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IN THE SUPREME COURT OF THE STATE OF NEVADA

CORY DEALVONE HUBBARD, Appellant, vs. THE STATE OF NEVADA, Respondent.	Case No.: 66185 RESPONSE TO STATE'S PETITION FOR REVIEW BY SUPREME COURT

COMES NOW, Appellant CORY HUBBARD, by and through his counsel, Brent D. Percival, and submits this pleading as his Response to State's Petition for Review which was filed on April 19.2016.

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This Response is based upon the following memorandum of points and authorities and all papers and pleadings on file with this Court.

DATED this 26th day September, 2016.

Respectfully Submitted,

/s/ Brent D. Percival

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MEMORANDUM OF POINTS AND AUTHORITIES

I. ADMISSIBILITY OF OTHER CRIMES/BAD ACTS EVIDENCE:

In the Petition for Review, the state requested this Honorable Court review the Court of Appeals' majority opinion regarding that court's analysis of the inadmissibility of other crimes evidence at Mr. HUBBARD's trial. Additionally, the state requested this Court review the standard of review applied by the majority in determining that the district court's erroneous admission of the other crimes/bad act evidence was a manifest abuse of discretion.

The state asserted that the majority opinion's analysis of the other crime/bad act issue: (1) "misconstrues this Court's 'at-issue' analysis and creates a new rule"; (2) contains an "intent analysis" that is "flawed and contradicts current law"; (3) was wrong as "the bad acts were admissible to establish identity"; and, (4) was wrong because "there was overwhelming evidence and the conviction should not be reversed."[1]

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[1] The Petition also challenges the alleged fact that the majority "sua sponte" decided to raise the "at-issue requirement that was not briefed by either party." While these words were included twice on p.3, the state failed to provide any authority or analysis regarding why this alleged action was inappropriate. Consequently, the inclusion of these extraneous words should not impact whether this Court employs its discretion to review any of the questions/issues presented by the state's Petition and Mr. HUBBARD will not respond to this

Finally, the Petition asserted that "the majority disregards the standard of review."

The introductory pages and the words sprinkled into the body of the Petition couch the presented questions as: "an issue of first impression," "an opinion that has statewide implications," an opinion that "conflicts with Ford v. State," and, an opinion that conflicts with the intent analysis espoused "by a majority of federal circuit courts." These words mirror the factors enunciated in NRAP 40B(a)(1-3).

However, the actual arguments contained in the body of the Petition establish that the state simply disagrees with the majority's decision regarding the inadmissibility of the Washington residential burglary. It is also clear that the state doesn't agree with the "manifest injustice" analysis of the majority. Thus, the Petition's arguments are spurred by the state's dislike or disagreement with the majority opinion.

Further, each of the above noted questions asserted by the state are not supported by this Court's precedent regarding the admissibility of other crimes/bad acts evidence.

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supposition.

Additionally, the Court of Appeals applied the correct standard of review -"manifest abuse of discretion" - which conformed with the standard regularly applied by this Court. Consequently, this Court should deny the state's request to review the majority opinion.

Additionally, the state's pleading, ultimately, requires this Court to engage in an extensive review of the facts underlying the majority's resolution of the issues presented by Mr. HUBBARD's direct appeal. Based upon this fact, this Court should not exercise its discretion and should determine that review by this Court is unwarranted.

Finally, review of any question posed in the Petition should be denied because the Petition exhibits a blatant purposeful misrepresentation of authority by the state. One argument in the Petition is based upon the state's assertion that the majority could not apply the Newman other crime analysis because that case involves a general intent crime while Mr. HUBBARD was charged with burglary - a specific intent crime.[2]

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[2] Petition at 8.

In furtherance of this argument, the state cited to United States v. Miller and declared that this case "**distinguishes general intent crimes and holds that 'intent is automatically at issue in specific intent crimes**.'"[3]

As established by the following argument, in actuality the Miller decision completely eliminated any supposed distinction in the admission of other crime/bad act evidence based on whether the charges are specific or general intent crimes. Moreover, given Miller's lengthy discussion about the principles underlying the admission of other crimes evidence, it was impossible for the state to read Miller and inadvertently cite its arguments and conclusions in such a mendacious manner. That the state blatantly misrepresented an authority establishes the lengths that it will go to in order to obtain review from this Court. This fact should result in this Court's complete denial of the state's entire Petition.[4]

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[3] Id. Emphasis added.

