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Supreme Court No. _____
District Court Case No. C250630

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TO PETITION FOR WRIT OF MANDAMUS OR IN THE
ALTERNATIVE, A WRIT OF PROHIBITION
AND REQUEST FOR STAY OF TRIAL

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DAVID ROGER
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DISTRICT ATTORNEY
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REGISTER OF ACTIONS

CASE NO. 08C250630

The State of Nevada vs Brian K O'Keefe

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Case Type: Felony/Gross
Misdemeanor
Date Filed: 12/19/2008
Location: Department 17
Conversion Case Number: C250630
Defendant's Scope ID #: 1447732
Lower Court Case Number: 08F23348

PARTY INFORMATION

Defendant O'Keefe, Brian K
Other Agency Numbers
1447732 Scope ID Subject Identifier

Lead Attorneys
Patricia A. Palm

Court Appointed

7024863431(W)

Plaintiff State of Nevada

David J. Roger
702-671-2700(W)

CHARGE INFORMATION

Charges: O'Keefe, Brian K	Statute	Level	Date
1. MURDER	200.010	Felony	01/01/1900
1. DEGREES OF MURDER	200.030	Felony	01/01/1900
1. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME	193.165	Felony	01/01/1900

EVENTS & ORDERS OF THE COURT

04/29/2010

Status Check (8:15 AM) ()
STATUS CHECK: SUPREME COURT REMAND / RESET TRIAL Court Clerk: Carol Donahoo Reporter/Recorder: Michelle Ramsey Heard By: Villani, Michael

Minutes
04/29/2010 8:15 AM
- Deft. O'Keefe incarcerated in the Nevada Department of Corrections (NDC) and not present. Mr. Schieck advised the Remittitur has not been issued by the Supreme Court yet; further, Randall Pike, SPD, will be handling this matter and he is still recovering from surgery. Mr. Schieck requested the matter be CONTINUED. COURT SO ORDERED. NDC

Parties Present
Return to Register of Actions

REGISTER OF ACTIONS

CASE NO. 08C250630

The State of Nevada vs Brian K O'Keefe

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Case Type: Felony/Gross
Misdemeanor
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Other Agency Numbers
1447732 Scope ID Subject Identifier

Lead Attorneys
Patricia A. Palm

Court Appointed

7024863431(W)

Plaintiff State of Nevada

David J. Roger
702-671-2700(W)

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1. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME	193.165	Felony	01/01/1900

EVENTS & ORDERS OF THE COURT

05/20/2010 | Status Check (8:15 AM) ()
STATUS CHECK: SUPREME COURT REMAND / RESET TRIAL Court Clerk: Carol Donahoo Reporter/Recorder: Michelle Ramsey Heard By: Michael Villani

Minutes
05/20/2010 8:15 AM
- Deft. O'Keefe incarcerated in the Nevada Department of Corrections (NDC) and not present. Court Services advised Deft. was not transported; Ms. Jackson advised Deft. should really be present. Therefore, COURT ORDERED matter CONTINUED. NDC CONTINUED TO: 06/10/10 8:15 AM

Parties Present
Return to Register of Actions

REGISTER OF ACTIONS

CASE NO. 08C250630

The State of Nevada vs Brian K O'Keefe

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Case Type: Felony/Gross Misdemeanor
Date Filed: 12/19/2008
Location: Department 17
Conversion Case Number: C250630
Defendant's Scope ID #: 1447732
Lower Court Case Number: 08F23348

PARTY INFORMATION			
Defendant	O'Keefe, Brian K Other Agency Numbers 1447732 Scope ID Subject Identifier	Lead Attorneys Patricia A. Palm	
		Court Appointed	
		7024863431(W)	
Plaintiff	State of Nevada	David J. Roger 702-671-2700(W)	

CHARGE INFORMATION			
Charges: O'Keefe, Brian K	Statute	Level	Date
1. MURDER	200.010	Felony	01/01/1900
1. DEGREES OF MURDER	200.030	Felony	01/01/1900
1. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME	193.165	Felony	01/01/1900

EVENTS & ORDERS OF THE COURT	
06/10/2010	<div>All Pending Motions (8:15 AM) () ALL PENDING MOTIONS (6/10/10) Relief Clerk: Susan Jovanovich /sj Reporter/Recorder: Michelle Ramsey Heard By: Michael Villani</div> <div>Minutes 06/10/2010 8:15 AM - STATUS CHECK: SUPREME COURT REMAND / RESET TRIAL... MOTION FOR JUDICIAL RULING Michael Hyte, Deputy Special Public Defender (Bar # 10088), also present. Ms. Lavell advised she w as just assigned onto the case this morning. Colloquy regarding additional subpoenas to be served for additional medical records, and HIPPA protection guidelines. Arguments by Mr. Pike. Matter submitted by State. COURT ORDERED, Motion GRANTED. Court advised counsel to have redactions of sensitive information done on medical records. Ms. Lavell requested an in-camera view be done on these records upon being received by counsel. Colloquy regarding resetting trial date. Statements by Deft. MATTER TRAILED for Court to review current trial schedule. RECALLED. Mr. Pike advised this matter is overflow eligible, and requested additional time to prepare pre-trial briefs. COURT SO ORDERED, FURTHER, trial date SET. At request of counsel, COURT ORDERED, Deft. REMANDED into CUSTODY on this matter. CUSTODY 8-17-10 8:15 AM CALENDAR CALL 8-23-10 10:00 AM TRIAL BY JURY</div> <div>Parties Present Return to Register of Actions</div>

001
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PATRICIA PALM, ESQ.
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1212 CASINO CENTER BLVD.
LAS VEGAS, NV 89104
Phone: (702) 386-9113
Fax: (702) 386-9114
Email: Patricia.palmlaw@gmail.com
Attorney for Brian O'Keefe

DISTRICT COURT
CLARK COUNTY, NEVADA

FILED
JUL 21 2010
Clerk of Court

STATE OF NEVADA,

Plaintiff,

vs.

BRIAN K. O'KEEFE,

Defendant.

CASE NO: C250630

DEPT NO. XVII

DATE:

Aug 3, 2010

TIME:

8:15 a

**NOTICE OF MOTION AND MOTION BY DEFENDANT O'KEEFE TO PRECLUDE THE
STATE FROM INTRODUCING AT TRIAL OTHER ACT OR CHARACTER EVIDENCE
AND OTHER EVIDENCE WHICH IS UNFAIRLY PREJUDICIAL OR WOULD VIOLATE
HIS CONSTITUTIONAL RIGHTS**

COMES NOW Defendant, Brian K. O'Keefe, by and through his attorney, Patricia Palm of Palm Law Firm, Ltd., and hereby moves this Honorable Court for an order precluding the State from introducing other act or character evidence and other evidence which is unfairly prejudicial or would violate his constitutional rights.

This Motion is made and based upon the record in this case, including the papers and pleadings on file herein, the Constitutions of the United States and the State of

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1 Nevada, the points and authorities set forth below, and any argument of counsel at the
2 time of the hearing on this Motion.

3 Dated this 21st day of July, 2010.

4 PALM LAW FIRM, LTD.

5 
6

7 Patricia Palm, Bar No. 6009
8 1212 Casino Center Blvd.
9 Las Vegas, NV 89104
10 Phone: (702) 386-9113
11 Fax: (702) 386-9114
12 Attorney for Defendant O'Keefe

13 **NOTICE OF MOTION**

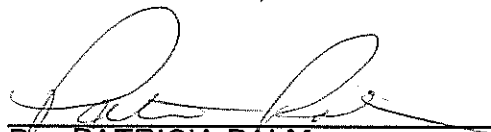
14 TO: STATE OF NEVADA, Plaintiff; and

15 TO: DAVID ROGER, District Attorney, Attorney for Plaintiff

16 YOU WILL PLEASE TAKE NOTICE that the undersigned will bring on the above
17 and foregoing **MOTION BY DEFENDANT O'KEEFE TO PRECLUDE THE STATE**
18 **FROM INTRODUCING AT TRIAL OTHER ACT OR CHARACTER EVIDENCE AND**
19 **OTHER EVIDENCE WHICH IS UNFAIRLY PREJUDICIAL OR WOULD VIOLATE HIS**
20 **CONSTITUTIONAL RIGHTS** on the 3 day of Aug, 2010, at the hour of
21 8:15 a.m., in Department No. XVII of the above-entitled Court, or as soon thereafter as
22 counsel may be heard.

23 DATED this 21st day of July, 2010.

24 PALM LAW FIRM, LTD.

25 
26

27 By: PATRICIA PALM
28 Nevada Bar No. 6009
1212 Casino Center Blvd.
Las Vegas, NV 89104
(702) 386-9113
Attorney for Defendant O'Keefe

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POINTS AND AUTHORITIES
PROCEDURAL HISTORY

The State charged Defendant Brian K. O'Keefe with murder with use of a deadly weapon. He entered a plea of not guilty and invoked his right to a speedy trial. The State filed a motion to admit evidence of other crimes, which O'Keefe opposed. The Court ruled that the State could introduce evidence of threats to the alleged victim Victoria Whitmarsh that witness Cheryl Morris claims were made by O'Keefe, and his demonstration of proficiency at killing with knives, which Morris claims to have witnessed. The Court further ruled that the State could introduce certified copies of O'Keefe's prior 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 is permitted to introduce only the details of when O'Keefe was convicted, in which jurisdiction, and the name of the offenses, and with the felony domestic battery, the fact that Whitmarsh had testified against him in that case. 3/16/09 TT 2-10.

The instant case was tried before this Honorable Court beginning March 16, 2009. After five days of trial, on March 20, 2009, the jury returned a verdict finding O'Keefe guilty of second degree murder with use of a deadly weapon. On May 5, 2009, this 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.

O'Keefe timely appealed to the Nevada Supreme Court. After briefing, the Court reversed O'Keefe's conviction, agreeing with him that the district court "erred by giving the State's proposed instruction on second-degree murder because it set forth an alternative theory of second-degree murder, the charging document did not allege this alternate theory, and no evidence supported this theory." The Court explained, "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

1 Reversal and Remand (April 7, 2010). The Court further stated, "The district court's
2 error in giving this instruction was not harmless because it is not clear beyond a
3 reasonable doubt that a rational juror would have found O'Keefe guilty of second-
4 degree murder absent the error." Id. at 2.

5 After remand to this Court, trial was reset to begin on August 23, 2010.

6 STATEMENT OF FACTS

7 The prior trial testimony in this case showed that Brian O'Keefe and Victoria
8 Whitmarsh met in a treatment facility in 2001. 3/17/09 TT 18, 3/19/09 TT 183-84. They
9 dated and co-habitated off and on and had what could be described as a very
10 tumultuous relationship. 3/19/09 TT 186-90. In 2004, O'Keefe was convicted of
11 burglary for entering into the couple's joint dwelling with the intent to commit a crime
12 against Whitmarsh. O'Keefe was sentenced to probation, but his probation was
13 revoked when he was convicted of a felony for a third offense domestic battery against
14 Whitmarsh, and he went to prison in 2006. 3/18/09 TT 139-40, 3/19/09 TT 187-88.
15 Whitmarsh testified against O'Keefe in the domestic battery case. 3/18/09 TT 139.

16 When O'Keefe was released from prison in 2007, he met and began a
17 relationship with Cheryl Morris. 3/17/09 TT 10, 3/19/09 TT 189. He would often speak
18 to Morris about his previous relationship with Whitmarsh, and even expressed to her
19 that he still had strong feelings for Whitmarsh. 3/17/09 TT 13-14, 37. Morris claimed at
20 trial that O'Keefe said he was upset with Whitmarsh because she put him in prison and
21 he said he wanted to "kill the bitch." 3/17/09 TT 14-17. Morris testified that O'Keefe left
22 at one point to be with Whitmarsh, and then telephoned Morris, asking her to move out
23 of their jointly shared apartment so Whitmarsh could move in. 3/17/09 TT 11. Morris
24 testified that Whitmarsh got on the phone with her during that call and told her she had
25 decided to resume her relationship with O'Keefe. The two of them appeared to be a
26 loving couple and were open about their relationship. 3/16/09 TT 259, 3/19/09 TT 18-
27 21, 30-36.

28 At about 10:00 p.m. on the evening of the incident, in November 2008, a
neighbor who lived in the apartment below O'Keefe and Whitmarsh heard what she

1 described as thumping and crying noises coming from upstairs. 3/16/09 TT 185-88.
2 The noise became so loud that it woke her husband, Charles Toliver, who was in bed
3 next to her. Id. at 186-200. Toliver went upstairs to inquire about the noise and found
4 the door to O'Keefe's apartment open. Id. at 206-209. He yelled inside to get the
5 occupants' attention, at which time O'Keefe came out of the bedroom and shouted at
6 Toliver to "come get her!" Id. at 209-10. When Toliver entered the bedroom, he saw
7 Whitmarsh lying on the floor next to the bed and saw blood on the bed covers. Id. at
8 210. O'Keefe was holding her and saying "baby, baby, wake up, don't do me like this."
9 Id. at 210, 224. O'Keefe did not stop Toliver from going in the apartment or otherwise
10 fight with him. Id. at 224. Toliver left the apartment immediately and shouted at a
11 neighbor who was outside to call the police. Id. at 213. He also brought Todd
12 Armbruster, another neighbor, back upstairs. Id. at 214. O'Keefe was still holding
13 Whitmarsh and told Armbruster to get the hell out of there. Id. at 215. Armbruster
14 called 911. Id. at 238. He thought that O'Keefe was drunk. Id. at 240, 245.

15 By this time, shortly after 11:00 p.m., police had arrived on the scene. 3/16/09
16 TT 215, 3/17/09 TT 65. When they entered the bedroom, they found Whitmarsh lying on
17 the floor next to the bed and an unarmed O'Keefe cradling her in his arms and stroking
18 her head. 3/17/09 at 87, 96. The police believed Whitmarsh to be dead and ordered
19 O'Keefe to let go of her, but he refused. Id. at 51-52, 60-61, 87. The officers
20 eventually subdued him with a taser gun and carried him out of the bedroom. Id. 88.
21 O'Keefe was acting agitated, id. at 73, the officers testified that he had a strong odor of
22 alcohol on him, and he appeared to be extremely intoxicated. Id. at 127-28, 3/18/09 TT
23 170-76. Much of his speech was incoherent, but at one point he said that Whitmarsh
24 stabbed herself and he also said that she tried to stab him. 3/17/09 TT 56, 85, 92.
25 They arrested him and brought him to the homicide offices. 3/17/09 TT 177.
26 Subsequent to his arrest, O'Keefe gave a rambling statement indicating he was not
27 aware of Whitmarsh's death or its cause. 3/18/09 TT 133. Police interviewed him at
28 1:20 a.m., at which time he was crying, raising his voice, talking to himself, and slurring.
Detective Wildemann stated that during the interview O'Keefe smelled heavily of

1 alcohol, and when police took photographs of him at about 3:55 a.m., they had to hold
2 him upright to steady him. 3/18/09 TT 146-49. Wildemann said it was pretty obvious
3 that O'Keefe had been drinking, however, law enforcement did not obtain a test for his
4 breath or blood alcohol level either before or after the interview. Id.

