IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN KERRY O'KEEFE,))) Petitioner,)) **EIGHTH JUDICIAL DISTRICT**) **COURT; THE HONORABLE**) **MICHAEL P. VILLANI,**) **DISTRICT COURT JUDGE,**)) Respondents,) And)) **THE STATE OF NEVADA,**)) Real Party in Interest.)	Supreme Court No. _____ District Court Case No. C250630 **PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION, AND REQUEST FOR STAY OF TRIAL**

Petitioner Brian Kerry O'Keefe, by and through his counsel Patricia A. Palm, hereby moves this Honorable Court for a Writ of Mandamus, or in the alternative, a Writ of Prohibition pursuant to NRAP 21, Article 6 § 4 of the Nevada Constitution, NRS 34.160 and NRS 34.320. Petitioner has satisfied the procedural requirements of verification and service. See Attached.

Parties and Procedural History

Petitioner O'Keefe is the defendant in the case of State v. O'Keefe, Eighth Judicial District Court, Case C250630, wherein he was first charged by Information with one count of Open Murder with Use of a Deadly Weapon. He invoked his speedy trial rights and was tried before a jury in March, 2009. The jury found him guilty of Second-Degree Murder, and a Judgment of Conviction was filed on May 8, 2009. O'Keefe directly appealed to this Court, and on April 7, 2010, this Court reversed his conviction for error in jury instruction. The case was retried on a Second Amended Information alleging one count of Second-Degree Murder with Use of a

Deadly Weapon. O'Keefe unsuccessfully moved for a mistrial based on repeated prosecutorial misconduct, including attempts to argue domestic battery syndrome as a theory of guilt and a community cause. The District Court denied O'Keefe's request for instruction on Involuntary Manslaughter. The jury deadlocked, and a mistrial was declared on September 2, 2011.

O'Keefe again requested a speedy trial, and trial was set for January 24, 2011. The State sought to introduce new domestic battery-related bad act evidence and also noticed for the first time an expert in battered women's syndrome. O'Keefe sought to preclude this evidence, and also filed a Motion to Dismiss based on Double Jeopardy and Speedy Trial violations, which the district court denied. The district court declined to stay or continue the trial for O'Keefe to pursue a petition for extraordinary relief to this Court; however, the district court then continued the matter because O'Keefe was not prepared to defend against the new bad act evidence ruled admissible. The district court set the Petrocelli hearing for April 12, 2011, and reset trial for June 6, 2011.

Respondent Judge Villani has presided over this case at the two previous trials and currently presides over the district court case.

Real Party in Interest State of Nevada is the entity prosecuting Petitioner O'Keefe and is the party which prosecuted him during the prior two trials.

Synopsis of the Legal Arguments

Petitioner O'Keefe contends that the Double Jeopardy, Speedy Trial and Due Process provisions of the United States and Nevada Constitutions and NRS 178.556 prohibit another trial. Alternatively, if a third trial is not barred, then this Court's intervention is needed because the district court's determination that O'Keefe is not entitled to an Involuntary Manslaughter instruction as a lesser included offense of Second-Degree Murder will deny

him his rights to due process and to present a defense as granted by the United States Constitution and Nevada Constitutions.

A Writ of Mandamus and/or Prohibition Is The Appropriate Remedy

Petitioner O'Keefe will suffer irreparable harm by having to stand trial for a third time. O'Keefe has been in custody since 2008, and has suffered the continuing anxiety and risks of enhanced possibility of conviction attendant to repeated trials and now must suffer further delay and prepare for a third trial, at which the State will benefit from its prior misconduct and he will be denied a fair proceeding. The matters presented here concern purely legal issues which do not require factual inquiries.

This Court will issue a writ of mandamus "'to compel the performance of an act which the law requires as a duty resulting from an office or where discretion has been manifestly abused or exercised arbitrarily or capriciously.'" Hidalgo v. Dist. Ct., 124 Nev. ___, ___, 184 P.3d 369, 372 (2008) (quoting Redeker v. Dist. Ct., 122 Nev. 164, 167, 127 P.3d 520, 522 (2006)). A writ of prohibition "serves to stop a district court from carrying on its judicial functions when it is acting outside its jurisdiction." Sonia F. v. Dist. Ct., 125 Nev. ___, ___, 215 P.3d 705, 707 (2009). An extraordinary writ may be issued "where there is not a plain, speedy and adequate remedy" at law. NRS 34.330. In addition, where an important issue of law needs clarification and public policy is served by this Court's invocation of its original jurisdiction, consideration of a petition for extraordinary relief may be justified. Mineral County v. State, Dept. of Conserv., 117 Nev. 235, 243, 20 P.3d 800, 805 (2001). This Court has recognized that extraordinary relief might be available for similar double jeopardy pretrial claims. See Glover v. Eighth Jud. Dist. Ct., 125 Nev. ___, 220 P.3d 684 (2009). Petitioner O'Keefe has no other plain, adequate or speedy remedy at law to protect his rights. Judicial economy and sound judicial administration warrant issuance of the writ.

Request for Relief

Wherefore, based on the foregoing and the accompanying Points and Authorities, Petitioner O'Keefe respectfully requests that this Court issue a Writ of Mandamus and/or Prohibition requiring Respondent to grant O'Keefe's Motion to Dismiss. In the alternative, O'Keefe requests that this Court order the district court to grant O'Keefe an Involuntary Manslaughter instruction at the future trial. If this matter cannot be determined before the scheduled trial date of June 6, 2011, O'Keefe requests a stay of trial.

Dated this 7th day of April, 2011.

PALM LAW FIRM, LTD.

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POINTS AND AUTHORITIES IN SUPPORT OF WRIT

I. Facts/Procedural History 2009 Trial: The State charged Brian K. O'Keefe by Information filed December 19, 2008, with Murder with Use of a Deadly Weapon for the alleged November 5, 2008 killing of Victoria Whitmarsh. 1 Appendix (APP) 1. On January 20, 2009, he entered a plea of not guilty and invoked his rights to a speedy trial. 1 APP 5. The State filed a motion to admit evidence of other crimes, which O'Keefe opposed. 1 APP 7, 25. The State's motion addressed numerous bad acts but sought to introduce only one prior felony conviction. 1 APP 14. The district court ruled that the State could introduce evidence through witness Cheryl Morris, a woman whom O'Keefe had dated then rejected in favor of

Whitmarsh, that O'Keefe had stated to Morris a desire to kill Whitmarsh for putting him in prison previously and also demonstrated to Morris his proficiency at how to kill with knives. (Whitmarsh was found dead with one stab wound to her side). The court further ruled that the State could introduce certified copies of O'Keefe's 2006 Judgment of Conviction for felony domestic battery, involving Whitmarsh. Further, if O'Keefe testified, then the State could inquire into his other prior felony convictions. Pursuant to the court's ruling on his prior Judgments of Conviction, the State was permitted to introduce only the details of when O'Keefe was convicted, in which jurisdiction, and the names of the offenses, and with the felony domestic battery, the fact that Whitmarsh had testified in that case. 2 APP 1-16. An Amended Information was filed. 1 APP 35. The State did not charge a theory of Felony Murder. Id. Trial began on March 16, 2009. 1 APP 71 During this trial, the parties understood that O'Keefe could introduce evidence of the loving and forward looking relationship of O'Keefe and Whitmarsh during the period after he was released from prison without opening the door to other bad acts. 2 APP 12-13.