[4] Even though Mr. HUBBARD believes that this Court should completely deny the state's request for discretionary review based upon its action regarding the Miller case, Mr. HUBBARD will present arguments responsive to the other issues raised in the Petition.

B. The admissibility of other crime/bad act evidence is not dependent upon whether the crime committed was a general or specific intent crime

In support of the Petition's allegation that the majority's "intent analysis is flawed," the state manufactured an analysis that was never part of the Newman decision. The state claimed that Newman's conclusion that "[i]dentification of an at-issue, nonpropensity purpose for admitting prior-bad-act evidence is a necessary first step of any NRS 48.045(2) analysis" only applied to general intent crimes.[5]

A review of Newman clearly establishes that this Court was not concerned with whether the crimes charged were either a general or specific intent crimes. The terms - general or specific intent - are not found anywhere in the Newman opinion. Rather, this Court was clearly focused on the defense actually raised regarding the crime of child abuse in relationship to the admissibility of the other bad acts.

In trying to further manufacture a distinction between Mr. HUBBARD's case and Newman, the state raised the fact that Newman cited to U.S. v. Miller.

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[5] Newman v. State, 289 at 1178. See Petition at 8.

Then, the state falsely claimed that Miller "distinguishes general intent crimes and holds that 'intent is automatically at issue in specific intent crimes.'"[6]

Contrary to this assertion, the Seventh Circuit Court of Appeals noted, in Miller, that,

> the parties debate whether intent is always at issue, and whether the answer to that question depends on the "general intent" or "specific intent" nature of the crimes charged. We explained in United States v. Hicks, 635 F.3d 1063, 1071 (7th Cir.2011), ...that **if a mere claim of innocence were enough to automatically put intent at issue, the resulting exception would swallow the general rule against admission of prior bad acts**.[7]

Immediately after recognizing that a claim of innocence would swallow the general rule of inadmissibility, the Seventh Circuit further noted that the government, like the state in the Petition,

> attempts to distinguish Hicks as addressing only general intent crimes like actual drug distribution, not specific intent crimes like possession with intent to distribute. But the point in Hicks applies broadly.[8]

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[6] Petition at 8. Emphasis added.

[7] United States v. Miller, 673 F.3d 688, 697 (7th Cir. 2012).

[8] Id.

Finally, while that Court recognized that it had previously stated that "intent is automatically in issue" in specific intent crimes," it explained prior statement the cited case had:

> also clarified that identifying ... [an] exception, such as intent, that is 'at issue' is only the first step of the analysis. Identification of an at-issue, non-propensity ... exception is a necessary condition for admitting the evidence, but not a sufficient condition. ***Whether the intent element is specific or general for the charged crimes, all bad acts evidence must be balanced for probative value and unfair prejudice.***[9]

Given the state's willingness to purposefully mislead this Court in an attempt to obtain review of the issues it doesn't agree with, should result in denial of all issues raised in the state's Petition.

C. This Court has rejected the state's assertion that intent is "automatically at issue" and the majority opinion does not enunciate a "new rule" but correctly applies this Court's precedent regarding admission of other crime/bad act evidence

As long ago as 1993, this Honorable Court specifically recognized that prejudicial other crimes/acts evidence is not admissible until the issue, for which the other crime evidence is alleged to be relevant, is actually raised.

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[9] Id.

> 'Before an issue can be said to be raised, which would permit the introduction of such evidence so obviously prejudicial to the accused, it must have been raised in substance if not in so many words, and the issue so raised must be one to which the prejudicial evidence is relevant. *The mere theory that a plea of not guilty puts everything material in issue is not enough for this purpose.*'[10]

Clearly, in Taylor, this Court ruled against the position espoused by the state that "intent is automatically at issue."[11] Thus, Taylor establishes that the majority's opinion is not a "new rule" and does not contradict "this Court's long-standing, *implicit* practice."[12]

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[10] Taylor v. State, 109 Nev. 849, 854, 858 P.2d 843 (1993). Emphasis added.