5 Whitmarsh had also been drinking on the date of the incident, and at the time of
6 her death, her blood alcohol content was 0.24. 3/18/09 TT 94, 117. She died of one
7 stab wound to her side and had bruising on the back of her head. Id. at 93, 103.
8 Medical Examiner Dr. Benjamin testified that Whitmarsh's toxicology screen indicated
9 that she was taking Effexor and that drug should not be taken with alcohol. Id. at 109.
10 Whitmarsh had about three times the target dosage of Effexor in her system. 3/19/09
11 TT 94-96. The combination of Effexor and alcohol could have caused anxiety,
12 confusion and anger. 3/19/09 TT 95-96. Whitmarsh also had Hepatitis C and advanced
13 Cirrhosis of the liver, which is known to cause bruising with only slight pressure to the
14 body. 3/18/09 TT 93-97. Whitmarsh's body displayed multiple bruises at the time Dr.
15 Benjamin examined her and the bruises were different colors, but she could not say that
16 they were associated with Whitmarsh's death or otherwise say how long ago Whitmarsh
17 sustained the bruises. 3/18/09 TT 115. DNA belonging to O'Keefe and to Whitmarsh
18 was found on a knife at the scene. 3/18/09 TT 62-67.

19 O'Keefe testified. 3/19/09 TT 177. He acknowledged his problems with alcohol
20 and described his history with Whitmarsh. Id. at 177-93. He disputed Morris's claim
21 that he said he wanted to kill Whitmarsh, but he acknowledged being angry with her. Id.
22 at 190. It was Whitmarsh who called O'Keefe and initiated their renewed relationship.
23 Id. at 191. He was aware that Whitmarsh had Hepatitis C when she moved into his
24 apartment. Id. at 197-98. In November, 2008, Whitmarsh was stressed because of her
25 financial condition. 3/20/09 TT 17. A couple of days before the incident at issue here,
26 Whitmarsh confronted O'Keefe with a knife. Id. at 18-19. She had been drinking and
27 was on medication. Id. O'Keefe had not been drinking that night and was able to
28 diffuse the situation. Id. at 19. On November 5, 2009, O'Keefe learned that he would
be hired for a new job and had two glasses of wine to celebrate. Id. at 21-24. O'Keefe

1 and Whitmarsh went to the Paris Casino where they both had drinks. Id. at 24-25.
2 They returned home, and she was upset and went upstairs while he reclined in the
3 passenger seat of the car for a period of time. Id. at 26-28. He went upstairs and then
4 smoked outside on a balcony while she was in the bathroom. Id. at 29-30. He then
5 went in the bedroom and saw Whitmarsh coming at him with a knife. Id. at 33. He
6 swung his jacket at her and told her to get back. Id. He knew that she was mad at him
7 about a lot of things. Id. He grabbed the knife, she yanked it and cut his hand. Id. at
8 33. They struggled for a period of time. Id. at 33-36. During the struggle, she held the
9 knife and fell down, he fell on top of her and then he realized that she was bleeding. Id.
10 at 35-37. He was still drunk at this point and was trying to figure out what happened.
11 Id. at 37. He tried to stop the bleeding and panicked. Id. at 39. He tried taking care of
12 Whitmarsh and asked his neighbor to call someone after the neighbor came into his
13 room. Id. at 40. He became agitated when the neighbor brought another neighbor up
14 to look at Whitmarsh, who was partially undressed, rather than calling the paramedics.
15 Id. at 41. O'Keefe denied hitting or slamming Whitmarsh. Id. at 42. He testified that he
16 did not intentionally kill Whitmarsh, but felt responsible because he drank that night and
17 he should not have done so. Id. at 49.

18 19 ARGUMENT

20 O'Keefe requests rulings from this Court prohibiting the State from introducing,
21 and requiring the State to instruct their witnesses to refrain from introducing, improper
22 other act evidence, other irrelevant and overly prejudicial evidence, and evidence which
23 would violate O'Keefe's constitutional rights.

24 The Fifth, Sixth and Fourteenth Amendments to the United States Constitution,
25 as well as the Nevada Constitution, article 1, section 8, protect a criminal defendant's
26 right to a fair trial, at which he may confront and cross-examine witnesses and present
27 evidence in his defense. Pointer v. Texas, 380 U.S. 400 (1965) (recognizing that the
28 right of confrontation requires that a criminal defendant be given an opportunity to

1 cross-examine the witnesses against him); Chambers v. Mississippi, 410 U.S. 284, 294
2 (1973) (stating that "the rights to confront and cross-examine witnesses and to call
3 witnesses in one's own behalf have long been recognized as essential to due process").

4 NRS 48.015 provides that "relevant evidence" means evidence having any
5 tendency to make the existence of any fact that is of consequence to the determination
6 of the action more or less probable than it would be without the evidence." NRS
7 48.025(2) recognizes that "[e]vidence which is not relevant is not admissible."

8 Moreover, NRS 48.035 provides in part that:

9 1. Although relevant, evidence is not admissible if its probative value is
10 substantially outweighed by the danger of unfair prejudice, of confusion of
11 the issues or of misleading the jury.

12 2. Although relevant, evidence may be excluded if its probative value is
13 substantially outweighed by considerations of undue delay, waste of time
14 or needless presentation of cumulative evidence. . . .

15 Additionally, "[a]bsent certain exceptions, evidence of a person's character or a
16 trait of his character is not admissible for the purpose of proving that he acted in
17 conformity therewith on a particular occasion. Further, evidence of other crimes,
18 wrongs or acts is not admissible to prove the character of a person in order to show that
19 he acted in conformity therewith." Taylor v. State, 109 Nev. 849, 853, 858 P.2d 843,
20 846 (1993). If the State wishes to prove that character or other act evidence is
21 admissible under NRS 48.045(2), for the purpose of establishing proof of motive,
22 opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or
23 accident, the State must prove how these exceptions to the general rule "specifically
24 relate to the facts of this case. A mere recitation of the statute is not sufficient
25 justification for the admission of prior acts." Id. at 854, 858 P.2d at 846. In addition, the
26 State "may not present character evidence as rebuttal to a defense which the accused
27 has not yet presented." Id. at 854, 858 P.2d at 847; Roever v. State, 114 Nev. 867,
28 871, 963 P.2d 503, 505 (1998) ("[T]he bad character testimony should never have been

1 introduced because it was not in rebuttal to a defense made by the accused." (citing
2 NRS 48.045(1)(a)).

3 "Before an issue can be said to be raised, which would permit the
4 introduction of such evidence so obviously prejudicial to the accused, it
5 must have been raised in substance if not in so many words, and the
6 issue so raised must be one to which the prejudicial evidence is relevant.
7 The mere theory that a plea of not guilty puts everything material in issue
8 is not enough for this purpose. The prosecution cannot credit the accused
9 with fancy defenses in order to rebut them at the outset with some
10 damning piece of prejudice."

11 Taylor, 114 Nev. at 854, 858 P.2d at 846 (quoting McCormick on Evidence § 190 at 452
12 n. 54 (Edward W. Cleary, 2d ed 1972) (quoting Lord Summer in Thompson v. The King,
13 App. Cas. 221, 232 (1918))). Prior to admitting such evidence, the State must first bring
14 a "Petrocelli" motion and request a hearing to determine if "(1) the incident is relevant to
15 the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the
16 probative value of the evidence is not substantially outweighed by the danger of unfair
17 prejudice." Roever, 114 Nev. at 872, 963 P.2d at 505-06 (citing Tinch v. State, 113
18 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997); (Petrocelli v. State, 101 Nev. 46, 692
19 P.2d 503 (1985)). However, even if the other-act evidence is relevant to a permissible
20 purpose and proven by clear and convincing evidence, a court should still exclude it if
21 its probative value is substantially outweighed by the danger of unfair prejudice. Id. at
22 872, 963 P.2d at 505-06 (citing Tinch, 113 Nev. at 1176, 946 P.2d at 1064-65.

23 The Nevada Supreme Court recognizes that the use of character evidence to
24 convict a defendant is extremely disfavored in our criminal justice system. Such
25 evidence is likely to be prejudicial and irrelevant and forces the accused to defend
26 against vague and unsubstantiated charges. It may improperly influence the jury and
27 result in the accused's conviction because the jury believes he is a bad person. The use
28 of such evidence to show a propensity to commit the crime charged is clearly prohibited
by the law of this state and is commonly regarded as sufficient ground for reversal on

1 appeal. See Taylor, 109 Nev. at 854, 858 P.2d at 847 (citing Berner v. State, 104 Nev.
2 695, 696-97, 765 P.2d 1144, 1145-46 (1988)).

3
4 **A. The State should be precluded from introducing evidence showing that**
5 **O'Keefe had claimed to Cheryl Morris that he could kill anyone with a knife and**
6 **had demonstrated how he would kill with knives.**

7 The State did not seek permission to introduce this evidence at the prior trial
8 because the State did not believe it was bad act or character testimony. When the
9 defense raised the issue, the Court ruled that the evidence did not show a bad act and
10 that Morris would be allowed to testify regarding the same. 3/16/09 TT 14-16.

11 Morris testified that O'Keefe made statements indicating he was proficient with
12 knives and that he was capable of killing anyone with a knife. According to Morris, he
13 demonstrated how he would kill someone with a knife: "O'Keefe would hold me on one
14 shoulder and have a pretend sort of weapon in his hand, and he would stand there and
15 hold me as ... arm's length and say he would come at me or could come at a person
16 and shove it through the cage – rib cage area and then just pull up pretty much ...
17 slicing someone open." 3/17/09 TT 17. Morris demonstrated this slicing action on her
18 sternum area. Id. at 17-18.

19 Whether this evidence is treated as other bad act evidence or not, it is irrelevant
20 and unfairly prejudicial. The alleged victim in this case was killed by a puncture type
21 stab wound under her armpit that went directionally from front to back and downward.
22 3/18/09 TT 103, 118. Therefore, nothing close to the gutting or upward sternum area
23 slicing about which Morris contended O'Keefe had bragged occurred here. The State
24 has shown no relevance, i.e., the evidence makes no fact of consequence more or less
25 probable. Moreover, the evidence tends to show that O'Keefe acted consistent with a
26 character trait of being capable of killing with knives and that he is a killer. Thus, the
27 evidence is highly inflammatory and unfairly prejudicial and must be excluded in order to
28 protect O'Keefe's constitutional right to a fair trial.

///

1 **B. The State should be limited to presenting the Judgment of Conviction for**
2 **felony domestic battery with the redaction to omit the reference to a concurrent**
3 **sentence.**

4 During the prior trial, the parties agreed that when the State introduced in its
5 case-in-chief the copy of a certified Judgment of Conviction to show the felony domestic
6 battery in C207835, the reference to a concurrent sentence would be redacted. 3/18/09
7 TT 122. Because of the irrelevant and prejudicial nature of this evidence, and out of an
8 abundance of caution, O'Keefe requests a ruling requiring the same redaction for this
9 trial.

10
11 **C. The State should be precluded from introducing any evidence of a sexual**
12 **assault allegation related to O'Keefe's prior burglary conviction.**

13 During the prior trial, the State agreed that it would not introduce any evidence
14 related to the sexual assault allegation, of which O'Keefe was acquitted in C202793.
15 3/16/09 TT 10. Because of the irrelevant and extreme prejudicial nature of this
16 evidence, O'Keefe requests a ruling precluding the State from introducing the sexual
17 assault allegation during the retrial.

18 **D. The State should be precluded from introducing the term "sexual assault**
19 **kit" with reference to the DNA collection here or referring to any sexual assault.**

20 During the prior trial, the State agreed that it would not introduce the term "sexual
21 assault kit" or make reference to any sexual assault in trial because there is no
22 evidence of a sexual assault here. 3/18/09 TT 115-16. Because of the irrelevant and
23 prejudicial nature of term "sexual assault", O'Keefe requests a ruling prohibiting the
24 State from introducing or using such terms during the retrial.

25 ///

26 ///

27 ///

28 ///

1 **E. The State should be precluded from introducing photographs of**
2 **Whitmarsh's bruises which cannot be linked to the time of the incident here.**

3 During the prior trial, the State introduced numerous photographs of bruising on
4 Whitmarsh's body over defense objection. 3/16/09 TT 267-68, 3/18/09 TT 98-99
5 (admitting exhibits 32-28, 40, 44-48, and 55-59), 126. However, the medical examiner,
6 Dr. Benjamin, admitted that none of the bruises could be linked to the incident leading to
7 Whitmarsh's death. Further, Whitmarsh bruised easily upon normal contact because of
8 her advanced Cirrhosis and Hepatitis C. 3/18/09 TT 115-16. None of the bruises was
9 life threatening and each could have been inflicted by Whitmarsh herself or another
10 person. 3/18/09 TT 98-100.

11 On appeal, O'Keefe challenged the district court's ruling permitting the
12 introduction of these photographs. However, having reversed on the jury instruction
13 issue, the Supreme Court declined to address O'Keefe's remaining issues.

14 There is no foundation for any assertion that the bruises on Whitmarsh's body
15 were caused by O'Keefe and were not the result of other incidents combined with her
16 Cirrhosis of the liver medical condition. Given the lack of foundation showing a nexus
17 between the bruises and the events at issue here, and their highly prejudicial and
18 inflammatory nature, this evidence should be excluded during the retrial. NRS 48.035;
19 Townsend v. State, 103 Nev. 113, 117-18, 734 P.2d 705, 708 (1987). Admission of this
20 evidence would violate O'Keefe's constitutional right to a fair trial. Spears v. Mullin, 343
21 F.3d 1215, 1225-26 (10th Cir. 2003); Romano v. Oklahoma, 512 U.S. 1, 12 (1994).

22
23 **F. The State should be precluded from introducing any reference to racial**
24 **slurs allegedly made by O'Keefe.**

25 During the previous trial, the State introduced testimony from transportation
26 officer Hutcherson that O'Keefe told him to "turn that nigger music off" and said "I don't
27 listen to nigger music." 3/17/09 TT 179, 251. This testimony came as a surprise to the
28 defense, and was the basis for a motion for mistrial. The State offered an additional
reason as to why it believed the testimony to be relevant:

1 The intent and state of mind of the defendant before, during and after the
2 murder, the stabbing of Victoria, is very important to this case. The fact
3 that he's angry, mean, violent, and is spewing racial slurs is in the State's
4 opinion probative and relevant to the case.

5 3/18/09 TT 2-8.

6 O'Keefe raised the issue of the improper introduction of this evidence on appeal.
7 However, the Supreme Court did not address the issue after determining that reversal
8 was warranted for the jury instruction error.

9 In order to protect his due process right to a fair trial, O'Keefe requests a pretrial
10 ruling prohibiting the State from introducing such prejudicial evidence. Improper
11 references to race can be so prejudicial as to result in a denial of due process. Moore
12 v. Morton, 255 F.3d 95, 114 (3rd Cir. 2001). There is no suggestion here that this
13 incident in any way involved racial animosity. Admission of the evidence would render
14 the trial fundamentally unfair, resulting in a denial of due process. The evidence
15 constitutes evidence of bad character which would invite the jury to infer that O'Keefe
16 committed the charged offense because of his bad character, and thus its admission
17 would be improper. NRS 48.045; Tavares v. State, 117 Nev. 725, 30 P.3d 1128 (2001).
18 This evidence uniquely tends to evoke an emotional bias against O'Keefe and has no
19 relevance to the issues of this case. Moreover, admission of this evidence would violate
20 O'Keefe's First Amendment rights. Dawson v. Delaware, 503 U.S. 159 (1992).

