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<tr><td>COURT OF APPEALS, STATE OF COLORADO

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Denver, Colorado 80203</td><td rowspan="3">
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<tr><td>Arapahoe District Court
Honorable JOHN LEOPOLD
Case Number 99CR2428</td></tr>
<tr><td>THE PEOPLE OF THE STATE OF COLORADO

Plaintiff-Appellee

v.

ANTHONY SHAPIRO

Defendant-Appellant</td></tr>
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<tr><td colspan="2">REPLY BRIEF</td></tr>
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INTRODUCTION AND OBJECTIONS TO STATE'S BRIEF

Mr. Shapiro submits the following in response to matters raised in the State's answer brief. [Citations to the answer brief and to the opening brief will be to "AB" and "OB."]

As a preliminary matter, Mr. Shapiro objects to the State's repeated failure to make any reference to page numbers in the record when purporting to set forth evidence relating to disputed issues. *See, e.g.,* AB at p. 9 ¶2-¶3 (Argument I); p.15 ¶1; p.16 ¶1; p.17 ¶1 (Argument II). The record is over 4000 pages long and it is almost impossible for this Court to confirm, or for Mr. Shapiro to refute, the State's version of facts when it fails to provide any citation to the record. The State's failure to provide record citations to support its version of the evidence facts violates C.A.R. 28(e), which mandates that references to evidence in the record be specific. Absent specific reference by the State to the volume and page number of the record to support its rendition of evidence, this Court should not rely on the State's version of disputed facts.

Mr. Shapiro also objects to the State's reliance on disputed, irrelevant, inadmissible and prejudicial "evidence" that the trial court did not admit at trial. (*See, e.g.,* AB at fn.3 (Tretter's allegation about "shanking"); p.28 ¶1 (State's late disclosure of alleged statement by Shapiro to Gregg that he should get a gun). The defense had no reason to challenge these disputed "facts" at trial, and they cannot provide any legitimate support for the State's arguments on appeal.

ARGUMENT

I. Mr. Shapiro's Right of Confrontation Was Violated By The Trial Court's Erroneous Admission of Patrick Tretter's Unreliable Hearsay.

a. Patrick Tretter's statements to police were not admissible under the residual hearsay exception in CRE 807.

The State agrees that the controlling 5-part test for determining the admissibility of

statements as residual hearsay is set forth in *People v. Fuller*.[1] *See also* CRE 807. The record does not, however, support the State's claim that the district court used the *Fuller* "framework" to rule on the admissibility of Tretter's statements. [AB at 8]. To the contrary, as pointed out at pages 8-10 of the opening brief, the trial court failed to make a single finding as to the most critical factor in *Fuller*: that the declarant's statement be "supported by circumstantial guarantees of trustworthiness" before it can be admitted properly under the residual hearsay exception. *Id.* at 748. Absent such guarantees, a hearsay statement is not admissible under either the residual hearsay exception or under the Confrontation Clauses of the state and federal constitutions. *See, e.g., People v. Newton*, 966 P.2d 563, 572-73 (Colo. 1998).

Moreover, to the extent Tretter's statement purports to describe a physical alteration with Shapiro, the statement does not meet the requirement of CRE 807 and *Fuller* that the statement be "more probative on the points for which it is offered than any other evidence which could be reasonably procured." *Id.* at 744. Here, there were two eyewitnesses to the altercation who testified at trial, and, thus, the challenged hearsay lacks the required probative value.

Given the trial court's lack of any findings of "circumstantial guarantees of trustworthiness" of Tretter's statements to police, the State attempts to discern such guarantees from the existing record. [AB at 9, ¶2] The State, however, overlooks the controlling *de novo* standard of review, key relevant factors and much well-settled constitutionally based law which holds that a statement to police which shifts blame from the declarant to the accused is inherently untrustworthy. *See, e.g., Lee v. Illinois*, 476 U.S. 530**,** 544 (1986) (co-defendant statement

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[1] For hearsay to be admissible under the residual exception, the proponent is required to establish five factors: "[1] the statement is supported by circumstantial guarantees of trustworthiness; [2] the statement is offered as evidence of material facts; [3] the statement is more probative on the points for which it is offered than any other evidence which could be reasonably procured; [4] the general purposes of the rules of evidence and the interests of justice are best served by the admission of the statement; and [5] the adverse party had adequate notice in advance of trial of the intention of the proponent of the statement to offer it into evidence." *People v. Fuller*, 788 P.2d 741, 744 (Colo. 1990).

implicating defendant is presumptively unreliable); *accord People v. Smith,* 790 P.2d 862 (Colo. App. 1990); *People v. Jensen*, 55 P.3d 135, 139 (Colo.App. 2001) (codefendant's hearsay statements are inherently unreliable when the government is involved in the statements' production), *citing Lilly v. Virginia*, 527 U.S. 116, 137 (1999).

Appellate courts review a trial court's reliability determination *de novo* because the issue does not involve an assessment of the declarant's in-court demeanor. *See id.*; *accord Bernal v. People,* 44 P.3d 184, 198 (Colo. 2002). There is a "weighty presumption against the admission of such uncross-examined evidence." *Lee v. Illinois*, 476 U.S. at 546. The proponent bears the burden of proving, by a preponderance, the reliability of statements that are presumptively barred by hearsay rules and the constitution. *See Wright v. Idaho*, 497 U.S. 805, 816 (1990); *Newton,* 966 P.2d at 576. Appropriate factors to consider in determining the reliability of a statement include: where and when it was made, to whom it was made, what prompted it, how it was made, and what it contained. *See Newton*, *supra*.

