

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN KERRY O'KEEFE,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 53859

District Court Case No. C250630

**FILED**

**AUG 19 2009**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *P. Malone*  
DEPUTY CLERK

**FAST TRACK STATEMENT**

1. **Name of party filing this fast track statement:** Appellant Brian O'Keefe
2. **Name, law firm, address, and number of attorney submitting this fast track statement:** JoNell Thomas, Clark County Special Public Defender's Office, 330 South 3rd Street, Suite 800, Las Vegas, Nevada 89155, (702) 455-6265.
3. **Name if different from trial counsel:** n/a
4. **Judicial district, county, and district court docket number of lower court proceedings:** Eighth Judicial District Court, Clark County, Docket No. C250630
5. **Name of judge issuing order appealed from:** Honorable Michael Villani
6. **Length of trial.** 5 days.
7. **Conviction appealed from:** One count of second degree murder with use of a deadly weapon.
8. **Sentence for each count:** A term of 10 to 25 years for second degree murder and a consecutive term of 96 months to 240 months for the weapons enhancement.
9. **Date district court announced decision, sentence, or order appealed from.** 5/5/09.
10. **Date of entry of written judgment or order appealed from:** 5/8/09
11. **If this appeal is from an order on a petition for a writ of habeas corpus ....** n/a
12. **If the time for filing the notice of appeal was tolled by a post-judgment motion:** n/a

**RECEIVED**

**AUG 19 2009**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
DEPUTY CLERK

09-20141

1 13. **Date notice of appeal filed:** 5/21/09  
2 14. **Specify rule governing the time limit for filing the notice of appeal:** NRAP 4(b).  
3 15. **Specify statute which grants this court jurisdiction:** NRS 177.015.  
4 16. **Specify nature of deposition.** Judgment of conviction entered pursuant to a jury verdict.  
5 17. **Pending and prior proceedings in this court.** None known to counsel.  
6 18. **Pending and prior proceedings in other courts.** None known to counsel.  
7 19. **Proceedings raising same issues.** None known to current counsel.  
8 20. **Procedural history.** The State charged O'Keefe with murder with use of a deadly  
9 weapon. 1 App. 1. He entered a plea of not guilty and invoked his right to a speedy trial.  
10 1 App. 5. The State filed a motion to admit bad act evidence which was addressed by the  
11 district court. 1 App. 8. It did not include as a bad act the claim that O'Keefe used a racial  
12 epithet while talking with an officer. 1 App. 8-9. An Amended Information was filed. 1  
13 App. 12. The State did not charge a theory of felony murder. 1 App. 12. Trial began on  
14 March 16, 2009. 1 App. 20, 65. During trial, O'Keefe filed a brief on the admissibility of  
15 evidence of the alleged victim's history of suicide attempts, anger outbursts, anger  
16 management therapy, self-mutilation (with knives and scissors) and erratic behavior. 2 App.  
17 313. Proposed jury instructions were submitted by O'Keefe. 2 App. 322. After five days  
18 of trial, on March 20, 2009, the jury returned a verdict finding O'Keefe guilty of second  
19 degree murder with use of a deadly weapon. 2 App. 309, 380. O'Keefe filed a motion to  
20 settle the record, which addressed matters that took place in chambers and during unrecorded  
21 bench conferences. 2 App. 381. Argument on the motion took place on April 7, 2009. 2  
22 App. 387. The sentencing hearing was held on May 5, 2009. 2 App. 391. As noted above,  
23 this timely appeal followed.  
24 21. **Statement of facts.** Brian O'Keefe and Victoria Whitmarsh, the alleged victim, met in  
25 a treatment facility in 2001. 1 App. 95, 2 App. 256. They dated and co-habitated off and on,  
26 and had what could be described as a very tumultuous relationship. 2 App. 256-57. In 2004,  
27 O'Keefe was convicted of burglary for entering into the couple's joint dwelling with the  
28 intent to commit a crime against Whitmarsh. O'Keefe was sentenced with probation, but his

1 probation was revoked when he was convicted of a third offense of domestic battery against  
2 Whitmarsh, and he went to prison in 2006. 1 App. 192, 2 App. 257. Whitmarsh testified  
3 against O'Keefe in the domestic battery case. 1 App. 192.