Like the majority opinion, other state appellate courts have also recognized that intent is not automatically at issue when a crime has allegedly been committed. See Barnett v. State, 893 A.2d 556, 559 (Del. 2006)(the state's proposition that in "*any* case requiring proof of intent, intent is *automatically* deemed to be at issue for the purposes of admitting other-crime evidence" is not supported by prior authority); see also State v. Brown, 44 Kan. App. 2d 344, 352, 236 P.3d 551, 558 (2010)(a defendant's not guilty plea is not sufficient to place the person's intent in dispute at trial for the purpose of admitting other crime/bad act evidence); and, State v. Hutton, 258 Or. App. 806, 812, 311 P.3d 909, 913 (2013)("intent is not a contested issue [for admission of other crime/bad act evidence] in every case merely by virtue of the fact that the state must prove that element.").

[11] Petition at 3.

[12] Petition at 3. Emphasis added. What this Court's "implicit practice", with respect to the admission of other crime/bad acts evidence, is never specified by the state. It is also unknown how the state could allege that an "implicit practice," which by definition is never

Rather, the majority's position is completely consistent with numerous decisions which recognize that bad act evidence is presumptively inadmissible.[13] Also, the majority opinion fairly applied this Court's determination that:

> the use of uncharged bad act evidence to convict a defendant remains heavily disfavored in our criminal justice system because bad acts are often irrelevant and prejudicial and force the accused to defend against vague and unsubstantiated charges.[14]

Based upon these two bedrock principles, this Court requires district courts review each asserted basis to determine if the other crime/bad act evidence is actually "relevant to the crime charged and for a purpose other than proving the defendant's propensity."[15]

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expressed, can control either the district court's admission of other crimes evidence or an appellate court's review of the admission of this kind of evidence.

[13] Bigpond v. State, __ Nev. __, 270 P.3d 1244, 1249 (2012); Ledbetter v. State, 122 Nev. 252, 259, 129 P.3d 671, 677 (2006); Rosky v. State, 121 Nev. 184, 195, 111 P.3d 690, 697 (2005).

[14] Newman v. State, 129 Nev. Adv. Op. 24, 298 P.3d 1171, 1178 (2013); see also Bigpond, 270 P.3d at 1249; Tavares v. State, 117 Nev. 725, 730, 30 P.3d 1128, 1131 (2001) holding modified by Mclellan v. State, 124 Nev. 263, 182 P.3d 106 (2008) and Armstrong v. State, 110 Nev. 1322, 1323, 885 P.2d 600 (1994).

[15] Bigpond, 270 P.3d at 1249-50.

Further, district courts must apply the individual tests announced by this Court to determine the admissibility of each purportedly relevant basis.

In order for other crimes/bad act evidence to be admissible as evidence of state of mind, ie. intent, motive and/or plan, both this Court and the Court of Appeals for the Ninth Circuit require significant similarity between the other crime/bad act evidence and the charged crime.[16] For other crime/bad act evidence to be admissible as absence of mistake, this Court has recognized that this "exception is applicable only when the evidence tends to show the defendant's knowledge of a fact material to the specific crime charged."[17]

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[16] See Rhymes v State, 121 Nev. 17, 22, 107 P.3d 1278 (2005)(in affirming the admission of the uncharged acts, this Court noted the "strong similarity" between the defendant's use of his job as a masseuse to enable him to commit the uncharged acts and the fact that defendant discussed his employment as a masseuse and his massaging the leg of the victim in the charged crime). See also, United States v. Spillone, 879 F.2d 514, 519 (9th Cir. 1989) (court holds that if used to prove intent, the prior act must be similar to the offense charged citing United States v. Marashi, 913 F.2d 724, 735 (9th Cir. 1990).

[17] Cirillo v. State, 96 Nev.489, 492 (1980).

Admissibility of other crime evidence that is asserted to be relevant to identity requires the characteristics of both the prior act and the charged crime be distinctive and unique.[18]

During pretrial litigation of the state's motion to admit the Washington state residential burglary during Mr. HUBBARD's trial, the district court did not find any significant similarity existed between the Washington crime and the Las Vegas burglary. Nor did the district court determine how the Washington crime showed Mr. HUBBARD's knowledge of a fact material to the alleged burglary. Finally, the district court did not enunciate how the characteristics of the Washington crime and the Las Vegas crime were distinctive and unique.

