

1 BELLON & MANINGO, LTD.
2 LANCE A. MANINGO, ESQ.
3 Nevada Bar No.: 006405
4 732 S. Sixth Street, Suite 102
5 Las Vegas, Nevada 89101
6 Telephone: (702) 452-6299
7 Facsimile: (702) 452-6298
8 Email: lam@bellonandmaningo.com
9 Attorney for Appellant
10 BRIAN O'KEEFE

Electronically Filed
Dec 11 2012 08:46 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

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

12 BRIAN KERRY O'KEEFE,)
13)
14 Appellant,)
15)
16 vs.)
17)
18 THE STATE OF NEVADA,)
19)
20 Respondent.)
21)
22)
23)
24)
25)
26)
27)
28)

Case No.: 61631
District Court Case No.: C250630

29 **REPLY TO FAST TRACK RESPONSE**

30 A. The district court violated O'Keefe's state and federal
31 constitutional rights against double jeopardy by forcing him to face a third
32 trial after the Nevada Supreme Court reversed his conviction stating that
33 "the evidence presented at trial did not support this theory of second-degree
34 murder."

35 In the State's Response to Appellant's Fast Track Statement, it states
36 that in the first trial, the jury "was instructed on a theory of felony Second-
37 Degree Murder based upon NRS 200.700 which was not alleged in the
38 information." However, in Respondent's Fast Track Response that was
39 filed on September 8, 2009, after Appellant's first trial where the issue was

1 raised regarding the flawed jury instruction, the State made the argument
2 that the second paragraph of Instruction #18 contained no reference to
3 felony murder, and simply instructed the jury what type of non-felonious
4 activity could constitute second degree murder. Supp. App. 1245.

5 During Appellant's first trial, the jury was instructed that murder is
6 the unlawful killing of another human being, with malice aforethought,
7 either express or implied. Instruction #18, which was previously discussed
8 in Appellant's Fast Track Statement, did not mention any felonious
9 activity. As the State pointed out in its Response to Appellant's Fast
10 Track Statement after his first trial, instruction number 18 used the
11 language from the involuntary manslaughter statute, and omitted any
12 reference to a felonious activity. Supp. App.1246.

13 Essentially, since the second paragraph of Instruction #18 did not
14 make any mention of felonious activity, it more clearly defined implied
15 malice. As such, when the Supreme Court reversed the conviction stating
16 that the evidence did not support a conviction under this theory of second-
17 degree murder, it essentially reversed Appellant's conviction based upon
18 sufficiency of the evidence.

19 The Double Jeopardy Clause can prevent a subsequent prosecution
20 when a conviction is reversed on appeal for insufficient evidence. *Burks v.*
21 *United States*, 437 U.S. 1, 16-17 (1978). The Double Jeopardy Clause
22 forbids a second trial for the purpose of affording the prosecution another
23 opportunity to supply evidence which it failed to muster in the first
24 proceeding. *Burks*, 437 U.S. at 11. This is central to the objective of the
25 prohibition against successive trials. *Id.* The Clause does not allow "the
26 State . . . to make repeated attempts to convict an individual for an alleged
27

1 offense,” since “[t]he constitutional prohibition against ‘double jeopardy’
2 was designed to protect an individual from being subjected to the hazards
3 of trial and possible conviction more than once for an alleged offense.”
4 *Green v. United States*, 355 U.S. 184, 187, 78 S.Ct. 221, 223 (1957).

5 The jury found Appellant guilty of second degree murder after his
6 first trial. The Nevada Supreme Court reversed the conviction stating that
7 the evidence did not support the theory of second degree murder defined in
8 paragraph 2 of jury instruction 18. Since paragraph 2 was not a separate
9 theory of second degree murder, and the Supreme Court stated that the
10 evidence did not support paragraph 2 of this instruction, the State should
11 never have been allowed to force Appellant to stand trial a second time, let
12 alone a third time, based upon the exact same evidence for the exact same
13 charge of second degree murder. The jury was given an instruction that
14 embodied all definitions of second degree malice murder, and the Nevada
15 Supreme Court clearly stated that the evidence did not support a conviction
16 based upon the second paragraph of the jury instruction.

