimony about trajectories over Turner's repeated objections. (VII:1408;1460-73,1477,1480-85;VIII:1543-46,1559-74;XI:2313-14).

The State knew that it would use this trajectory evidence to connect Turner to the gun that was fired. As the State admitted in its opening statement:

> And you'll hear from the detectives and the crime scene analysts and the trajectory analysis that they knew it was Mr. Turner who actually shot himself based on accounting for all of the -- the bullets in this case and all the shots in this case.

(VII:1267). Where the State knew it would rely on this additional expert testimony to convict Turner but failed to notify a single expert witness to testify about bullet trajectories, the State's deficient expert notices amounted to bad faith, plain and simple.

5) *Improper expert testimony prejudiced the defense.*

The State's deficient expert disclosures violated Turner's constitutional rights to due process and a fair trial. See **U.S. Const. amend. V, XIV Nev. Const. Art. 1 § 8;** see also **Grey**, 124 Nev. at 117-20. In **Grey**, 124 Nev. at 117-120, this Court held that "fundamental fairness and due process of law" compelled the State to timely notify the defense of any rebuttal expert witnesses that it intended to present at trial. The reasoning in **Grey** applies with equal force to any expert witness that the State intends to call in its case in chief. See **Wardius v. Oregon**, 412 U.S. 470, 474-75 (1973) ("It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the state").

Turner had a right to rely on the State's expert disclosures when preparing his defense at trial. Where the State disclosed no expert witnesses to testify about stippling or about the contents of Turner's medical records, Turner had no reason to believe the State would rely on expert testimony about stippling to place the SKS rifle in his hand. Yet, when Turner objected to the lack of notice and explained that he was unprepared to address the stippling evidence, the court denied Turner's request for a one week continuance and prevented him from retaining an expert to refute the State's evidence.[17] Without prior notice and an opportunity to consult with his own expert, Turner could not effectively cross-examine the State's witnesses

[17] Turner was wearing orange pants at the time he was shot in the leg. (VIII:1528 and State's Exhibit 28). An expert could have assisted Turner by explaining that the markings on Turner's skin were something other than "stippling", because any gunshot residue or markings would have been found on his pants instead of on his leg. See, e.g., Evidence Technology Magazine, "Handguns: Range of Fire and Gunpowder Stippling", John Louis Larsen and Arthur H. Borchers, http://www.evidencemagazine.com/index.php?option=com_content&task=view&id=1119&Itemid=49 (last visited 1/26/19) ("An investigator must use caution when attempting to interpret the powder stippling or the gunshot powder residue in order to determine the range of fire. Intermediate items such as clothing and fabrics can capture powder and contaminants when a projectile is fired through them. The investigator should thoroughly inspect the shooting incident site for these possible barriers and collect the actual items involved."); see also **Smith v. State**, No. 63702, 2015 WL 3489416, *3 n.3 (Nev. 2015) (unpublished) ("Soot and stippling are substances that result from the firing of a gun *and they do not pass through clothing*. They are caught on clothing when the gun is fired at close range.") (emphasis added).

about stippling. Then, after ambushing[18] Turner with unnoticed expert testimony about stippling, the State relied on that evidence in closing to argue that Turner fired the SKS rifle that shattered Officer Robertson's leg. 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, VI, XIV Nev. Const. Art. 1 § 8**; see also **Grey**, 124 Nev. 110 at 117-20; **Wardius**, 412 U.S. at 474-75.

III. UNDULY PREJUDICIAL FOR UNIFORMED POLICE OFFICERS TO PACK THE COURTROOM DURING CLOSING ARGUMENTS

The due process clause of the Fourteenth Amendment guarantees state criminal defendants the Sixth Amendment right to be tried "by a panel of impartial, 'indifferent' jurors [whose] verdict must be based upon the evidence developed at the trial." **Irvin v. Dowd**, 366 U.S. 717, 722 (1961) (citations omitted). As Chief Justice Warren noted in **Estes v. Texas**, 381 U.S. 532, 552 (1965) (Warren, C.J., concurring), due process requires the courts to safeguard against "the intrusion of factors into the trial process that tend to subvert its purpose." **Id**. at 560. As such, courts must guard against

[18] See **Land Baron Inv., Inc. v. Bonnie Springs Family Ltd. P'ship**, 356 P.3d 511, 522 n.14 (Nev. 2015) ("[t]rial by ambush traditionally occurs where a party withholds discoverable information and then later presents this information at trial, effectively ambushing the opposing party through gaining an advantage by the surprise attack").

