IN THE SUPREME COURT OF THE STATE OF NEVADA

CORY DEALVONE HUBBARD, Petitioner, v. THE STATE OF NEVADA, Respondent.	Electronically Filed Apr 19 2016 02:50 p.m. Tracie K. Lindeman Clerk of Supreme Court CASE NO: 66185

PETITION FOR REVIEW BY THE SUPREME COURT

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Deputy, OFELIA MONJE, and petitions this court for review in the above-captioned case.

This petition is based on the following memorandum of points and authorities and all papers and pleadings on file herein.

Dated this 19th day of April, 2016.

Respecfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar # 001565

BY */s/ Ofelia Monje*
OFELIA MONJE
Deputy District Attorney
Nevada Bar # 011663
Office of the Clark County District Attorney

MEMORANDUM
POINTS AND AUTHORITIES

On April 1, 2016, the Court of Appeals in a split 2-1 decision, issued an Order of Reversal and Remand holding that the district court manifestly abused its discretion in admitting a prior bad act. The State is aggrieved by and seeks Supreme Court review of that portion of the majority's Order regarding the bad act motion.

Judge Tao dissented from this legal conclusion on grounds that the majority's conclusion is not based upon the correct standard of review. Order, p. 21. In deferring to the district court's decision and reviewing it for a manifest abuse of discretion, Judge Tao correctly reasoned that it was not manifestly unreasonable to admit Hubbard's prior bad act to prove he had the specific intent to commit burglary because many federal courts have held a defendant's intent in a specific intent crime is automatically at issue. Order, p. 28-29. The State is not aggrieved by the insufficiency of evidence claims relating to Anthony, Thavin, or Trinity, but seeks Supreme Court review only as to the prior bad act issue.

The State now petitions for review pursuant to NRAP 40B. The instant appeal meets the standard for Supreme Court review because the majority's conclusion, that a non-propensity purpose for admitting a prior bad act must first be put "at issue" by a defendant before the State can admit prior-bad-act evidence, presents an issue of first impression for this Court. The majority's opinion has statewide implications

because it alters the burden the State is required to meet at a Petrocelli[1] hearing. Furthermore, as the dissent notes, although the Nevada Supreme Court has not yet adopted the principle that in specific intent crimes, intent is automatically at issue, most federal courts have and this would also be an issue of first impression for this Court. Additionally, the majority's finding that intent must be "at issue" conflicts with existing Supreme Court precedent as set forth in Ford v. State, 122 Nev. 796, 800, 138 P.3d 500, 503 (2006) and with a majority of federal circuit courts. Supreme Court review is also warranted because the majority has *sua sponte* decided to raise an "at-issue" requirement that was not briefed by either party.

The Majority Misconstrues this Court's "At-Issue" Analysis and Creates a New Rule

According to the majority, admission of a prior bad act requires an at-issue, non-propensity purpose and "[a] non-propensity purpose is only at issue when the defendant raises the purported defense at trial." Order, p. 11. The majority purports that a prior bad act is inadmissible until the defendant raises the issue *at trial* and then the State may rebut the issue during rebuttal. Order, pp. 11, 13. This new rule contradicts this Court's long-standing, implicit practice. Notably, this issue was not raised or briefed by either side. However, this new rule is ungrounded and misconstrues this Courts analysis in Newman and Honkanen. Further, this rule is

[1] Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

one of first impression of general statewide significance and also, involves a fundamental issue of statewide public importance.

In Newman, the Court found that a prior bad act was improperly admitted to show absence of mistake or accident in a child abuse case because the defendant admitted to deliberately striking the victim. Newman v. State, 129 Nev. __, __, 298 P.3d 1171, 1178 (2013). Thus, the prior incidents were irrelevant because the defendant admitted to an element of the crime. Id. The only reason absence of mistake or accident were not "at issue" was because the defendant admitted to that specific element of the crime. Id. Similarly, in Honkanen v. State, 105 Nev. 901, 902, 784 P.2d 981, 982 (1989), the Court found that absence of mistake and motive were not "at issue" when the defendant was charged with child abuse because he conceded that the incident occurred. The only dispute was whether the conduct was as severe as the State had alleged. Id. Instead of finding that a non-propensity purpose is not "at issue" when a defendant concedes and admits to an element, the majority has formed new law by finding that a non-propensity purpose is only "at issue" when the defendant raises that defense at trial. The majority's decision is far from what this Court intended. See Overton v. State, 78 Nev. 198, 205, 370 P.2d 677, 681 (1962) ("A plea of not guilty puts in issue every material allegation of the information."). Before, a defendant was allowed to concede an element of the crime