The first trial lasted five days. 2 APP 71-369; 3 APP 370-494, 4 APP 495-597. Evidence was admitted to show that prior to the incident in question, O'Keefe and Whitmarsh appeared to be a loving couple and were open about their relationship. 2 APP 358 (Tr. 20-21); 4 APP 500, 503-04 (Tr. 32-34, 36).

O'Keefe testified at this trial that he met Whitmarsh in 2001 during inpatient treatment. He explained the circumstances at the time of the incident, and he denied intentionally killing her. 4 APP 539-60.

During trial, O'Keefe requested to introduce medical records regarding Whitmarsh's psychiatric history, and he filed a brief on the issue. However, the district court denied this request. 4 APP 550-51, 598. The Defense also moved unsuccessfully for a mistrial based upon prosecutorial misconduct,

including the introduction of a racial slur allegedly made by O'Keefe. 3 APP 319 (Tr. 179), 439-440, 450. The jury was given the verdict of guilt options of First and Second-Degree Murder and Voluntary and Involuntary Manslaughter, each with and without use of a deadly weapon. 5 APP 693. The jury returned a verdict finding O'Keefe guilty of Second-Degree Murder with Use of a Deadly Weapon. Id. O'Keefe filed a motion to settle the record. 5 APP 694, 700. The district court sentenced O'Keefe to 10 to 25 years for Second-Degree Murder and a consecutive 96 to 240 months (8 to 20 years) on the deadly weapon enhancement. 5 APP 704. A Judgment of Conviction was filed on May 8, 2009. 5 APP 709.

O'Keefe directly appealed, arguing that the district court erred and denied O'Keefe his constitutional rights by (A) prohibiting him from introducing evidence of Whitmarsh's prior suicide attempts, bi-polar conditions, cutting and other acts, and anger management issues and treatment; (B) refusing to strike an erroneous jury instruction on an unnoticed theory of Second-Degree Felony Murder; (C) allowing an officer to testify that O'Keefe told him to "turn off that 'nigger' music"; (D) allowing photos of bruises on the body of the deceased despite lack of relevance to the case; and (E) allowing a police detective to testify and offer his expert opinion on the wounds to O'Keefe's hands. 5 APP 721-36.

This Court reversed O'Keefe's conviction and remanded for a new trial, concluding that the district court erred

> when it instructed the jury that second-degree murder involves involuntary killings that occur in the commission of an unlawful act because the State's charging document did not allege that O'Keefe killed the victim while he was committing an unlawful act and the evidence presented at trial did not support this theory of second-degree murder.

O'Keefe v. State, NSC Docket No. 53859, Order of Reversal and Remand (April 7, 2010). 5 APP 737-38. Further, the "error in giving this instruction

was not harmless because it is not clear beyond a reasonable doubt that a rational juror would have found O'Keefe guilty of second-degree murder absent the error." Id. Remittitur issued on May 7, 2010, and O'Keefe's trial was reset for August 23, 2010. 5 APP 739; 6 APP 746-48.

II. Facts/Procedural History 2010 Trial: Prior to retrial, O'Keefe filed a motion to preclude evidence, which was granted, in part, and denied, in part, after hearings. 6 APP 749; 7 APP 956-92, 1028-41; 12 APP 2236. He also filed a motion to suppress his statements, which was granted, in part, and denied, in part, after hearing. This motion was partially based upon the district court's prior rulings regarding the limits on introduction of other bad acts evidence. 6 APP 826; 7 APP 996-1033. O'Keefe also noticed new expert witnesses. 6 APP 785. He filed a motion for discovery, which was granted, in part, and denied, in part after hearing. 6 APP 817, 873-77; 7 APP 957-67, 1097-98. O'Keefe renewed his request to admit evidence relating to Whitmarsh's mental health condition and history, and the district court ruled that the parties should reach a stipulation, but O'Keefe could not introduce evidence of Whitmarsh's actual diagnoses. The court then ruled upon the contents of the stipulation and denied O'Keefe's request to admit it as an exhibit. 6 APP 765 (incorporating Exhibit at 5 APP 598); 7 APP 982-91, 1034-35, 1099-1111; 11 APP 1794-1796. The Court also ruled that the Defense could admit evidence regarding what O'Keefe and Whitmarsh were seen doing together prior to the incident, but could not admit opinion evidence characterizing their renewed relationship as loving without opening the door to other bad acts. 8 APP 1246-50; 9 APP 1268-79.

During the voir dire, a defense objection to the State's query about battered women's syndrome was sustained, and the Court ruled that no reference to syndromes would be permitted. 7 APP 1111-13.

During trial, O'Keefe's Judgment of Conviction for the 2006 Felony Domestic Battery was admitted into evidence. 11 APP 1958-59. Cheryl

Morris testified that she met O'Keefe in December, 2007. 9 APP 1280-84. On Father's Day, 2008, he resumed his relationship with Whitmarsh. 9 APP 1285, 1290-91. O'Keefe returned to Morris, however, and Whitmarsh was persistent in calling Morris. O'Keefe told Morris that he did not love her the same way as he did Whitmarsh. 9 APP 1305. O'Keefe said he was attracted to Whitmarsh because she was submissive. Id. at 1290. O'Keefe came to stay with Morris at her friend Dorothy Robe's house, where they lived as boyfriend and girlfriend for a month and a half. 9 APP 1286-87, 1290. During this time he talked about Whitmarsh and his anger and desire to kill her. 9 APP 1287-88. The prosecutor asked Cheryl Morris "*During those same conversations would the defendant tell you about his experience in the military and killing people?*" 9 APP 1288. She responded, "Yes. . . . He would describe to me some of the events that – how he would go through and it would either be kill or be killed and the type of weapon he would use. . . . " Id. at 1288-89. He would say that "he could take a knife and shove it towards . . . [the] sternum and then just pull up and that's how he would describe killing someone. Or perhaps coming from behind and . . . taking the knife from the left side of the neck to the right side." 9 APP 1289. Those conversations would not necessarily occur at the same time as he talked about Victoria. Id. When Morris did not want to be with O'Keefe, she could not leave without taking him out of Dorothy's house, so she agreed to move with him. 9 APP 1291. However, just after moving into the El Parque Avenue apartment together in late August, 2008, they broke up and O'Keefe left. He later called and said that he was bringing Whitmarsh home. 9 APP 1292-93. Whitmarsh also got on the phone and yelled at Morris. Id. at 1305. Morris denied being angry with O'Keefe for rejecting her, but her credibility was attacked during cross-examination. 9 APP 1297-1305, 1308-11.