21 **G. The State should be precluded from introducing the hearsay statement of**
22 **Charles Toliver that O'Keefe killed Whitmarsh.**

23 During the testimony of Joyce Tolliver, she was permitted to testify over defense
24 hearsay objection that her husband, Charles, returned from O'Keefe's apartment and
25 said, "baby, he done killed that girl." 3/16/09 TT 196-99. The Court admitted the
26 statement as an excited utterance.

27 However, the excited utterance hearsay exception is justified by the concept that
28 a witness, having just witnessed a startling event, is likely to truthfully describe it while
still under the stress of excitement. See State v. Rivera, 578 P.2d 1373, 1375 (Ariz.

1 1984) (the underlying rationale for excited utterance exception is that a witness having
2 just witnessed a startling event, is unlikely to fabricate). Here, Charles Toliver did not
3 witness any killing. His statement was clearly based on speculation. Therefore, to
4 admit such a statement for the truth of the matter asserted violates O'Keefe's rights to
5 confront and cross-examine witnesses under the Sixth and Fourteenth Amendments of
6 the United States Constitution, and under Article 1, Section 8 of the Nevada
7 Constitution.
8

9 **H. The State should be precluded from introducing through a homicide**
10 **detective an expert opinion on the nature of O'Keefe's wounds.**

11 During the prior trial, the court allowed a police detective to testify and offer his
12 opinion whether the wounds on O'Keefe's hands were defensive wounds, while also
13 denying O'Keefe the right to call his own expert to testify as to whether or not the wound
14 on the deceased could have been caused by an accident. Over an objection by
15 O'Keefe's counsel, Detective Wildemann testified that in his experience as a homicide
16 detective, it has frequently been the case that a suspect in a stabbing has cuts on his
17 fingers on the same area that O'Keefe had a cut on his hand. 3/18/09 TT 183-85.
18 O'Keefe's counsel objected on the basis that the detective was not an expert and what
19 happened in other cases is irrelevant. 3/18/09 TT 184, 3/19/09 TT 3. The district court
20 overruled her objection, 3/18/09 TT 184, but later employed a different standard when it
21 precluded a defense expert from testifying as to whether the crime scene suggested
22 that the death might have been accidental. 3/19/09 TT 143-53.

23 The defense expert, George Schiro, has extensive experience as a forensic
24 scientist and crime scene reconstruction and he had previously testified as to whether
25 wounds were defensive or accidental. The district court found that the question was
26 beyond Schiro's expertise and beyond what was identified in his report. Id. O'Keefe
27 challenged the district court's rulings on appeal, however, the Supreme Court declined
28 to address the issue having already determined to reverse on other grounds.

1 Whether other suspects have cuts on their hands is irrelevant without knowing
2 how such cuts were received in each individual case. Moreover, the evidence is unfairly
3 prejudicial because it indicates guilt is common where there are cuts on the hand similar
4 to O'Keefe's, regardless of the circumstances under which the cuts were received.
5 Therefore, the State should be precluded from introducing such evidence. O'Keefe
6 further contends that the State's detective should not be allowed to testify as to his
7 opinion on the defensive nature of wounds without first establishing that he is an expert
8 qualified to make such an opinion, Hallmark v. Eldridge, 189 P.3d 646 (Nev. 2008), and
9 he has been properly noticed as expert. To allow this otherwise usurps the jury's
10 function and violates O'Keefe's constitutional rights to due process and a fair trial. To
11 employ different standards for the State's experts than for the defense's also would
12 violate O'Keefe's rights of equal protection and due process.

13
14 **I. The State should be precluded from introducing evidence that a prior trial,**
15 **conviction or reversal occurred in this case.**

16 Evidence relating to the prior trial for open murder, the prior conviction of second-
17 degree murder, and the subsequent reversal is irrelevant and should be prohibited.
18 Such evidence is likely to cause jurors to shift the burden of proof to O'Keefe, as he has
19 already been once convicted, and the jury may improperly rely upon the previous jury's
20 assessment of the case. Likewise, the jury may become prejudiced against O'Keefe for
21 appealing and not accepting the previous jury's determination. Finally, the knowledge
22 that O'Keefe appealed from his previous conviction may lead the jury to feel a
23 diminished sense of responsibility since the prior jury did not have the last word on the
24 subject. Cf. Geary v. State, 112 Nev. 1434, 930 P.2d 719 (1996) (concluding that a
25 constitutional violation occurred when a death penalty jury was told that the defendant
26 would not be executed until he completed his first sentence of life in prison, as this
27 created an intolerable danger that the jury minimized its role because it believed that the
28 ultimate determination of death rested with others, such as the defendant, if he sought
commutation, and the Parole Board, if it granted parole), clarified on other grounds on

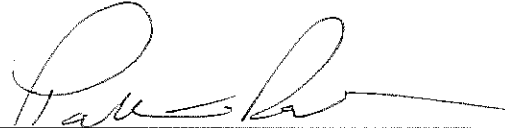
1 reh'g, 114 Nev. 100, 952 P.2d 431 (1998). Here, O'Keefe should not be further
2 burdened by the violation of his rights during the previous trial, and to allow the fact of
3 the previous trial, conviction, or appeal into evidence would taint his right to a fair retrial.
4
5

6 CONCLUSION

7 Based on the foregoing, Brian O'Keefe moves this Honorable Court for rulings
8 precluding the State from introducing improper evidence and argument as set forth
9 above and requiring the State to caution its witnesses regarding the same.

10 DATED this 21st day of July, 2010.

11 PALM LAW FIRM, LTD.
12

13 
14

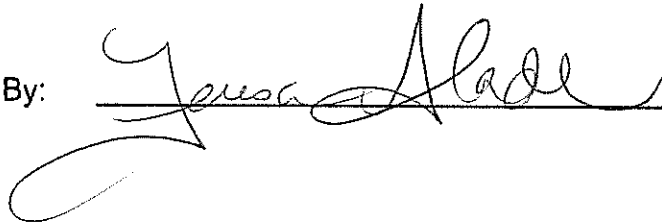
15 Patricia Palm, Bar No. 6009
16 1212 Casino Center Blvd.
17 Las Vegas, NV 89104
18 Phone: (702) 386-9113
19 Fax: (702) 386-9114
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21
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28

RECEIPT OF COPY

I, the undersigned, acknowledge that on this 21 day of July
2010, I received a true copy of the foregoing NOTICE OF MOTION AND MOTION BY
DEFENDANT O'KEEFE TO PRECLUDE THE STATE FROM INTRODUCING AT
TRIAL OTHER ACT OR CHARACTER EVIDENCE AND OTHER EVIDENCE WHICH
IS UNFAIRLY PREJUDICIAL OR WOULD VIOLATE HIS CONSTITUTIONAL
RIGHTS.

CLARK COUNTY DISTRICT ATTORNEY

By:

A handwritten signature in black ink, appearing to read "Joshua Alade", is written over a horizontal line. The signature is fluid and cursive.

001
PALM LAW FIRM, LTD.
PATRICIA PALM, ESQ.
NEVADA BAR NO. 6009
1212 CASINO CENTER BLVD.
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Phone: (702) 386-9113
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Email: Patricia.palmlaw@gmail.com
Attorney for Brian O'Keefe

FILED
JUL 21 2010
Clerk of Court

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

BRIAN K. O'KEEFE,

Defendant.

CASE NO.: C250630, DEPT XVII

DATE: August 3, 2010

TIME: 8:15 a.m.

**NOTICE OF MOTION AND MOTION BY DEFENDANT O'KEEFE TO ADMIT
EVIDENCE PERTAINING TO THE ALLEGED VICTIM'S MENTAL HEALTH
CONDITION AND HISTORY, INCLUDING PRIOR SUICIDE ATTEMPTS, ANGER
OUTBURSTS, ANGER MANAGEMENT THERAPY, SELF-MUTILATION
AND ERRATIC BEHAVIOR**

TO: THE STATE OF NEVADA, Plaintiff and

TO: DISTRICT ATTORNEY'S OFFICE, its counsel:

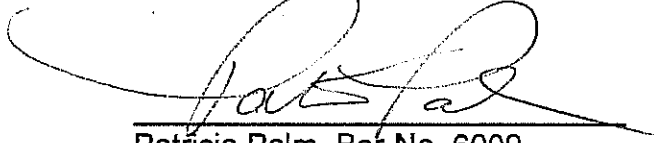
PLEASE TAKE NOTICE that on the above date and time, or as soon thereafter as counsel can be heard, Defendant Brian K. O'Keefe, by and through his attorney, Patricia Palm of Palm Law Firm, Ltd., will move the Court for an order allowing him to introduce evidence of the alleged victim's mental health condition and history, including prior suicide attempts, anger outbursts, anger management therapy, self-mutilation, and erratic behavior.

This Motion is made and based upon the record in this case, including the papers and pleadings on file herein, the Constitutions of the United States and the State of

1 Nevada, the points and authorities set forth below, and any argument of counsel at the
2 time of the hearing on this Motion.

3 Dated this 20th day of July, 2010.

4 PALM LAW OFFICE

5 

6
7 Patricia Palm, Bar No. 6009
8 1212 Casino Center Blvd.
9 Las Vegas, NV 89104
10 Phone: (702) 386-9113
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POINTS AND AUTHORITIES
PROCEDURAL HISTORY

The State charged Defendant Brian K. O'Keefe with murder with use of a deadly weapon. He entered a plea of not guilty and invoked his right to a speedy trial. The State filed a motion to admit evidence of other crimes, which O'Keefe opposed. The Court ruled that the State could introduce evidence of threats to the alleged victim Victoria Whitmarsh, which witness Cheryl Morris claims were made by O'Keefe, and his claim of proficiency at killing with knives, which Morris claims to have witnessed. The Court further ruled that the State could introduce certified copies of the prior Judgment of Conviction for felony domestic battery, which involved 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 is permitted to introduce only the details of when O'Keefe was convicted, in which jurisdiction, and the name of the offenses, and with the felony domestic battery, the fact that Whitmarsh had testified against him in that case. 3/16/09 TT 2-10.

The instant case was tried before this Honorable Court beginning March 16, 2009. O'Keefe was prohibited from introducing evidence regarding Whitmarsh's mental health condition which caused her to be erratic, have uncontrolled anger, attempt suicide by overdosing and cutting herself with knives and scissors when stressed, and required anger management therapy. After five days of trial, on March 20, 2009, the jury returned a verdict finding O'Keefe guilty of second degree murder with use of a deadly weapon. On May 5, 2009, this 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.

O'Keefe timely appealed to the Nevada Supreme Court. After briefing, the Court reversed O'Keefe's conviction, agreeing with him that the district court "erred by giving the State's proposed instruction on second-degree murder because it set forth an alternative theory of second-degree murder, the charging document did not allege this alternate theory, and no evidence supported this theory." The Court explained, "the

1 State's charging document did not allege that O'Keefe killed the victim while he was
2 committing an unlawful act and the evidence presented at trial did not support this
3 theory of second-degree murder." O'Keefe v. State, NSC Docket No. 53859, Order of
4 Reversal and Remand (April 7, 2010). The Court further stated, "The district court's
5 error in giving this instruction was not harmless because it is not clear beyond a
6 reasonable doubt that a rational juror would have found O'Keefe guilty of second-
7 degree murder absent the error." Id. at 2. Having reversed on this ground, the Court
8 declined to address O'Keefe's remaining contentions, which included a contention that
9 the district court erred by refusing O'Keefe's request to present evidence of Whitmarsh's
10 prior suicide attempts, anger outbursts, anger management therapy, self-mutilation, and
11 erratic behavior.

12 After remand to this Court, trial was reset to begin on August 23, 2010.

13 STATEMENT OF FACTS

14 The prior trial testimony in this case showed that Brian O'Keefe and Victoria
15 Whitmarsh met in a treatment facility in 2001. 3/17/09 TT 18, 3/19/09 TT 183-84. They
16 dated and co-habitated off and on and had what could be described as a very
17 tumultuous relationship. 3/19/09 TT 186-90. In 2004, O'Keefe was convicted of
18 burglary for entering into the couple's joint dwelling with the intent to commit a crime
19 against Whitmarsh. O'Keefe was sentenced to probation, but his probation was
20 revoked when he was convicted of a third offense of domestic battery against
21 Whitmarsh, and he went to prison in 2006. 3/18/09 TT 139-40, 3/19/09 TT 187-88.
22 Whitmarsh testified against O'Keefe in the domestic battery case. 3/18/09 TT 139.

23 When O'Keefe was released from prison in 2007, he met and began a
24 relationship with Cheryl Morris. 3/17/09 TT 10, 3/19/09 TT 189. He would often speak
25 to Morris about his previous relationship with Whitmarsh, and even expressed to her
26 that he still had strong feelings for Whitmarsh. 3/17/09 TT 13-14, 37. Morris claimed at
27 trial that O'Keefe said he was upset with Whitmarsh because she put him in prison and
28 he said he wanted to "kill the bitch." 3/17/09 TT 14-17. Morris testified that O'Keefe left
at one point to be with Whitmarsh, and then telephoned Morris, asking her to move out

1 of their jointly shared apartment so Whitmarsh could move in. 3/17/09 TT 11. Morris
2 testified that Whitmarsh got on the phone with her during that call and told her she had
3 decided to resume her relationship with O'Keefe. The two of them appeared to be a
4 loving couple and were open about their relationship. 3/16/09 TT 259, 3/19/09 TT 18-
5 21, 30-36.

6 At about 10:00 p.m. on the evening of the incident, in November 2008, a
7 neighbor who lived in the apartment below O'Keefe and Whitmarsh heard what she
8 described as thumping and crying noises coming from upstairs. 3/16/09 TT 185-88.
9 The noise became so loud that it woke her husband, Charles Toliver, who was in bed
10 next to her. Id. at 186-200. Toliver went upstairs to inquire about the noise and found
11 the door to O'Keefe's apartment open. Id. at 206-209. He yelled inside to get the
12 occupants' attention, at which time O'Keefe came out of the bedroom and shouted at
13 Toliver to "come get her!" Id. at 209-10. When Toliver entered the bedroom, he saw
14 Whitmarsh lying on the floor next to the bed and saw blood on the bed covers. Id. at
15 210. O'Keefe was holding her and saying "baby, baby, wake up, don't do me like this."
16 Id. at 210, 224. O'Keefe did not stop Toliver from going in the apartment or otherwise
17 fight with him. Id. at 224. Toliver left the apartment immediately and shouted at a
18 neighbor who was outside to call the police. Id. at 213. He also brought Todd
19 Armbruster, another neighbor, back upstairs. Id. at 214. O'Keefe was still holding
20 Whitmarsh and told Armbruster to get the hell out of there. Id. at 215. Armbruster
21 called 911. Id. at 238. He thought that O'Keefe was drunk. Id. at 240, 245.