The State's strained effort to find the requisite guarantees of reliability overlooks the fact that the prosecution, as the proponent of the hearsay, bears the burden of overcoming the weighty presumption against the admission of hearsay when, as here, it involves a statement shifting blame away from the declarant. In fact, the State confounds the applicable burden and presumption when it writes that "in the absence of evidence that the victim was falsely implicating the defendant, and because every reasonable inference pointed to the contrary, it is reasonable to conclude that the statement was supported by guarantees of trustworthiness." [AB at 9]. This misstates the controlling legal standard. And, the State fails to provide any record support for the "reasonable inferences" that could support the requisite guarantees of trustworthiness.

Here, Tretter's statements to police contained classic blame-shifting and were made about an individual whom Tretter despised. Tretter's statements clearly lack the circumstantial

guarantees of reliability required by CRE 807 (and the Confrontation Clauses) and the State has not overcome the weighty presumption that such hearsay should not be admitted.

b. The admission of Tretter's statements to police violated Mr. Shapiro's rights under the Confrontation Clauses of the state and federal constitutions.

The court's error in admitting Tretter's statements is both evidentiary error, since the challenged hearsay is not admissible under CRE 807, and constitutional error, since the admission of the challenged hearsay violated Mr. Shapiro's state and federal constitutional right to confront the witnesses against him. *See, e.g., Idaho v. Wright,* 497 U.S. 805 at 814 (held declarant's incriminating statements admissible under the residual exception to the hearsay rule are not admissible under the Confrontation Clause unless the prosecution establishes the statement bears adequate indicia of reliability)[2]; *accord Newton,* 966 P.2d at 573; *People v. Stephenson,* 56 P.3d 1112 (Colo. 2002) (defendant's wife's statement to police, which incriminated defendant and herself, was admissible under the statement against penal interest hearsay exception, but its admission violated defendant's constitutional right to confrontation).

The Confrontation Clause's reliability requirement can be met only where the statement either falls within a firmly rooted hearsay exception or is supported by a showing of "particularized guarantees of trustworthiness." *Id. a*t 1117. Clearly, the residual hearsay exception does not fall within a firmly recognized exception. *See, e.g., Idaho v. Wright, supra*. Consequently, the admission of Tretter's statements violated Mr. Shapiro's right to confrontation since they lacked the requisite particularized guarantees of trustworthiness. *See, e.g., id.*

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[2] In *Idaho v. Wright*, 497 U.S. at 814, Justice O'Connor, writing for the majority, stated:

> Although we have recognized that hearsay rules and the Confrontation Clause are generally designed to protect similar values, we have also been careful not to equate the Confrontations Clause's prohibitions with the general rule prohibiting the admission of hearsay statements. [citations omitted]. The Confrontation Clause, in other words, bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule. [citations omitted].

c. <u>The State uses the wrong standard of review to analyze whether the district court's error in admitting Tretter's statement to police requires reversal.</u>

The State argues, in the alternative, that if all five *Fuller* factors were not met vis-à-vis Tretter's blame-shifting statements to police, this Court should disregard the error "if there is no reasonable probability that the error contributed to the defendant's conviction." [AB at 10, citing *Fuller, supra,* 788 P.2d at 746, *Tevlin v. People,* 715 P.2d 338, 342 (Colo. 1986); and *People v. Carlson*, 712 P.2d 1018, 1023 (Colo. 1986)]. The three cited cases all involve mere evidentiary error; none involve an appellate court's review of constitutional error. *See Fuller* (court's failure to make findings necessary to admit evidence under residual hearsay exception held harmless where evidence was admissible); *Tevlin* (expert testimony of victim's truthfulness held inadmissible under CRE 608, but error deemed harmless); *Carlson* (held erroneous admission of irrelevant evidence of insurance company's denial of claim not harmless).

When hearsay statements have been admitted in violation of a defendant's Confrontation Clause rights, reversal is required unless the court is convinced beyond a reasonable doubt that the error did not contribute to the guilty verdict. *E.g., Blecha v. People,* 962 P.2d 931, 942 (Colo. 1998) (harmless error test "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error."). The proper standard of review for evidence admitted in violation of the Confrontation Clause is constitutional harmless error analysis, which differs from the standard harmless error analysis urged by the State. *Bernal, supra* at 200, fn. 11. Under constitutional harmless error analysis reversal is required unless the reviewing court is confident beyond a reasonable doubt that the error did not contribute to the guilty verdict. *Id.*

Here, Tretter's self-serving statement to police was the only evidence of Shapiro ever having instigated a fight with Tretter or having previously "threatened" Tretter. According to Tretter's statement, it was Shapiro who started the fight outside Tretter's work and it was Shapiro who spoke and acted inappropriately around Tretter's children. Tretter's statement was

the only evidence that Shapiro had "cold-cocked" Tretter. As a whole, the hearsay evidence tended to show Shapiro as an aggressor and undermine several aspects of Shapiro's defense, e.g., that he acted in self-defense and defense of others; that it was Tretter who constantly and without provocation threatened Shapiro, his girlfriend, her children and other members of Shapiro's family; and that Shapiro feared Tretter would harm him or those close to him.