Defense witness Dorothy Robe testified that Morris and O'Keefe lived with her for three months. She saw them every day. She never heard

O'Keefe say that he wanted to kill Whitmarsh and never saw him demonstrate how to kill a person with knives. 11 APP 2006, 2008. Robe did not tell Morris that she wanted O'Keefe out of her house. Id. at 2009.

On November 5, 2008, beginning shortly after 9:00 p.m., a downstairs neighbor, Joyce Toliver, began hearing noise coming from O'Keefe and Whitmarsh's upstairs apartment. 9 APP 1331, 1343. The walls and floors at the apartment were pretty thin. Id. at 1407. There had never been noise up there before; the couple was very quiet. Id. at 1343, 1349. The only voice heard at the time of the incident sounded like a female and high pitched crying and moaning. Id. at 1345, 1356. Charles Toliver woke up from the noise about 10:00 p.m. He heard banging noises but not voices or arguing. After a while he hit the ceiling with a broom. About 15 minutes later, he heard a loud burst of noise and he went upstairs. 9 APP 1378, 1385-88, 1404, 1408-09. He hollered in the doorway of O'Keefe's apartment, and O'Keefe came to the bedroom door and said "Come get her man, come get her," as if something was wrong with her. Id. at 1392. Charles Toliver followed O'Keefe into the bedroom, where O'Keefe reached down and grabbed Whitmarsh, saying "Baby, wake up, baby wake up, don't . . . do me like this." Id. at 1395-96. O'Keefe was holding Whitmarsh's arms, trying to pick her up from the floor, and rocking her. Whitmarsh appeared to be unconscious. Id. at 1393-96, 1409, 1414-15. Charles ran outside and yelled for help. Id. at 1398.

Todd Armbruster testified that shortly after 11:00 p.m., he went with Charles Toliver to O'Keefe's apartment. O'Keefe was at the foot of the bed standing over Whitmarsh. 9 APP 1482, 1487. She was not moving and was naked from the waist down. O'Keefe was grabbing her legs and trying to lift her up. He was talking to her asking her to get up. Id. at 1487, 1495. Armbruster told O'Keefe "Hey, let me take a look at her." That's when O'Keefe stood up, took a swing at him and said, "Get the hell out of here."

Id. at 1489, 1498-99. O'Keefe was stumbling, unsteady on his feet, was intoxicated and looked "tore up." Id. at 1498-1500.

Jimmy Hathcox, who lived next door to O'Keefe and Whitmarsh, had also heard a little ruckus going on which began about 10:00 p.m., but it did not seem out of the ordinary. 9 APP 1503, 1506-08. Hathcox never heard yelling, and the noises he heard from the apartment could have been someone banging things around in a temper fit. It sounded like a thumping noise and a repetitive voice. Id. at 1506, 1508. Later, Hathcox heard a bang on the rail outside, looked out and saw O'Keefe entering his apartment. O'Keefe did not appear to have anything in his hands or blood on his clothing. Id. at 1511-13. About 15 minutes after O'Keefe entered the apartment, Hathcox heard Toliver yelling for help. Id. at 1511.

Police responded to the scene at 11:06 p.m., but O'Keefe did not obey their commands that he leave the bedroom or Whitmarsh's body. O'Keefe yelled for officers to come into the room and stated that Whitmarsh was bleeding or breathing and had stabbed herself. At one point he said, "she's alive" and "she's dead." 9 APP 1525-26, 1528, 1530, 1543-44; 10 APP 1634-36, 1644-46, 1701. O'Keefe was mumbling and not very coherent. 9 APP 1543; 10 APP 1644-46. While lying next to Whitmarsh on the floor, he was caressing the back of her head and waving his arm up and down telling police to not look at her. She was naked from the waist down. 10 APP 1640-42, 1718-19. O'Keefe was tased twice, then arrested. 10 APP 1672-73, 1720-22. Police had O'Keefe in their custody by 11:13 p.m. 9 APP 1544. Officers were inconsistent in their testimony as to which of them went over to the other side of Whitmarsh's body during the arrest and whether O'Keefe was dropped at any point. 9 APP 1543; 10 APP 1642, 1650-52, 1655-57, 1674, 1682-83, 1686-87, 1703-06, 1711, 1730-32, 1734. It was possible that Whitmarsh was bumped during the arrest process and that O'Keefe went on top of her body during the tasing. It was also apparent that O'Keefe was

extremely intoxicated. 10 APP 1684-86, 1704, 1732. After his arrest, O'Keefe was saying, "You're mad at me," and, "she tried to stab me." 10 APP 1699. While being held by a transportation officer, O'Keefe was obviously intoxicated, was loud, and was yelling, "What did I do, I'm not getting in the back of this car." 10 APP 1746, 1753-54. After about 5 to 10 minutes inside the car, O'Keefe passed out or fell asleep for a few minutes, then became conscious or awoke and starting talking or mumbling. 10 APP 1747-48, 1752-53. He began mumbling by himself and said, "That's why I love you V, because you're so crazy;" "What did I do wrong?;" and "I swear to God, V, I didn't mean to hurt you." He also said that he wanted to do the 10 years. 10 APP 1751-53.

O'Keefe was interrogated, and gave a rambling statement indicating he was not aware of Whitmarsh's death or its cause. The redacted interrogation was played for the jury. 11 APP 1970. Detective Martin Wildemann testified regarding the interrogation. Id. at 1960. The post-Miranda interrogation starts at 1:45 a.m., about two hours and forty-five minutes post incident. It continues until 2:01 a.m., which was the first break. That break lasted on hour, then O'Keefe was re-interviewed from 3:06 to 3:28 a.m. 11 APP 1960, 1973. Wildemann testified regarding his experience with stabbing homicide cases. Id. at 1956-57. He was allowed to opine, pursuant to the district court's pretrial rulings, that it is not uncommon for people to get cut while stabbing others. Id. at 1961. It occurs when they encounter some sort of resistance when the knife hits the body and their fingers will slide up the handle and hit the blade. 11 APP 1962, 1975-76. Wildemann had attended forensic classes but did not know how many, several over a long career. He attended a class in crime scene preservation years ago. He interpreted O'Keefe's finger injury as to meaning but he did not personally examine the thumb injury. 11 APP 1975-76. Wildemann also characterized O'Keefe during the interrogation as

lacking in sincerity. 11 APP 1966, 1971. Detectives did not collect a sample of O'Keefe's blood because it was apparent that he was in full comprehension. Id. at 1965. However, Wildemann was aware of LVMPD policy allowing for blood draws and recognizing that blood alcohol level may be an important issue. Id. at 1980-81. Although Wildemann had previously testified there was no protocol for blood draws, he differentiates between policy and protocol. Id. at 1982. Wildemann was aware that the use of force report prepared by Officer Ballejos had been requested by the Defense, but its existence was denied. Wildemann stated that the detectives did not know of the report, which was ultimately turned over by court order. No other reports document that O'Keefe was extremely intoxicated. Id. at 1985, see also 10 APP 1685-86. Wildemann testified that O'Keefe ordered about the female interrogating detective and addressed her as "young lady." However the characterization of O'Keefe as having mistreated this female detective was challenged on cross-examination. 11 APP 1967, 1973-74, 1988-1994.