22 By this time, shortly after 11:00 p.m., police had arrived on the scene. 3/16/09
23 TT 215, 3/17/09 TT 65. When they entered the bedroom, they found Whitmarsh lying on
24 the floor next to the bed and an unarmed O'Keefe cradling her in his arms and stroking
25 her head. 3/17/09 at 87, 96. The police believed Whitmarsh to be dead and ordered
26 O'Keefe to let go of her, but he refused. Id. at 51-52, 60-61, 87. The officers
27 eventually subdued him with a taser gun and carried him out of the bedroom. Id. 88.
28 O'Keefe was acting agitated, id. at 73, the officers testified that he had a strong odor of
alcohol on him, and he appeared to be extremely intoxicated. Id. at 127-28, 3/18/09 TT

1 170-76. Much of his speech was incoherent, but at one point he said that Whitmarsh
2 stabbed herself and he also said that she tried to stab him. 3/17/09 TT 56, 85, 92.
3 They arrested him and brought him to the homicide offices. 3/17/09 TT 177.
4 Subsequent to his arrest, O'Keefe gave a rambling statement indicating he was not
5 aware of Whitmarsh's death or its cause. 3/18/09 TT 133. Police interviewed him at
6 1:20 a.m., at which time he was crying, raising his voice, talking to himself, and slurring.
7 Detective Wildemann stated that during the interview O'Keefe smelled heavily of
8 alcohol, and when police took photographs of him at about 3:55 a.m., they had to hold
9 him upright to steady him. 3/18/09 TT 146-49. Wildemann said it was pretty obvious
10 that O'Keefe had been drinking, however, law enforcement did not obtain a test for his
11 breath or blood alcohol level either before or after the interview. Id.

12 Whitmarsh had also been drinking on the date of the incident, and at the time of
13 her death, her blood alcohol content was 0.24. 3/18/09 TT 94, 117. She died of one
14 stab wound to her side and had bruising on the back of her head. Id. at 93, 103.
15 Medical Examiner Dr. Benjamin testified that Whitmarsh's toxicology screen indicated
16 that she was taking Effexor and that drug should not be taken with alcohol. Id. at 109.
17 Whitmarsh had about three times the target dosage of Effexor in her system. 3/19/09
18 TT 94-96. The combination of Effexor and alcohol could have caused anxiety,
19 confusion and anger. 3/19/09 TT 95-96. Whitmarsh also had Hepatitis C and advanced
20 Cirrhosis of the liver, which is known to cause bruising with only slight pressure to the
21 body. 3/18/09 TT 93-97. Whitmarsh's body displayed multiple bruises at the time Dr.
22 Benjamin examined her and the bruises were different colors, but she could not say that
23 they were associated with Whitmarsh's death or otherwise say how long ago Whitmarsh
24 sustained the bruises. 3/18/09 TT 115. DNA belonging to O'Keefe and to Whitmarsh
25 was found on a knife at the scene. 3/18/09 TT 62-67.

26 O'Keefe testified. 3/19/09 TT 177. He acknowledged his problems with alcohol
27 and described his history with Whitmarsh. Id. at 177-93. He disputed Morris's claim
28 that he said he wanted to kill Whitmarsh, but he acknowledged being angry with her. Id.
at 190. It was Whitmarsh who called O'Keefe and initiated their renewed relationship.

1 Id. at 191. He was aware that Whitmarsh had Hepatitis C when she moved into his
2 apartment. Id. at 197-98. In November, 2008, Whitmarsh was stressed because of her
3 financial condition. 3/20/09 TT 17. A couple of days before the incident at issue here,
4 Whitmarsh confronted O'Keefe with a knife. Id. at 18-19. She had been drinking and
5 was on medication. Id. O'Keefe had not been drinking that night and was able to
6 diffuse the situation. Id. at 19. On November 5, 2009, O'Keefe learned that he would
7 be hired for a new job and had two glasses of wine to celebrate. Id. at 21-24. O'Keefe
8 and Whitmarsh went to the Paris Casino where they both had drinks. Id. at 24-25.
9 They returned home, and she was upset and went upstairs while he reclined in the
10 passenger seat of the car for a period of time. Id. at 26-28. He went upstairs and then
11 smoked outside on a balcony while she was in the bathroom. Id. at 29-30. He then
12 went in the bedroom and saw Whitmarsh coming at him with a knife. Id. at 33. He
13 swung his jacket at her and told her to get back. Id. He knew that she was mad at him
14 about a lot of things. Id. He grabbed the knife, she yanked it and cut his hand. Id. at
15 33. They struggled for a period of time. Id. at 33-36. During the struggle, she held the
16 knife and fell down, he fell on top of her and then he realized that she was bleeding. Id.
17 at 35-37. He was still drunk at this point and was trying to figure out what happened.
18 Id. at 37. He tried to stop the bleeding and panicked. Id. at 39. He tried taking care of
19 Whitmarsh and asked his neighbor to call someone after the neighbor came into his
20 room. Id. at 40. He became agitated when the neighbor brought another neighbor up
21 to look at Whitmarsh, who was partially undressed, rather than calling the paramedics.
22 Id. at 41. O'Keefe denied hitting or slamming Whitmarsh. Id. at 42. He testified that he
23 did not intentionally kill Whitmarsh, but felt responsible because he drank that night and
24 he should not have done so. Id. at 49.

25 During trial, the State objected to the admission of any testimony concerning
26 Whitmarsh's suicide attempts and to admission of documents concerning Whitmarsh's
27 medical history. 3/19/09 TT 81. O'Keefe's counsel submitted points and authorities as
28 to the admissibility of evidence showing that Whitmarsh had a history of suicide
attempts by overdose and cutting herself, depression, panic disorder, anger outbursts,

1 and incidents with self-mutilation by cutting. See Defense Proposed Exhibit B (on file
2 with this Court); 2 ROA 265. The Court found that Whitmarsh's attempted suicides
3 were not acts of violence and found that the testimony and evidence from the medical
4 records were not admissible. 3/20/09 TT 7-8. The Court also prohibited admission of
5 evidence concerning her anger management classes. Id.

6 7 ARGUMENT

8
9 O'Keefe has a fundamental federal and state constitutional right to present
10 evidence in his defense pertaining to the alleged victim Whitmarsh's mental
11 health condition and history and its manifestations through conduct, including
12 her pattern of suicidal behavior and anger control problems, in support of his
13 claims regarding the sequence of events and his innocent actions during the
14 incident leading to Whitmarsh's death.

15 O'Keefe renews his request to present evidence in his defense, by way of expert
16 testimony summarizing Whitmarsh's mental health history and condition and its
17 manifestations through conduct, by admission of portions from medical records
18 documenting the same,¹ and by way of his own testimony regarding his knowledge of
19 Whitmarsh's mental health condition and its manifestations.

20 Having been Whitmarsh's partner on and off since 2001, O'Keefe was well aware
21 at the time of the incident of her mental health history, which included multiple suicide
22 attempts, both by overdose and cutting herself with knives or scissors, was aware that
23 she self-mutilated, was aware that she had uncontrollable anger outbursts and
24 problems when stressed over relationship issues and when abusing drugs or alcohol,
25 and that she was attending anger management counseling.

26 This evidence supports O'Keefe's testimony regarding the events leading up to
27 Whitmarsh's death and his innocent response to her aggression, and as such it is
28 relevant and highly probative on the issues of whether Whitmarsh was alone in the

¹The State has previously stipulated to the authenticity of these records, which are on
file with the Court as Defendant's Proposed Exhibit B from the prior trial.

1 apartment and having a fit of anger when the neighbors heard banging noises (as
2 O'Keefe contends that she must have been and which would explain the lack of fresh
3 bruising as would be consistent with the State's prolonged-abuse theory of the case);
4 whether she had taken the kitchen knife into the bathroom of the master bedroom when
5 she was alone in the apartment (as O'Keefe contends she may have been preparing to
6 harm him, self-mutilate, or commit suicide by overdose and cutting, which is consistent
7 with the facts that she had three times her prescription dose of Effexor in her system
8 and had an apparent injury on her hand); whether she was holding the knife when
9 O'Keefe entered the bedroom (O'Keefe contends that she was holding the knife and
10 surprised him); and whether she charged at O'Keefe in anger (as she has a
11 documented history of anger control problems, which may have been exacerbated by
12 the mixture of Effexor and alcohol in her system).

13 The evidence related to Whitmarsh's mental health history is also corroborative
14 evidence of O'Keefe's state of mind and whether he believed Whitmarsh was going to
15 harm him when she came at him with the knife -- he knew she was unstable and
16 dangerous when upset, especially when under the influence of alcohol and drugs.

17 The medical records from which O'Keefe seeks to admit excerpts and upon
18 which his expert will rely show as follows:

19
20 **October 2001 Admission to Montevista Hospital (when Whitmarsh and Brian met)**

21 Whitmarsh was admitted October 31, 2001 *after she cut both wrists*
22 *with a knife in what she reported was her fourth suicide attempt.* She
23 was on the medications Celexa, Xanax and Vistaril. She was diagnosed
with Major Depressive Episode, Panic Disorder with Agoraphobia.

24 **May 2002 Admission to Montevista Hospital**

25 Whitmarsh was admitted on May 21, 2002 because she'd been using
26 Xanax, Lortab, Oxycotin; she was blacking out and unable to function at
27 work; withdrawal was severe; consequences of use included severe
28 dysfunction in her relationship with husband from whom she is separated;
psychiatric history was reported as follows: *"She has severe anxiety and
depression; she was suicidal and hospitalized at Montevista Hospital in
October of 2001 for an overdose and cutting her wrist. She also*

1 overdosed in 1983 and was hospitalized." Her diagnosis was opiate
2 dependence, continuous, xanax dependence continuous, major
3 depression, recurrent.

4 **September 2006 Admission Montevista Hospital (this admission was during**
5 **Brian's incarceration)**

6 Whitmarsh was admitted September 26, 2006. She was diagnosed as
7 Bipolar, Dep; Polysub dep; liver cirrhosis w/ascites; Hep C; underweight;
8 gerd; social; marital. The Report of Dr. Allgower states "took lethal dose
9 of Xanax requiring intubation/mechanical ventilation h/o depression, also
10 has self-inflicted wrist lac." Form by Dr. Slagle states: "Ms Whitmarsh has
11 made at least 3 suicide attempts. Recent attempt could have been fatal."
12 Report by Dr. Ajayi states that Whitmarsh's suicide attempt resulted in
13 admission to ICU. She had been transferred from St. Rose where she
14 had been in ICU from 9/24/06 – 9/26/06, **she overdosed on Xanax and**
15 **friend's morphine after an argument with her estranged husband.**
16 Diagnosis at St. Rose was Bipolar Disorder type II, depressed vs recurrent
17 major depression and borderline personality traits. She reported 2
18 previous suicide attempts (1983 OD on pain meds after fight with
19 husband) and (OD on pills and cutting wrists in 2001). "She has been
20 self-mutilating for the pasts 15 years and stated that **she cuts herself**
21 **when she is angry and the last time she cut her left wrist was with a**
22 **pair of scissors on September 22, 2006.** She complained of irritability,
23 mood swings, difficulty sleeping at night because of racing thoughts, poor
24 appetite, anxiety, . . . She also reports episodic euphoria, anger outbursts
25 and decreased need for sleep. She reports ongoing conflict with her
26 estranged husband and her sister and her 21 year old daughter." Dr.
27 Slagle documented poor impulse control, and that her 2001 admission to
28 Montevista was because "she was angry, screaming and "went
berserk" after an argument with her husband and overdosed on pills
and cut her wrist." Drug and alcohol abuse history: She has a history of
abusing Xanax back to at least 2001; history of dependence on Lortab,
Percocet, and Oxycotin dating back to 2002. Inpatient Detox at
Montevista in May 2002 followed by inpatient rehab through June 2002.
Most recently admitted for detox from Percocet and Lortab at Valley
Hospital in August 2006. Her diagnosis was: biopolar disorder, type II,
depressed, benzodiazepine dependence, opiate dependence, hx of
alcohol dependence in sustained full remission; borderline personality
traits.... Hep C, Liver Cirrhosis.... Her treatment plan included anger
management.

She had racing thoughts and substantial mood swings since 2000; 2 prior
suicide attempts in the 1980s both since she married her husband; history
of high moods and anger problems; past history of very heavy alcohol use.
Hx of pain medication abuse.

1
2 Chart notes further show that Whitmarsh "admits to a history of self-
3 mutilation. Most recently, she **stabbed herself on her hands**, August 22,
4 2006, "because I am not happy [with] myself."

5 And "pt denies wanting to kill self, but does state when angry she will self-
6 mutilate and take pills to cope [with] emotional pain. **Admits to "taking**
7 **the pills because I was mad [with] my husband."**

8 **Southern Nevada Adult Mental Health October 2007 Admission (This admission**
9 **was after Brian's release from incarceration but while the couple was separated)**

10 Whitmarsh took an overdose of pills in an apparent suicide attempt.

11 (Emphasis added).

12 Whitmarsh's records demonstrate a pattern of self-mutilation by cutting and
13 suicide attempts by overdosing and cutting during angry or berserk reactions to fights
14 with her husband and when she was not even in a relationship with O'Keefe. The
15 evidence supports O'Keefe's explanation for why it was Whitmarsh, and not he, who
16 brought the knife into the bedroom. However, a jury deprived of this evidence, and
17 knowing of O'Keefe's prior felony domestic battery conviction involving Whitmarsh, is
18 likely to unfairly assume that O'Keefe retrieved the knife from the kitchen to harm
19 Whitmarsh or that if Whitmarsh did bring the knife into the bedroom, she was doing so
20 to protect herself.

21 O'Keefe must be allowed to present this crucial evidence, as it corroborates his
22 claim of self-defense/accident, i.e., that Whitmarsh was out of control and he was
23 defending himself, and during the struggle for the knife, the accident occurred leading to
24 Whitmarsh's death. This Court has already ruled, pursuant to the State's bad acts
25 motion, that the State may introduce evidence that O'Keefe was convicted of felony
26 domestic battery involving Whitmarsh as relevant to his motive and intent.

27 The State also presented evidence at the previous trial to show that Whitmarsh
28 was "very meek" and submissive. 3/17/09 TT 15, 40. The State was also quick to point
out during the previous trial that Whitmarsh had a wound on her hand, when a defense

1 expert opined that she had no defensive wounds. 3/19/09 TT 156. O'Keefe must be
2 allowed to rebut that evidence with evidence that Whitmarsh had a history of cutting
3 herself and suffered from uncontrollable anger and suicidal tendencies.

4 The Fifth, Sixth and Fourteenth Amendments to the United States Constitution,
5 as well as the Nevada Constitution, article 1, section 8, protect a criminal defendant's
6 right to a fair trial, at which he may confront and cross-examine witnesses and present
7 evidence in his defense. Preclusion of this evidence violates O'Keefe's rights. Pointer
8 v. Texas, 380 U.S. 400 (1965) (recognizing that the right of confrontation requires that a
9 criminal defendant be given an opportunity to cross-examine the witnesses against
10 him); Chambers v. Mississippi, 410 U.S. 284, 294 (1973) (stating that "the rights to
11 confront and cross-examine witnesses and to call witnesses in one's own behalf have
12 long been recognized as essential to due process").

13 It is unclear in Nevada whether evidence of an alleged victim's prior mental
14 health history including suicide attempts and anger control issues comes under the test
15 for character evidence or whether it is simply subject to a probative-value-versus-unfair-
16 prejudice test.