"the atmosphere in and around the courtroom [becoming] so hostile as to interfere with the trial process, even though ... all the forms of trial conformed to the requirements of law...." **Id**. at 561.

Prior to closing arguments, Turner objected to the courtroom being packed with uniformed police officers in a police shooting case because their presence was unduly prejudicial and coercive to the jury:

> And, Your Honor, just briefly. It is our understanding that after the jury comes in, in the gallery, there's going to be a lot of law enforcement officers into the courtroom. And I believe that that is going to be extremely intimidating to the jury that is considering a police officer shooting case.
>
> I realize this is an open courtroom, and anyone who can be here -- I know that there have been family members here from both of the defendants throughout this case. But the idea that numerous, numerous officers are going to come into this gallery and stare at this jury immediately before a case involving an officer-involved shooting and an officer that was shot goes to the jury is extremely prejudicial. I need to make a record on that at this point. And, obviously, we'll submit to Your Honor's discretion on any remedy thereof.

(X:2015). The State admitted that the numerous officers would all be appearing in uniform. (X:2016). Although the court could have ordered that all spectators appear in plain clothes without weapons to avoid a coercive effect, it refused to take any steps to minimize the prejudice from the jury seeing the courtroom packed with uniformed officers. (X:2016-17). The court abused its discretion by failing to address this inherently prejudicial

situation. See, e.g., **Holbrook v. Flynn**, 475 U.S. 560, 570-71 (1986) ("We do not minimize the threat that a roomful of uniformed and armed policemen might pose to a defendant's chances of receiving a fair trial"); **Woods v. Dugger**, 923 F.2d 1454, 1459-60 (11th Cir. 1991) (hostile atmosphere created by pretrial publicity in small rural community in which defendant's capital murder trial took place for killing of prison guard, in combination with number of prison guards who attended trial in full uniform, rose to level of "inherent prejudice," thereby depriving defendant of fair trial); **Norris v. Risley**, 918 F.2d 828, 830 (9th Cir. 1990) (finding spectators at a kidnapping and rape trial who were wearing buttons inscribed with the words "women against rape" posed an impermissible factor, "[b]ecause the buttons ... conveyed an implied message encouraging the jury to find Norris guilty, and because the buttons were not subject to the constitutional safeguards of confrontation and cross-examination"); **Long v. State**, 151 So. 3d 498, 501–02 (Fla. 1st DCA 2014) (presence of a group of men wearing leather jackets bearing the insignia, "Bikers Against Child Abuse," at defendant's trial on charge of lewd and lascivious molestation and sexual battery, created an inherently prejudicial atmosphere and deprived defendant of due process); **Shootes v. State**, 20 So. 3d 434, 438, 439–40 (Fla. 1st DCA 2009) (noting that "[t]he presence of courtroom observers wearing uniforms, insignia,

buttons, or other indicia of support for the accused, the prosecution, or the victim of the crime does not automatically constitute denial of the accused's right to a fair trial"; but holding that defendant showed inherent prejudice where a large number of law enforcement personnel were present in courtroom on last day of trial for aggravated assault, stemming from incident in which defendant fired gun at officers attempting to detain him; approximately half or more of the spectators were officers, officers sat together as a group in seats closest to jury, some officers wore formal and informal uniforms). Turner is entitled to a new trial because it was inherently prejudicial to fill the courtroom with uniformed police officers during closing arguments in a trial involving a police shooting.