Under the circumstances of this case, the error in admitting Tretter's self-serving statement to police cannot be deemed harmless constitutional error. *Cf. Blecha* (constitutional error harmless) and *Stephenson, supra* at 1120 (constitutional error not harmless where wife's erroneously admitted statement to police contradicted the defense theory).

d. <u>The State erroneously represents that there was no objection to the admission of the contents of Tretter's diary and, thus, erroneously, asserts that the admission of any of the diary contents is subject to "plain error" review on appeal.</u>

The State claims that the references to the contents of Tretter's diary during the prosecutor's opening statement and Detective Piel's testimony were not objected to and that these references are, thus, subject to non-preserved or plain error review on appeal. [AB at 11-12]. This is not correct. When, as here, the admissibility of evidence is litigated at a pretrial hearing on a motion *in limine*, there is no requirement of additional contemporaneous trial objections to preserve error. In such a case, to prevent "waste of time and fraying of patience," the objector is entitled to assume that the trial court will adhere to its initial ruling and that the objection need not be repeated. *E.g., People v. Gross,* 39 P.3d 1279 (Colo. App 2001), quoting *People v. Pratt,* 759 P.2d 676, 686 n.5 (Colo. 1988) (quoting *McCormick on Evidence* § 52 (3d ed.1984)); *see also Uptain v. Huntington Lab, Inc.,* 723 P.2d 1322 (Colo. 1986) (objection to evidence adequately preserved if objection was made in pre-trial motion in limine).

The State also argues that the "contents" of the diary were not admitted, since the actual words in the diary were not read to the jury, but were merely characterized, (e.g., the jury was told that Tretter professed his "undying love for Gregg" in the diary). On this basis, the State

urges this Court to disregard Mr. Shapiro's argument that the diary contents were not admissible under CRE 807 [AB at 11-12]. The State's attempt to distinguish the admission of verbatim statements from the diary from the admission of summaries of the diary contents is not supported by law. In analyzing the admissibility of hearsay, there is no distinction between actual quotes and paraphrasing or summarizing quotes so long as each qualify as out of court statement. The issue is whether the declarant's out of court statement, be it a verbatim quote or something less precise, is admissible as an exception to the rule against hearsay. The State offers no authority for its suggestion that a summary of out of court statements should not be considered hearsay.

II. The State's Unwarranted Pretrial Threats to Prosecute Defense Witnesses Deprived Shapiro of His Right to Compulsory Process and to Present a Defense.

The State ignores the fundamental nature of the constitutional error raised by Mr. Shapiro. Here, the prosecution threatened to file charges against two defense witnesses and, thus, deprived Mr. Shapiro of his right to call these witnesses in his defense. This manipulation and suppression of defense evidence violated Mr. Shapiro's right to compulsory process, to present a defense and to a fair trial; and, it also distorted the jury's ability to view relevant evidence and thus undermined the truthseeking function of the trial. In *Washington v. Texas,* 388 U.S. 14, 19 (1967), the Court wrote:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law…

This right to present the testimony of defense witnesses is found specifically in the Sixth Amendment right to compulsory process and is "so fundamental and essential to a fair trial that it

is incorporated in the Due Process Clause of the Fourteenth Amendment." *United States v. Morrison*, 535 F.2d 223 (3d Cir. 1976).

This Court most recently recognized the fundamental importance of a defendant's right to present defense evidence in *People v. Scearce,* ___ P.3d ___ (No. 01CA1660) (Colo. App. Dec. 4, 2003). In *Scearce,* the court erroneously precluded the defense from eliciting evidence of what was said between the defendant and an alleged co-conspirator, and this Court reversed, holding that the constitutional error in excluding defense evidence was not harmless, *i.e.*, the court "[could] not say with fair assurance that, beyond a reasonable doubt, the exclusion of this evidence could not have affected the jury's determination. Thus, defendant's conviction must be reversed." Slip op. at 15, *citing People v. McGrath,* 793 P.2d 664, 666-67 (Colo. App. 1989).

The fundamental due process right of an accused to present a defense by calling witnesses is violated if the State exerts improper influence on defense witnesses causing them not to testify. *E.g., People v. Mancilla*, 250 Ill. App. 3d 353, 358, 620 N.E.2d 1163, 1167 (1993), *citing Webb v. Texas*, 409 U.S. 95, 98 (1972); *see also People v. Bryant*, 157 Cal.App.3d 582, 591, 203 Cal.Rptr. 733, 737 (1984) ("This basic right is violated whenever governmental conduct, whether by state statute or prosecutorial misconduct, interferes with the right of the accused to present testimony of the witnesses."). Several courts have recognized that a defendant need not establish bad faith or motive on the prosecution's part to prevail on a claim like the one raised here. *See, e.g., United States v. Morrison*, 535 F.2d 223, 228 (3rd Cir. 1976). The defendant need only show that the prosecution by its conduct effectively encouraged a defense witness from testifying. *See People v. Shapiro*, 50 N.Y.2d 747, 409 N.E.2d 897, 905 (1980) (substantial interference by the State with a defense witness' free and unhampered choice to testify violates due process as surely as does a willful withholding of evidence."); *Bryant, supra* (per se reversible error where prosecutor stated witness would be charged with perjury if he testified as he did at earlier proceeding); *State v. Allen,* 800 S.W.2d 82 (Mo. Ct. App. 1990)

(new trial required where prosecutor advised defendant's brother of possible charges and asked whether he wanted to consult with lawyer, which in turn caused brother to refuse to testify by asserting Fifth Amendment privilege.).