4 When O'Keefe was released from prison in 2007, he met and began a relationship  
5 with Cheryl Morris. 1 App. 93, 2 App. 257. He would often speak to Morris about his  
6 previous relationship with Whitmarsh, and even expressed to her that he still had strong  
7 feelings for Whitmarsh. 1 App. 93-94, 99. Morris claimed at trial that O'Keefe said he was  
8 upset with Whitmarsh because she put him in prison and he said he wanted to "kill the bitch."  
9 1 App. 94. Morris testified that O'Keefe left at one point to be with Whitmarsh, and then  
10 telephoned Morris, asking her to move out of their jointly shared apartment so Whitmarsh  
11 could move in. 1 App. 93. Morris testified that Whitmarsh got on the phone with her during  
12 that call and told her she had decided to resume her relationship with O'Keefe. The two of  
13 them appeared to be a loving couple and were open about their relationship. 1 App. 85; 2  
14 App. 215, 218-19.

15 At about 10:00 p.m. on the evening of the incident, in November 2008, a neighbor  
16 who lived in the apartment below O'Keefe and Whitmarsh heard what she described as  
17 thumping and crying noises coming from upstairs. 1 App. 67. The noise became so loud that  
18 it woke her husband, Charles Toliver, who was in bed next to her. 1 App. 67, 70. Toliver  
19 went upstairs to inquire about the noise and found the door to O'Keefe's apartment open.  
20 1 App. 72. He yelled inside to get the occupants' attention, at which time O'Keefe came out  
21 of the bedroom and shouted at Toliver to "come get her!" 1 App. 72-73. When Toliver  
22 entered the bedroom, he saw Whitmarsh lying on the floor next to the bed and saw blood on  
23 the bed covers. 1 App. 73. O'Keefe was holding her and saying "baby, baby, wake up, don't  
24 do me like this." 1 App. 73, 76. O'Keefe did not stop Toliver from going in the apartment  
25 or otherwise fight with him. 1 App. 76. Toliver left the apartment immediately and shouted  
26 at a neighbor who was outside to call the police. 1 App. 73. He also brought Todd  
27 Armbruster, another neighbor, back upstairs. 1 App. 74. O'Keefe was still holding  
28 Whitmarsh and told Armbruster to get the hell out of there. 1 App. 74. Armbruster called

1 911. 1 App. 80. He thought that O'Keefe was drunk. 1 App. 80, 81.

2 By this time, shortly after 11:00 p.m., police had arrived on the scene. 1 App. 74, 103.  
3 When they entered the bedroom, they found Whitmarsh lying on the floor next to the bed and  
4 an unarmed O'Keefe cradling her in his arms and stroking her head. 1 App. 112, 114. The  
5 police believed Whitmarsh to be dead and ordered O'Keefe to let go of her, but he refused.  
6 1 App. 103, 105, 112. The officers eventually had to subdue him with a taser gun and  
7 forcibly carried him out of the bedroom. 1 App. 108, 112, 120, 129. O'Keefe was acting  
8 agitated, 1 App. 108, the officers testified that he had a strong odor of alcohol on him, and  
9 he appeared to be extremely intoxicated. 1 App. 122, 200-01. Much of his speech was  
10 incoherent, but at one point he said that Whitmarsh stabbed herself and he also said that she  
11 tried to stab him. 1 App. 104-06, 111, 113, 121, 126. They arrested him and brought him  
12 to the homicide offices. 1 App. 134.

13 Subsequent to his arrest, O'Keefe gave a rambling statement indicating he was not  
14 aware of Whitmarsh's death or its cause. 1 App. 190. Police interviewed him at 1:20 a.m.,  
15 at which time he was crying, raising his voice, talking to himself, and slurring. Detective  
16 Wildemann stated that during the interview O'Keefe smelled heavily of alcohol, and when  
17 police took photographs of him at about 3:55 a.m., they had to hold him upright to steady  
18 him. 1 App. 194. Wildemann said it was pretty obvious that O'Keefe had been drinking,  
19 however, law enforcement did not obtain a test for his breath or blood alcohol level either  
20 before or after the interview. 1 App. 194.