17 Other states' courts considering the admissibility of evidence pertaining to
18 alleged victims' mental health conditions have determined that the evidence is not
19 restricted by the rules pertaining to character evidence. Instead, the evidence is
20 deemed to be admissible so long as relevant to a material issue. See State v. Stanley,
21 37 P.3d 85, 90 (N.M. 2001) (collecting cases and noting that a clear majority of courts
22 hold that evidence of suicide attempts by a victim in a homicide case is admissible to
23 show the victim's state of mind); People v. Salcido, 246 Cal.App.2d 450, 458-60
24 (Cal.App. 5th Dist. 1966) (same); State v. Jaeger, 973 P.2d 404, 407-08 (Utah 1999)
25 (medical records, containing statements that the victim had previously attempted
26 suicide, were admissible when introduced in a case where defendant claimed the victim
27 committed suicide).

28 In Stanley, The New Mexico Supreme Court concluded that it is not appropriate
to consider such evidence as "character evidence" subject to the rule preventing

1 evidence of a person's character or a trait of character from being admitted for the
2 purpose of proving conformity. That court reasoned that the evidence is related to
3 mental illness and its specific manifestations and not character. 37 P.3d at 375.
4 Further, since the main purpose of the evidence rules is to search for the truth, a finding
5 of relevancy and the careful application of the probative-value-versus-unfair-prejudice
6 balancing test is sufficient to prevent the misuse of this evidence. Id. at 375-76. Where
7 a deceased person has a pattern of suicidal or violent behavior prior to the incident
8 leading to his death, that evidence is relevant to the alleged victim's state of mind and
9 causation in a murder trial. 37 P.3d at 372-73. In Stanley, the court concluded that the
10 alleged victim's pattern of suicide attempts and violent or suicidal behavior dating back
11 to 1987, i.e., 11 years prior to the death in question, should have been admitted at trial.
12 Id. at 374. The court determined that evidence that a deceased person suffered from
13 mental illness and had attempted suicide in the past "is not the type of evidence that
14 has the unusual propensity to prejudice, confuse, inflame or mislead the fact finder." Id.
15 Finally, the court recognized that a defendant has a "fundamental right to present
16 evidence negating the State's evidence on causation and the fact finder should [be]
17 given the opportunity to consider such evidence and determine what weight, if any, to
18 give to it in light of the other evidence." Id. at 374.

19 Similarly, in Salcido, the California Court of Appeals determined that hospital
20 records showing the victim of an alleged murder had been treated for a suicide attempt
21 are relevant to whether death was brought about by criminal agency. 246 Cal.App.2d at
22 458. The court stated that "in a murder case it is the victim's inclination or propensity to
23 commit suicide under emotional stress that is relevant and any competent evidence
24 which logically and reasonably tends to show this is admissible unless objectionable
25 under some other rule of exclusion." Id. at 459-60. The Court further recognized that
26 even a remote suicide attempt, when considered in light of several similar attempts, has
27 evidentiary value. Id.

28 NRS 48.015 defines "relevant evidence" as "evidence having any tendency to
make the existence of any fact that is of consequence to the determination of the action

1 more or less probable than it would be without the evidence." Pursuant to that statute,
2 relevant evidence is admissible, however, it may be excluded its probative value is
3 *substantially outweighed* by the danger of unfair prejudice, of confusion of the issues, of
4 misleading the jury, or by considerations of undue delay, waste of time or needless
5 presentation of cumulative evidence. NRS 48.035. Here the evidence sought to be
6 introduced is relevant on all of the issues set forth above, i.e., Whitmarsh's state of
7 mind, O'Keefe's state of mind, whether there is an innocent explanation for the banging
8 noises the neighbors heard, whether O'Keefe's claim that Whitmarsh had the knife is
9 likely to be true, and whether O'Keefe's claim that Whitmarsh was in an uncontrolled fit
10 of anger so that he was defending himself from her when an accident caused her death
11 is likely to be true. Indeed, the probative value here is even greater because the jury
12 will be aware of O'Keefe's prior conviction for felony domestic battery and will likely tend
13 to disbelieve his claim that Whitmarsh brought the knife into the bedroom and was the
14 aggressor. There is no unfair prejudice to the State by allowing the jury to hear this
15 evidence and determine for itself the weight to give it.

16 On the other hand, even if the evidence in question constitutes "character
17 evidence," it is admissible as it tends to show that Whitmarsh was the likely aggressor in
18 the conflict leading to her death.

19 NRS 48.045(1)(b) provides that "[e]vidence of a person's character or a trait of
20 his character is not admissible for the purpose of proving that he acted in conformity
21 therewith on a particular occasion, except: . . . [e]vidence of the character or a trait of
22 character of the victim of the crime offered by an accused . . . and similar evidence
23 offered by the prosecution to rebut such evidence." Additionally, NRS 48.055(1) states,
24 "In all cases in which evidence of character or a trait of character of a person is
25 admissible, proof may be made by testimony as to reputation or in the form of an
26 opinion. On cross-examination, inquiry may be made into specific instances of
27 conduct."

28 The Nevada Supreme Court has interpreted these statutes to require that an
accused, who claims he acted in self-defense, be permitted to present evidence of the

1 character of an alleged victim *regardless of the accused's knowledge of the victim's*
2 *character* when it tends to prove the victim was the likely aggressor. Petty v. State, 116
3 Nev. 321, 326-27, 997 P.2d 800, 802-03 (2000). Proof may be established by
4 testimony as to reputation or in the form of an opinion. Id. *An opinion as to violent*
5 *character may even be based on knowledge of only one incident of violence.* For
6 instance, in Petty, the Court held that the district court erred by excluding testimony
7 from a probation officer and police officer regarding their opinions as to the violent
8 character of the victim, even though the police officer's opinion was based upon only
9 one violent incident. Id. Based upon the foregoing authorities, Brian O'Keefe is entitled
10 to present evidence in the form of his is opinion or reputation testimony as to
11 Whitmarsh's erratic character and problems with anger control which caused her to act
12 irrationally and dangerously and to overdose and cut herself with knives and scissors.

13 Furthermore, at the time of the incident in question, Brian O'Keefe was aware of
14 Whitmarsh's aggressive and erratic character and uncontrollable anger wherein she
15 turned to pills and cutting instruments. The Nevada Supreme Court has held that if the
16 accused, who is claiming he acted in self-defense, is aware of specific acts of violence
17 by an alleged victim, then evidence as to those specific acts is admissible to show the
18 accused's state of mind at the time of the allege crime. Id. at 326-27, 997 P.2d at 803;
19 see also Burgeon v. State, 102 Nev. 43, 45-46, 714 P.2d 576, 578 (1986); Sanborn v.
20 State, 107 Nev. 399, 812 P.2d 1279 (1991). In Daniel v. State, 119 Nev. 498, 78 P.3d
21 890 (2003), the Nevada Supreme Court explained as follows:

22 [A] defendant should be allowed to produce supporting evidence to prove
23 the particular acts of which the accused claims knowledge, thereby
24 proving the reasonableness of the accused's knowledge and
25 apprehension of the victim and the credibility of his assertions about his
26 state of mind. . . . The self-serving nature of an accused's testimony about
prior violent acts of the victim makes corroborating evidence of those acts
particularly important for an accused's claim of self-defense.

27 Id. at 516, 78 P.3d at 32 (citing State v. Daniels, 465 N.W.2d 633, 636 (Wis. 1991)).

28 The admission of evidence of a victim's specific violent acts, *regardless of its*
source, is within the sound and reasonable discretion of the trial court and is limited to

1 the purpose of establishing what the defendant believed about the character of the
2 victim. Daniel, 119 Nev. at 516, 78 P.3d at 32. In sum, not only may a defendant
3 present evidence regarding specific acts by victims where the accused is aware of such
4 acts, *but the defendant may also present corroborating evidence to prove the particular*
5 *acts of which the accused claims knowledge. "[W]hen a defendant claims self-defense*
6 *and knew of relevant specific acts by a victim, evidence of the acts can be presented*
7 *through the defendant's own testimony, through cross-examination of a surviving victim,*
8 *and through extrinsic proof."* Id. at 516, 78 P.3d at 32-33. Therefore, because Brian
9 O'Keefe was aware of Whitmarsh's prior acts of violence, including violence to herself
10 by cutting/overdosing, and her anger control problems, he is entitled to present not only
11 his own testimony but any additional corroborating evidence to establish those prior
12 acts.

13 Additionally, to the extent that the State may again seek to admit evidence of
14 Whitmarsh's character of peacefulness, as it did during the previous trial by introducing
15 evidence that Whitmarsh was meek and submissive, O'Keefe has a right to confront
16 and cross-examine the State's witnesses as to their knowledge of Whitmarsh's angry
17 fits wherein she screamed, went berserk, lost control, overdosed, and used cutting
18 instruments to do violence upon herself. See State v. Sella, 41 Nev. 113, 168 P. 278
19 (1917); U.S. Const. Amend VI; Nev. Const. art. 1, sec. 8. Indeed, NRS 48.055(1)
20 specifically provides that when proof by testimony as to reputation or in the form of an
21 opinion has been given, "on cross-examination, inquiry may be made into specific
22 instances of conduct."

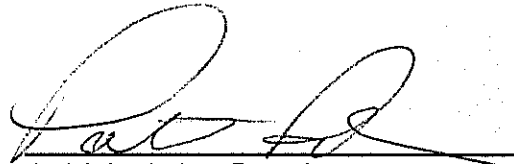
23 24 CONCLUSION

25 Based on the foregoing, Brian O'Keefe moves this Court for a ruling permitting
26 him to present expert testimony summarizing Whitmarsh's mental health history and
27 condition and its manifestations, evidence from the medical record documentation
28 discussed herein, and his own testimony showing that she had a pattern of prior suicide
attempts through overdose of pills and cutting, and a history of anger outbursts, anger

1 management therapy, self-mutilation, and erratic behavior. All of this evidence
2 corroborates and supports his claim that he reasonably believed Whitmarsh's state of
3 mind was such that she attempting to cause him serious injury at the time of the
4 incident, his claim that she was the aggressor, and his explanation of the circumstances
5 leading to Whitmarsh's accidental death.

6 DATED this 20th day of July, 2010.

7 PALM LAW FIRM, LTD.

8
9
10 

11 Patricia Palm, Bar No. 6009
12 1212 Casino Center Blvd.
13 Las Vegas, NV 89104
14 Phone: (702) 386-9113
15 Fax: (702) 386-9114
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RECEIPT OF COPY

I, the undersigned, acknowledge that on the _____ day of _____
2010, I received a true copy of the foregoing NOTICE OF MOTION BY DEFENDANT
O'KEEFE TO ADMIT EVIDENCE PERTAINING TO THE ALLEGED VICTIM'S
MENTAL HEALTH CONDITION AND HISTORY, INCLUDING PRIOR SUICIDE
ATTEMPTS, ANGER OUTBURSTS, ANGER MANAGEMENT THERAPY, SELF-
MUTILATION AND ERRATIC BEHAVIOR AND THE ATTACHED NOTICE OF
MOTION AND MOTION.

CLARK COUNTY DISTRICT ATTORNEY

By: _____

1 NOTC
2 PALM LAW FIRM, LTD.
3 PATRICIA PALM
4 STATE BAR NO. 6009
5 1212 CASINO CENTER BLVD.
6 LAS VEGAS, NV 89104
7 PHONE: 702-386-9113
8 FAX: 702-386-9114
9 EMAIL: patricia.palmlaw@gmail.com

FILED
JUL 29 1 31 PM '10
CLERK

6 DISTRICT COURT
7 CLARK COUNTY, NEVADA

8 STATE OF NEVADA,
9 Plaintiff,

10 vs.

11 BRIAN K. O'KEEFE,
12 Defendant

Case No.: C250630

Dept. No.: XVII

14 SUPPLEMENTAL NOTICE OF DEFENDANT'S EXPERT WITNESSES
15 [NRS 174.234(2)]

16 DATE:

TIME:

17 TO: THE STATE OF NEVADA, PLAINTIFF, and

18 TO: DAVID ROGER, DISTRICT ATTORNEY, Attorney for Plaintiff,

19
20 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that Defendant, Brian
21 K. O'Keefe, by and through his attorney, PATRICIA PALM of PALM LAW FIRM, LTD.,
22 intends to call the following experts in his case in chief, in addition to those experts who
23 have been previously noticed and whose reports have previously been provided:

- 24 1. GEORGE SCHIRO, 5004 W. Admiral Doyle Dr., New Iberia, LA 70560, an expert
25 in forensic science. Should this witness testify, he will testify in the area of crime
26 scene analysis, crime scene investigation, processing of crime scenes, collection
27 and preservation of evidence, latent print comparison, footwear examination,
28

1 DNA evaluations, and defensive and accidental wounds, and will give his
2 opinions related thereto.

3 (The scope of expected testimony listed above and the report previously given
4 have been supplemented; an updated CV and supplemental report are
5 attached.).

- 6 2. TODD CAMERON GREY, M.D., Medical Examiner's Office, State of Utah, 48 N.
7 Medical Drive, Salt Lake City, UT 84113, an expert in general pathology and
8 cause and manner of death. Should he testify he will testify in the area of
9 general pathology, cause and manner of death, and specific issues related to this
10 case, including but not limited to the autopsy report, the extent/nature of wounds
11 and injuries in this case and the physical condition of the deceased's body. Dr.
12 Grey will also testify regarding aspects of the case that may assist the jury in
13 reaching a verdict, including but not limited to physical evidence and
14 interpretation of the autopsy report, protocol, and photographs, including crime
15 scene photographs. (CV is attached.)

- 16 3. LOUIS F. MORTILLARO, PHD, 501 S. Rancho Drive, Ste. F-37, Las Vegas, NV
17 89106, an expert in clinical psychology. Should he testify, he will testify in the
18 area of the mental health history and condition and diagnoses of the alleged
19 victim as documented in her medical records, including but not limited to her
20 history of suicide attempts by overdose and cutting, major recurrent depression,
21 anxiety disorder as comorbidity, panic attacks, polysubstance abuse, self-
22 mutilation, anger outbursts and anger control problems, bipolar disorder, and
23 borderline personality traits, and explain how the victim's mental health
24 conditions might have affected her at the time of the incident. (CV is attached).

- 25 4. TAWNI CHRISTENSEN, M.D., 540 Summer Mesa Dr., Las Vegas, NV 89144, an
26 expert in the area of emergency medicine and medical science. Should she
27 testify, she will testify in the area of the effects of alcohol and
28

1 Effexor/Venlafaxine, the levels of these detected in the autopsy toxicology report
2 in this case, and the alleged victim's medical condition and target dosage of
3 Effexor as documented in her medical records.

4 (CV and report previously provided).