Nonetheless, the judge indicated that the conviction would be admissible as absence of mistake.[19] When the state asserted that the Washington conviction should also be admissible regarding motive and

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[18] See Coty v. State, 97 Nev. 243, 244, 627 P.2d 407, 408 (1981); Mayes v. State, 95 Nev. 140, 591 P.2d 250 (1980); see also United States v. Perkins, 937 F.2d 1397, 1400 (9th Cir.1991) (quoting United States v. Powell, 587 F.2d 443, 448 (9th Cir.1978)). Emphasis added.

[19] I AA 87 lines 11-13.

intent,[20] the judge added those uses as a relevant basis for admission of the Washington conviction.[21]

Although the district court did not apply the relevant tests, the majority of the Court of Appeals applied each specific test to determine whether the Washington crime was admissible pursuant to the stated exceptions: absence of mistake, motive and intent exceptions.[22] After application of each specific test, the majority opinion properly concluded that "the evidence was not relevant for any of the State's proffered nonpropensity uses."

As the majority opinion correctly applied the required admissibility test, enunciated by this Court, for absence of mistake, motive and intent, the majority opinion did not announce a "new rule" of admissibility.

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[20] I AA 87 line 14.

[21] I AA 87 line 15. During this hearing, when it is clear that the state's enunciation of any basis for admission would be accepted by the court, the state never mentioned or requested the Washington crime be admissible with regard to identity.

[22] Order at 13-17. Although, the presumption of inadmissibility was only overcome with respect to absence of mistake, motive and intent, the majority also analyzed whether the Washington crime could have been admitted to prove identity. Order at16-17.

Moreover, the state did not, because it could not, enunciate any substantive challenge to the majority's application of this Court's other crimes decisions. Therefore, this Honorable Court should deny the state's request for review as the issues raised in the Petition do not fulfill the standards of review and principles enunciated in NRAP 40B.

D. The majority opinion does not misconstrue this Court's analysis in Newman and Honkanen

As a basis for establishing that this Court should exercise its discretion and review the majority opinion, the state asserted that the majority opinion misconstrued this Court's analysis in Newman and Honkanen.[23] This is a patently absurd statement.

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[23] While neither controlling nor fully measuring this Court's exercise of discretion, NRAP 40B sets out three factors that will be considered when determining whether to review a Court of Appeals decision. One such factor is whether the decision of the Court of Appeals conflicts with a prior decision of the Court of Appeals, the Supreme Court or the United States Supreme Court.

The state's description of the majority's opinion as "misconstruing" is important because that word equates to confusing, misapprehending or misinterpreting. Issuing "conflicting" opinions is not the same as "misconstruing opinions" authored by this Court. Therefore, it does not appear that this Court should exercise its discretion and review the Court of Appeals' majority opinion.

In trying to convince this Court that the majority opinion was ungrounded and misconstrued this Court's bad acts analysis, the state relied solely on the *facts* of Newman.[24] Amazingly, the state did not enunciate or distinguish the clear holding of Newman which specified that:

> [i]dentification of an at-issue, nonpropensity purpose for admitting prior-bad-act evidence is a necessary first step of any NRS 48.045(2) analysis.[25]

Rather than misconstruing this holding, the majority opinion began the analysis of the admissibility of the Washington crime with this very premise.[26]

The Petition utterly failed to enunciate any legal challenge to majority's reliance upon and interpretation of Newman. As the majority opinion did not "misconstrue" Newman and also did not conflict with Newman, this Court should deny the state's request to review the majority opinion.

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[24] See Petition at 4.

[25] Newman v. State, 129 Nev. Adv. Op.24, 289 P.3d 1171, 1178 (2013).

[26] Order at 11.