to avoid admission of a prior bad act, but now, the State must first show a defendant intends to present a defense at trial *and* then that the prior bad act is relevant not only for the non-propensity purpose, but also to rebut that defense. This new rule is not only broad and expansive but also unattainable because the State must predict the defendant's theory of defense and hope that it does not change throughout the course of trial. As Judge Tao recognizes, a Petrocelli hearing is not supposed to be based on trial evidence but rather a pre-trial offer based on "what the trial evidence is anticipated to be." Order, pp. 24.

Further, the majority's new rule conflicts with federal courts of appeal because the courts have held that bad act evidence can be admitted to prove an element of a charged crime, regardless of the defense's actions. Sparks v. Gilley Trucking Co., Inc., 992 F.2d 50, 52 (4th Cir. 1993) ("We have held repeatedly that when intent to commit an act is an element of a crime, prior activity showing a willingness to commit that act may be probative."); United States v. Renteria, 625 F.2d 1279, 1281-82 (5th Cir. 1980) ("[I]n a conspiracy case, the government may introduce extrinsic offense evidence during its case in chief to prove intent, reasoning that, although in the end the defense might choose not to contest the issue of intent, the government has no way of knowing that when it presents its case in chief."); United States v. Burkett, 821 F.2d 1306, 1309 (8th Cir. 1987) (the government is allowed to offer a

prior bad act to prove the issue of intent in its case-in-chief, even though a defendant's defense was to present an alibi defense and not contest the issue of intent, because the government must establish all essential elements of the crime in its case-in-chief, the government does not need to wait for a defendant's denial before offering evidence, and a defendant is not required to maintain the alibi defense when the time came); United States v. Hadley, 918 F.2d 848, 852 (9th Cir. 1990) (The government's burden to prove every element of a crime beyond a reasonable doubt is not relieved by a defendant's promise to forgo argument on an issue.); see also United States v. Spillone, 879 F.2d 514, 518 (9th Cir. 1989) (evidence of prior conviction properly admitted on issue of intent despite defendant's promise not to argue it); United States v. Diaz-Lizaraza, 981 F.2d 1216, 1224 (11th Cir. 1993) (The trial court properly admitted the prior bad acts to demonstrate intent even though a defendant claimed he was not involved in the drug-related activities because when a "conspiracy defendant pleads not guilty, he or she 'makes intent a material issue in the case and imposes a substantial burden on the government.'") Thus, the majority's new rule also conflicts with the federal courts where it has held that prior bad act are admissible to prove an element of the crime regardless of the defendant's defense.

The majority's solution is that when it is unclear whether a defendant will present a defense theory at trial, the district court may rule the evidence admissible only in the State's rebuttal if the defendant put the non-propensity purpose at issue. Order, p. 13. Notably, the majority cites to the dissent of Armstrong as support, however, the Armstrong majority held that Petrocelli hearings must be on the record. Armstrong v. State, 110 Nev. 1322, 1324, 885 P.2d 600, 601 (1994). The majority's analysis and conclusion is not rooted in this Court's precedent. Furthermore, it is often not until a defendant's closing argument that the defense's actual theory comes to light because a defendant is not required to present an opening argument, ask any cross-examination questions, nor present any evidence during their case-in-chief. At the time of closing arguments, the State cannot reopen the case and present additional evidence. Burkett, 821 F.2d at 1309; Renteria, 625 F.2d at 1281-82 (Even if a defendant chooses not to contest the issue of intent, the government would not know during its case in chief so "[s]uch proof would have to be offered during the case-in-chief because if the defendant offered no evidence there would be no opportunity to offer evidence in rebuttal."). The majority's misconstruction of this Court's "at-issue" analysis creates unprecedented new law that warrants this Court's review.