21 Whitmarsh had also been drinking on the date of the incident, and at the time of her  
22 death, her blood alcohol content was 0.24. 1 App. 181, 186. She died of one stab wound to  
23 her side and had bruising on the back of her head. 1 App. 180, 183. Medical Examiner Dr.  
24 Benjamin testified that Whitmarsh's toxicology screen indicated that she was taking Effexor  
25 and that drug should not be taken with alcohol. 1 App. 184-85. Whitmarsh had about three  
26 times the target dosage of Effexor in her system. 2 App. 234. The combination of Effexor  
27 and alcohol could have caused anxiety, confusion and anger. 2 App. 234. Whitmarsh also  
28 had Hepatitis C and advanced Cirrhosis of the liver, which is known to cause bruising with

1 only slight pressure to the body. 1 App. 180-81. Whitmarsh's body displayed multiple  
2 bruises at the time Dr. Benjamin examined her and the bruises were different colors, but she  
3 could not say that they were associated with Whitmarsh's death or otherwise say how long  
4 ago Whitmarsh sustained the bruises. 1 App. 186. DNA belonging to O'Keefe and to  
5 Whitmarsh was found on a knife at the scene. 1 App. 173-74.

6 O'Keefe testified. 2 App. 254. He acknowledged his problems with alcohol and  
7 described his history with Whitmarsh. 2 App. 254-58. He disputed Morris's claim that he  
8 said he wanted to kill Whitmarsh, but he acknowledged being angry with her. 2 App. 258.  
9 It was Witmarsh who called O'Keefe and she initiated their renewed relationship. 2 App.  
10 258. He was aware that Whitmarsh had Hepatitis C when she moved into his apartment. 2  
11 App. 259-60. In November, 2008, Whitmarsh was stressed because of her financial  
12 condition. 2 App. 268. A couple of days before the incident at issue here, Whitmarsh  
13 confronted O'Keefe with a knife. 2 App. 269. She had been drinking and was on  
14 medication. 2 App. 269. O'Keefe had not been drinking that night and was able to diffuse  
15 the situation. 2 App. 269. On November 5, 2009, O'Keefe learned that he would be hired  
16 for a new job and had two glasses of wine to celebrate. 2 App. 269-70. O'Keefe and  
17 Whitmarsh went to the Paris Casino where they both had drinks. 2 App. 270. They returned  
18 home and she went upstairs while he reclined in the passenger seat of the car for a period of  
19 time. 2 App. 271. He went upstairs and then smoked outside on a balcony while she was in  
20 the bathroom. 2 App. 272. He then went in the bedroom and saw Whitmarsh coming at him  
21 with a knife. 2 App. 272. He swung his jacket at her and told her to get back. 2 App. 272.  
22 He knew that she was mad at him about a lot of things. 2 App. 272. He grabbed the knife,  
23 she yanked it and cut his hand. 2 App. 272. They struggled for a period of time. 2 App.  
24 272-73. While fighting, she fell down, he fell on top of her and then he realized that she was  
25 bleeding. 2 App. 273. He was still drunk at this point and was trying to figure out what  
26 happened. 2 App. 273. He tried to stop the bleeding and panicked. 2 App. 274. He tried  
27 taking care of Whitmarsh and asked his neighbor to call someone after the neighbor came  
28 into his room. 2 App. 274. He became agitated when the neighbor brought another neighbor

up to look at Whitmarsh, who was partially undressed, rather than calling the paramedics. 2 App. 274. O'Keefe denied hitting or slamming Whitmarsh. 2 App. 275. He testified that he did not intentionally kill Whitmarsh, but felt responsible because he drank that night and he should not have done so. 2 App. 276.

**22. Issues on appeal.**

A. Whether the district court denied O'Keefe his state and federal constitutional rights to present evidence by prohibiting him from introducing evidence of the deceased's prior suicide attempts, self reported bi-polar conditions, "cutting" and other acts, and anger management issues and treatment that were contained within her medical records and that were within the knowledge of O'Keefe.

B. Whether the district court erred, and denied O'Keefe his state and federal constitutional rights to due process and a fair trial, by refusing to strike an erroneous jury instruction and instead directing the State not to rely upon the erroneous instruction in its closing argument.

C. Whether the district court erred, and denied O'Keefe his state and federal constitutional rights to due process and a fair trial, by allowing a transportation officer to testify that O'Keefe "told him to turn off that "nigger" music." O'Keefe's counsel were not given notice of this highly prejudicial statement.

D. Whether the district court erred by allowing photos of bruises on the body of the deceased despite the lack of relevance to this case due to the difficulty in determining the time of the bruising with the deceased's Hepatitis C and cirrhosis issues.

E. Whether the district court denied O'Keefe his state and federal constitutional rights to a fair trial by allowing a police detective to testify and offer his "expert" opinion whether the wounds on O'Keefe's hands were defensive wounds, while also denying O'Keefe the right to call his own expert to testify as to whether or not the wound on the deceased could have been caused by an accident.