Thereafter, the state conducted the same *factually* focused analysis of Honkanen. Here, as was done in Newman, the state completely failed to discuss or distinguish the clear holding of that case:

> if none of these statutory exceptions [motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident] *are issues at trial*, it is impermissible to introduce the "other crime, wrong or act" into evidence.[27]

In the Petition, the state also neglected to enunciate a legal challenge to the majority's reliance and interpretation of Honkanen. Therefore, it is clear that the majority opinion did not "misconstrue" this Court's analysis in Honkanen nor did the opinion conflict with this case. It is submitted that this Court should deny the state's request for review on this basis.

E. The majority opinion correctly determined that other crime/bad act evidence is only admissible when a nonpropensity purpose is "at-issue" through the defense at trial

The majority opinion's secondary conclusion that "a nonpropensity purpose is only at-issue when the defendant raises the purported defense at trial"[28] is a correct statement of law.

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[27] Honkanen v. State, 105 Nev. 901, 902, 784 P.2d 981, 982 (1989).

[28] Order at 11.

This conclusion is supported by Honkanen's requirement that statutory exceptions must actually be "at-issue." Further, the majority's interpretation of Honkanen is supported by numerous other opinions published by this Honorable Court.

> Twenty-three years ago, this Court specified that,
>
> > the state may not legitimately claim that the evidence was relevant to rebut claims of accident or mistake because appellant did not present a defense based on accident or mistake.[29]

This conclusion supports the majority opinion's determination that a relevant defense must be raised before other crime/bad act evidence is admissible. In Rosky, this Court concluded that,

> Rosky's identity was not at issue during the trial. CJW clearly identified him in court on multiple occasions and the police had no doubt that Rosky was the proper suspect. Going further, Rosky admitted in his statement to his interactions with CJW.[30]

Obviously, if identity is not raised as a purported defense at trial, the other crime/bad act evidence is not admissible.

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[29] Taylor, 109 Nev. at 854

[30] Rosky, 121 Nev. at 197.

In Ledbetter, this Court determined that,

> Ledbetter's identity was not at issue during trial, and we reject the State's argument that the prior act evidence was admissible under this exception. Whether Ledbetter's actions were the result of an accident, mistake or unintentional conduct also do not appear at issue in this case, and we reject the State's reliance upon these exceptions as a basis for admission.[31]

Another recognition that the statutory exceptions are not admissible unless a relevant nonpropensory issue has been raised at trial.

Finally, in 2013, this Court recognized that when a defendant does not mount a specific defense and the other crime/bad act evidence does not disprove the actual defense presented, prior bad acts should not be admitted. When the statutory exception is irrelevant to the defense mounted, other crime/bad act evidence is inadmissible.[32]

All of these cases support the majority's decision that a defense relevant to the NRS 48.045(2) exception must be raised or be "at issue" before other crime/bad act evidence is admissible.

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[31] Ledbetter, 122 Nev. at 260. Emphasis added.

[32] Newman, _ Nev. _, 298 P.3d 1171, 1178 (2013)(citing Honkanen v. State, 105 Nev. 901, 902, 7884 P.2d 981, 982 (1989)).

Moreover, the majority's opinion that a relevant defense must be "at-issue" is squarely in accord with this Court's pronouncement that "the prosecution cannot credit the accused with fancy defences in order to rebut them at the outset with some damning piece of prejudice."[33]

Therefore, the state's contentions that the majority opinion announced a "new rule" which presented "an issue of first impression for this Court" and "has statewide implications" as "it alters the burden the State is required to meet at a Petrocelli hearing" are completely unfounded and unsupported by any opinion authored by this Court. Consequently, this Court should deny the state's request to review the majority opinion of the Court of Appeals.

F. Other state appellate courts, which interpret state statutes identical to or extremely similar to NRS 48.045(2), require that a defense must be raised or be "at issue" before other crime/bad act evidence, particularly for the issue of intent, shall be admissible

In 2007, the Indiana Court of Appeals recognized that its Supreme Court had ruled that evidence of other crimes/wrongs/acts may be admitted to prove intent of the defendant only when he "has alleged a particular contrary intent at trial."

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[33] Taylor, 109 Nev. at 846. Emphasis added.