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The Majority's Intent Analysis is Flawed and Contradicts Current Law

The majority claims that under this Court's precedent, "[t]o be a valid nonpropensity use, intent must be at issue." Order, p. 14. But this is an overbroad conclusion. The majority cites Newman for this proposition, but Newman only concerned the general intent crime of child endangerment and cited in turn to U.S. v. Miller, 673 F.3d 688, 697 (7th Cir. 2012), which distinguishes general intent crimes and holds that "intent is automatically at issue in specific intent crimes." See Newman, 129 Nev. ___, 298 P.3d at 1178.

The majority errs in applying the "at-issue" requirement of general intent crimes in Newman to the specific intent crime of burglary in the present case. Under the majority's reasoning, the State could never introduce bad act evidence in its case-in-chief, but could only do so in its rebuttal case after the defense had made the non-propensity use "at issue." Newman is not applicable to specific intent crimes and the majority errs in relying upon it.

Nor does the majority's reasoning find support in the claimed split in authority on the issue among federal courts of appeal citing U.S. v. Crowder, 141 F.3d 1202, 1211 (D.C. Cir. 1998). The split in authority concerns not whether intent is automatically at issue for specific intent crimes, but whether the defense's offer to concede or stipulate to an element of an offense can preclude the government from

introducing bad act evidence to prove that element. Id. The instant case does not involve any offer by Hubbard to stipulate to intent in order to avoid bad act evidence, and the majority errs in relying upon this case law.

Further, the majority's reliance on United States v. Colon, 880 F.2d 650, 658-60 (2d Cir. 1989) for the proposition that intent is not at issue when a defendant claims the acts did not occur, is not applicable to Hubbard's case. Order, pp. 15. In Colon, the Second Circuit found that a defendant's theory that he did not commit the alleged act removes the issue of intent but "in order to take such an issue out of a case, a defendant must make some statement to the court of sufficient clarity to indicate that the issue will not be disputed." Id. at 659. Hubbard did not stipulate to the issue of intent and he reserved his opening statement. 1 AA 136. Thus, there was no indication of Hubbard's defense theory that would have been sufficient for the district court to presume that intent would not be at issue. In fact, Hubbard changed his defense throughout trial because initially, Hubbard indicated to a detective that he was randomly shot walking down the street (not during the robbery) and then his defense later changed to him being shot during a drug transaction. 6 AA 986-87, 1018, 1023. The district court could not and should not have to predict the defense's theory based on Hubbard's initial statement to the police officer. Because Hubbard did not make an opening statement providing the district court

with a basis of the defense's theory and did not offer to stipulate to intent, intent always remained at issue.

Additionally, many federal circuit courts have held that intent is automatically at issue in a specific intent crime. United States v. Rodriguez-Berrios, 573 F.3d 55, 63-64 (1st Cir. 2009) ("intent is in issue when it is an element of the crime charged, regardless of the defense presented"); See United States v. Sanchez, 118 F.3d 192, 196 (4th Cir. 1997) ("A not-guilty plea puts one's intent at issue and thereby makes relevant evidence of similar prior crimes when that evidence proves criminal intent."); United States v. Misher, 99 F.3d 664, 670 (5th Cir. 1996) ("A defendant places his intent in issue when he has pled not guilty in a drug conspiracy case and, therefore, evidence of past drug transactions can be used to establish criminal intent."); United States v. Myers, 123 F.3d 350, 363 (6th Cir. 1997) (intent was at issue even though the defendant's defense was that he did not even possess the drugs because specific intent is at issue regardless of defendant's defense); United States v. Mazzanti, 888 F.2d 1165, 1171 (7th Cir. 1989) ("In cases involving specific intent crimes, intent is automatically an issue, regardless of whether the defendant has made intent an issue in the case.") (internal quotations omitted); United States v. Miller, 974 F.2d 953, 960 (8th Cir. 1992) (intent it automatically at issue because it is the prosecution's burden to prove every element of the crime regardless of the

kind of defense defendant asserts and whether the defendant contests an issue); see United States v. Spillone, 879 F.2d 514, 518-20 (9th Cir. 1989) (intent is a material element of the crime that the State may prove by evidence of a prior conviction despite defendant's promise not to argue it); United States v. Nahoom, 791 F.2d 841, 845 (11th Cir. 1986) ("A defendant's plea of not guilty in a conspiracy case places his intent at issue, and intent remains at issue unless the defendant affirmatively removes it from the case."). Thus, the majority's decision that Hubbard did not put intent at issue because he argued he was not present, conflicts with the majority of courts where it has found that intent in specific intent crimes is automatically at issue.

