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**IN THE SUPREME COURT OF THE STATE OF NEVADA**

CORY DEALVONE HUBBARD,	)	
	)	Case No.: 66185
Appellant,	)	
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
_____	)	

REPLY TO RESPONDENT'S SUPPLEMENTAL BRIEF

COMES NOW, Appellant CORY HUBBARD, by and through his counsel, Brent D. Percival, and timely submits this pleading as his Reply to Respondent's Supplemental Brief.

It is submitted that Mr. Hubbard's briefs establish that Mr. Hubbard's intent was never at issue during his trial. Rather, Mr. Hubbard denied committing any of the crimes underlying his trial.

Given this defense, this Court, like numerous other state appellate courts, should recognize that the district court's admission of inherently prejudicial other crime evidence for the purpose of establishing a non-controverted "intent" was a manifest abuse of discretion.

Intent was not an issue because the state proved the mens rea of the burglary charge by establishing that Mr. Hubbard's entered "with the intent to commit larceny and/or any felony and/or robbery." The state was able to prove the necessary "specific intent" by commission of the specific crimes of larceny, any other felony which would include assault with a deadly weapon and discharge of a firearm inside the residence and robbery. Therefore, admission of the inherently prejudicial Washington burglary was a manifest abuse of discretion.

Moreover, admission of this inherently prejudicial evidence was a manifest abuse of discretion because the district court utterly failed to enunciate how or why the other crime - a daytime residential burglary in the state of Washington in which Mr. Hubbard was convicted based upon his possession of a stolen watch not his identification as the burglar - was relevant to proving Mr. Hubbard's state of mind ie intent upon entering the Shirehampton residence on August 22, 2013.

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Finally, even though the district court admitted the Washington burglary in order to prove the absence of mistake, based upon the fact that no evidence was ever adduced that Mr. Hubbard had mistakenly done anything, it was a manifest abuse of discretion to admit the Washington crime during Mr. Hubbard's trial.

DATED this 18<sup>th</sup> day July, 2017.

Respectfully Submitted,

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## Argument

Mr. Hubbard's April 17, 2017 Supplemental Brief began his analysis of the issues specified in this Court's October 21, 2016 order by reminding this Honorable Court that twenty-four (24) years ago, it specifically held:

Before an issue can be said to be raised, which would permit the introduction of [other crimes] 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.<sup>1</sup>

This case and this language have never been over ruled by this Court. This case and this language have never been receded from by this Court. This case and this language should control this Court's decision in the case at bar.

The state utterly failed to address or distinguish the Taylor case in the May 8, 2017 Supplemental Brief filed with this Court.<sup>2</sup>

In this case, Mr. Hubbard's intent and lack of mistake were required to have been "raised in substance if not in so many words" before the facts regarding his Washington conviction were admitted. That never happened.

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<sup>1</sup> Taylor v. State, 109 Nev. 849, 854, 858 P.2d 843, 846 (1993).

<sup>2</sup> See Table of Authorities of Respondent's Supplemental Brief. All further reference to this brief will be denoted as SSB.

Therefore, the district court manifestly abused his discretion by admitting irrelevant facts regarding the Washington residential day time burglary.

- A. The language of the Burglary While in Possession of a Firearm charge specified that Mr. Hubbard entered, the Shirehampton residence, with the intent to commit “a larceny and/or any felony and/or a Robbery” therefore proof of the commission of a larceny, a felony - discharge of a firearm inside a structure and robbery established the requisite mens rea for the burglary charge

As noted in Mr. Hubbard’s Supplemental Brief, during the pretrial litigation, the state sought admission of the Washington crime as proof of intent because Mr. Hubbard was,

charged with Burglary While in Possession of a Firearm. Thus, the intention with which he entered the residence is clearly at issue in this case. The evidence establishes ... he intended to steal items inside of the residence.<sup>3</sup>

At trial, the charging document read to the jury asserted that Mr. Hubbard committed Burglary While in Possession of a Firearm when he entered, the Shirehampton residence, “with the intent to commit a larceny and/or any felony and/or Robbery.”<sup>4</sup>

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<sup>3</sup> I AA 35-36.