IV. PROSECUTORIAL MISCONDUCT

Prosecutorial misconduct violated Turner's state and federal constitutional rights to a fair trial by an impartial jury and to due process of law. **U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3 and 8.** "When considering claims of prosecutorial misconduct, this [C]ourt engages in a two-step analysis. First, [it] must determine whether the prosecutor's conduct was improper. Second, if the conduct was improper, [it] must determine whether the improper conduct warrants reversal." **Valdez**, 124 Nev. at 1188.

When the defense objects to prosecutorial misconduct, this Court applies a harmless error standard of review on appeal. **Id**. If the error is of constitutional dimension, this Court applies **Chapman v. California**, 386 U.S. 18 (1967), and reverses unless the State shows beyond a reasonable doubt that the error did not contribute to the verdict. **Valdez**, 124 Nev. at 1189. Prosecutorial misconduct can reach a constitutional dimension if "in light of the proceedings as a whole, the misconduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" **Valdez**, 124 Nev. at 1189 (quoting **Darden v. Wainwright**, 477 U.S. 168, 181 (1986)). When prosecutorial misconduct was not objected to and preserved for appeal, this Court will review for plain error. **Valdez**, 124 Nev. at 1190. This Court will reverse when plain error affects appellant's substantial rights by "causing 'actual prejudice or miscarriage of justice.'" **Id.** (quoting **Green v. State**, 119 Nev. 542, 545 (2003)).

A. Inflaming the Passions of the Jury.

It is improper for a prosecutor to engage in argument intended to inflame the emotions or passions of the jury. **United States v. Young**, 470 U.S. 1, 9 n.7 (1985); **Floyd v. State**, 118 Nev. 156, 173 (2002) ("any inclination to inject personal beliefs into arguments or to inflame the passions of the jury must be avoided. Such comments clearly exceed the

boundaries of proper prosecutorial conduct."), abrogated on other grounds by **Grey**, 124 Nev. at 117-19; **Shannon v. State**, 105 Nev. 782, 789 (1989); **Jones v. State**, 101 Nev. 573, 577-78 (1985).

While questioning CSA Robbie Dahn, the State asked Dahn, "Ma'am, you were not present when Officer Robertson's life was saved on that driveway, correct?" When Turner objected to the inflammatory question, the court granted his motion to strike. (VII:1420).

During rebuttal closing, in a courtroom packed with uniformed police officers, the State made the following argument:

> Now, if you heard this story at a bar, sitting and having a drink with somebody, and someone came up to you and said, Hey, I heard about this officer-involved shooting today. There's -- two officers respond to a residence, and those two officers opened the door. High-powered rifle round comes flying through the door, hits officer in the leg. He goes down. Second round comes through. It's from a shotgun. Cops return 12 rounds. Guys split. One of them's caught in the backyard. The other one's caught with a shrapnel in his leg about two blocks away.
>
> **If I were to tell you that story over a glass of whiskey, you would look at me and go, Good. I'm glad you caught the two guys who shot the cops. That's what this is about.**

(X:2086-87) (emphasis added). Although Turner did not object, this inflammatory argument invited jurors to feel "good" about convicting both defendants based on the identity of the victims as opposed to the evidence presented.

B. *Invoking Prosecutorial Authority.*

It is improper for a prosecutor to invoke his personal opinions and authority as the State's representative when seeking a conviction. See, e.g., **Berger v. United States**, 295 U.S. 78, 85 (1935); **United States v. McKoy**, 771 F.2d 1207, 1210-1211 (9th Cir. 1985); **United States v. Smith**, 962 F.2d 923, 934 (9th Cir. 1992); **Earl v. State**, 111 Nev. 1304 (1995). As such, it is misconduct for a prosecutor to tell jurors why it exercised its prosecutorial discretion in charging a defendant with a crime. See, e.g., **Hall v. United States**, 419 F.2d 582, 587 (5th Cir. 1969) (misconduct for prosecutor to tell jury that "we try to prosecute only the guilty").

During rebuttal closing, the State told jurors it could have charged Turner and Hudson with additional crimes but chose not to: "Now, they could have been charged with four counts of attempt murder based upon the transferred intent instruction. They could have been – we could have charged them with four counts." (X:2097). When Turner objected to this highly improper argument, the court sustained the objection and asked the jury to disregard it. (X:2097-98).