Furthermore, during closing arguments, Hubbard argued that he lacked the specific intent to commit Attempt Murder With Use of a Deadly Weapon. 6 AA 1122-23. In fact, Hubbard's argument on intent spans a total of four pages. 6 AA 1126-29. Hubbard was able to successfully argue he lacked the requisite intent, demonstrated by the jury's acquittal of the Attempt Murder with Use of a Deadly Weapon charge. 6 AA 1169. Thus, it is clear that Hubbard was disputing certain elements of the crime and not merely conceding that all elements of the crime occurred but he did not do it. The majority's conclusion that Hubbard did not put intent "at issue" allows a defendant to have it both ways. A defendant will be able to pick and choose which element of the crime to dispute while hiding behind the

shield that he is alleging he was never present and thus, the elements are technically not "at issue" when it comes to an admission of a prior bad act. This result conflicts with the Nevada Legislature's intention of allowing the State to admit a prior bad act for a non-propensity purpose. If the majority ruling stands, a defendant can always hide behind the shield of alleging he was never there and be protected from the admission of a prior bad act, but also dispute the elements he sees fit. As such, the majority's ruling cannot stand and warrants this Court's review.

Moreover, the majority's conclusion that the prior burglary conviction was not relevant for any of the proffered nonpropensity uses, conflicts with Ford, 122 Nev. at 806, 138 P.3d at 507-08, where this Court held that Ford's prior burglaries were admissible to prove his intent and/or the absence of mistake in committing the charged burglary. As in the present case, Ford maintained that he was not in the neighborhood where the burglary occurred and had not put his intent "at issue," but his prior burglaries were nonetheless relevant to prove intent and absence of mistake. Id. The conclusion that no reasonable judge could find a prior burglary is relevant to intent in committing a subsequent burglary is flawed and this Court has held otherwise.

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The Bad Acts were Admissible to Establish Identity

The district court's lack of finding for the prior 2012 burglary to be admissible for the purpose of identity does not preclude a reviewing court from considering identity as a non-propensity purpose. See McNelton v. State, 115 Nev. 396, 405, 990 P.2d 1263, 1269 (1999) (a district court's failure to hold a Petrocelli hearing does not require reversal if the record is sufficient to determine the prior bad act was admissible). The majority erred in finding that the two crimes do not have sufficient similarities to prove identity. Despite Judge Tao concluding that he would not address identity because he believed that the admission of the prior bad act for intent was enough, Judge Tao found that the two crimes are "strikingly similar and that the 2012 crime was highly related to elements of the 2013 crime." Order, p. 27-28.

Specifically, in both crimes (1) Hubbard participated in the offense with two other people, (2) Hubbard and his co-conspirators targeted homes as opposed to businesses, (3) they drove to the location, (4) they parked in front of the house, (5) they knocked or rang the doorbell prior to entering, (6) once they gained entry, they began ransacking the residence, (7) they stole personal property from the residence, (8) they did not attempt to conceal their face, and (9) they fled the residence in the vehicle that was driven to the scene. The majority's attempt to distinguish the two crimes by stating that one occurred in the morning while the other occurred in the

evening and different methods were used to enter the house is merely a grasp for differences and is ignoring the standard of review. Canada v. State, 104 Nev. 288, 292, 756 P.2d 552, 554 (1988) (the decision to admit a prior robbery conviction for identity purposes is within the sound discretion of the trial court). Driving and parking directly in front of a house and then loudly announcing your arrival by knocking and ringing the doorbell prior to committing a burglary can hardly be categorized as crimes lacking sufficient uniqueness to establish identity. Furthermore, that conclusion could not be reached under a manifest abuse of discretion standard especially considering the defendant is claiming mistaken identity. See Canada, 104 Nev. at 293, 756 P.2d at 555 (holding sufficient similarities when both robberies took place in deserted bars late at night, one person entered a lone and ordered a beer, at least one person wore a mask, and both robberies had armed perpetrators) (the difficulty of a victim in identifying the perpetrators "argues for, rather than against, the admission" of a prior robbery). As such, the majority's lack of disregard for the standard of review warrants this Court's review.