Here, the issue is whether the State's action in threatening the possibility of charges and effectively driving defense witnesses off the witness stand denied Mr. Shapiro his constitutional rights to compulsory process, to present a defense and to a fair trial. The State's brief overlooks the fact that it was the prosecution's actions that caused the witnesses to claim a privilege and which, in turn, denied Mr. Shapiro his right to call witnesses. The State erroneously attempts to frame the issue raised as if it merely involved whether a defendant can compel a witness to waive his or her Fifth Amendment privilege. However, this is not the issue Mr. Shapiro raises.

In *People v. Weddle*, 652 P.2d 1111 (Colo. App. 1982), this Court recognized that a defendant may be denied a fair trial if the prosecution deprives him of exculpatory evidence by intimidating witnesses by threats of possible charges. *See id.* at 1112-13, citing *United States v. Morrison, supra* (conviction reversed where prosecutor's conduct caused witness who had been willing to testify for defense to assert Fifth Amendment privilege). The *Weddle* court also distinguished cases in which the prosecution causes a witness to refuse to testify for the defense from those in which a witness independently chooses to exercise a privilege not to testify. *Id.* at 1113, citing *United States v. Herman*, 589 F.2d 1191 (3d Cir. 1978) (reversal not required when witness independently invokes 5th Amendment privilege not to testify).

In both *Morrison* and *Herman*, the Third Circuit recognized a Sixth Amendment and Due Process Clause "guarantee to a defendant the right to subpoena a witness and to have that witness available as he finds him." *Herman,* citing *Morrison* and *Washington v. Texas,* 388 U.S. 14, 19 (1967). In *Morrison,* and in this case, "the government's threats and intimidation … violated that right by depriving the defendant of that witness's testimony." *See Herman,* citing *Webb v. Texas*, 409 U.S. 95 (1972).

None of the cases cited by the prosecution involve defense witnesses who were willing to testify until the State threatened to bring charges against them and, thus, caused the witnesses to assert their privilege against self-incrimination. Here, the existing record plainly reflects that the prosecution's conduct eliminated the Vicorys as witnesses at trial (v17 p71-75; v21 p4-8). The State's effort on appeal to portray the Vicorys' exercise of a privilege as the mere product of their own counsel's advice, overlooks the undisputed record that the prosecution and its agents triggered counsel's advice by, among things, subpoenaing the Vicorys to court before jury selection to "advise" them off the record of a purported investigation and the possibility of charges, including perjury, being filed against them.

The thrust of the State's argument is that a person's right to present a defense and to compulsory process is not absolute since it may conflict with the rights of others, including a witness's privilege against self-incrimination. The cases cited by the State for this general proposition are not cases in which the prosecution's conduct caused witnesses who wanted to testify for the defense to refuse to do so. *See* AB at 12-13, citing *People v. Chastain*, 733 P.2d 1206, 1212 (Colo. 1987); *People v. Coit,* 50 P.3d 936, 938 (Colo. App. 2002); *United States v. Trejo-Zambrano*, 582 F.2d 460 (9th Cir. 1978).

In *Coit*, the co-defendant simply refused to testify at the defendant's trial by asserting his Fifth Amendment privilege; there was no suggestion that the prosecution influenced the co-defendant's decision not to testify. The court rejected the defendant claim that her right to compulsory process included within it a right to compel her co-defendant to testify notwithstanding his assertion of his constitutional privilege against self-incrimination. *See id.; accord Trejo-Zambrano, supra*.

Similarly, in *Chastain,* the prosecution bore no responsibility for the unavailability of the sole defense witness who failed to appear on his subpoena. The issue on appeal was whether the court's refusal to grant a mistrial violated the defendant's right to compulsory process and to due

process. The supreme court found no constitutional violation since the prosecution "played no role in making the witness unavailable." 733 P.2d at 1213.

In cases like Mr. Shapiro's where the prosecution is responsible for the absence of a witness, the *Chastain* court recognized that a defendant may establish a violation of his right to compulsory process if he can make a "'plausible showing of how [the] testimony would have been both material and favorable to his defense.'" *Id.* at 1212*, quoting United States v. Valenzuela-Bernal,* 458 U.S. 858, 867 (1982); *see also* Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 Harv. L. Rev. 567 (1975).

The record more than establishes a plausible showing that the testimony of Juanita and Steven Vicory would have been material and favorable to the defense (OB at 13-14). In response, the State summarily asserts that the Vicorys' testimony "would not have been nearly as important as the defense portrays" and that the "majority of it would have been cumulative information regarding the victim's volatile behavior and numerous threatening phone calls he made." [AB at 17]. While there was substantial evidence about Tretter's repeated threats to Brenda Gregg and Tony Shapiro, there was not substantial evidence about Tretter's threats to Tony's mother and family or that Tony was fearful that Tretter would hurt or kill them. Moreover, the jury was never allowed to perceive the demeanor of these witnesses and access how real their fear of Tretter was and how great Tony's desire was to protect, not only Brenda and her children, but his own mother and brother.

The defense in this case was self-defense and defense of others. It is one thing for the evidence to show, which it did, that Tretter often threatened Tony and Brenda; it is quite another thing to show the depth of anger, hatred and threats that Tretter bestowed on Tony's mom and family. Moreover, the testimony about Tretter's threatening behavior came out primarily through Brenda Gregg, a witness very much beholden to the prosecution: one with every motivation to please the prosecution with her testimony since she was yet to be sentenced

pursuant to her plea agreement whereby the prosecution would "continue to consider and evaluate her cooperation" in making its sentencing recommendation to the court (v1 p368).