F. Whether the district court's rulings on jury instructions were erroneous.

**23. Legal argument, including authorities.**

A. The district court denied O'Keefe his state and federal constitutional rights to present evidence by prohibiting him from introducing testimony and evidence of the deceased's prior suicide attempts, self reported bi-polar conditions, "cutting" and other acts, and anger management issues and treatment that were contained within her medical records and that were within O'Keefe's knowledge.

The State objected to the admission of any testimony concerning Whitmarsh's suicide attempts and to admission of documents concerning Whitmarsh's medical history. 2 App. 230. O'Keefe's counsel submitted points and authorities as to the admissibility of evidence

1 showing that Whitmarsh had a history of suicide attempts, depression, panic disorder and  
2 incidents with cutting herself with knives. 2 App. 265, 313. The relevant documents were  
3 included in Defense Proposed Exhibit B. 2 App. 265. The State argued that evidence of  
4 Whitmarsh's suicide attempts was not relevant because it did not constitute a violent act. 2  
5 App. 266. The Court found that her attempted suicides were not acts of violence and found  
6 that the testimony and evidence from the medical records was not admissible. 2 App. 266.  
7 The district court also prohibited admission of evidence concerning her anger management  
8 classes. 2 App. 266.

9 O'Keefe wished to testify that as Whitmarsh's partner on and off since 2001, he was  
10 aware at the time of the incident of her mental health history, which included multiple suicide  
11 attempts, both by overdose and cutting herself with knives or scissors, was aware that she  
12 self-mutilated, was aware that she had uncontrollable anger outbursts, and problems when  
13 stressed and when abusing drugs or alcohol, and that she was attending anger management  
14 counseling. 2 App. 256, 260. In addition, two nights before the incident, Whitmarsh  
15 confronted O'Keefe when he was reclining. She was yelling and brandishing a knife at him;  
16 however, as he was sober at the time, he was able to calm her down and diffuse the situation.  
17 2 App. 269.

18 O'Keefe provided the State with Whitmarsh's medical records and sought admission  
19 of these records at trial as they would have corroborated his claims as to her aggression and  
20 anger problems and her anger management treatment. 2 App. 265; Exhibit B. Those records  
21 include an October 2001 Admission to Montevista Hospital, after she cut both wrists with  
22 a knife in what she reported was her fourth suicide attempt. She was on the medications  
23 Celexa, Xanax and Vistaril. She was diagnosed with Major Depressive Episode, Panic  
24 Disorder with Agoraphobia. It was during this hospitalization that she and O'Keefe met.  
25 Next, a May 2002 Admission to Montevista Hospital after she used Xanax, Lortab, Oxycotin;  
26 was blacking out and unable to function at work. Her withdrawal was severe. Those  
27 documents noted a psychiatric history of severe anxiety and depression; a hospitalization in  
28 October 2001 for OD and cutting her wrist; a hospitalization for an overdosed in 1983 and

1 a diagnosis of opiate dependence, continuous, xanax dependence continuous, and major  
2 depression, recurrent. Next, she was admitted in September 2006 to Montevista Hospital for  
3 a variety of issues, including bipolar disorder and depression. The report noted that she had  
4 taken lethal dose of Xanax requiring intubation/mechanical ventilation h/o depression, also  
5 has self-inflicted wrist lac.” The report noted at least 3 suicide attempts and that she has been  
6 self-mutilating for the pasts 15 years, she stated that she cuts herself when she is angry and  
7 the last time she cut her left wrist was with a pair of scissors on September 22, 2006. Her  
8 treatment included anger management. A Southern Nevada Adult Mental Health October  
9 2007 admission showed that in October, Victoria took an overdose of pills in an apparent  
10 suicide attempt. Exhibit B.

11 O’Keefe sought to admit portions of the records from the 2001, 2002, and 2006  
12 hospitalizations as corroborative evidence of his knowledge about Whitmarsh’s and his state  
13 of mind regarding whether she was mentally capable and likely to cause him great bodily  
14 harm when she came at him with a knife. 2 App. 265. Additionally, he was aware of and  
15 had the opinion that Whitmarsh could be irrational and had a temper problem that caused her  
16 to be aggressive and violent, especially when she was under the influence of alcohol or drugs.  
17 The district court, despite full briefing on the issue by O’Keefe, precluded admission of the  
18 evidence. 2 App. 266.