<sup>4</sup> I AA 13.

During trial the state proved that Mr. Hubbard committed the felony of discharging a firearm within a structure and seven counts of robbery.<sup>5</sup> Clearly, the state proved the requisite mens rea of the crime of burglary just as it had alleged in the charging document.

Regardless of these unchallengeable facts, the state tries to muddy the waters by asserting the obvious - robbery and burglary are two separate crimes which do not merge with each other.<sup>6</sup> Mr. Hubbard never argued these were the same offense which should merge. Rather, Mr. Hubbard focused on the asserted mens rea - the intent to commit a larceny and/or any felony and/or a Robbery - which if proven made Mr. Hubbard guilty of the burglary charge.

Unfortunately for the state, the assertion “when any felony is committed after a building is entered with the specific intent to commit a felony, the perpetrator has committed burglary and the other felony” actually supports Mr. Hubbard’s argument.<sup>7</sup>

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<sup>5</sup> VI AA 1169-70.

<sup>6</sup> SSB 8-9.

<sup>7</sup> SSB 8.



And, Mr. Hubbard's argument is further strengthened by the state's follow up assertion "while commission of the underlying felony may be used as evidence of the intent element of burglary, intent must still be proven by the State."<sup>8</sup>

Yes, the state must prove intent but this mens rea can be and was proven by commission of the felony discharge of a firearm in a structure and by seven counts of robbery.

Consequently, evidence of the Washington daytime residential burglary was unnecessary, irrelevant and inadmissible. By admitting irrelevant evidence, which is a clearly erroneous application of NRS 48.045(2), the district court manifestly abused his discretion.<sup>9</sup>

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<sup>8</sup> SSB 9.

<sup>9</sup> Jones v. Eighth Judicial Dist. Court, 130 Nev. \_\_\_, 330 P.3d 475, 481 (2014).

- B. The decision by the Court of Appeals was not premised on an erroneous understanding of the “intent” issue associated with the burglary charge

As a conclusion to the intent by proof of commission of any felony and robbery argument, the state asserted, without any citation to the majority opinion,

the premise of the Court of the Court of Appeals’ decision to reverse the district court was the erroneous belief that in a case charging specific intent crimes, the State cannot address intent until a defendant actively argues that there was no requisite intent.

This is an unsupported assertion which is not based upon any language contained within the Court of Appeals’ decision. As such, it should be completely disregarded by this Court.

- C. The state’s brief inappropriately argued that the criteria for admission of the Washington crime was met and therefore the district court did not abuse his discretion

On October 21, 2016, this Honorable Court granted, in part, the state’s Petition for Review. In this order, this Court specified that the supplemental briefing should focus on “whether the district court abused its discretion in admitting prior bad act evidence to prove absence of mistake or intent” because Mr. Hubbard “did not put absence of mistake or intent at issue” during his trial.

Rather than limit the argument to the issues set forth in this Court's order, the state chose to engage in a factual analysis of why the Washington crime was admissible at trial.<sup>10</sup> The October 21, 2016 order clearly precluded the entirety of the state's criteria argument. Moreover, this Court's order clearly precluded the state's argument that the Washington crime established identity.<sup>11</sup> Given these facts, Mr. Hubbard will not respond to this argument and requests this Honorable Court strike that portion of the state's argument from the brief.

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<sup>10</sup> SSB 12-14.

<sup>11</sup> SSB 13.

### Conclusion

Mr. Hubbard's trial judge admitted the Washington conviction even though intent was not at issue and even though no facts existed that Mr. Hubbard mistakenly entered the Shirehampton residence. Therefore, the district court manifestly abused his discretion and this Court should remand the case to the district court for further proceedings consistent with the Order of Remand authored by the Court of Appeals.

DATED this 18<sup>th</sup> day July, 2017.

Respectfully Submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect X7 in size 14 Arial font.

I further certify that this brief complies with the page-or type-volume limitations established by this Court's June 28, 2017 order because, it is:

[ X] Proportionately spaces, has a typeface of 14 points or more, and contains 1840 words.

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

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I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 18<sup>th</sup> day of July, 2017.

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 18<sup>th</sup> day of July, 2017. 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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