17
18 **D.** The district court erred, and denied O’Keefe his state and
19 federal constitutional rights to due process and a fair trial, by allowing a
20 substitute judge to preside over the trial. The State argues that Appellant
21 did not object to having a substitute judge to preside over his trial
22 However, on his first day of trial, Appellant did make representations
23 regarding it being unfair to not have Judge Villani preside over his trial
24 when Judge Villani knew this case’s history and knew all of his prior
25 rulings regarding evidence. 1 App. 155.

26 **E.** The district court abused its discretion, erred, and violated
27 O’Keefe’s state and federal constitutional rights by refusing instructions
28

1 proffered by O’Keefe and by overruling instructions which were objected
2 to by O’Keefe. The court rejected O’Keefe’s instruction regarding
3 defining an abandoned and malignant heart. 5 App. 1148-1151. O’Keefe
4 requested an instruction more specifically defining an abandoned and
5 malignant heart in addition to the state’s implied malice instruction.
6 Appellant did not attach the proposed instruction in his appendix, however
7 has supplied a supplemental appendix with the proposed instruction and
8 requests that the court consider the instruction included in the appeal
9 record. Supp. App. 1256.

10
11 Appellant requested that the jury be specifically instructed that “the
12 abandoned and malignant heart implied malice requires that the State prove
13 beyond a reasonable doubt that Brian O’Keefe acted with an extreme
14 recklessness regarding homicidal risk. That is, he must have intended to
15 commit acts which caused the death of Victoria Whitmarsh, he must have
16 known that his acts were likely to cause her death, and he must have
17 consciously disregarded that risk to her life.” Supp. App. 1256. As
18 Respondent points out, the jury was instructed that “malice may be implied
19 when no considerable provocation appears, or when all the circumstances
20 of the killing show an abandoned and malignant heart.” However, this
21 instruction is vague as to the definition of abandoned and malignant heart
22 and does not accurately instruct the jury as to the meaning. Not including a
23 more specific definition of abandoned and malignant heart, as Appellant
24 proposed the district court do, violated his constitutional rights by
25 providing the jury with a vague jury instruction.

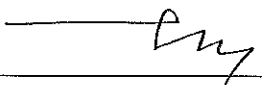
1 **CERTIFICATE OF COMPLIANCE**

2 1. I hereby certify that this brief complies with the formatting
3 requirements of NRAP 32(a)(4), the typeface requirements of NRAP
4 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this
5 brief has been prepared in a proportionally spaced typeface using Microsoft
6 Word in 14 point Times New Roman font.

7 2. I further certify that this brief complies with the page- or type-
8 volume limitations of NRAP 3C(h)(2) because, excluding the parts of the
9 brief exempted by NRAP 32(a)(7)(C), Proportionately spaced, has a
10 typeface of 14 points or more, and does not exceed 5 pages.

11 3. Finally, I hereby certify that I have read this appellate brief,
12 and to the best of my knowledge, information, and belief, it is not frivolous
13 or interposed for any improper purpose. I further certify that this brief
14 complies with all applicable Nevada Rules of Appellate Procedure, in
15 particular NRAP 28(e)(1), which requires every assertion in the brief
16 regarding matters in the record to be supported by a reference to the page
17 and volume number, if any, of the transcript or appendix where the matter
18 relied on is to be found. I understand that I may be subject to sanctions in
19 the event that the accompanying brief is not in conformity with the
20 requirements of the Nevada Rules of Appellate Procedure.

21 DATED this 10th day of December, 2012.

22 
23 _____
24 LANCE A. MANINGO, ESQ.
25 Nevada Bar No. 006405
26
27
28

BELLON & MANINGO, LTD.
732 SOUTH SIXTH STREET, SUITE 102
LAS VEGAS, NEVADA 89101
702-452-6299 • 702-452-6298 FAX

BELLON & MANINGO, LTD.
732 SOUTH SIXTH STREET, SUITE 102
LAS VEGAS, NEVADA 89101
702-452-6299 • 702-452-6298 FAX

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF MAILING

I, hereby certify that on the 10th day of December, 2012, I did serve a true and correct copy of the foregoing REPLY TO FAST TRACK RESPONSE by depositing same in the United States mail, first-class postage fully prepaid, addressed as follows:

Clark County District Attorney
200 Lewis Ave., 3rd Floor
Las Vegas, NV 89155

Nevada Attorney General
100 North Carson Street
Carson City, NV 89701-4717



An Employee of Bellon & Maningo