Nevertheless, despite the court's ruling, the State immediately reminded the jury of its prosecutorial discretion, telling the jury why the State had only charged the defendants with two counts of attempt murder:

> They are charged with two counts because we can't prove that they specifically shot -- intended to shoot at either the police officers or Willow and Eric. Okay. That's an important distinction. **We know they tried to kill two shapes in the door**. Whether or not it's dark inside and they don't know who they're shooting at doesn't matter. **I mean, that's the truth. That's the reality of it.** Whether they thought it was Eric and Willow who finally had the, you know, whatever it's called to come to the door, or whether they know those two bodies are these two, they attempted to kill two human beings. That's all that matters.

(X:2098) (emphasis added). The State's improper arguments invited the jury to convict both defendants because the State would not have charged them with two counts of attempt murder if they weren't guilty of those charges.

C. Disparaging the Defense.

"Disparaging comments have absolutely no place in a courtroom, and clearly constitute misconduct." **McGuire v. State**, 100 Nev. 153, 157 (1984). It is prosecutorial misconduct for the State to "ridicule or belittle the defendant or the case". **Earl**, 111 Nev. at 1311. Prosecutors may not undermine the defense by making inappropriate and unfair characterizations. **Riley v. State**, 107 Nev. 205, 212 (1991).

In its rebuttal closing the State argued, "Now, I don't mean to repeat this, but there's absolutely zilch, zero evidence, of a third person involved in this case. **The only thing, the only way that idea came into anyone's head, including the defense attorney's** is because" . . . (X:2091-92).

Turner objected to the disparaging comment and court sustained, asking the jury to disregard the comment. (X:2092).

D. Misstating the Evidence and the Law.

It is prosecutorial misconduct for the State to make false or unsupported statements of fact to the jury during closing argument. See, e.g., **Witherow v. State**, 104 Nev. 721, 724 (1988); **Collier v. State**, 101 Nev. 473, 478 (1981). In its rebuttal closing, the State argued that Mr. "Turner knew those two guys are vulnerable" (based on Clarkson's demeanor on the stand) and argued that Turner "knew [Clarkson] didn't have a gun in his home". (X:2092-93). When defense counsel objected to these facts not in evidence, the court sustained the objection and the State withdrew the improper arguments. (X:2093). But after the objection was sustained, the State made the exact same improper argument: "But what does matter is that Mr. Turner knew who was in that house, what he could get from that house, **and that those victims were helpless**. That's why they went over there, to rob them, to do a dope raid." (X:2093) (emphasis added).

The State also argued facts not in evidence by stating, over Turner's objection, that "[c]ommon sense tells you that the gunpowder only goes 36 inches. It can deflect of a surface just like the shrapnel can." (X:2102). However, this argument was not a reasonable inference because Lester's

testimony about "36 inches" had to do with stippling on skin, not gunpowder residue in general. (IX:1946).

The State continued to argue facts not in evidence over Turner's objection, claiming: "Common sense dictates that those hollow point rounds that Metro uses across the board, they mushroom instead of blowing up like these high-powered rifle rounds." (X:2103). The State made this argument to refute Turner's argument that the fragment found in his leg came from Grego-Smith's Glock, not from the SKS rifle. However, the State had not presented any evidence that Metro's hollow point bullets could *only* "mushroom instead of blowing up like these high-powered rifle rounds." (X:2103).

In addition to misstating the evidence, the State misstated the law during its closing arguments. During its initial closing argument, the State misstated the law regarding the crime of attempt burglary while in possession of a deadly weapon. (X:2032-34). Pursuant to **NRS 205.060(4)**,

> A person convicted of burglary who has in his or her possession or gains possession of any firearm or deadly weapon at any time during the commission of the crime, at any time before leaving the structure or upon leaving the structure, is guilty of a category B felony. . .