Prejudice arising from the denial of a defendant's right to present witnesses is almost presumed. Courts have noted the difficulty in holding such error harmless since the impact on the jury of the excluded witnesses' testimony is difficult. *See, e.g., State v. Finley*, 268 Kan. 557 998 P.2d 95, 104 (2000) ("It is impossible to gauge the impact [the witness's] testimony may have had on the jury. For this very reason, the majority of courts addressing this issue have held that this type of violation cannot be deemed harmless error."); *accord Morrison, supra,* 535 F.2d at 228 ("where the Government has prevented the defendant's witness from testifying freely before the jury, it cannot be held that the jury would not have believed the testimony or that the error is harmless."); *People v. Williams,* 45 Mich. App. 623, 207 N.W.2d 176, 178 (1973) (whether the excluded witness's testimony "would have changed the jury verdict is conjectural, but in the interest of justice and a fair trial, all important available evidence must be presented.")

When, as here, the government is to blame for the absence of a witness, it must bear the consequences of the loss. *See, e.g., United States v. Tsutagawa,* 500 F.2d 420 (9th Cir. 1974); *see also* Westen, Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases, 91 Harv. L.Rev. 567, 596 (1975). In *Tsutagawa,* the government deported several witnesses after the defendant's arrest and before trial. The appellate court reversed, finding a violation of the defendant's right to compulsory process. While the prosecutorial action differs in this case, the same principles control since the government is responsible in both cases for rendering defense witnesses unavailable and depriving the accused of his right to compulsory process.

The State attempts to justify the morning-of-trial timing of the prosecution's threats of possible prosecution against the Vicorys by implying that the State lacked evidence against the Vicorys "until after th[e] July 25, 2000 motions hearing, when Brenda Gregg tendered her

'proffer'" [AB at 14]. There are many problems with the State's attempt. As noted above in the introduction section, the State fails to provide any references to pages in the record that might support its factual assertions as to when the State received information that would support any threatened charges against the Vicorys. The State claims that the Gregg proffer, which is not part of the record, provided the State with its first notice of the "Vichorys' (sic) involvement in the case." However, the prosecution never claimed at trial that it was the Gregg proffer that prompted its threats of prosecution against the Vicorys. Furthermore, Ms. Gregg's testimony at trial about the Vicorys' "involvement in the case" does not implicate them in any possible criminal charges. (v20 p170 et seq.; v21 p1-206; v22 p11-123).

This is not, as the State suggests, a case in which the defendant's right to present a defense and to compulsory process "properly gave way to the witnesses' privilege not to give self-incriminating testimony" or where the record "was clear that the [witnesses] faced a real possibility of incriminating themselves on cross-examination if the defense attorney questioned them as he indicated he would." [AB at 13] Rather, it is a case in which the prosecution threatened two critical defense witnesses on the morning of trial with possible charges and coerced them into asserting their Fifth Amendment privilege (v17 p71-75; v21 p4-8). The record speaks for itself: the witnesses' attorney never suggested there was a "real possibility" that the witnesses would incriminate themselves [OB at 15-16]. And, the prosecutor's nebulous, but intimidating, on-the-record statements never established a "real possibility" of self-incrimination. [*See* OB at 15, quoting prosecutor's statement at v17 p74 of the record.]

The State subpoenaed the defense witnesses to court on the day jury selection began. The State did not subpoena the Vicorys because they wanted them to testify. Rather, the State used its subpoena power to summon the defense witnesses to court so that it could advise (or threaten) the witnesses off the record with the possibility that charges would be filed if they testified. The prosecution's calculated decision to eliminate witnesses for the defense by threatening charges

on the morning of trial is not the only instance of the State exploiting its power to create evidence for itself and to deprive the defense of exculpatory evidence and a fair means of testing the State's case. The prosecution not only deprived the defense of its right to present the Vicorys' testimony, it and its agents also actively discouraged Brenda Gregg from ever talking with Mr. Shapiro's counsel, and timed the grant of immunity to Ms. Gregg (immediately prior to her pre-trial hearing testimony), her guilty plea (the night before her three days of trial testimony) and her sentencing (after Mr. Shapiro's trial) in a manner maximized the benefits of her testimony for the prosecution and eliminated defense counsel's ability to investigate the case by speaking with Ms. Gregg.

While the prosecution's motives in encouraging the Vicorys to assert their privilege and discouraging them from testifying for the defense are transparently suspect, the fact is the law does not require that Mr. Shapiro prove the prosecutors acted in bad faith. *See, e.g., Morrison, supra*. Nevertheless, the prosecution's interest in "advising" the Vicorys of possible charges was obviously not the "pure" interest of protecting the Vickorys' individual constitutional rights. Rather, the prosecution's interest lay in gaining a strategic advantage by discouraging their testimony for the defense. The prosecution's actions violated Mr. Shapiro's due process and compulsory process rights.

The issue raised by Mr. Shapiro calls upon this Court to determine whether the State's power to suppress important defense evidence by threatening charges should be condoned or tolerated, or whether life should be given to the fundamental notion that a criminal trial contemplates a fair opportunity for the accused to present a defense so that the jury may have access to relevant evidence and fairly determine whether the State has met its burden of proving the accused guilty of the charged offense.

III. The Trial Court Erred When It Failed to Prevent the State from Using Co-Defendant Brenda Gregg's Guilty Plea to Accessory to a Crime (*First Degree Murder*) as Substantive Evidence that Shapiro Committed *First Degree Murder*.