5 Dated this 29th day of July, 2010.

7 PALM LAW FIRM, LTD.

8 
9


10 Patricia A. Palm, Bar No. 6009
11 1212 Casino Center Blvd.
12 Las Vegas, NV 89104
13 (702) 386-9113
14 Attorney for Defendant O'Keefe

13 RECEIPT OF COPY

14 RECEIPT of a copy of the Supplemental Notice of Defendant's Expert Witnesses
15 is hereby acknowledged.

16 DATED: July 29, 2010.

18 DISTRICT ATTORNEY'S OFFICE

19 
20 200 Lewis Ave., 3rd Floor
21 Las Vegas, NV 89155
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HOME PAGE

**GEORGE SCHIRO, MS, F-ABC
CONSULTING FORENSIC SCIENTIST
FORENSIC SCIENCE RESOURCES®**

**P.O. Box 188
CADE, LA 70519 USA
CELL: (337) 322-2724
E-MAIL: Gjschiro@cs.com**

EDUCATION**Master of Science, Industrial Chemistry - Forensic Science**

Including five hours of credit in Forensic DNA Analysis of Biological Materials and accompanying lab course, three hours of credit in Quality Assurance and Bioinformatics, three hours of credit in Biochemistry, two hours of credit in Forensic Analysis of DNA Data, and three hours of credit in Experimental Statistics

University of Central Florida, Orlando, FL.

Bachelor of Science, Microbiology

Including three hours of credit in Genetics

Louisiana State University, Baton Rouge, La.

PROFESSIONAL CERTIFICATION

Certificate of Professional Competency in Criminalistics, Fellow of the American Board of Criminalistics, Specialty Area: Molecular Biology

PROFESSIONAL TRAINING ATTENDED

March 2010	"2010 Forensic Symposium – Advanced Death Investigation" – Instructors: Dr. Karen Sullivan, Dennis McGowan, George Schiro, Rae Wooten, Dr. Richard Weems, and Dr. Mark Guilbeau, North Georgia College & State University, Dahlonega, GA
February 2010	"ISO 17025 and Audit Preparation" - Instructor: David Epstein, Forensic Quality Services, New Iberia, LA
August 2009	"Actual Innocence: Establishing Innocence or Guilt, Forensic Science Friend or Foe to the Criminal Justice System" – Instructors: various, The <u>Center for American and International Law</u> , Plano, TX
June 2009	"Digital Photography for Law Enforcement" – Instructors: Donnie Barker and Joe Russo, <u>Institute of Police Technology and Management</u> , Lafayette, LA

- March 2008 "Forensic Symposium 2008 – The Investigation of Sex Crimes and Deviant Behavior" – Instructors: Roy Hazelwood, George Schiro, Dr. Brent Paterline, Jeff D. Branyon, Tim Relph, and Dr. Daniel J. Sheridan, North Georgia College & State University, Dahlonega, GA
- February 2008 "Conference on Crimes Against Women" – Instructors: various, Dallas, TX
- October 2007 "Integrity, Character, and Ethics in Forensic Science" – Instructor: Dan B. Gunnell, Louisiana Association of Forensic Scientists (LAFS) Fall 2007 Meeting, Baton Rouge, LA
- February 2007 "Anatomy of a Wrongful Conviction: A Multidisciplinary Examination of the Ray Krone Case" – Co-chairmen: George Schiro and Dr. Thomas Streed, American Academy of Forensic Sciences Meeting, San Antonio, TX
- February 2006 "Solving the South Louisiana Serial Killer Case – New Approaches Blended With Older Trusted Techniques" Co-chairmen: George Schiro and Ray Wickenheiser, American Academy of Forensic Sciences (AAFS) Meeting, Seattle, WA
- December 2004 "National Forensic Science Technology Center (NFSTC) Auditor Workshop" – Instructors: Mark Nelson, John Wegel, Richard A. Guerreri, and Heather Subert
- June 2003 "CODIS v5.6 Software Training" – Instructor: Carla Heron, Baton Rouge, LA
- May 2003 "DNA Auditor Training" - Instructors: Richard A. Guerreri and Anja Einseln, Austin, TX
- April 2003 "Statistical Analysis of Forensic DNA Evidence" - Instructor: Dr. George Carmody, Harvey, LA
- January 2002 "Association of Forensic DNA Analysts and Administrators (AFDAA) Workshops" - Instructors: S. Cribari, Dr. T. Wang, and R. Wickenheiser, Austin, TX
- March 2001 "Basic Forensic DNA Analysis" - Instructor: Dr. Pat Wojtkiewicz, Baton Rouge, LA
- February 2000 DNA Workshop, AAFS Meeting, Reno, NV
- November 1999 "Advanced AmpFl STRTM & ABI PrismTM 310 Genetic Analyzer Training" - Instructor: Catherine Caballero, PE Biosystems, Baton Rouge, LA
- March 1998 "DNA Typing with STRs - Silver Stain Detection Workshop" - Instructors: Dr. Brent Spoth and Kimberly Huston, Promega Corp., Madison, WI
- November 1997 "Laboratory Auditing" - Instructors: Dr. William Tilstone, Richard Lester, and Tony Longhetti, NFSTC Workshop, Baton Rouge, LA
- October 1997 "Forensic Microscopy" - Instructor: Gary Laughlin, McCrone Research Institute,

La. State Police Training Academy, Baton Rouge, LA

- September 1997 "Presenting DNA Statistics in Court" - Instructors: Dr. Bruce Weir and Dr. George Carmody, Promega Symposium, Scottsdale, AZ
- August 1997 "Forensic DNA Analysis" - Instructors: Pat Wojtkiewicz and Michelle Gaines, North La. Crime Lab, Shreveport, LA
- February 1997 DNA Workshop, AAFS Meeting, New York, NY
- November 1996 "Forensic DNA Testing" - Instructors: Dr. Jim Karam and Dr. Sudhir Sinha, Tulane University Medical Center, New Orleans, LA
- August 1996 "Bloodstain Pattern Analysis and Crime Scene Documentation" - Instructors: Paulette Sutton, Steven Symes, and Lisa Elrod North La. Crime Lab, Shreveport, LA
- June 1996 "Introduction to Forensic Fiber Microscopy" - Instructor: Skip Palenik, Acadiana Crime Lab, New Iberia, LA
- February 1996 DNA Workshop, AAFS Meeting, Nashville, TN
- July 1995 "Personality Profiling and Crime Scene Assessment" - Instructors: Roy Hazelwood and Robert Ressler, Loyola University, New Orleans, LA
- June 1993 "Basic Forensic Serology," FBI Academy, Quantico, VA
- May 1993 DNA Workshop - Instructor: Anne Montgomery, GenTest Laboratories, Southern Association of Forensic Scientists (SAFS) Spring Meeting, Savannah, GA
- March 1993 Attended the Second International Symposium on the Forensic Aspects of DNA Analysis, FBI Academy, Quantico, VA
- September 1990 "Introduction to Human Immunoglobulin Allotyping" - Instructor: Dr. Moses Schanfield, AGTC, La. State Police Crime Lab, Baton Rouge, LA
- July 1989 Bone Grouping Techniques Workshop - Instructor: Dr. Robert Gaensslen and Dr. Henry Lee, University of New Haven, New Haven, CT
- June 1989 Attended the International Symposium on the Forensic Aspects of DNA Analysis, FBI Academy, Quantico, VA
- September 1988 DNA Workshop, SAFS Fall Meeting, Clearwater, FL
- June 1988 "Non-Isotopic Detection of DNA Polymorphisms" - Instructor: Dale Dykes, AGTC, North La. Crime Lab, Shreveport, LA
- June 1988 "Microscopy of Hairs" - Instructor: Skip Palenik, North La. Crime Lab, Shreveport, LA

- April 1988 "Analysis of Footwear and Tire Evidence" - Instructors: Max Courtney and Ed Hueske, North La. Crime Lab, Shreveport, LA
- September 1987 Introduction to Forensic Genetics Workshop - Instructor: Dr. Moses Schanfield, SAFS Fall Meeting, Atlanta, GA
- March 1987 Isoelectric Focusing Workshop, SAFS/ SWAFS/ SAT Combined Spring Meeting, Baton Rouge, LA
- June 1986 Attended the International Symposium on Forensic Immunology, FBI Academy, Quantico, VA
- February 1986 "Collection and Preservation of Physical Evidence" - Instructor: Dale Moreau, FBI School, Metairie, LA
- August 1985 "Atomic Absorption in Determining Gunshot Residues," FBI Academy, Quantico, VA
- April 1985 "Arson Accelerant Detection Course" - Instructors: Rick Tontarski, Mary Lou Fultz, and Rick Stroebel, Bureau of Alcohol, Tobacco, and Firearms (BATF) Lab, Rockville, MD
- July 1984 "Questioned Documents for the Investigator" - Instructor: Dale Moreau, FBI School, Baton Rouge, LA

PROFESSIONAL EXPERIENCE

- 2002 - present** Acadiana Criminalistics Laboratory – New Iberia, LA
An ASCLD-LAB accredited laboratory

Employed as a Forensic Chemist - DNA Technical Leader. Duties include incorporating the DNA Advisory Board (DAB) standards, accountability for the technical operations of the lab's biology section, conducting DNA analysis using the 13 STR core loci and Y STR in casework, DNA research, forensic science training, and crime scene investigation. Qualified as an expert over 145 times in 29 Louisiana parish courts, Pope County Arkansas, San Bernardino County California, Lee County Florida, Washington County Mississippi, St. Louis County Missouri, Clark County Nevada, Bronx County New York, Cabell County West Virginia, federal court, and two Louisiana city courts. Has qualified as an expert in the following areas: latent fingerprint development; serology; crime scene investigation; forensic science; trajectory reconstruction; shoeprint identification; crime scene reconstruction; bloodstain pattern analysis; DNA analysis; fracture match analysis; and hair comparison. Has also consulted on cases in 23 states, for the United States Army and Air Force, and in the United Kingdom. Worked over 2900 cases. Independently contracted DNA technical auditor with NFSTC and Forensic Quality Services - International. Contracted DNA Technical Leader to the Southwest La. Crime Lab in Lake Charles, LA from 2005-2008. Is a member of the Lafayette Parish Sexual Assault Response Team (SART). Is also a member of the La. Foundation Against Sexual Assault (LAFASA) Training Team.

1988 - 2001

Louisiana State Police Crime Lab - Baton Rouge, LA
An ASCLD-LAB accredited laboratory

Employed as a Forensic Scientist 2. Duties included incorporating the DNA Advisory Board (DAB) standards and conducting DNA analysis using the 13 STR core loci in casework. Duties have also included setting up and developing methods for the analysis of blood and body fluids using biological, chemical, microscopic, immunological, biochemical, electrophoretic, and isoelectric focusing techniques; applying these methods to criminal investigations; and testifying to the results in court. Additional duties included crime scene investigation/reconstruction; latent print development; fracture match comparison; projectile trajectory determination; shoeprint comparison; hair examination; blood spatter interpretation; and training personnel in various aspects of forensic science.

1984 - 1988

Jefferson Parish Sheriff's Office Crime Lab - Metairie, LA

Employed as Criminalist (I). From 11/85 to 4/88 duties included collection and analysis of blood, body fluids, hairs, and fibers using microscopic, immunological, biochemical, and chemical techniques. Also testified to the results of these analyses in court. Trained under Senior Forensic Biologist Joseph Warren. From 6/84 to 10/85 duties included marijuana analysis, arson analysis, gunshot residue detection, hit and run paint analysis, and development of latent fingerprints. Trained under Lab Director Ron Singer.

PROFESSIONAL PAPERS

"A Cold Hit... Relatively Speaking" presented at the International Association of Forensic Sciences 18th Triennial Meeting in New Orleans, LA, July 25, 2008. Also presented as "We Are Family... the Key to Solving a Series of Rapes" at the 2008 Southern Association of Forensic Scientists Meeting in Shreveport, LA.

"Criminalistics Errors, Omissions, Problems, and Ethical Issues" presented as part of the "Anatomy of a Wrongful Conviction: A Multidisciplinary Examination of the Ray Krone Case" workshop at the 2007 AAFS Meeting in San Antonio, TX; as part of the LAFS Fall 2007 Meeting in Baton Rouge, LA; and as part of "Actual Innocence: Establishing Innocence or Guilt, Forensic Science Friend or Foe to the Criminal Justice System" at The Center for American and International Law in Plano, TX.

"Using the Quality Assurance Standards for Forensic DNA Testing Laboratories to Distinguish the Unqualified Forensic DNA Experts From the Qualified Forensic DNA Experts" presented at the 2007 AAFS Meeting in San Antonio, TX and at the AFDA 2007 Winter Meeting in Austin, TX.

"Investigative Uses of DNA Databases" presented as part of the "Solving the South Louisiana Serial Killer Case - New Approaches Blended With Older Trusted Techniques" workshop at the 2006 AAFS Meeting in Seattle, WA.

"Trace DNA Analysis: Casework Experience" presented as a poster at the 2004 AAFS Meeting in Dallas, TX and as a talk at the July 2003 AFDA Meeting in Austin, TX. Also presented as "Interesting Casework Using AmpFISTR® Profiler Plus® and COfiler® Kits" at Applied Biosystems "Future Trends in Forensic DNA Technology," September, 2003 in New Orleans, LA.

"Extraction and Quantification of Human Deoxyribonucleic Acid, and the Amplification of Human

Short Tandem Repeats and a Sex Identification Marker from Fly Larvae Found on Decomposing Tissue” a thesis to fulfill one of the Master of Science requirements. Successfully defended on July 13, 2001 at the University of Central Florida, Orlando, Florida. Presented at the 2004 AAFS Meeting in Dallas, TX, the Spring 2002 La. Association of Forensic Scientists (LAFS) Meeting, and the January 2003 AFDA Meeting in Austin, TX.

“Administrative Policies Dealing with Crime Scene Operations” published in the Spring 1999 issue of *Southern Lawman Magazine*.

“Shooting Reconstruction - When the Bullet Hits the Bone” presented at the 10th Anniversary Convention of the La. Private Investigators Association (LPIA)/ National Association of Legal Investigators (NALI) Region IV Seminar, September 13, 1997, New Orleans, LA. Licensed as continuing education for Texas Private Investigators by the Texas Board of Private Investigators and Private Security Agencies. Published in the Fall 1998 issue of *Southern Lawman Magazine*.

“Using Videotape to Document Physical Evidence” presented at the Seventh Annual Convention of the LPIA/NALI Region IV Seminar, August 16, 1996, New Orleans, LA. Licensed as continuing education for Texas Private Investigators by the Texas Board of Private Investigators and Private Security Agencies. Published in April 1997 issue of *The LPIA Journal*. An edited version was published in the Winter 1998 issue of *Southern Lawman Magazine*.

“Collection and Preservation of Blood Evidence from Crime Scenes” distributed as part of a blood collection workshop held at the Jefferson Parish Coroner’s Eighth Annual Death Investigation Conference, November 17, 1995, Harahan, LA. Presented as continuing legal education by the La. Bar Association. Electronically published on the World Wide Web at the Crime Scene Investigation Web Page (<http://police2.ucr.edu/csi.htm>). Published in the September/October 1997 issue of the *Journal of Forensic Identification*. Referenced in the 7th edition of *Techniques of Crime Scene Investigation* by Barry A.J. Fisher.