19 The Fifth, Sixth and Fourteenth Amendments to the United States Constitution, as  
20 well as the Nevada Constitution, article 1, section 8, protect a criminal defendant’s right to  
21 a fair trial, at which he may confront and cross-examine witnesses and present evidence in  
22 his defense. Preclusion of this evidence violated O’Keefe’s rights. Pointer v. Texas, 380  
23 U.S. 400 (1965) (recognizing that the right of confrontation requires that a criminal  
24 defendant be given an opportunity to cross-examine the witnesses against him); Chambers  
25 v. Mississippi, 410 U.S. 284, 294 (1973) (stating that “the rights to confront and cross-  
26 examine witnesses and to call witnesses in one’s own behalf have long been recognized as  
27 essential to due process”). Preclusion of this evidence also violated O’Keefe’s statutory  
28 rights. NRS 48.045(1)(b); NRS 48.055(1). This Court has interpreted these statutes to



1 require that an accused, who claims he acted in self-defense, be permitted to present evidence  
2 of the character of an alleged victim regardless of the accused's knowledge of the victim's  
3 character when it tends to prove the victim was the likely aggressor. Petty v. State, 116 Nev.  
4 321, 326-27, 997 P.2d 800, 802-03 (2000). Attempts to commit suicide, especially when  
5 those attempts are made with knives or other cutting instruments, and acts of self-mutilation  
6 with cutting instruments constitute acts of aggression or violence. Such evidence is relevant  
7 under the circumstances presented here. State v. Stanley, 37 P.3d 85, 90 (N.M. 2001)  
8 (collecting cases and noting that a clear majority of courts hold that evidence of suicide  
9 attempts by a victim in a homicide case is admissible); People v. Salcido, 246 Cal.App.2d  
10 450, 458-60 (Cal.App. 5th Dist. 1966) (same); State v. Jaeger, 973 P.2d 404, 407-08 (Utah  
11 1999) (medical records, containing statements that the victim had previously attempted  
12 suicide, were admissible when introduced in a case where defendant claimed the victim  
13 committed suicide).

14 Further, at the time of the incident, O'Keefe was aware of Whitmarsh's prior acts of  
15 violence and aggressive character. This Court has held that if the accused, who is claiming  
16 he acted in self-defense, is aware of specific acts of violence by an alleged victim, then  
17 evidence as to those specific acts is admissible to show the accused's state of mind at the  
18 time of the alleged crime. Id. at 326-27, 997 P.2d at 803; Daniel v. State, 119 Nev. 498, 78  
19 P.3d 890 (2003) ("[A] defendant should be allowed to produce supporting evidence to prove  
20 the particular acts of which the accused claims knowledge, thereby proving the  
21 reasonableness of the accused's knowledge and apprehension of the victim and the credibility  
22 of his assertions about his state of mind. . . . The self-serving nature of an accused's  
23 testimony about prior violent acts of the victim makes corroborating evidence of those acts  
24 particularly important for an accused's claim of self-defense."). "[W]hen a defendant claims  
25 self-defense and knew of relevant specific acts by a victim, evidence of the acts can be  
26 presented through the defendant's own testimony, through cross-examination of a surviving  
27 victim, and through extrinsic proof." Id. at 516, 78 P.3d at 32-33. O'Keefe was entitled to  
28 present this evidence. He is entitled to a new trial based upon the district court's order

1 prohibiting his counsel from presenting this evidence.