Specifically, for other crime/bad act evidence to be admissible regarding intent,

> the defendant must go beyond merely denying the charged culpability and must affirmatively present a claim of contrary intent through his opening statement, cross examination or own case-in-chief.[34]

Thus, the Indiana Supreme Court and Appellate Court have held, like the majority in the case at bar, that the defendant must raise a defense that places the nonpropensity purpose at-issue for other crime/bad act evidence to be admissible.

In 2010, the Texas Court of Appeals recognized that when a defendant does not contest or attempt to refute the state's evidence concerning intent, evidence of other crime/bad acte is inadmissible as the defense never "put intent in issue." Specifically, in order for other crime/bad act evidence to be admissible regarding intent, the State's evidence regarding intent must either be contradicted by the defendant or undermined by cross-examination of the state's witnesses.

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[34] Maymon v. State, 870 N.E.2d 523, 528–29 (Ind. Ct. App. 2007). See also Lafayette v. State, 917 N.E.2d 660, 662-63 (Ind. 2009).

An assertion of a defense resting upon the State's failure to prove the defendant committed the crime does not support admission of other crime/bad act evidence because it is lacks any relevance in this situation.[35]

Clearly, Texas appellate courts, like Indiana appellate courts, concur with the majority's determination that the defendant must raise a defense that places the nonpropensity purpose at-issue for other crime/bad act evidence to be admissible.

Like the Texas Court of Appeals, in 2010, the Kansas Court of Appeals stated that in order for other crime/bad act evidence to be admissible regarding intent, the trial court must determine whether the defendant's intent is "in dispute at trial."[36] This conclusion was based directly upon the Kansas Supreme Court's statement that,

> the crucial distinction in admitting other crimes evidence ... on the issue of intent is not whether the crime is a specific or general intent crime but whether the defendant has claimed that his ... actions were innocent.[37]

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[35] See Jackson v. State, 320 S.W.3d 873, 885 (Tex. App. 2010).

[36] State v. Brown, 44 Kan. App. 2d 344, 351, 236 P.3d 551, 558 (2010).

[37] Brown, 236 P.3d at 558.

Therefore, when a defendant presents a defense, that does not assert that his actions were innocent, other crime/bad act evidence is not admissible to prove intent. A defendant's testimony that asserts a general denial of commission of the act underlying the charged crime does not put forward an "innocent explanation."[38]

Thus, the appellate courts of Kansas, Indiana and Texas concur with the majority's determination that the defendant must raise a defense that places the nonpropensity purpose at-issue for other crime/bad act evidence to be admissible.

Like the appellate courts of Indiana, Texas, and Kansas, the Illinois Court of Appeals has also concluded that "other-crime evidence may not be admitted to prove intent where the defendant's intent is not contested at trial."[39] This Court recognized that a defendant stating he did not commit the crime at all does not require a jury to "wrestle with [the question] of intent." Likewise, testimony by a defendant that he was not present when the crime was committed does not raise the question of intent.[40]

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38 Brown, 236 P.3d at 558.

39 People v. Clark, 35 N.E.3d 1060, 1065 (Ill. App. Ct. 2015).

40 Clark, 35 N.E.3d at 1066.

Clearly, the Illinois appellate courts also concur with the majority's determination that the defendant must raise a defense that places the nonpropensity purpose at-issue for other crime/bad act evidence to be admissible.

Finally, the South Carolina Court of Appeals,[41] the Minnesota Supreme Court,[42] and the Florida Court of Appeals [43] also concur with the majority's determination that the defendant must raise a defense that places the nonpropensity purpose at-issue for other crime/bad act evidence to be admissible.

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[41] State v. Fonseca, 383 S.C. 640, 648, 681 S.E.2d 1, 5 (S.C. Ct. App 2009)(in a sex crime when there is no challenge to the occurrence of the physical act itself other crime evidence relevant to intent is not admissible).

[42] State v. Courtney, 696 N.W.2d 73, 83–84 (Minn. 2005) (when the defense is based on the claim that the defendant did not commit the crime, admission of other crime evidence, specifically to prove intent, was error).

[43] Jackson v. State, 140 So.3d 1067, (other crime evidence is admissible to prove a material fact in issue. "A material fact is not at issue simply because it relates to an element of the charged crimes and the defendant has pled not guilty." When the defense presented at trial was that the defendant was not involved in the crime, did not assert that he did not intend to commit an offense, and his counsel argued that the witness' allegations about the incident were not credible, other crimes evidence is inadmissible to prove intent.).