“Collection and Preservation of Evidence” presented at La. Foundation Against Sexual Assault/ La. District Attorneys Association sponsored conference, “Meeting the Challenge: Investigation and Prosecution of Sex Crimes,” March 3, 1994, Lafayette, LA. Presented as continuing legal education by the La. Bar Association. Published in the *Forensic Medicine Sourcebook*. Electronically published on the World Wide Web at the Crime Scene Investigation Web Page (<http://police2.ucr.edu/csi.htm>). Also published in *Nanogram*, the official publication of LAFS. A modified version of the paper was presented at the Sixth Annual Convention of the LPIA, August 19, 1995, New Orleans, LA; the NALI Region IV Continuing Education Seminar, March 9, 1996, Biloxi, MS; and the Texas Association of Licensed Investigators (TALI) Winter Seminar, February 15, 1997, Addison, TX. Published in the July/August 1996 issue and the September/October 1996 issue of *The Texas Investigator*. Electronically published on the World Wide Web at TALI’s Web Page (<http://pimall.com/tali/evidence.html>). Published in the May 2001 issue of *The Informant*, the official publication of the Professional Private Investigators Association of Colorado. An updated version was presented at La. Foundation Against Sexual Assault/La. District Attorneys Association sponsored conference, “Collaborating to STOP Violence Against Women Conference,” March 12, 2003, Lafayette, LA.

“The Effects of Fecal Contamination on Phosphoglucosmutase Subtyping” presented at the 1989 AAFS Meeting held in Las Vegas, Nevada and at the Fall, 1987 SAFS Meeting held in Atlanta, Georgia.

“A Report on Gamma Marker (Gm) Antigen Typing” presented at the Fall, 1986 SAFS Meeting held in Auburn, Alabama and at the Summer, 1986 LAFS Meeting.

"An Improved Method of Glyoxylase I Analysis" co-presented with Joseph Warren at the Summer, 1986 LAFS Meeting.

ARTICLES PUBLISHED

"Forensic Science and Crime Scene Investigation: Past, Present, and Future" published in the Winter 2000 issue of *American Lawman Magazine*.

"New Crime Scenes – Same Old Problems" published in the Winter 1999 issue of *Southern Lawman Magazine*.

"Shoeprint Evidence: Trampled Underfoot" published in the Fall 1999 issue of *Southern Lawman Magazine*.

"LASCI: A Model Organization" published in the Summer 1999 issue of *Southern Lawman Magazine*.

"Applications of Forensic Science Analysis to Private Investigation" published in the July 1999 issue of *The LPIA Journal*.

TRAINING CONDUCTED

Have conducted training at the following seminars and have trained the following organizations and agencies in crime scene investigation, forensic science, and/or the collection and preservation of evidence: Fourth and Seventh International Conferences of Legal Medicine held in Panama City, Panama; U.S. State Department's Anti-Terrorism Assistance Program Police Executive Seminar; Intellinet 27th Annual Conference; AAFS; American Chemical Society; AFDAA; Forensic Science Education Conference; SAFS; Southern Institute of Forensic Science; University of Nevada Las Vegas Biotechnology Center; Professional Private Investigators Association of Colorado; Indiana Coroner's Training Board; DNA Security, Inc. Open House; South Carolina Coroners Association; Forensic Symposia 2008 and 2010, North Georgia College & State University, Dahlonega, GA; Palm Bay Police Dept., Palm Bay, Florida; CGEN 5200, Expert Testimony in Forensic Science, University of North Texas Health Science Center, Ft. Worth, TX; Mississippi Society for Medical Technology; Forensic Investigation Research & Investigation; La. State Coroners' Association; Jefferson Parish Coroner's Office Eighth Annual Death Investigation Conference; Southern University Law Center; La. State University Chemistry Department Seminar; Chemistry 105, Southeastern Louisiana University; University of Louisiana at Lafayette Biology Club; Louisiana Homicide Investigators Association; Louisiana Division of the International Association for Identification; U.S. Department of Justice La. Middle District Law Enforcement Coordinating Committee Crime Scene Investigation Workshop; La. State University's Law Enforcement Training Program Scientific Crime Investigator's Institute; La. State University's Continuing Law Enforcement Education School; La. State Police Training Academy's Advanced Forensic Investigation School; La. District Attorneys Association; La. Southeast Chiefs of Police Association; Acadiana Law Enforcement Training Academy; Caddo Parish Sheriff's Office; Mystery Writers of America - Florida Chapter; NALI Continuing Education Seminars; TALI; Lafayette Parish Sheriff's Office; Iberia Parish Sheriff's Office; Jefferson Parish Sheriff's Office Training Academy; Kenner Police Dept.; St. Charles Parish Sheriff's Office; Terrebonne Parish Sheriff's Office; East Feliciana Parish Sheriff's Office; Tennessee Association of Investigators; East

Baton Rouge Parish Sheriff's Office; West Baton Rouge Parish Sheriff's Office; Vermilion Parish Sheriff's Office; Washington Parish Rape Crisis Center Volunteers; Mississippi Professional Investigators Association; East Baton Rouge Stop Rape Crisis Center Volunteer Physicians; Stuller Place Sexual Assault Response Center Volunteers; Evangeline and St. Landry Parish Rape Crisis Volunteers; Tri-Parish Rape Crisis Volunteer Escorts; LPIA; La. Foundation Against Sexual Assault; Louisiana Society for Medical Technology; Baton Rouge Society for Medical Technology; Baton Rouge Police Dept. Sex Crimes Unit, Crime Scene Unit, and Traffic Homicide Unit; Violence Against Women Conference; Family Focus Regional Conference; Our Lady of the Lake Hospital Emergency Room Personnel; Sexual Assault: Effective Law Enforcement Response Seminar; La. State Police Training Academy; La. Association of Scientific Crime Investigators (LASCI); LAFS; and the Basic Police Academy (La. Probation and Parole, La. Dept. of Public Safety, La. Motor Vehicle Police, and La. Dept of Wildlife and Fisheries).

PROFESSIONAL ORGANIZATIONS

International Society for Forensic Genetics
International Association of Bloodstain Pattern Analysts (Full Member)
AAFS (Fellow)
American Board of Criminalistics (Molecular Biology Fellow)
American Society for Testing and Materials Committee E-30 on Forensic Sciences
AFDAA (Chairperson 2004-2005, Fellow)
Association for Crime Scene Reconstruction
SAFS
LAFS (Editor of *Nanogram*, the official publication of LAFS - July 1994 to May 1998, President - 1990, Vice President - 1989)
LASCI

OTHER ACCOMPLISHMENTS

Analyzed evidence and issued a report in the 1991 La. State Police investigation of the assassination of U. S. Senator Huey P. Long.

Contributing author to the *Forensic Medicine Sourcebook*, edited by Annemarie S. Muth.

One of several technical advisors to the non-fiction books *Blood and DNA Evidence*, *Crime-Solving Science Experiments* by Kenneth G. Rainis, *O.J. Unmasked*, *The Trial*, *The Truth*, and *the Media* by M.L.Rantala and *Pocket Partner* by Dennis Evers, Mary Miller, and Thomas Glover.

One of several technical advisors to the fictional books *Crusader's Cross* by James Lee Burke, *Company Man* by Joseph Finder, *Savage Art* by Danielle Girard, and *Bones in the Backyard* by Florence Clowes and Lois J. Blackburn.

Featured on the "Without a Trace" and "Through the Camera's Eye" episodes of *The New Detectives* television show that first aired on the Discovery Channel, May 27, 1997 and June 11, 2002.

Featured on the "No Safe Place" episode of *Forensic Files* that first aired on Court TV, January 3, 2007.

Featured on the “Hung Up” episode of *Extreme Forensics* that first aired on the Investigation Discovery Channel, October 13, 2008.

Featured on the “Knock, Knock, You’re Dead” episode of *Forensic Factor* that first aired on the Discovery Channel Canada, April 16, 2009.

Recipient of the second Young Forensic Scientist Award given by *Scientific Sleuthing Review*.

Formerly a columnist for *Southern Lawman Magazine*.

Authored and managed two federal grants that awarded the La. State Police Crime Lab \$147,000 and \$237,000 to set up and develop a DNA laboratory.

A member of the La. State Police Crime Lab’s ASCLD-LAB accreditation preparation committee.

Featured in the books *The Bone Lady: Life as a Forensic Anthropologist* by Mary Manhein, *Rope Burns* by Robert Scott, *Smilin Acres: The Angry Victim* by Chester Pritchett, *An Invisible Man* by Stephanie A. Stanley, *Soft Targets, A Woman’s Guide to Survival* by Detective Michael L. Varnado, *Kirstin Blaise Lobato’s Unreasonable Conviction* by Hans Sherrer, *Zombie CSU, The Forensics of the Living Dead* by Jonathan Maberry, and *Science Fair Winners: Crime Scene Science* by Karen Romano Young and David Goldin.

Featured on an episode of *Split Screen* that first aired on the Independent Film Channel, May 31, 1999.

Featured as a character on the “Kirstin Lobato Case” episode of *Guilty or Innocent?* that first aired on the Discovery Channel, April 1, 2005.

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July 27, 2010

This is a supplemental report to the FSR 3-09 report issued 3/15/09 by George Schiro.

Case No.: FSR 3-09

Client: Palm Law Firm, Ltd., 1212 Casino Center Blvd., Las Vegas, NV 89104

Client Case No.: C250630, Brian O'Keefe

Dates Case Accepted: 1/26/09 and 7/14/10

Case Documentation Received and Examined By: George Schiro

Dates of Analysis: 1/31/09 to 3/15/09 and 7/18/10 to 7/27/10

Type of Examination Requested: Review case documentation, particularly the parts related to collection and preservation of evidence and any information that might aid in scene analysis and reconstruction.

Specimens Examined: Case documentation, photographs, and a DVD

Analytical Procedures: Reviewed and analyzed case documentation, photographs, and DVD.

Results:

1. There is no documentation indicating that blood and urine specimens for toxicological analysis were collected from Mr. O'Keefe in the hours immediately after the death of Ms. Whitmarsh.
2. The documentation indicates that the penile swabs collected from Mr. O'Keefe were collected improperly.
3. The documentation indicates that Mr. O'Keefe had wounds to his right thumb and right index finger.
4. Although a full crime scene reconstruction is not possible based on the case documentation, certain aspects of the scene following Ms. Whitmarsh's injury can be interpreted.
5. The possibility of an accidental stabbing cannot be ruled out.

CONCLUSIONS:

1. Toxicology

Blood and urine specimens should have been collected from Mr. O'Keefe in the hours immediately after the death of Ms. Whitmarsh. In potential homicide cases in which a suspect is arrested shortly after the killing, it is a useful practice to obtain blood and urine specimens from the suspect to be screened for the presence of drugs and alcohol.¹ These blood and urine specimens could have been subjected to toxicological analysis and would have provided a quantitative estimate of the amount of alcohol and drugs in Mr. O'Keefe's

¹ Fisher, Barry A.J., *Techniques of Crime Scene Investigation*, CRC Press, Boca Raton, FL, 2004, p. 325.

Todd Cameron Grey, M.D.

Address:

Work: Medical Examiner=s Office
State of Utah
48 N. Medical Drive
Salt Lake City, Ut. 84113
(801)-584-8410
Fax: (801)-584-8435

Home: 652 N. Little Tree Circle
Salt Lake City, Ut. 84108

Pre-medical Education:

§ Yale University - B.A. 1976 Anthropology

Medical Education:

§ Dartmouth Medical School - M.D. June, 1980

Hospital Training:

§ Intern Anatomic Pathology - U.C.S.D. 1980-1981
§ Resident Anatomic Pathology - U.C.S.D. 1981-1982

Past Employment:

§ Staff Anatomic Pathologist
Rehoboth McKinley Christian Hospital 1982-1985
§ Designated Pathologist
Office of the Medical Investigator
McKinley County, New Mexico 1983-1985
§ Associate Medical Examiner
Dade County M.E.=s Office 1985-1986
§ Clinical Assistant Professor
University of Miami School of Medicine 1985-1986
XAssistant Medical Examiner and Deputy Director
Office of the Medical Examiner, State of Utah 1986-1988
XClinical Assistant Professor
Dept. of Pathology, University of Utah School of Medicine 1986-1992

Current Employment:

§ Chief Medical Examiner
Office of the Medical Examiner - State of Utah

§ Adjunct Associate Professor of Pathology
University of Utah School of Medicine

Certification:

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- § National Board of Medical Examiners, Diplomate, August 1, 1981 #238440
- § Board Certified, Anatomic and Forensic Pathology, June 20, 1986

Licensure:

- § State of Utah No. 86-17491-1205
- § Previously licensed in California and New Mexico

Honors and Awards:

- § B.A. cum laude with Honors in the major
- § M.D. Dean=s Honor Roll
- § A.O.A. Honor Society

Professional Society Memberships:

- § National Association of Medical Examiners
- § American Academy of Forensic Sciences
- § Utah Society of Pathologists

Committees and Consultantships:

- § Sudden Infant Death Syndrome Advisory Committee
Utah Department of Health, 1986 to 2005
- § Vital Statistics Task Force-Death Certificate Revision Committee
Utah Department of Health, August-December 1987
- § Department Improvement Committee
Utah Department of Health, April-August 1988
- § Architect Selection Board for Medical Examiner Facility
Division of Facility and Construction Management, State of Utah, April-May 1988
- § Information Technology Task Force
Assigned to review Dept. of Health data processing systems and make recommendations for improvement, July to December 1992
- § Child Fatality Review Committee
Multi-Agency Board to review deaths of children in Utah, November 1991 to present
- § Infant and Fetal Death Technical Review Committee
Utah Department of Health, Division of Family Health Services, August 1992 to September 1995
- § Residency Committee
Department of Pathology, University of Utah School of Medicine, June 1990 to present § Health
Tasked to rewrite various statutes concerning the collection and use of data by the state health department, August-September 1995
- § Suicide Prevention Task Force
Legislatively mandated committee tasked with providing recommendations on ways to reduce the number of suicides that occur in Utah. July - November 1999
- § Intermountain Tissue Center Scientific Advisory Board
Provides advice and expertise on issues related to tissue harvesting. October 2000 to 2006

§ Electronic Death Registration Advisory Committee

Provide advice and expertise for the development of a web based electronic death registration system November 2004 to August 2006

§ National Violent Death Registration System Advisory Committee

Provide advice and expertise in the process of data collection and analysis of violent deaths in Utah July 2005 to present

Presentations:

§ Grey, T.C. AKeams Mid-Air Collision-The Role of the Medical Examiner in Aircraft Disasters@ Aircraft Disaster Seminar, Jackson Hole, WY., October 1987

§ Grey, T.C. APreserving the Scene@ and AMechanisms of Injury@

Eighth Annual Life Flight Conference, SLC, UT., March 1989

§ Penny, J.A., Grey, T.C., and Sweeney, E.S. ACause of Death: Venomous Snake Bite, Manner of Death: Homicide@ Presented by Grey, T.C. at the 40th Annual Meeting of American Academy of Forensic Sciences, Philadelphia, Pa., February 1988

§ Grey, T.C. and Schnittker, S.I. AA Fowl Deed at the Aviary@

National Association of Medical Examiners 1989 Annual Meeting, Sanibel Island, Fl., October 1989

§ Grey, T.C. AEquivocal Deaths: >What=s the Manner With You?=@

5th Annual National Conference on Serial Murders, Unidentified Bodies and Missing Persons, Nashville, Tn., March 1993

§ Grey, T.C. AMechanisms of Injury and Their Medicolegal Significance@

1993 Clinical Care Conference: Transport and Care of the Critically Injured, Snowbird, Ut., May 1993

X Grey, T.C. AHighway Accident Deaths: The Role of the Medical Examiner and a Plea to Change Utah Law@

Northwest Association of Forensic Sciences-Fall Meeting, SLC, Ut., October

1996

XGrey, T.C., ASudden Infant Death Syndrome@

Family Practice Grand Rounds, Salt Lake Regional Medical Center, SLC, Ut., June 1997

Pediatric Grand Rounds, Primary Children=s Medical Center, SLC, Ut., September 1997

§ Grey, T.C. AThe Pediatric Autopsy: Role of the Medical Examiner@

Panel Discussion-Pediatric Grand Rounds, Primary Children=s Medical Center,

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SLC, UT., October 1997

§ Grey, T.C. AForensic Issues for First Responders@, AGunshot Wounds@, ASharp Force Injuries@ and ABlunt Force Injuries@
26th Annual Intermountain E.M.S Conference, SLC, UT., November 14 - 15, 2002

§ Grey, T.C. ACSI Utah - The Investigation and Interpretation of Equivocal Deaths@
Intermountain Critical Care Conference. Salt Lake City, UT. October 28, 2005

§ Grey, T.C. AForensic Pathology@ Idaho Council on Domestic Violence and Victim Assistance. Boise ID, June 7, 2006

Publications:

§ Sweeney, E.S. and Grey, T.C. ALetter to the Editor-SIDS@ New England Journal of Medicine Vol. 315, No. 26, Dec. 25, 1986.