As it does in Argument II, the State attempts to alter the issue presented on appeal. The issue is not simply whether a conviction of an alleged accomplice may be used for impeachment under Colorado law. The issue is whether reversible error occurred in this case when:

1) the State was permitted, over objection, to introduce evidence that Ms. Gregg pleaded guilty to accessory to first degree murder when: (a) the name of the offense to which she pleaded guilty was accessory to a crime; and (b) the only legitimate purpose for admitting evidence of Ms. Gregg's guilty plea under Colorado law was for impeachment and it was only the defense that sought to impeach Ms. Gregg's trial testimony; and

2) the prosecution exploited the admission of Ms. Gregg's plea to "accessory to first degree murder" by improperly a) injecting evidence that the court had approved the charge of accessory to first degree murder against Ms. Gregg, and b) arguing to the jury that Ms. Gregg would not have pleaded guilty to "accessory to first degree murder" unless the predicate offense had, in fact, occurred.

The State agrees that the law prohibits the use of an accomplice's plea as substantive evidence of a defendant's guilt. [AB at 17] Here, the issue calls upon this Court to evaluate whether the prosecution has any legitimate interest in re-naming the offense to which Ms. Gregg pleaded guilty in a manner that unnecessarily increased the risk that jurors would improperly use her guilty plea as evidence of Mr. Shapiro's guilt.

The State erroneously claims that the danger of the jury misusing the evidence of Ms. Gregg's plea was diminished by the court's limiting instruction, which, according to the State, "made it abundantly clear that Ms. Gregg's guilty plea could not be used as substantive evidence of defendant's guilt." [AB at 18]. However, the court's language, which is quoted in both briefs, does no such thing. [*See* OB at 22 (full quote); AB at 18 (partial quote)]. At most, the court's instruction tells the jury that the fact that Gregg pleaded guilty to accessory to first degree

murder[3] is not enough in and of itself to establish Shapiro's guilt. The court did not tell the jury that it could not use Gregg's plea as evidence of Shapiro's guilt. To the contrary, the Court's contemporaneous instruction expressly permitted the jury to base its verdict on "evidence presented here in the courtroom" and this evidence, of course, included Gregg's plea to "accessory to first degree murder."

As noted in *People v. Carlson*, 712 P.2d 1018, 1023 (Colo. 1986), an improper limiting instruction may exacerbate the prejudice of improperly admitted evidence. Here, the limiting instruction permitted the jury to use "evidence" to establish Mr. Shapiro's guilt and, plainly, Gregg's plea to accessory to first degree murder was evidence, which the jury could, therefore, use in deciding Mr. Shapiro's guilt.

The State also makes no effort in its answer brief to refute Mr. Shapiro's argument that the unacceptable risk that the jury would use Gregg's plea to accessory to first degree murder was exacerbated by the trial court's decision to overrule defense objections to irrelevant and prejudicial evidence as to why the charge of accessory to first degree murder was filed against Gregg and to testimony that both the arrest warrant and the charge of accessory to first degree murder were approved by the court and the prosecutors (v22 p144-47). [*See* OB at p. 23, fn. 8 and Appendix A.] (v22p144-47).

The State offers only one case to support its argument that the court properly allowed the prosecution to admit evidence of Gregg's plea to accessory to *first degree murder: People v. Brunner,* 797 P.2d 788, 789 (Colo. App. 1990). *Brunner*, however, is clearly distinguishable. First, there was no objection in *Brunner* to the accomplice's testimony that he had pleaded guilty to a crime involving the same LSD the defendant was charged with distributing. And, the *Brunner* decision expressly recognizes that evidence concerning a co-defendant or co-

[3] The actual name of the offense is "accessory to a crime." The felony level of the predicate crime determines the offense's felony level. *See* OB at p.21, citing § 18-8-105, 6 C.R.S. (2002).

conspirator's plea to charges arising from the same event that underlies the charge against the defendant may be "prejudicial and inadmissible against the defendant." Moreover, *Brunner* acknowledges the governing principle that "the guilty plea or conviction of a co-defendant may not be used as substantive evidence of another's guilt. (citations omitted)." 797 P.2d at 789. *Brunner* did not involve the re-naming the accomplice's conviction or the State's use of the that conviction as evidence of the defendant's guilt.

Finally, the State again provides this Court with the wrong standard of review to determine whether the error raised is reversible. Here, the State asserts that a "plain error" standard of review applicable to non-preserved, non-constitutional error applies. [*See* AB at 19, citing *People v. Kruse*, 839 P.2d 1, 3 (Colo. 1992) (refusing to recognize error as "plain error" where issue not raised in trial court)]. The defense, however, specifically objected to the prosecution introducing evidence that Ms. Gregg pleaded guilty to accessory to *first degree murder* and expressly requested that her conviction be referred to by its proper and less prejudicial name "accessory to a crime". The defense also specifically objected to the State's questions about its decision to charge this crime and the court's approval of the particular charge (v21 p13-14;v22 p144-47). Under these circumstances, the issue has been preserved for appellate review.

IV. The Trial Court Committed Reversible Error When It Admitted Evidence Of An Unrelated 1991 Stabbing For The "Limited" Purposes Of Establishing Motive, Modus Operandi, Intent, Plan And Preparation In This Case.