It is recognized that the opinions of other state appellate courts do not control the decisions of this Honorable Court. Nonetheless, they are instructive regarding admission of other crimes only when a defense is presented either through cross examination or in the defendant's case in chief. As these other state courts of appeal agree with the majority's conclusion, it is submitted that the analysis enunciated by the majority opinion is correct. This Court should deny the state's request for review of the majority opinion.

G. This Court should not review the majority opinion regarding the state's complaints that "the bad acts were admissible to establish identity" and "there was overwhelming evidence and the convictions should not be reversed"

NRAP 40B establishes that this Court will not automatically review parts of or an entire opinion rendered by the Court of Appeals. NRAP 40B specifically states this Court's review of a Court of Appeal's opinion "is not a matter of right but of judicial discretion." Moreover, this Court will exercise its discretion to review decisions in which the question presented is one of first impression of general statewide significance; when the decision of the Court of Appeals conflicts with a prior decision

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of the Court of Appeals, the Supreme Court, or the United States Supreme Court; and/or when the case involves fundamental issues of statewide public importance.

The portion of the Petition, regarding the admissibility of other crimes/bad acts, concludes by asserting that "the bad acts were admissible to establish identity"[44] and "there was overwhelming evidence and the conviction should not be reversed."[45] The state doesn't even bother to pretend that either of these issues present questions relevant to the discretionary factors enunciated in NRAP 40B(a)(1-3).

The state just doesn't like the majority's decisions regarding these issues. This fact is clearly evident in the section asserting the bad acts were admissible to establish identity.[46]

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[44] Petition pp.13-14.

[45] Petition pp.14-19

[46] Throughout the Petition to state refers to the other bad acts. During pretrial litigation, only one bad act was allegedly admissible pursuant to NRS 48.045(2) - the 2012 Washington residential burglary. When Mr. HUBBARD testified he admitted he had sustained four felony convictions, one being the 2012 residential burglary. However, these convictions were not admitted into evidence and were certainly not admissible as other crimes/bad act evidence.

Both the majority and the dissent concluded that the Washington crime did not fulfill the test required for the other crime/bad act evidence to be admissible as to identity. Nonetheless, in the Petition, the state went through the supposed similarities of the facts that it believed established the Washington burglary was admissible for the purpose of identity.[47]

Additionally, the state espoused, in a fact intensive disagreement with the majority opinion's conclusion, that the evidence of Mr. HUBBARD's guilt was not overwhelming.[48] Review by this Court should not be granted when the purported issues rely upon a determination of the facts.

Plainly the state disagrees with and dislikes the resolution of these issues by the Court of Appeals. Disagreement with and dislike of a resolution should not provide a basis for review of the issues by this Honorable Court. Review of these kinds of issues is not consistent with NRAP 40B's recognition that review by this Court is not a matter of right but one of discretion. Therefore, it is requested that this Court deny the state's request to review these particular issues.

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[47] Petition at 13-14.

[48] Petition at 14-19.

H. The majority applied the correct standard of review in determining that the district court's decision to admit evidence of the Washington residential burglary was a "manifest abuse of discretion" which was not harmless

This Court has consistently held that a "trial court's determination to admit or exclude evidence is to be given great deference and will not be reversed absent manifest error."[49] In the case at bar, the majority specifically recognized that "the decision to admit or exclude uncharged misconduct ... rests in the sound discretion and will not be overturned absent manifest abuse of discretion."[50] The majority also cited to Phillips v. State as support for its finding that,

> the Nevada Supreme Court has concluded a district court's decision to allow evidence where the probative value is substantially outweighed by its prejudicial effect is a manifest abuse of discretion.[51]