2       **B.** The district court erred, and denied O’Keefe his state and federal constitutional  
3 rights to due process and a fair trial, by refusing to strike an erroneous jury instruction and  
4 instead directing the State not to rely upon the erroneous instruction in its closing argument.  
5 The parties settled jury instructions in chambers. At that time, O’Keefe’s counsel objected  
6 to the State’s proposed instruction defining second degree murder, citing Jennings v. State,  
7 116 Nev. 488, 998 P.2d 557 (2000), and argued they had no notice of a second degree felony  
8 murder theory and the second paragraph of the State’s instruction set forth a felony murder  
9 theory. 2 App. 384. The district court determined that the State’s proposed instruction  
10 defining second degree felony murder in paragraph #2 would not be given because no such  
11 theory had been alleged in the Information. 2 App. 384, 388. After the parties returned,  
12 made a record of objections, the district court passed out the final instructions just before  
13 instructing the jury. 2 App. 296, 384. The reading of the jury instructions was not  
14 transcribed, but the record reflects that a bench conference was held during the reading of  
15 the instructions. 2 App. 296-97. When the district court got to the instruction (#18) defining  
16 “Murder of the Second Degree”, the parties approached the bench, and the district court  
17 noted that it understood the jury was not going to be instructed on second degree felony  
18 murder. 2 App. 384. O’Keefe’s counsel agreed with this understanding, and stated that the  
19 instruction should not be given with the second paragraph. 2 App. 384. The State argued  
20 that they simply would not argue the theory to the jury. 2 App. 384. O’Keefe’s counsel  
21 argued that this solution was not satisfactory because the jury might still understand that they  
22 could find the theory from the district court’s instruction. 2 App. 384. The district court  
23 overruled O’Keefe’s objection and gave the instruction which it knew to be erroneous. 2  
24 App. 384, 388. The jury was instructed in the second paragraph of Instruction #18 that  
25 “[W]here an involuntary killing occurs in the commission of an unlawful act, the natural  
26 consequences of which are dangerous to life, which act is intentionally performed by a  
27 person who knows that his conduct endangers the life of another, even though the person has  
28 not specifically formed an intention to kill.” 2 App. 354.

1 During closing arguments, the prosecutor argued that a finding of murder could be  
2 based upon implied malice. 2 App. 298, 299. O'Keefe's counsel objected to this argument  
3 and a conference was held at the bench, but it was not recorded. 2 App. 299. The jury was  
4 not instructed to disregard this argument and was not instructed that the second paragraph  
5 of Instruction #18 could not be used as a basis for a conviction.

6 O'Keefe's state and federal constitutional rights to a fair trial, proper jury instructions,  
7 and notice of the charges against him were violated by the district court's actions. It is  
8 entirely unprecedented for a district court to give a jury instruction, despite a previous order  
9 that the instruction would not be given, with full knowledge that the jury instruction was  
10 unsupported by authority from this Court. Likewise, there is no precedent holding that such  
11 an instruction may be given so long as the prosecutor does not argue the erroneous and  
12 unconstitutional theory to the jury. There is no valid question as to the fact that this jury  
13 instruction was improper. The State failed to charge O'Keefe with felony-murder and he was  
14 given no notice of the State's intent to prosecute him under a felony-murder theory. A  
15 defendant has a fundamental right to be clearly informed of the nature and cause of the  
16 charges in order to adequately prepare his defense. Jennings, 116 Nev. at 491, 998 P.2d at  
17 559 (citing Sheppard v. Rees, 909 F.2d 1234, 1236 (9th Cir. 1989), Cole v. Arkansas, 333  
18 U.S. 196 (1948)). See also Alford v. State, 111 Nev. 1409, 1415, 906 P.2d 714, 717 (1995).  
19 Despite the fact that the State did not charge O'Keefe under a second-degree felony murder  
20 theory, the jury was instructed on this theory of prosecution and under the facts presented  
21 here, the jury may have very well relied upon this instruction in reaching its verdict. Reversal  
22 of the judgment is therefore required. Cortinas v. State, 195 P.3d 315, 320-21 (Nev. 2008).

23 C. The district court erred, and denied O'Keefe his state and federal constitutional  
24 rights to due process and a fair trial, by allowing a transportation officer, Officer Hutcherson,  
25 to testify that O'Keefe told him to "turn that nigger music off" and said "I don't listen to  
26 nigger music." 1 App. 135. This testimony was sprung upon the defendant during trial  
27 without any prior notice. O'Keefe's counsel asked to approach the bench and an unrecorded  
28 bench conference took place. 1 App. 135. The officer did not write a report about this