The State's reliance on *Douglas v. People,* 969 P.2d 1201 (Colo. 1998), and *People v. Willner*, 879 P.2d 19 (Colo. 1994), is misplaced. In both cases, more than one prior violent incident involving the defendant was ruled admissible pursuant to CRE 404(b). In *Douglas*, the supreme court specifically distinguished cases, like *Spoto* (and Mr. Shapiro's), in which a single

prior bad act of the accused is admitted over objection for a limited purpose. *See Douglas, supra* at 1206, fn.6. The court distinguished cases involving the admissibility of a single prior similar act with those involving more than one prior bad act as follows:

> Thus, this much higher frequency of similar conduct requires greater deference be given the trial judge's ruling. In *Spoto*, as to the third prong, we relied, at least in part, on the doctrine of chances in concluding that the evidence there was not independent of the prohibited intermediate inference of bad character. *Spoto*, 795 P.2d at 1318. Under the doctrine of chances:
>
>> The more often the defendant performs the actus reus, the smaller is the likelihood that the defendant acted with an innocent state of mind. The recurrence of repetition of the act increases the likelihood of a mens rea or mind at fault. In isolation, it might be plausible that the defendant acted accidentally or innocently.... However, in the context of other misdeeds, the defendant's act takes on an entirely different light. The fortuitous coincidence becomes too abnormal ... or objectively improbable to be believed. The coincidence becomes telling evidence of mens rea.

Id. at 1208, fn.6, quoting, E. Imwinkelreid, Uncharged Misconduct Evidence 5.05 (1996).

Under the doctrine of chances, the 1991 stabbing incident is not admissible to prove that a 1999 stabbing by the accused was not justified, although if there had been more than one prior stabbing, the prior incidents might be admissible in light of *Douglas* and *Wilner*. However, when these two cases are read in combination with *Spoto*, it is clear that a single prior incident involving a weapon is not admissible under CRE 404(b) to disprove a claim of self-defense.

V. Mr. Shapiro's Right To A Reliable Determination Of His Guilt Or Innocence Was Violated By The Erroneous Admission Of Inflammatory, Unnecessary And Misleading Photographs.

The State argues that Mr. Shapiro did not object to Exhibit 31, the extremely graphic post-mortem photograph, on the ground it was an overly graphic autopsy photograph, but only

on the ground it was duplicative to Exhibit 35. [AB at 31]. However, in context and in light of the obviously graphic nature of the photograph, it is clear that defense counsel objected to Exhibit 31 on multiple grounds and that the trial court recognized that it was ruling on both the graphic and the cumulative nature of the challenged photograph (v19 p p38-40). *See* OB at 36. Nothing more is required to preserve the issue for appeal.

The State cites *People v. Gibbens,* 905 P.2d 604 (Colo. 1995), for the general proposition that a reviewing court should assume the maximum probative and minimum prejudicial value of evidence when reviewing a trial court's decision to admit the evidence over objection. [AB at 32]. Clearly, *Gibbens*, is not a case in which a juror became so physically ill upon viewing the challenged piece of evidence that the proceedings had to be delayed. Under the circumstances of Mr. Shapiro's trial, the general rule of appellate review is not applicable since the record refutes the rule' presumption. Moreover, as the supreme court recently clarified in *People v. Welsh*, a trial court's ruling pursuant to CRE 403 can be wrong, and deference to trial court discretion is not equivalent to automatic approval. *Id.,* ___ P.3d ___ (Colo. Dec. 8, 2003).

Lastly, in evaluating the prejudicial effect of Exhibit 31, one must consider the prosecution's repeated and dramatic use of the bloody photographs at Mr. Shapiro's trial. In context, it is apparent that the State used the photograph to prejudice and inflame the passions of the jury. The prosecution used high-tech equipment to both dramatically enlarge the photographs and to expose the jurors to prolonged viewings of the photographs by placing viewing screens throughout the jury box during the coroner's testimony (v19 p43-44, 48). The prosecution persisted in this even though the photograph had literally sickened juror Jahen and caused a scene in the jury box. The prosecution dimmed the courtroom lights and used enlarged versions of the bloody photographs at both the beginning and end of its closing argument (v23 p52 et seq.). The admission of and the prosecution's repeated use of Exhibit 31 improperly and unnecessarily increased the risk that the jurors would be detracted from their proper task of

considering all the evidence and fairly determining Mr. Shapiro's guilt or innocence.

VI. The Court Erred When It Refused To Dismiss a Juror After He Became Physically Ill In Reaction To Exhibit 31, the Erroneously Admitted Autopsy Photograph.

The State claims that Mr. Shapiro overstates Juror Jahen's physical reaction to the autopsy photograph. Mr. Shapiro disagrees and has cited to the record on appeal to support his position in the brief. That the juror fainted is supported by defense counsel's representation that the juror "almost appeared to pass out," (v19 p145), and it is also a fair inference from the descriptions of juror Jahen's reactions by both the court and defense counsel. [*See* OB at 37-39].

VII. The Trial Court Erroneously Instructed The Jury On The Affirmative Defense Of Self-Defense and, Thus, Lessened The State's Burden Of Proof And Violated Shapiro's Right To Trial By Jury.

The self-defense instructions were deficient in two distinct aspects. First, the instructions erroneously limited the defense available to instances where it appears to the accused that "another person was about to cause or reasonably appeared about to cause bodily injury to any person *by means of a deadly weapon*" when the statutory right of an individual to act in response to an actual or perceived assault is not limited to cases involving deadly weapons. Pursuant to §18-1-704(2), one can use physical force when "the other person is committing or reasonably appears about to commit … assault as defined in sections 18-3-202 and 18-3-203." Such assaults do not necessarily require use or apparent use of a deadly weapon. *See* OB at 42. And, second, the court failed to instruct the jury, as requested by the defense, that one's right to act in defense of an assault may be satisfied even if the other person is armed only with their fists.