After the interrogation, O'Keefe's injuries were photographed to show the cut to his hand, bruising and scratches, and his clothing was impounded. O'Keefe was unable to stand without officer assistance during this evidence collection. 11 APP 1798-1824.

Law enforcement found no disarray in O'Keefe's apartment, except for in the bedroom where O'Keefe and Whitmarsh were found. There was a carving knife with an 8 inch blade on the bed, lying under a bloody pillow case, and analysis of it showed both Whitmarsh's and O'Keefe's blood, but no prints of comparison quality and no wipe marks. 9 APP 1523; 10 APP 1772, 1786; 11 APP 1852-53; 1892-1917; 1941-45. There was a laborer's union jacket on the floor by some blinds that had fallen to the floor. 10 APP 1773-74. There were also some bloody stretch pants on the bathroom floor. 11 APP 1927-28, 1947. O'Keefe had cuts on his right thumb and finger. 10

APP 1582. O'Keefe's vehicle was photographed and showed that one of the seats inside was still reclined and glasses were in the center console. 12 APP 2044-49.

Defense forensic expert George Schiro testified that it was more likely that O'Keefe was cut while grabbing the blade in self-defense before Whitmarsh received her wound or that he cut himself accidentally or purposely after Whitmarsh was wounded than that he received his cut at the same time as she received hers. 10 APP 1590-94, 1596. Schiro also opined that the possibility of an accidental stabbing of Whitmarsh could not be ruled out by the physical evidence. Id. at 1596-97.

The Stipulation regarding Whitmarsh's mental health history was read to the jury. It showed that Whitmarsh attempted suicide in 2001 by cutting her wrists - this was her fourth suicide attempt, which was prompted by an argument with her husband which caused her to get angry and go berserk. She again attempted suicide in 2006 by cutting her wrists and overdosing after an argument with her then-estranged husband, and she admitted to cutting herself when angry, self-mutilating for 15 years, having problems with anger outbursts, poor anger management and impulse control, and having previously stabbed herself in her hands because she was not happy. 11 APP 2002-05.

The State's medical examiner, Dr. Benjamin, ruled the cause of Whitmarsh's death was a single stab wound to the side of the body into the liver, with a contributing factor of blunt trauma, and the cause of death was homicide. 8 APP 1210, 1216, 1219. However, neither she, nor the Defense's expert Medical Examiner, Dr. Grey, could rule out accident or suicide based on the physical evidence. 8 APP 1190, 1239, 1241-42; 9 APP 1428-29. Dr. Grey explained that the location of the knife wound was such that it could have resulted from a struggle over the knife where Whitmarsh was holding the knife in her right hand, and a fall on the bed. There was a small

puncture next to the wound that would be consistent with the knife striking the skin during a struggle. 9 APP 1426. The depth of the wound also indicated it could have been caused accidentally because the knife only was inserted 4 ½ inches into the liver, and nothing bony would have stopped it from going further. 9 APP 1427. In addition, a small mark next to the stab wound might have been a hesitation mark indicating a self-inflicted stabbing. Id. at 1428. Both doctors agreed that Whitmarsh had both healing and acute bruising, but few of the bruises were determined to be acute, and the bruising could have been consistent with being injured during a struggle, a fall to the floor, bumping into things or being bumped into or by being grabbed in an effort to render aid. Whitmarsh had advanced liver cirrhosis, which exacerbates bruising, as does use of alcohol. Her blood alcohol level at the time of death was .24. 8 APP 1197-1209, 1213-14, 1219, 1224-29, 1241; 9 APP 1431-48. The injury on the back of her head was small, about one and a quarter inches, and was acute. 8 APP 1225; 9 APP 1434. The injury to the forehead was acute and was the only facial injury. 8 APP 1225. Whitmarsh's body did not show the extensive bruising that would be expected if Whitmarsh had been beaten constantly for an hour. 9 APP 1439-40. The Effexor metabolite in Whitmarsh's blood could be high if it were her steady state level. 8 APP 1215, 1234. Effexor can increase the risk of suicidal thoughts and attempts, and alcohol can disinhibit a person in suicidal behavior. 9 APP 1479-80. Cirrhosis and alcohol can impair cognition. Id. A medical examiner would want to know about a history of suicide attempts and a history of self-mutilation with knives when weighing the conclusion about the manner of death. 9 APP 1430.

O'Keefe also presented witnesses to show that he had a hope of going back to work the day of the incident, 11 APP 2027-30, and that he and Victoria were living as a couple. She had participated in his union activities and his alcohol treatment program. 9 APP 1316, 1322-23; 11 APP 2050-56.

O'Keefe filed proposed jury instructions. 7 APP 1038. The district court refused O'Keefe's request for, *inter alia*, instruction on Involuntary Manslaughter. 12 APP 2033-43, 2072-76; see also 12 app 2191-2218 (Jury Instructions given). O'Keefe then determined not to testify. 12 APP 2081.

O'Keefe moved for a mistrial after closing argument, based upon misconduct including repeated attempts to argue domestic violence as a theory of guilt and a community concern. That motion was denied. 12 APP 2179-2185. The jury deadlocked, and a mistrial was declared on September 2, 2010. 12 APP 2221-32.

III. Facts/Procedural history Third Trial: On September 16, 2010, O'Keefe invoked his rights to a speedy trial, but reserved his right to pursue an extraordinary writ to this Court. 12 APP 2241-42. The district court set trial for January 24, 2011, with a calendar call of January 18. 12 APP 2243-45. The prior trial transcripts were filed on November 23, 2010. O'Keefe considered a writ while he also prepared for retrial.

On January 2, 2011, O'Keefe filed a Motion to Preclude the State from Introducing at Trial Improper Evidence and Argument. 13 APP 2246; see also 14 APP 2371 (Opposition). On January 3, 2011, the State filed a Supplemental Notice of Expert Witnesses stating that it intended to present the testimony of "an expert in battered women's syndrome, power and control dynamics, and the cycle of abuse, generally." 13 APP 2316. On January 6, 2010, the State filed a Motion in Limine to Admit Evidence of Other Bad Acts Pursuant to NRS 48.045 and Evidence of Domestic Violence Pursuant to NRS 48.061. 13 APP 2321; see also 14 APP 2449 (Opposition). On January 7, 2011, O'Keefe filed a Motion to Dismiss on Grounds of Double Jeopardy Bar and Speedy Trial Violation and, alternatively, to Preclude State's New Expert Witness, Evidence and Argument Relating to The Dynamics or Effects of Domestic Violence and Abuse. 13 APP 2344; see also

14 APP 2481 (Opposition). On January 14, the State filed a Supplemental Notice of Witnesses, listing numerous additional witnesses to the new bad acts evidence it sought to introduce. 14 APP 2429.