Liability for this offense requires **possession** of a firearm or deadly weapon during the commission of the crime. See **NRS 205.060(4)**. However, in a

Power Point slide entitled, "ATTEMPT BURGLARY WHILE IN POSSESSION OF A FIREARM", the State's advised the jury:

> If more than one person commits a crime, and one of them uses a deadly weapon in the commission of that crime, **each may be convicted of using the deadly weapon even though he did not personally himself use the weapon if you find that he aided and abetted or conspired to commit the offense.**
>
> An unarmed offender "**uses" a deadly weapon when the unarmed offender is liable for the offense under aiding and abetting or coconspirator liability, another person liable for the offense is armed with and uses a deadly weapon in the commission of the offense, and the unarmed offender had knowledge of the use of the deadly weapon.**

(XI:2383) (emphasis in original). Based on this slide, the State argued that "let's just say for the sake of argument, you believe that one of them didn't have a gun, they are both still liable for attempt burglary while in possession of a firearm." (X:2032-33). Although Turner objected to the slide and the argument, the court erroneously overruled Turner's objection. (X:2033).

In order to convict Turner of aiding and abetting a possessory offense, the State needed to show that Turner either furnished the deadly weapon to Hudson, or was otherwise vicariously liable for Hudson's act of *possession*. See, e.g., **State v. Plunkett**, 134 Nev. Adv. Op. 88, 429 P.3d 936 (2018). The State's closing argument conflated "possession" with "use" and lowered the State's burden of proof on the possession charge in violation of Turner's constitutional rights.

During rebuttal closing, the State argued: "They're shooting at two human beings and the only, only result that comes from shooting a weapon like this is death." (X:2098-99).Turner objected that the State was misstating the law of attempt murder and the court sustained the objection. (X:2099). The court agreed that the comment was misleading because "you have to have the specific intent to kill and then shoot." (X:2099).

Recognizing that this Court does not typically reverse appellants' convictions on the basis of individual instances of prosecutorial misconduct, Turner asks that all of the above instances of misconduct be considered cumulatively. As set forth in **Section V**, infra, when considered "*in light of the proceedings as a whole,* the State's misconduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" **Valdez**, 124 Nev. at 1189 (emphasis added).

V. CUMULATIVE ERROR

"The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." **Valdez**, 124 Nev. at 1195-96 (quoting **Hernandez v. State**, 118 Nev. 513, 535 (2002)). When evaluating a claim of cumulative error, this Court will consider: "(1) whether the issue of guilt is close, (2) the

quantity and character of the error, and (3) the gravity of the crime charged." **Id**. (quoting **Mulder**, 116 Nev. at 17).

In this case, Turner's confrontation clause rights were violated when he was forced to go to trial with a co-defendant who made inculpatory statements to police that were not subject to cross-examination and where the State relied on those statements to establish that he held and fired the SKS rifle. 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 to place the SKS rifle squarely 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 that related directly to the charges of attempt murder, battery and weapons use & possession.

As to the contested charges, issue of guilt was close. The State conceded that "they didn't go there with the intent to kill a cop" (X:2106), so it was necessary for the State to place a gun in Turner's hand to establish Turner's specific intent to kill. As the State argued in closing, "No single person fired both these weapons. Both of the people who fired those weapons had one intent when they pulled the trigger." (X:2107). But without Hudson's inculpatory statements, there was no direct evidence that Turner

actually fired a gun at police. Likewise, without the State's unnoticed expert testimony on stippling and trajectories, there was no physical evidence that Turner fired *any weapon*. Rather, based on eyewitness testimony, Turner argued that a third person who was present in the back yard fired the SKS rifle.

The crimes charged are grave, particularly the two counts of attempt murder with use of a deadly weapon on police officers, and Turner is currently serving an aggregate sentence of 14-40 years in prison on those two counts alone. Because Turner did not receive the fair trial that was guaranteed to him by the constitution, his convictions for attempt murder, battery and weapons use & possession must be reversed.

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CONCLUSION

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,

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 size font.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

Proportionately spaced, has a typeface of 14 points or more and contains 13,819 which does not exceed the 14,000 word limit.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in

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

DATED this 4 day of February, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 4 day of February, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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