The State makes three arguments in its brief, none of which should persuade this Court. First, the State claims that any problem with the self-defense instruction is harmless because the instruction permitted the jury to find self-defense without finding a deadly weapon under

paragraph 1 and 2 of the instruction (v2 p401).[4] But these aspects of justified force, i.e., the ability to use force upon reasonable belief and imminent danger of being killed or of receiving great bodily harm are not the only applicable grounds for the justified use of physical force. The instruction is erroneous because it improperly eliminated the affirmative defense even if the jury believed that Tretter was about to assault or appeared about to assault (as assault is defined by statute) but did not have a deadly weapon.

The State also claims that any error in the self-defense instruction was "invited." This is not correct. First, the record does not clearly establish that the defense was responsible for the erroneous "deadly weapon" language in paragraph 3 of the self-defense instruction. The prosecutor's comments, which are quoted by the State, were made in the context of the State's objection to another instruction, the "apparent necessity" instruction (v23 p43-45).[5] The prosecutor's words seem to suggest only that the defense asked that the jury be instructed on the permissible use of force under §18-1-704(2) (right to use self-defense against assault or perceived imminent assault); the record does not reflect who was responsible for injecting the concept of "deadly weapon" into Paragraph 3 of the self-defense instruction.

Second, even if the defense tendered the self-defense instruction with the "deadly

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[4] The self-defense instruction used at trial read:

> It is an affirmative defense to the crime of Murder in the First Degree- After Deliberation and Murder in the Second Degree that the defendant used deadly physical force because:
>
> 1. he reasonably believed a lesser degree of force was inadequate, and
>
> 2. had reasonable grounds to believe, and did believe, that he or another person was in imminent danger of being killed or of receiving great bodily injury, or
>
> 3. another person was about to cause or reasonably appeared about to cause bodily injury to any person by means of a deadly weapon. (v2 p401).

[5] Although the State quotes from the prosecutor's argument, it fails to provide this Court with a reference to the record. The record on jury instructions is found at volume 23, pages 42-50.

weapon" language, the concept of invited error would not preclude this Court's consideration of the issue presented. The doctrine of invited error may preclude a party from complaining on appeal about an error that he is responsible for injecting into a case. However, the courts will review nontactical instructional omissions for plain error. *Cf. People v. Stewart*, 55 P.3d 107, 119-120 (Colo. 2002) (court rejects State's claim that review is barred as invited error and reviews adequacy of defense tendered self defense instruction) and *Horton v. Suthers,* 43 P.3d 611, 618 (Colo. 2002) (where Warden confessed in state habeas court that court should determine the claim, doctrine of invited error barred Warden from arguing on appeal that habeas court should not have decided the claim). Here, the defense could gain no conceivable strategic advantage from requiring proof that Tretter had a deadly weapon for Shapiro to have the right to use force in an assault situation. Thus, even if the defense had tendered the self-defense instruction it would be reviewable for plain error. *See Stewart, supra.*

Moreover, the court's failure to instruct the jury that fists may constitute a "deadly weapon" is fully preserved constitutional error and reversal is required unless this Court is convinced beyond a reasonable doubt that the error is harmless. Such a conclusion is impossible when, as here, the error involves the defense raised and is exploited in closing argument. Specifically, the prosecutor was allowed to argue, over objection that she was misstating the law, that Tretter had no "deadly weapon" and that self-defense did not apply (v23 p72-73, 137, 139).

VIII. The Cumulative Effect of Error Denied Mr. Shapiro His Due Process Right To A Fair Trial.

If there is any doubt whether Mr. Shapiro is entitled to a new trial for any one of the individual errors set forth in Arguments I-VII of the opening brief, this Court should consider whether the cumulative impact of error requires reversal. The cumulative effect of the error cannot be denied since it deprived Mr. Shapiro of his right to challenge the State's case by

confronting the witnesses against him through cross-examination (Argument I), and by presenting witnesses in his defense (Argument II). This error distorted the truthseeking function of a criminal trial by unreliably bolstering the State's case and unfairly undermining the defense. The State's case was also unfairly bolstered by the following: the prosecution's misuse of its power to create evidence in support of its own theory of the case in the form of Brenda Gregg's accessory plea (Argument III); the erroneous admission of enormously prejudicial prior bad act evidence (Argument IV); and the prejudicial and inflammatory use of gory photographs (Arguments IV and V). And, lastly, in addition to these errors, the jury was erroneously instructed on the affirmative defense of self-defense and defense of others in a manner that was exploited by the State in its closing argument and which lessened the State's burden of proof (Argument VII). The cumulative effect of these errors deprived Mr. Shapiro of his right to a fair trial and to a fair determination by the jury of his guilt or innocence of the charged offense.

CONCLUSION

For the reasons set forth above and in the opening brief, Mr. Shapiro respectfully requests that this Court reverse his conviction and remand the cause for new trial so that a jury may fairly determine whether the State has proven him guilty of first degree murder.

Dated this ____ day of December 2003.

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CERTIFICATE OF SERVICE

I certify that, on March 31, 2004, a copy of this Reply Brief was hand-delivered to the Colorado Court of Appeals for deposit in the Attorney General's mailbox and addressed to the attention of:

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