On January 13, 2011, the district court heard partial argument on O'Keefe's motion to preclude improper evidence and argument. The court granted the motion, in part, and denied the motion, in part, including denying O'Keefe's requests to prevent witness Cheryl Morris from testifying that O'Keefe killed people during military service. 14 APP 2433-42. The Court continued argument on the final issue raised by O'Keefe: That the State should be precluded from arguing or introducing evidence related to domestic violence syndromes and the general cause of fighting against domestic violence. 14 APP 2446-48.

At calendar call on January 18, 2011, the Defense stated that it could not announce ready until the remaining motions were decided, because depending on the district court's rulings, the Defense might seek a stay to pursue a writ to this Court. 14 APP 2540-41. The Defense also stated that its ability to announce ready for trial depended on whether further investigation would be needed, and that if the State were allowed to present new bad acts evidence, further delay would be attributable to the State, affecting O'Keefe's speedy trial rights. 14 APP 2541-43.

On January 20, 2011, the district court heard the remaining motions. The district court refused a stay or a continuance for the Defense to pursue a writ. 14 APP 2547-48. The court denied O'Keefe's Motion to Dismiss, stating that there was no misconduct, and if there was, the court did not see it as intentional. Id. at 2548-52. Defense counsel argued the State's battered woman's syndrome expert should be precluded. Id. at 2552-56. The prosecutor argued that he had a right to explain why Whitmarsh would have stayed with O'Keefe. Id. at 2555-57. The district court ruled, "Well, he's not going to – the expert's not going to say her – her particular state of

mind is generally this is what the dynamics of this – of a domestic violence relationship entails. So he can't – is not going to be allowed to say this is what she was thinking in this case." When O'Keefe's counsel questioned the relevance of the evidence, the court responded that "there's absolutely no case law, statutory law, that provides that on a second trial, third trial, fourth trial the . . . State or defense can't notice new witnesses, can't notice new experts as long as they're noticed timely." The court then found that the State's notice was timely and indicated it would address the substantive claim later. 14 APP 2559. The court found no Speedy Trial violation. Id. at 2559-64.

On the afternoon of January 20, 2011, the district court heard the State's Motion to Admit Evidence of Other Bad Acts. The parties stated their positions regarding discovery, and the Defense objected to the fact that 300 pages of new discovery was provided on January 19, 2010, and it had no opportunity to prepare to meet this evidence. 14 APP 2569-70. The parties argued whether the new bad act evidence and expert testimony were permissible. 14 APP 2572-78. The district court ruled that the two guilty pleas to domestic battery and a jury verdict were admissible; the remaining acts might also be admissible. Id. at 2582-84. The court then determined to continue the matter for a Petrocelli hearing and reset trial, based on the Defense's inability to be ready for trial the following Monday, i.e., the 24th, given the decision to admit new bad acts evidence. Id. at 2585-86.

ARGUMENT

I. DOUBLE JEOPARDY BARS PREVENT RETRIAL

The Double Jeopardy Clauses of the United States and Nevada Constitutions may entitle a defendant who is put to trial to go free if the trial fails to end in a final judgment. See Glover v. District Court, 125 Nev. ___, ___, 220 P.3d 684, 692 (2009); U.S. Const. amend. V, XIV; Nev. Const. art. 1, § 8. O'Keefe submits even if the federal provision is inadequate to

prevent retrial, Nevada's jeopardy provision should where, as here, the prosecution has so clearly contravened the spirit of the clause. See Wilson v. State, 123 Nev. 587, 595, 170 P.3d 975, 980 (2007) (providing greater protection in area of resentencing), but see Glover, 125 Nev. at ___ n.5, 220 P.3d at 698 n.5 (stating that this Court has never differentiated between state and federal protection). A defendant need not show prejudice in order to invoke the bar where his trial ends in a mistrial. Arizona v. Washington, 434 U.S. 497, 504 n.15, 98 S. Ct. 824, 830 n.15 (1978). On review, the level of deference given to the trial court's determination on a double jeopardy claim varies, with the strictest scrutiny required where there is reason to believe that the prosecutor is using the superior resources of the State to harass or achieve a tactical advantage over an accused, or the basis for the mistrial is unavailability of evidence and the prosecutor is guilty of inexcusable negligence. Glover, 125 Nev. at ___, 220 P.3d at 684; Washington, 434 U.S. at 508, 98 S. Ct. at 832. Double Jeopardy bars protect

> the "deeply ingrained" principle that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

Yeager v. United States, ___ U.S. ___, 129 S. Ct. 2360, 2365-66 (2009) (quoting Green v. United States, 355 U.S. 184, 187-188, 78 S. Ct. 221 (1957)); Washington, 434 U.S. at 504 n.14, 98 S. Ct. at 829 n.14.

Therefore, the Double Jeopardy bar "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence it failed to muster in the first proceeding." Burks v. United States, 437 U.S. 1, 11, 98 S. Ct. 2141, 2147 (1978). This rule lies "at the core of the Clause's protections" and "prevents the State from honing its trial strategies and

perfecting its evidence through successive trials." Tibbs v. Florida, 457 U.S. 31, 41, 102 S. Ct. 2211, 2218 (1982); Johnson v. Estelle, 506 F. 2d 347, 352 (5th Cir. 1975) ("We cannot permit initial trial deficiencies to be cured by subsequent trials.") To allow the State another opportunity to produce evidence that it failed to muster at the original proceedings runs counter to Double Jeopardy principles. State v. Biegenwald, 524 A.2d 130, 150 (N.J. 1987).

It is appropriate for both parties to revisit prior rulings and strategy following reversal of a conviction for legal error and where a verdict is against the weight of the evidence (as opposed to based on insufficient evidence). Tibbs, 457 U.S. 31, 43 n.19, 102 S. Ct. 2211, 2219 n.19 (1982); United States v. Shotwell Manufacturing Co. 355 U.S. 233, 243, 78 S. Ct. 245, 252 (1957); State v. Hennessy, 29 Nev. 320, 341, 90 P. 221, 226 (1907); United States v. Gallagher, 602 F.2d 1139, 1143 (3rd Cir. 1979). However, a mistrial should not be permitted to operate as a post-jeopardy continuance to allow the prosecution to strengthen its case. United States v. Wilson, 534 F.2d 76, 80 (6th Cir. 1976). Thus, retrial is prohibited where a prosecutor intentionally commits misconduct for the purpose of a tactical advantage, such as using an aborted proceeding as a trial run for the next. Washington, 434 U.S. at 508, 98 S. Ct. at 832.