There was Overwhelming Evidence and the Conviction Should Not be Reversed

Even if the district court erred in admitting the bad acts evidence, the evidence was overwhelming against Hubbard, thus Hubbard's conviction should not be

reversed. See Richmond v. State, 118 Nev. 924, 934, 59 P.3d 1249, 1255 (2002). Contrary to the majority's erroneous ruling, the circumstantial evidence in this case was overwhelming. See Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980) (circumstantial evidence can uphold a conviction)

An hour before the robbery, the surveillance photos from Rhodes Ranch community show Hubbard arriving at 7:53 p.m. in a red Chevy Impala. 6 AA 1050-54. Hubbard admitted that he drove to Las Vegas in a red Chevy Impala. 6 AA 982. Hubbard called Joseph at his number, 702-236-4175, when he arrived at the Rhodes Ranch gate at 7:54 p.m. and 7:58 p.m. 6 AA 1055-56. Joseph resided at the Rhodes Ranch community, specifically at 64 Honors Court. 5 AA 878-79.

At 8:43 p.m., the victim's neighbor's surveillance video showed a dark colored SUV pulling up and then three men barging into the front door of the victim's house. 5 AA 862. The victims testified that the men robbed them at gun point. 2 AA 225-28, 243, 300, 316. The darker, thicker, broader, and heavier black male, identified as Hubbard, ran upstairs. 2 AA 284. David fired his gun at Hubbard when he reached the top of the stairs and hit him in the shoulder. 1 AA 144-147. After the shots were fired, the three men began to flee the residence. 3 AA 432. At the end of the neighbor's video, it showed Hubbard and Joseph run back to the SUV and drive away. 5 AA 865. Then it shows a flash where Carter shot into

the house and then ran away on foot. 5AA 865-66. David called 911 at 8:51 pm to report the robbery. 1 AA 171. Five minutes later, at 8:56 p.m., Joseph called 911, from the number 702-236-4175, to report that his friend had been shot and was at the Chevron Station at Durango and Windmill. 5 AA 867-74. At this exact same time, at 8:56 p.m., the cell phone pings from that number, 702-236-4175, and showed that Joseph was traveling northbound on Durango near Windmill where the Short Line Express was located. 5 AA 876-78, 880-81.

Shortly after, Hubbard stumbled into the Short Line Express at 8096 South Durango which is approximately 4 miles away – about 7 minutes – from 657 Shirehampton Drive—the victim's address. 3 AA 441, 448-49; 5 AA 856. Hubbard had a gunshot wound in the same exact area where David shot the suspect. 3 AA 449, 481, 595. At 8:58 p.m., about 7 minutes after David reported the robbery, the cashier at Short Line Express called 911 to report Hubbard's gunshot wound. 3 AA 448, 460; 5 AA 874. Hubbard refused to tell the 911 operator, the paramedics, the police officers, and the detectives how he obtained his gunshot wound. 3 AA 456, 488, 594-95.

The surveillance video at Rhodes Ranch showed a SUV matching the description of the vehicle used in the robbery entering Rhodes Ranch on 8:59 p.m. on August 22, 2013. 5 AA 890-91.

Both Carter and Hubbard were arrested the night of the crime. 5 AA 855, 889. Upon being booked at the Clark County Detention Center, Hubbard called Joseph at the same number that Joseph used to make the 911 call, 702-236-4175. 5 AA 888-89. However, Joseph did not answer because the cell phone was suspiciously disconnected the day after the robbery. 5 AA 888-90. Hubbard attempted to call Joseph a total of seven times at that number while Hubbard was in jail. 5 AA 889. Moreover, while Hubbard was in jail, Hubbard called three of the same numbers that also appeared on Joseph's phone records. 5 AA 895-96. Additionally, Carter also called some of the same people that Joseph was calling. 5 AA 896.

