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

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SUPREME COURT
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OF THE STATE OF COLORADO
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<tr><td>Certiorari to the Colorado Court of Appeals
Case No. 06CA930
District Court, Adams County, 05CR1417</td></tr>
<tr><td>RYAN YUSEM

Petitioner

v.

THE PEOPLE OF THE STATE OF COLORADO

Respondent</td></tr>
<tr><td>Douglas K. Wilson,
Colorado State Public Defender
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(303) 764-1400 (Telephone)</td><td>Case Number: 08SC526</td></tr>
<tr><td colspan="2">MR. YUSEM'S REPLY BRIEF</td></tr>
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In response to matters raised in the Attorney General's Answer Brief, and in addition to the arguments and authorities presented in the Opening Brief, Mr. Yusem submits the following Reply Brief.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN UPHOLDING THE TRIAL COURT'S ADMISSION OF PRIOR ACT EVIDENCE BECAUSE, AS THE DISSENTING JUDGE CORRECTLY CONCLUDED, THE PRIOR ACT EVIDENCE HAD NO RELEVANCE INDEPENDENT OF AN INFERENCE OF BAD CHARACTER AND WAS UNFAIRLY PREJUDICIAL.

The State argues that the July 2004 incident in which Mr. Yusem, while wearing his sidearm, angrily complained to Ms. Eckhardt that his apartment was unfit for occupation due to water damage, was relevant to the question of whether Mr. Yusem acted in self-defense almost a year later when he pointed his gun at the car coming toward him in the dark and ordered the unseen driver to back away from him. Answer Brief, p31-38. While the State concedes that other than the presence of Mr. Yusem's gun the two incidents have nothing in common, the State asserts that the dissimilarity is insignificant. Answer Brief, p36. Relying on this Court's decision in *Douglas v. People*, 969 P.2d 1201 (Colo. 1998), the State argues that the prior act

evidence was logically relevant "to negate Mr. Yusem's claim of self-defense and to shed light on whether Mr. Yusem knowingly placed Mr. Longsine in fear of serious bodily injury." Answer Brief, p36.

The State's reliance on *Douglas*, however, is misplaced. In *Douglas* the defendant was charged with menacing and claimed he acted in self-defense. The State introduced two prior incidents in each of which Douglas had become angry and pointed a gun at the individual with whom he was angry and then later claimed that he had acted in self-defense. *Id.* at 1202-1203. Douglas conceded that the evidence of the two prior incidents was related to a material fact and logically relevant to his intent as it demonstrated his propensity for threatening people with a gun, but argued that the relevance was not independent of the prohibited inference that he was a person of bad character and acted in conformity with such character in the current incident. *Id.* at 126. This Court ruled that there was logical relevance independent of the prohibited inference because the two prior *similar* incidents demonstrated "that Douglas previously threatened others by use of a gun without provocation and in the absence of any danger to himself" and thus, rebutted the claim that Douglas has acted in self-defense in the current case. *Id.* Thus, contrary to the State's assertion, the similarity of the prior incidents was significant in *Douglas.*

Moreover, the number of similar prior incidents was significant. Citing the "doctrine of chances," this Court noted that in contrast to the situation in which there is a single prior incident, "this much higher frequency of similar conduct requires greater deference be given the trial judge's ruling." *Id.*, n6.

Here, by contrast, there is a single prior act. Moreover, the act is completely dissimilar. Mr. Yusem did not point his weapon and claim self-defense in the prior incident. While the State repeatedly asserts that the prior incident is relevant to rebut Mr. Yusem's claim of self-defense in the current case, the State fails to articulate any precise evidential hypothesis to support its assertion. Accordingly, the State's argument must fail.

The State in its Answer Brief urges this Court to consider an alternative argument for the admission of the prior act evidence. For the first time in the course of litigating this case, the State in its Answer Brief asserts that this Court should uphold the rulings of the trial court and court of appeals on the ground that Mr. Yusem "opened the door" to the evidence by asking Mr. and Ms. Longsine and Ms. Eckhardt about Mr. Yusem's demeanor and whether they had previously had "any complaints or problems" with him. Answer Brief, p43-44. This ground was not argued or ruled upon in the trial court or in the court of appeals and is not fairly

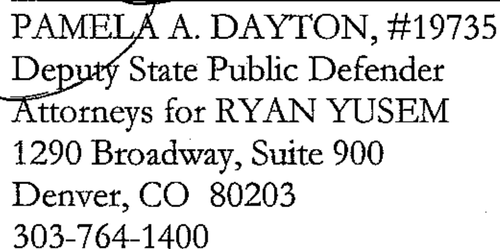
encompassed within the question on which this Court granted certiorari and therefore, this Court should decline to address it.

However, even if this Court elects to address the argument, this Court should reject it. The "opening the door" doctrine "represents an effort by courts to prevent one party from gaining an unfair advantage by presenting evidence that, without being placed in context, creates an incorrect or misleading impression." *People v. Melillo,* 25 P.3d 769, 775 (Colo. 2001). Application of the "opening the door" doctrine is subject to the considerations of relevance and prejudice required under CRE 401 and 403. *People v. Melillo, supra.* Contrary to the State's assertion, the questions to which the State refers did not place Mr. Yusem's character in evidence. Nor did they create an incorrect or misleading impression that required correction. Rather, they addressed the particular personal history of Mr. Yusem's relationship with the alleged victims to demonstrate that Mr. Yusem had no reason to be angry with them or to harm them, thus making it less likely that he had any intent to menace them and more likely that he was in fact acting to protect himself.

CONCLUSION

For the foregoing reasons and authorities, Mr. Yusem respectfully requests that this Court reverse his conviction and remand this case for a new trial.

DOUGLAS K. WILSON
Colorado State Public Defender



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CERTIFICATE OF SERVICE

I certify that, on March 30, 2009, a copy of this Reply Brief was hand-delivered to the Colorado Court of Appeals for deposit in the Attorney General's mailbox to the attention of:

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