In Ohio v. Betts, 2007 Ohio App. Lexis 4873 (2007), 14 APP 2588, the same rare factual scenario as the instant case was presented, i.e., "the somewhat unusual backdrop of potential double jeopardy implications following the *denial* of the motion for mistrial and the case is then retried following a hung jury." Id. at 10. The court concluded that prosecutorial misconduct will bar a subsequent retrial where the prosecutor acted with the specific intent either to inspire a motion for a mistrial or to obtain a conviction where an acquittal was likely. Id. at 10-11. Courts apply objective factors to determine whether the governmental conduct was done

with improper intent. Oregon v. Kennedy, 456 U.S. 667, 675, 102 S. Ct. 2083, 2089 (1982). For instance, in United States v. Lun, 944 F.2d 642, 644-46 (9th Cir. 1991), the Ninth Circuit Court of Appeals considered: (1) whether the government's case was going badly, causing the prosecutor to fear acquittal and affirmatively seek a mistrial; (2) whether the government would gain from a second trial; and (3) whether the government committed repeated acts of misconduct. Applying these factors here demonstrates that the district court erred in denying O'Keefe relief on his Double Jeopardy claim.

(1) The government's case was going badly.

This Court had previously recognized there was not overwhelming evidence of a Second-Degree Murder. 5 APP 737-38. At the retrial, prosecution fought the giving of a lesser included instruction on Involuntary Manslaughter though one was given at the first trial. 12 APP 2072-76. None of the experts at retrial could rule out suicide or accident based on the physical evidence. The evidence showed possible innocent explanations for Whitmarsh's bruising, her physical condition and alcohol use, combined with the circumstances of O'Keefe's arrest and his attempts to render aid by lifting her body. There was no evidence of any sort of domestic dispute in the days before the incident. See 9 APP 1343, 1349 (the downstairs neighbor testified there had never been noise in O'Keefe's apartment before). No witness saw any domestic dispute or battery occurring. The responding officer witnesses gave conflicting testimony, and the good faith of police investigation and motives of Cheryl Morris were challenged. 9 APP 1297-1305, 1308-11; 11 APP 2006, 2008. The prosecution's theory that O'Keefe mistreated women as indicated by his treatment of the female homicide detective was a strained but improper attempt to convict O'Keefe based upon conformity with a character trait. 11 APP 1967, 1973-74, 1988-94.

The jury hung at the retrial, even with the improper introduction of other bad acts evidence depicting O'Keefe as a killer and the improper argument by the State.

(2) The prosecution saw advantage in a successive trial.

Strong evidence of the prosecutor's intent came after trial with the flurry of pretrial motions seeking to admit new evidence. The prosecution obviously perceived advantages from a third trial: the ability to admit new evidence on domestic violence that was unavailable at the second trial. The State failed to notice the expert in Battered Women's Syndrome within the time to present this expert during the prior trial. See NRS 174.234(2) (requiring 21 days' notice). The rulings on the bad act issues were settled, 2 APP 1-16, and the State had not timely noticed or provided full discovery for the new bad act evidence.

(3) The prosecution committed repeated acts of misconduct.

The prosecution's repeated misconduct substantially reduced the probability of acquittal and created an unacceptable risk of biased jury deliberations. See Kennedy, 456 U.S. at 690, 102 S. Ct. at 2097 (Stevens, J., concurring) (jeopardy bar is appropriate where prosecutorial error substantially reduced the probability of acquittal); Glover, 125 Nev. at ___, 220 P.3d at 692 (improper advocacy that places prejudicial and inadmissible evidence before the jury can create an unacceptable risk of biased jury deliberations and require a mistrial).

A. Improper argument re domestic abuse

Despite the prior rulings of the court, and the understandings of the parties, during the 2010 retrial, the State repeatedly introduced the issue of battered women's syndrome as a theory of guilt and a community cause. During voir dire, the Court ruled that the State could not discuss domestic violence syndromes or define that term. 7 APP 1111-13.

In his opening statement, the prosecutor stated, *"An anonymous domestic violence survivor once made this observation. If you can't be thankful for what you have, be thankful for what you have escaped. Well, unfortunately Victoria was not able to escape from the defendant . . . ."* 8 APP 1166-67. In rebuttal closing argument, the prosecutor argued,

> *It was Ralph Waldo Emerson who said all violence, all that is dreary, all that repels is not power. It is the absence of power. In battering Victoria in the hours leading up or the minutes leading up to her ultimate death, the defendant didn't show us what kind of power he has. He showed us how weak he is. Men who beat women.*

12 APP 2148. The prosecution argued a theme that O'Keefe was a misogynist or a sexist who mistreated women. Id. at 2149. The prosecutor also made reference to Whitmarsh's bruising *in various stages of healing* and argued that this proved malice in that she *"had been roughly handled in an ongoing bashing."* A defense objection to this argument was sustained. 12 APP 2171-72. The prosecutor further argued, *"Mary Gianocos who is the director of Voices against Violence once said. . . everything we know . . . ."* A defense objection to this argument was sustained. 12 APP 2177. The prosecutor continued, *"Everything we know about domestic violence is that it is about power and controlling people. Fortunately, the defendant is no longer in control."* Id. At the conclusion of argument, the Defense made a motion for a mistrial based, in part, on these arguments. The district court concluded that any errors did not warrant a mistrial. 8/31/10 TT 163-69.

It was misconduct for the prosecutor to appeal to the conscience of the community or societal concerns because the jurors' only proper focus should have been on whether the State proved its charge. See Atkins v. State, 112 Nev. 1122, 1138, 923 P.2d 1119 (1996) (Rose, J., concurring), overruled on other grounds, Berjano v. State, 122 Nev. 1066, 1076, 146 P.3d 265 (2006). The prosecutor committed misconduct by intentionally referring to and

arguing facts outside the record. Cf. Glover, 125 Nev. at ___, 220 P.3d at 696 (mistrial was necessary because the *defense* argued facts not in evidence). The improper argument relying regarding domestic violence was extremely prejudicial in light of the fact that the Defense had limited O'Keefe's evidence of a loving relationship and good character so as not to open the door to bad acts evidence, 2 APP 2-13; 8 APP 1246-50; 9 APP 1268-79, and had been denied the opportunity to explain Whitmarsh's actual psychiatric diagnoses. Further, no evidence was admissible for the purpose of showing that O'Keefe acted in conformity with the character traits of an abuser or that Whitmarsh acted in conformity with the character traits of a victim.

Moreover, the evidence did not conform to the charging document. Once jeopardy had attached and O'Keefe had testified, it was extremely unfair and a violation of due process for the State to argue an unlawful act (ongoing domestic violence) theory not charged in the information. This conduct was in defiance of this Court's previous determination that permitting the jury to consider an unnoticed unlawful act theory violated O'Keefe's Due Process rights because "the State's charging document did not allege that O'Keefe killed the victim while he was committing an unlawful act and the evidence presented at trial did not support this theory of second-degree murder." 5 APP 737-38. See also Jennings v. State, 116 Nev. 488, 998 P.2d 557 (2000).

B. Improper introduction of bad acts

During the August 2010 retrial, without seeking permission, the State elicited through questioning of Morris that O'Keefe had killed people before during his military service. This evidence was irrelevant and inadmissible character evidence. See NRS 48.015; NRS 48.025(2); NRS 48.035; Roever v. State, 114 Nev. 867, 871-72, 963 P.2d 503, 505-06 (1998). The evidence was

extremely inflammatory as it depicts O'Keefe as an actual killer. The district court denied O'Keefe's motion to preclude this evidence at any future trial. 14 APP 2433-42.