As such, there is an overwhelming amount of evidence connecting Hubbard to the robbery. To believe that Hubbard did not commit the crime, a person would have to believe an incredible series of coincidences. A person would have to believe that a red Chevy Impala, the same car Hubbard drove to Vegas in, coincidentally arrived at Joseph's home an hour before the robbery. Joseph coincidentally called 911 to report another friend, besides Hubbard, was shot. Joseph coincidentally was driving by the Short Line Express at the same time Hubbard was being dropped off. Hubbard coincidentally had a gunshot wound in the same place that David shot the robber. Joseph coincidentally drove a SUV, matching the same description of

the SUV used in the robbery, back to his house ten minutes after the robbery occurred. That Carter, Hubbard, and Joseph, coincidentally called the same numbers, even though Hubbard claimed he had never met Carter before. For the majority to conclude that there is not overwhelming evidence against Hubbard, because the victims did not make an in-court identification, Carter claimed to not know Hubbard, and no surveillance videos showed a vehicle dropping Hubbard off, is unreasonable. Moreover, the evidence explains why none of the victims made an in-court identification of Hubbard and only one victim identified Hubbard in a photo lineup. Hubbard immediately went upstairs after the three men barged into the house and only David was upstairs. 1 AA 143-49. The rest of the family members were downstairs and many of them identified Carter as the slender, tall black male with the firearm. 2 AA 242-43, 291, 536. Moreover, David was able to identify Joseph as one of the perpetrators. 1 AA 177-79; 5 AA 894-85. Kenneth did make a positive identification of Hubbard and stated the picture was an 8 out of 10 on the resemblance level. 3 AA 573. Furthermore, although the other family members were unable to make a facial identification of Hubbard, their description of the third assailant matches Hubbard's description. 2 AA 238-40,379; 3 AA 396-404; 5 AA 897-98.

Further, it was only after the State presented the above overwhelming evidence, that it argued that Hubbard's prior offenses should be considered to show that Hubbard was not randomly shot walking down the street and that Hubbard had the intent to commit a crime when he entered the house. 6 AA 1095, 1100. As such, the State minimally referenced Hubbard's prior offenses in argument and any error in its admission did not substantially affect the jury's verdict.

Accordingly, the majority heavily erred in finding there was not overwhelming evidence against Hubbard.

The Majority Disregards the Standard of Review

Although the majority acknowledges that the district court's decision will not be overturned absent a manifest abuse of discretion, which is a clearly erroneous interpretation or application of the law or rule, it then finds that the court manifestly abused its discretion because the evidence had no non-propensity use. Order, pp. 10. As Judge Tao notes in his dissent a," [r]eview for 'abuse of discretion' is . . . one of the most deferential standards that exists in appellate law." Order, pp. 21. In crafting the Order, the majority completely disregards the standard of review and appears to be reviewing the issues *de novo*. The majority found that the non-propensity purpose of intent did not apply because it was never at issue. Order, p. 15. However, it fails to give the district court deference that intent was at issue

because Hubbard never conceded intent and never stated his theory of defense at trial. Further, the district court did not err in interpreting existing Nevada Supreme Court law because the majority's ruling depends on new rules that it created. Lastly, the majority failed to conduct a proper overwhelming evidence analysis and completely minimizes a witness's identification of Hubbard in a lineup, the fact that Hubbard was shot in the same exact place as the perpetrator, that Hubbard stumbled into a convenience store that is 7 minutes away from the victim's house right after the robbery, and that Joseph's cellphone records indicate that Hubbard was with him. As such, the State is aggrieved from the Majority's Order.

WHEREFORE, the State respectfully requests Supreme Court review of the Majority's Order on the prior-bad-act issue and AFFIRM Hubbard's conviction.

Dated this 19th day of April, 2016.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar # 001565

BY *<u>/s/ Ofelia Monje</u>*
OFELIA MONJE
Deputy District Attorney
Nevada Bar #011663
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2750

CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this petition for review or answer 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this petition complies with the type-volume limitations of NRAP 40, 40A and 40B because it is proportionately spaced, has a typeface of 14 points and contains 4,561 words.

Dated this 19th day of April, 2016.

Respecfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar # 001565

BY */s/ Ofelia Monje*
OFELIA MONJE
Deputy District Attorney
Nevada Bar #011663
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2570

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on April 19, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT
Nevada Attorney General

BRENT D. PERCIVAL, ESQ.
Counsel for Respondent

OFELIA MONJE
Deputy District Attorney

/s/ j. garcia
Employee,
Clark County District Attorney's Office

OLM/Vivian Luong/jg