1 matter, did not give a recorded statement, and did not state that this happened in his  
2 handwritten note. 1 App. 136. Although the State was aware of these alleged statements,  
3 O'Keefe's counsel were not given notice of this highly prejudicial statement. The State did  
4 not request a Petrocelli hearing to establish the admissibility of this highly inflammatory and  
5 irrelevant evidence. 1 App. 153, 159. The State argued that no discovery violation occurred  
6 because the statement was not memorialized and it was not exculpatory. 1 App. 153. The  
7 district court ruled that there was no discovery violation and found that O'Keefe was not  
8 prejudiced by the testimony. 1 App. 154. O'Keefe's counsel noted that some jurors reacted  
9 strongly to the testimony. 1 App. 159. Counsel further noted that the testimony was  
10 especially prejudicial as the police officer and one of the prosecutors, and at least one juror,  
11 were African-American and testimony concerning the racial slur was likely to cause the  
12 jurors to more closely align themselves with the State because of empathy to the officer or  
13 prosecutor or because of anger toward O'Keefe. 1 App. 159. Additional prejudice was  
14 present as O'Keefe and Whitmarsh were of different races. Counsel requested a mistrial  
15 based upon the State's intentional non-disclosure of the evidence, the highly prejudicial  
16 testimony, and the inability to conduct voir dire on racial bias which would have been  
17 conducted had the statement been disclosed. 1 App. 159. The State offered an additional  
18 reason as to why it believed the testimony to be relevant:

19 Now, prejudicial, yes. But probative, very probative as to the state – this is a  
20 first degree murder trial. The intent and state of mind of the defendant before,  
21 during and after the murder, the stabbing of Victoria, is very important to this  
case. The fact that he's angry, mean, violent, and is spewing racial slurs is in  
the State's opinion probative and relevant to the case.

22 1 App. 164. The district court again denied the motion for a mistrial. 1 App. 164.

23 Improper references to race can be so prejudicial as to result in a denial of due  
24 process. Moore v. Morton, 255 F.3d 95, 114 (3rd Cir. 2001). There is no suggestion here  
25 that this incident in any way involved racial animosity. Admission of the evidence rendered  
26 the trial fundamentally unfair, resulting in a denial of due process. The evidence constituted  
27 evidence of bad character which permitted the jury to infer that O'Keefe committed the  
28 charged offense because of his bad character. This evidence uniquely tended to evoke an

1 emotional bias against O'Keefe but had no relevance to the issues of this case. Moreover,  
2 admission of this evidence violated O'Keefe's First Amendment rights. Dawson v.  
3 Delaware, 503 U.S. 159 (1992). In addition, the State's use of this evidence, as established  
4 by the State's remarks above, was an improper use of character evidence. NRS 48.045;  
5 Tavares v. State, 117 Nev. 725, 30 P.3d 1128 (2001). For each of these reasons the judgment  
6 of conviction must be reversed.

7       **D.** The district court erred by allowing photos of bruises on the body of the deceased  
8 despite the lack of relevance to this case due to the difficulty in determining the time of the  
9 bruising with the deceased's Hepatitis C and cirrhosis issues. The medical examiner testified  
10 that none of the bruises were life threatening and could have been caused by minimal  
11 contact, and could have been inflicted by Whitmarsh herself or another person. 1 App. 182.  
12 Although no causation or association with the incident was established, the district court  
13 admitted as evidence numerous photographs of bruises on Whitmarsh's body. 1 App. 182  
14 (admitting exhibits 32-38, 40, 44-48, and 55-59). Many of these photographs were also  
15 referenced during closing arguments. 2 App. 299. O'Keefe has filed a motion requesting  
16 that these photographs be transmitted to this Court so that their prejudicial impact may be  
17 fully appreciated by the Court. O'Keefe objected to the admission of photographs showing  
18 bruising on Whitmarsh's body unless there was a foundation for the assertion that they were  
19 caused by O'Keefe and were not the result of other incidents combined with her cirrhosis of  
20 the liver medical condition. 1 App. 86, 189. Despite the lack of foundation showing a nexus  
21 between the bruises and the events at issue here, and despite their highly prejudicial and  
22 inflammatory nature, the district court admitted this evidence. It was error to do so. NRS  
23 48.035; Townsend v. State, 103 Nev. 113, 117-18, 734 P.2d 705, 708 (1987). Admission of  
24 this evidence violated O'Keefe's constitutional right to a fair trial. Spears v. Mullin, 343  
25 F.3d 1215, 1225-26 (10th Cir. 2003); Romano v. Oklahoma, 512 U.S. 1, 12 (1994).