C. Misconduct at original trial

The prosecution has now committed intentional misconduct at successive trials. Although this Court declined to rule on the issue during O'Keefe's direct appeal from the first conviction, in his original trial, the prosecution elicited testimony from a transportation officer that O'Keefe told him to "turn that nigger music off" and said "I don't listen to nigger music." 3 APP 420 (Tr. 179), 422 (Tr. 188). The Defense requested a mistrial, which the district court denied. 3 APP 439-40. This denied O'Keefe his constitutional rights. See Moore v. Morton, 255 F.3d 95, 114 (3rd Cir. 2001); NRS 48.045; Tavares v. State, 117 Nev. 725, 30 P.3d 1128 (2001)).

In sum, the district court failed to give due weight to the objective evidence of the prosecution's prohibited intent. The prosecution proceeded to retrial aware that it could not use certain evidence. If it had not tried to do so improperly, but had simply stopped the trial for lack of this evidence, a third trial would have been barred by the Double Jeopardy Clause. See Washington, 434 U.S. at 508, 98 S. Ct. at 832 ("If . . . a prosecutor proceeds to trial aware that key witnesses are not available to give testimony and a mistrial is later granted for that reason, a second prosecution is barred."); Hylton v. District Court, 103 Nev. 418, 426, 743 P.2d 622, 627 (1987) (retrial barred where prosecutor was guilty of inexcusable negligence). The prosecution should not be rewarded for its misconduct, which tainted the jury, by receiving another chance to hone its trial strategies and to put forth evidence it had previously affirmatively abandoned.

II. DUE PROCESS AND SPEEDY TRIAL PROVISIONS BAR RETRIAL

The district court erred in prejudicing O'Keefe's speedy trial rights by accommodating the State's desire to revamp its case with new evidence. O'Keefe has suffered multiple trials, having to undergo the stress and anxiety attendant thereto and a lengthy pretrial detention since his arrest on November 6, 2008. The district court's rulings allowing the State's new evidence necessitated further delay in violation of O'Keefe's rights to due process and a speedy trial. U.S. Const. amend. VI, XIV; Nev. Const., art. 1, sec. 8; NRS 178.556(1). NRS 178.556(1) provides for a trial within 60 days after the arraignment on an Information and after a mistrial. Rodriguez v. State, 91 Nev. 782, 542 P.2d 1065 (1975). Dismissal for the failure to bring a defendant to trial within 60 days is mandatory if there is no good cause shown for the delay. Anderson v. State, 86 Nev. 829, 834, 477 P.2d 595, 598 (1970). The State has the burden of showing good cause for delay. Id. An accused is not required to show that he was prejudiced by the failure to bring him to trial within 60 days. State v. Craig, 87 Nev. 199, 484 P.2d 719 (1971).

O'Keefe was arraigned on January 20, 2009, and invoked his right to a speedy trial. He at all times thereafter asserted his speedy trial rights. Even assuming the district court's calendar constitutes good cause for the January 24, 2011 trial setting after the mistrial was declared on September 2, 2010, there was no good cause for the further delay caused by re-determining the law of the case to allow new evidence for which inadequate discovery had been provided until after calendar call.

The Defense was diligent in seeking discovery, filing a formal discovery motion, 6 APP 817, and conducting multiple reviews of the District Attorney's open file. The prosecution was aware of the additional other bad

acts by February, 2009. See 1 APP 7-22. However, the State failed to provide O'Keefe with more than simple incident reports, see 14 APP 2449-80, until after the January 18, 2011 calendar call, when it provided the additional 300 plus pages of discovery regarding the numerous prior criminal offenses and cases, which included statutory discovery such as witness statements. O'Keefe was entitled to this discovery. NRS 174.235; U.S. Const. amend V, XIV; Nev. Const. art. 1, sec. 8; Mazzan v. Warden, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000); U.S. Const., amend. V, XIV. The failure of the State to timely provide the discovery impaired his ability to mount a defense for trial. O'Keefe's request for time to pursue a writ to this Court was denied. A much lengthier delay, however, was necessary to meet the State's new evidence. The Defense must now investigate new witnesses and records. Further, the Defense must change its entire strategy and secure the testimony of good character witnesses that it previously forwent based upon the settled rulings in the case, the prosecution's representation that it would not seek to admit the bad act evidence, and the Defense's desire not to open the door to the evidence. Finally, the Defense will likely need to re-litigate previously settled issues which relied on the previous bad acts rulings, i.e., O'Keefe's motions to suppress his statements and admit evidence of Whitmarsh's psychological history. See 6 APP 826; 7 APP 996-1033. The State's lack of diligence should have barred the district court from granting its request to admit the new evidence.

The district court also acted arbitrarily in accommodating the State's desire to present new evidence. Cf. Bennett v. District Court, 121 Nev. ___, 121 P.3d 605, 610 (2005) (due process prevents the State from alleging new aggravators during a retrial of capital penalty phase where the State had chosen to forego these aggravators during the notice period); Browning v. State, 124 Nev. ___, 188 P.3d 60, 74 (2008) (assuming without deciding that

the State might be prevented from presenting new penalty hearing evidence at a second penalty trial, but concluding that minimal additional evidence was actually introduced). The district court also favored the State in both the matter of a stay/continuance and whether any timing issue barred evidence. When the Defense sought to admit expert testimony and evidence regarding Whitmarsh's actual diagnoses, the prosecutor argued, "*I mean, now what we're going to do is we're going to have a – a shrink come in, I guess, and analyze someone who's dead after the fact.*" The Court responded, "*Well, we're not having it at this point.*" 7 APP 990. However, the district court ignored timing when the State sought to introduce evidence to support its theories regarding the psychological traits of Whitmarsh and O'Keefe.

Contrary to the State's assertions, the new evidence which the State seeks to admit is not made admissible by NRS 48.061. Subsection 2 of that statute provides, "*Expert testimony concerning the effect of domestic violence may not be offered against a defendant pursuant to subsection 1 to prove the occurrence of an act which forms the basis of a criminal charge against the defendant."* (Emphasis added.) This language demonstrates that the State's reliance on the dynamics of abusive relationships to prove its case is improper. The State relied on the 2001 amendments to NRS 48.061, see 2001 Nev. Stat., ch. 360, at 1699, allowing the presentation evidence of domestic violence and its effects and limiting expert testimony. However, there is no exception in Nevada to the usual presumption against admitting such evidence under NRS 48.045. By the 2001 amendments, the Legislature sought only to remedy the problem of testifying but recanting victim and not to create an exception to the usual presumption against character evidence. See Minutes of Hearing on AB 417 Before the Assembly Comm. on Judiciary, 71st Leg. (Nev., April 5, 2001); Minutes of Hearing on AB 417 Before the Senate Comm. on Judiciary, 71st Leg. (Nev., May 16, 2001).