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[49] Qualls v. State, 114 Nev. 900, 902, 961 P.2d 765, 766 (1998); see also Fields v. State, 125 Nev. 776, 783, 220 P.3d 724 (2009) Lytle v. State, 125 Nev. 1058, 281 P.3d 1197 (2009); Diomampo v. State, 124 Nev. 414, 429–30, 185 P.3d 1031 (2008); Phillips v. State, 121 Nev. 591, 601, 119 P.3d 711 (2005) receded from on other grounds Cortinas v. State, 124 Nev. 1013, 195 P.3d 315 (2008) Cipriano v. State, 111 Nev. 534, 541, 894 P.2d 347 (1995) overruled on other grounds by State v. Sixth Judicial Dist. Court In & For Cty. of Humboldt, 114 Nev. 739, 964 P.2d 48 (1998) holding modified by Tinch v. State, 113 Nev. 1170, 946 P.2d 1061 (1997); Crawford v. State, 107 Nev. 345, 348, 811 P.2d 67 (1991).

[50] Order at 10.

[51] Order at 12.

After meticulously reviewing the law regarding the admission of other crime/bad act evidence, analyzing the facts of Mr. HUBBARD's case and determining that the Washington residential burglary was not relevant for any of the State's asserted nonpropensity uses, the majority determined that "the district court manifestly abused its discretion in admitting testimony related to the 2012" Washington conviction.[52]

The majority did not end the analysis with that conclusion. Rather, the majority reviewed the state's arguments that: (1) if the court erred in admitting the evidence, it was harmless because the conviction could have been admitted pursuant to NRS 50.095(1); and, (2) any error in admitting the evidence was not reversible because the other evidence of Hubbard's guilt was overwhelming.[53]

After determining that the state's NRS 50.095(1) argument was invalid, the majority reviewed the evidence presented by the state and concluded that the primarily circumstantial evidence did not establish Mr. HUBBARD's guilt was overwhelming and the erroneous admission of the other crime evidence substantially affected the jury's verdict.[54]

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[52] Order at 17.

[53] Order at 18.

[54] Order at 18-19.

The majority clearly applied the proper standard of review.

The state agreed that the majority recognized the correct standard of review - a manifest abuse of discretion.[55] And the state concurred with the majority's definition of a manifest abuse of discretion as "a clearly erroneous interpretation or application of the law or rule.[56] Furthermore, while it quoted one line of Judge Tao's dissent, the state did not urge or argue that his standard of review is correct.[57] Finally, the state asserted the supposition that the majority "appears" to review the issues de novo.

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[55] Petition at 19.

[56] Id.

[57] Judge Tao combined the analysis for admission of expert testimony (Leavitt v. Siems a medical malpractice/ professional negligence case) with the review applied when the sufficiency of the evidence is challenged (Koza v. State). Order at 21-22. According to Judge Tao, the Court of Appeals is required to apply a standard of review which is next to impossible to fulfill. Order at 21-27.

Judge Tao believes application of this entirely incorrect standard of review is appropriate because if "the trial court decisions [are] reviewed too closely and [the Court] gives it too little leeway" ... "the price of deciding wrongly is that a serious felony conviction will be voided and have to be retried at enormous mental, emotional and financial costs." This is a completely inappropriate result for a Court of Appeals to consider when determining whether the district court manifestly abused its discretion and admitted prejudicial other crime evidence.

Simple quotation of these words does not establish that fact.

This Court doesn't often find admission of other act evidence to be a manifest abuse of discretion. However, sometimes the Court does make this finding. The "manifest abuse of discretion" is a difficult standard to meet but when the evidence was inappropriately admitted, the evidence of guilt is not overwhelming, and the admitted evidence substantially affected the jury's verdict, a trial court has manifestly abused its discretion and our appellate courts should reverse convictions on this basis.

The state is only "aggrieved" because it lost in the Court of Appeals. It is respectfully submitted that this issue, like all of the complaints raised in the Petition, should not be reviewed by this Honorable Court.

DATED this 26th day September, 2016.

Respectfully Submitted,
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CERTIFICATE OF COMPLIANCE

I hereby certify that this response 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 WordPerfect Office X7 in 14 point font of the Arial style.

NRAP 40B does not enunciate any type-volume limitations applicable to the preparation of a response to a petition for review.

DATED this 26th day September, 2016.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 26th day of September, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Chief Deputy District Attorney Steven Owens

Attorney General Adam Laxalt

Brent D. Percival

/s/ Brent D. Percival
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