26       **E.** The district court denied O'Keefe his state and federal constitutional rights to a  
27 fair trial by allowing a police detective to testify and offer his "expert" opinion whether the  
28 wounds on O'Keefe's hands were defensive wounds, while also denying O'Keefe the right

1 to call his own expert to testify as to whether or not the wound on the deceased could have  
2 been caused by an accident. Over an objection by O'Keefe's counsel, Detective Wildemann  
3 testified that in his experience as a homicide detective, it has frequently been the case that  
4 a suspect in a stabbing has cuts on his fingers on the same area that O'Keefe had a cut on his  
5 hand. 1 App. 203. O'Keefe's counsel objected on the basis that the detective was not an  
6 expert. 2 App. 211. The district court employed a different standard, however, when it  
7 precluded a defense expert from testifying as to whether the crime scene suggested that the  
8 death might have been accidental. 2 App. 246. The defense expert, George Schiro, had  
9 extensive experience as a forensic scientist and crime scene reconstruction and he had  
10 previously testified as to whether wounds were defensive or accidental. 2 App. 240-41, 246.-  
11 48, 253-54. The district court found that the question was beyond Schiro's expertise and  
12 beyond what was identified in his report. 2 App. 248. The district court abused its discretion  
13 in allowing the State's expert to testify about his opinion as to the defensive nature of  
14 wounds without first establishing that the expert was qualified to make such an opinion.  
15 Hallmark v. Eldridge, 189 P.3d 646 (Nev. 2008). This action usurped the jury's function and  
16 violated O'Keefe federal constitutional rights to due process and a fair trial. The district  
17 court also violated O'Keefe's rights of equal protection and due process by employing a  
18 different standard for admission of testimony by a defense expert. Finally, the district court  
19 violated O'Keefe's federal constitutional rights of cross-examination and confrontation, and  
20 his right to present evidence on his behalf, by precluding the defense expert from testifying.  
21 Pointer v. Texas, 380 U.S. 400 (1965) (recognizing that the right of confrontation requires  
22 that a criminal defendant be given an opportunity to cross-examine the witnesses against  
23 him); Chambers v. Mississippi, 410 U.S. 284, 294 (1973)

24 F. O'Keefe submits that the district court abused its discretion, erred, and violated  
25 O'Keefe's state and federal constitutional rights by refusing several instructions proffered  
26 by the defense and by overruling several instructions which were objected to by the defense.  
27 Specifically, the district court refused to give an anti-flight instruction. 2 App. 230, 294, 326.  
28 Cf. Carter v. State, 121 Nev. 759, 770, 121 P.3d 592, 599 (2005). The court overruled

1 O'Keefe's instruction to the State's proffered malice instruction. 2 App. 294, 327. The court  
2 overruled O'Keefe's objection to the "absolute necessary" language of the self-defense  
3 instruction. 2 App. 294, 328. The court overruled O'Keefe's proffered instruction on  
4 voluntary manslaughter and the heat of passion and overruled the defense objection to the  
5 instruction given at trial on these issues. 2 App. 294, 296, 329-32. See Crawford v. State,  
6 121 Nev. 746, 752, 121 P.3d 582, 587-88 (2005). The court overruled O'Keefe's proffered  
7 instruction on good character. 2 App. 295, 333. See Emerson v. State, 98 Nev. 158, 162,  
8 643 P.2d 1212, 1214 (1982); Beddow v. State, 93 Nev. 619, 624, 572 P.2d 526-29 (1977).  
9 The failure to give the instructions proffered by the defense, and the giving of instructions  
10 objected to by the defense, deprived O'Keefe of his state and federal constitutional rights to  
11 have the jury properly instructed on the elements of the offense and deprived him of a fair  
12 trial. See Sandstrom v. Montana, 442 U.S. 510 (1979). Reversal is also warranted for the  
13 cumulative error involving jury instructions and the other issues presented herein.

14 **24. Preservation of issues.** All issues raised herein were preserved by timely objections at  
15 the time of trial and/or by pretrial motions, as set forth above.

16 **25. Issues of first impression or of public interest.** Yes. O'Keefe respectfully renews his  
17 request for full briefing so that each of these issues may be adequately set forth and so  
18 appropriate legal authority may be cited in support of each of the issues presented.


#### 19 VERIFICATION

20 I recognize that pursuant to N.R.A.P. 3C I am responsible for filing a timely fast track  
21 statement and that the Supreme Court of Nevada may sanction an attorney for failing to file  
22 a timely fast track statement, or failing to raise material issues or arguments in the fast track  
23 statement, or failing to cooperate fully with appellate counsel during the course of an appeal.  
24 I therefore certify that the information provided in this fast track statement is true and  
25 complete to the best of my knowledge, information, and belief.

26 Dated this \_\_\_ day of August, 2009.

27  
28   
JoNell Thomas

- 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

  
KATHLEEN FITZGERALD  
an employee of  
The Special Public Defender