The State contended that the evidence would explain why Whitmarsh returned to a relationship with O'Keefe, 14 APP 2555-57, but this was irrelevant, and delay related to this evidence is not supported by good cause.

II. DUE PROCESS REQUIRES JURY INSTRUCTION ON INVOLUNTARY MANSLAUGHTER.

The district court erred in determining that Involuntary Manslaughter is not a lesser included offense to Second-Degree Murder. 12 APP 2076. The denial of O'Keefe's request for an Involuntary Manslaughter instruction deprived him of constitutional due process. All of the elements of Involuntary Manslaughter are included in Second-Degree Murder, and some evidence supported the finding of Involuntary Manslaughter. See Rosas v. State, 122 Nev. 1258, 1263-69, 147 P.3d 1101, 1105-09 (2006) (setting forth requirements for entitlement to instruction on lesser included offense); In the Matter of Somers, 31 Nev. 531, 535, 103 P.1073, 1074 (1909) (Involuntary Manslaughter is a lesser degree of Murder). O'Keefe's proposed instruction was also appropriately tailored to the facts in this case. See Brooks v. State, 124 Nev. ___, 180 P.3d 657, 662 (2008) (instructions should be tailored to the case).

O'Keefe's proposed instruction provided as follows:

> Involuntary manslaughter is the unintentional killing of a human being without malice aforethought, but in the commission of a lawful act which might probably produce such consequence in an unlawful manner.
>
> If Brian O'Keefe unintentionally or accidentally killed Victoria Whitmarsh during a lawful act, but in doing so acted with wanton or reckless disregard for human life that is not of the extreme nature that will support a finding of implied malice, then the crime is involuntary manslaughter and not second-degree murder.

7 APP 1057. This instruction was a correct statement of the law. NRS 200.070(1) defines involuntary manslaughter, as relevant here:

> [I]involuntary manslaughter is the killing of a human being, *without any intent* to do so, in the commission of an unlawful act, or a *lawful act which probably might produce such a consequence in an unlawful manner*, but where the involuntary killing occurs in the commission of an unlawful act, which, in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense is murder.

NRS 200.010(1) provides that murder is the unlawful killing of a human being with malice aforethought, either express or implied. NRS 200.020(1) defines express malice as "that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof." The crime of Second-Degree Murder may involve an intentional killing with express malice but without the admixture of premeditation and deliberation, i.e., a killing that is the result of passionate impulse but not within the definition of manslaughter. Byford v. State, 116 Nev. 215, 236 & n.4, 994 P.2d 700, 714 & n.4 (2000). The alternative form of Second-Degree Murder relevant here is based on implied malice. Malice is implied "when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart." NRS 200.020(2). "Abandoned and malignant heart" refers to an extreme recklessness regarding homicidal risk. Collman v. State, 116 Nev. 687, 712-13, 7 P.3d 426, 442 (2000). See also Keys v. State, 104 Nev. 736, 738, 766 P.2d 270, 271 (1988) (implied malice signifies a general malignant recklessness of others' lives). For an implied malice murder, where the felony murder rule is not applicable, the defendant must intend to commit acts that are likely to cause death and that show a conscious disregard for human life. Collman, 116 Nev. at 716, 7 P.3d at 444; United States v. Mottweiler, 82 F.3d 769, 771 (7th Cir. 1996) (criminal recklessness requires that the actor is conscious of a substantial risk that the prohibited events will come to pass).

In contrast, Involuntary Manslaughter requires proof that the defendant acted with gross negligence, defined as "wanton or reckless disregard for human life" but not of the extreme nature as will support a finding of implied malice. United States v. Crowe, 563 F.3d 969, 973 (9th Cir. 2009); Cal. Jury Instr., Crim. (CALJIC), 7th ed., Section 8.51.

The evidence here supported a finding that O'Keefe may have been cut by grabbing the knife blade in self-defense, 10 APP 1590-94, 1596. He told police that Whitmarsh tried to stab him. 10 APP 1699. There was disarray in the bedroom indicating a struggle. O'Keefe was extremely intoxicated and failed to respond appropriately once Whitmarsh was injured. A jury could find from this evidence that O'Keefe acted in self-defense but in a grossly negligent manner. The denial of O'Keefe's right to have the jury instructed on this lesser offense unfairly risked conviction, and, combined with the prosecutorial misconduct, likely led to the deadlocked jury. See Rosas, 122 Nev. at 1264, 147 P.3d at 1106 (instruction on lesser is required because of the "substantial risk" that a jury will convict despite a failure to prove the charged offense if the defendant appears guilty of some offense). If O'Keefe is required to stand trial again, Due Process requires that he be granted the Involuntary Manslaughter Instruction.

CONCLUSION

For all of the foregoing reasons, Petitioner Brian O'Keefe respectfully requests that this Court grant him the relief requested herein.

Dated this 7th day of April, 2011.

/S/

Patricia A. Palm, Bar No. 6009
1212 S. Casino Center Blvd.
Las Vegas, Nevada, 89104
(702) 386-9113
Attorney for Brian O'Keefe

VERIFICATION

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

PATRICIA PALM, being first duly sworn, deposes and says:

1. That she is an attorney duly licensed to practice law in the State of Nevada and is the attorney appointed to represent Mr. O'Keefe herein.

2. That Counsel has read the foregoing Petition for Writ of Mandamus, or in the Alternative, Writ of Prohibition, and Request for Stay of Trial, and knows the contents therein and as to those matters they are true and correct and as to those matters based on informed and belief she is informed and believes them to be true.

3. That Mr. O'Keefe has no other remedy at law available to him and that the only means to address this problem is through the instant writ.

4. That Counsel signs this Verification on behalf of Mr. O'Keefe, under his direction and authorization and further states that Mr. O'Keefe is currently in custody of the authorities of the Clark County Detention Center.

Further your Affiant sayeth naught.

Dated this 7th day of April, 2011.

PATRICIA A. PALM

SUBSCRIBED AND SWORN to before me
This 7th day of April, 2011, by Patricia Palm.

NOTARY PUBLIC
KRISTINE TACATA
STATE OF NEVADA - COUNTY OF CLARK
MY APPOINTMENT EXP. OCTOBER 23, 2011
No: 03-84813-1

Notary Public

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Petition, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record, to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying Petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: April 7, 2011.

/S/

_____

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Attorney for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 7th day of April, 2011, she personally delivered a copy of the foregoing Petition for Writ of Mandamus, or in the Alternative, a Writ of Prohibition and Appendices to The Honorable Michael P. Villani, RJC, 11th Floor, Department 17, 200 Lewis Ave., Las Vegas NV 89155, by leaving a copy at his chambers with Cindy DeGree, his Judicial Executive Assistant, who accepted the documents on his behalf.

It is understood that counsel for Respondent will be served via the e-filing system.

Dated this 7th day of April, 2011.

/S/
PATRICIA A. PALM
PALM LAW FIRM, LTD.