§ Grey, T.C. and Sweeney, E.S. APhysicians and the Death Penalty (letter)@
West. J. Med. 1987, July 147:207.

§ Sweeney, E.S. and Grey, T.C. ACause of Death-Proper Completion of the Death Certificate (letter)@ JAMA Vol. 258, No. 22, Dec. 11, 1987

§ Grey, T., Mittleman, R., and Wetli, C.: AAortoesophageal Fistulae and Sudden Death: A Report of Two Cases and Literature Review@ Am. J. of Forensic Medicine and Pathology Vol. 9, No. 1, March 1988 pp 19-22.

§ Andrews, J.M., Sweeney, E.S, and Grey, T.C. AHelp, I=m Freezing to Death@ ASCP Forensic Pathology Check Sample. F.P. 90-5 (Accepted April 8, 1988).

§ Grey, T.C. and Sweeney, E.S. APatient Controlled Analgesia (letter)@ JAMA Vol. 259, No. 15, April 15, 1988.

§ Andrews, J.M., Sweeney, E.S., Grey, T.C. and Wetzel, T. AThe Biohazard Potential of Cyanide Poisoning During Postmortem Examination@ J. of Forensic Sciences Vol. 34, No. 5, September 1989 pp 1280-1284.

§ Grey, T.C. ADefibrillator Injury Suggesting Bite Mark@ Am. J. of Forensic Medicine and Pathology Vol. 10, No. 2, June 1989 pp 144-145.

§ Grey, T.C. ABook Review; Salamander: The story of the Mormon Forgery Murders, (Stiltoe and Roberts)@ J. of Forensic Sciences Vol. 34, No. 4, July 1989 pp 1044.

§ Grey, T.C. AThe Incredible Bouncing Bullet: Projectile Exit Through the Entrance

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- Wound@ J. of Forensic Sciences Vol. 28, No. 5, September 1993, pp 1222.
- \$ Grey, T.C. AShaken Baby Syndrome: Medical Controversies and Their Role in Establishing AReasonable Doubt@ Child abuse Prevention Council Newsletter, May 1998.
- \$ CDC (Grey, T.C. - contributor) AFatal Car Trunk Entrapment Involving Children United States, 1997-1998" MMWR Vol. 47, No. 47, 1998 pp 1019-22
- \$ Grey, T.C. AUnintentional and Intentional Injuries@ in Understanding Pathophysiology (Second Edition), McCance, K. L. and Huether, S. E., Mosby, St. Louis. 2000.
- \$ CDC (Grey, T.C. - contributor) AHypothermia Related Deaths - Utah, 2000 and United States, 1979 -1998" MMWR Vol. 51, No. 4, 2001 pp 76-78
- \$ Bennett, P.J., McMahon, W.M., Watabe J., Achilles J., Bacon M., Coon H., Grey T., Keller T., Tate D. Tcaciuc I., Workman J. and Gray D. ATryptophan Hydroxylase Polymorphisms in Suicide Victims@, Psychiatr. Genet. 2000 Mar;10(1):13-7.
- \$ Boyer, R. S., Rodin, E. A. & Grey, T.C. AThe Skull and Cervical Spine Radiographs of Tutankahem: A Critical Appraisal@ Am. J. of Neuroradiol.. 24: 1142-1147, June/July 2003
- \$ Caravati, E.M., Grey, T.C., Nangle, B., Rolfs, R.T. & Peterson-Porucznik, C. A. AIncrease in Poisoning Deaths Caused by Non-Illicit Drugs C Utah, 1991B2003", Morbidity & Mortality Weekly Report. January 21, 2005/ Vol. 54 / No. 2.
- \$ Callor, W. B., Petersen, E., Gray, D., Grey, T. C., Lameroux, T & Bennet, P. APreliminary Findings of Noncompliance with Psychotropic Medication and Prevalence of Methamphetamine Intoxication Associated with Suicide@. Crisis 2005; Vol 26 (2): 78 - 84.

Seminars and other training activities:

- \$ ADetermination of the Cause and Manner of Death@ Presented July 1988 at Utah Peace Officers Association Annual Conference, Wendover, Nevada.
- \$ AIjuries due to Gunfire, Sharp and Blunt Forces@ Eight hour presentation to Wyoming Coroner=s Basic Certification Course. Wyoming Law Enforcement Academy, Douglas, Wyoming, February 26, 1991, March 23, 1993 and June 17, 1996

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- \$ ADeath Investigation@ Eight hour course for law enforcement professionals on investigative techniques and pathologic findings.
Cedar City, Utah, April 5, 1991.
St. George, Utah, April 10, 1992.
Vernal, Utah, June 5, 1992.
- \$ APathological Techniques for Discovering Non-Accidental Causes of Death in Children@. Prosecution Council Training Seminar on Child Sexual Abuse and Child Fatalities, Snowbird, Utah, June 18, 1991.
- \$ AShaken Baby Syndrome-The Role of the Medical Examiner@. Child Abuse Prevention Council of Ogden, Weber State University, Ogden, Utah, August 6, 1992.
- \$ AMechanism, Cause and Manner of Death: The Proper Completion of the Death Certificate@ Pediatric Grand Rounds, University of Utah Medical Center, Salt Lake City, Utah, February 22, 1993.
- \$ AS.I.D.S. and The Office of the Medical Examiner@ Utah Department of Health Symposium on S.I.D.S. for Public Health Nurses, Salt Lake City, Utah, March 30, 1993.
- \$ APatterns of Injury: Investigative Challenges@ Federal Bureau of Investigation-College of American Pathologists Course AMedicolegal Investigation of Death & Injury in Child Abuse and S.I.D.S.@ Salt Lake City, Utah. August 14, 1995.
- \$ AFire Related Deaths@ Salt Lake City Fire Department, September 12, 1995.
Also presented to Idaho Chapter, International Arson Investigators, November 7, 1996.
- \$ AForensic Medicine: The Vital Link in Organ/Tissue Donation@ Intermountain Organ Recovery Systems Educational Symposium, Salt Lake City, Utah, May 6, 1997.
- \$ AWhat Your Pathologist Can and Can=t Do For You@@
Utah Prosecution Council Prosecutor Training Course. Layton, UT. September 18, 2003
- \$ AProsecutors and the Office of the Medical Examiner@ Utah Prosecution Council Homicide Conference. St. George, UT. November , 2008.

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Other Activities:

- \$ Initial design development and participation in oversight of design and construction of a new 18,000 sq. ft. facility for the Office of the Medical Examiner, State of Utah, 1989-1991.
- \$ Development, purchase and implementation of Macintosh7 based computer system for the Office of the Medical Examiner, State of Utah, 1989-1991.
- \$ Completion of Series I and II of Certified Public Manager=s Course. University of Utah and Utah Department of Human Resource Management. November 1995.
- \$ Development, purchase and implementation of MS Windows7 based computer system for the Office of the Medical Examiner, State of Utah, 1996-1997.
- \$ Development of web based Medical Examiner database and case management program, State of Utah, 2009

LOUIS F. MORTILLARO, PH.D.

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Las Vegas, Nevada 89106
(702) 388-9403 FAX (702) 388-9643
E-Mail: mortpsych501@AOL.COM

LICENSURE:

- Psychologist, State of Nevada, 1987, license number PY0169
- Marriage & Family Therapist, State of Nevada, 1985, license number 310

AREAS OF SPECIALIZATION:

- Clinical - Counseling Psychology
- Clinical Neuropsychology
- Clinical Health and Rehabilitation Psychology
- Family Psychology

PROFESSIONAL CREDENTIALS & CERTIFICATIONS:

- 1984: National Certified Counselor, National Board for Certified Counselors, certificate number 447
- 1988: Diplomate, American Academy of Pain Management, certificate number 144
- 1996: Diplomate, American Board of Forensic Examiners, certificate number 2118
- 1996: Diplomate, American Board of Forensic Medicine, certificate number 1393
- 1996: Fellow and Diplomate, American Board of Medical Psychotherapists, certificate number 2096
- 1996: Disability Analyst and Fellow, American Board of Disability Analysts, certificate number 3556
- 1997: Diplomate of the American Board of Psychological Specialties
 - Forensic Neuropsychology, certificate number 6112
 - Family/Marital/Domestic Relations Psychology, certificate number 6112

PROFESSIONAL CREDENTIALS:

- California Life Credential in Pupil Personnel Services with Specializations in Psychometry, Counseling, Social Work and Attendance, 1971, certificate number 104682
- California Life Credential in Adult Education Subjects (Basic Education, Biology, Chemistry, General Sciences, French and Social Sciences), 1969, certificate number 293258

EDUCATIONAL HISTORY:

Post Graduate Certificate of Specialization in Clinical Neuropsychology

The Fielding Institute, Santa Barbara, California

Dates Attended: February, 1996 - January, 1998

Major: Clinical Neuropsychology

Course Work: 40 semester units

2000 hour practicum

200 hours of clinical case supervision

Date Certificate Conferred: January 24, 1998

Ph.D., United States International University, San Diego, California

Major: Professional Psychology

Minor: Clinical Psychodiagnostics

Dates Attended: 1976 - 1978

Date Degree Conferred: June 11, 1978

M.P.A., University of Southern California, Los Angeles, California
Major: Public Administration
Minor: Criminal Justice Administration
Dates Attended: 1974 - 1975
Date Degree Conferred: January 29, 1975

M.S.Ed., University of Southern California, Los Angeles, California
Major: Counseling Psychology
Minor: School Psychology
Dates Attended: 1967 - 1971
Date Degree Conferred: August 30, 1968

B.S. Loyola University of Los Angeles, California
Major: Biology
Minor: Chemistry/Philosophy
Dates Attended: 1962 - 1966
Date Degree Conferred: June 3, 1966

INTERNSHIPS:

Predoctoral Internship (2500 hours)

1976 - 1978

· Clark County Juvenile Court
Las Vegas, Nevada

Supervisors: Patrick Maloney, Ph.D.
Verdun Trione, Ed.D.

Supervised forty hour per week practice of conducting psychological evaluations and performing psychotherapy for juvenile delinquents, status offenders, and abandoned, neglected, and abused children and their family members in a juvenile court setting. Also, provided case consultation/conferencing and training for a staff of institutional youth counselors and probation and parole officers, as well as provided expert court testimony as requested.

· CareUnit Program
Lake Mead Hospital
North Las Vegas, Nevada

Supervised six hour per week practice of conducting psychological evaluations, as well as performing individual, group and family psychotherapy and consultation/conferencing services in an inpatient hospital setting for substance abusers.

Postdoctoral Internship (2500 hours)

1978 - 1980

· Jean Hanna Clark Rehabilitation Center
Las Vegas, Nevada

Supervisor: Verdun Trione, Ed.D.

Supervised forty hour per week practice of conducting psychological, neuropsychological, presurgical and vocational evaluations; provided biofeedback therapy and individual/group

psychotherapy to help clients cope with pain and psychosocial issues related to physical disability; performed case consultation/conferencing within a multidisciplinary evaluation and treatment team setting in a rehabilitation center for industrially injured workers .

School Psychology Internship (700 hours)

1971

· Pasadena Unified School District
Pasadena, California

Supervisor: Allen Webb, Ph.D.
O'Neal Varner, M.A. (350 supervised hours)

Conducted psychoeducational evaluations for school-aged students to identify levels of learning disability, emotional disturbance, and attention deficits. Communicated test results and developed remedial recommendations through use of a written report and verbal presentation during participation in case conferences with teachers, parents, and school administrators.

1972

· Clark County Juvenile Court
Las Vegas, Nevada

Supervisor: Allen Webb, Ph.D. (350 supervised hours)

Conducted psychological evaluations for school-aged students involved with the Clark County Juvenile Court as an adjudicated delinquent, child in need of supervision, or a child abandoned, neglected, or abused by their parents. Written test results were submitted to the Juvenile Court judge, hearing master, probation and parole officers, parents, and the Clark County School District for use in developing prescriptive remedial educational and behavioral changing treatment programs.

PROFESSIONAL EXPERIENCE:

1989 - Present

Private Psychology Practice

As part of a diversified outpatient and hospital practice, the following psychological services are provided not only for self-referred clients, but also upon referral from physicians, chiropractors, insurance claims adjusters, nurse case managers, psychological colleagues, attorneys, the courts, private industry, and the public sector.

Clinical Assessments:

- Neuropsychological
- Psychological
- Presurgical
- Vocational
- Substance Use
- Pain Management

Forensic Assessments:

- Competency
- Death Penalty Mitigation
- Dangerousness
- Fitness For Duty
- Child Custody
- Public Safety Officer Post Job Offer Screening

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Clinical Treatment:

- Individual Psychotherapy
- Group Counseling
- Family Counseling
- Marital Counseling
- Biofeedback Therapy
- Psycho Education

Clinical Consultation/Conferencing With:

- Physicians
- Psychological colleagues
- Lawyers, judges, appeals and hearing officers
- Claims adjusters and/or nurse case managers
- Physical and occupational therapists
- Clients and client family members
- Vocational rehabilitation counselors

Psychological services provided are for clients referred from the following practice areas and present with a number of medical and psychosocial problems:

- Hospital practice
 - Health South Rehabilitation Hospitals
 - Head trauma
 - Post-surgical rehabilitation
 - Spinal cord injuries
 - Cerebrovascular accidents
 - Medical/Surgical Hospitals (UMC, Valley, Humana, Mountain View, Desert Springs, and Summerlin)
 - Post-surgical recovery
 - Trauma recovery
 - Fountain Ridge Alcoholism Center
 - Substance abuse/dependence detoxification process
 - Full range of psychological disorders
 - Montevista Psychiatric Hospital
 - Adult Inpatient
 - Adult Outpatient
- Forensic Practice
- Clark County Public Defender
 - Capital Murder
 - Competency to stand trial and assist counsel
 - Sexual dangerousness
- Clark County Special Public Defender
 - Capital Murder
 - Death penalty mitigation
- Clark County District Attorney
 - Sexual abuse
 - Domestic violence
 - Capital murder
- Defense and Plaintiff's Attorneys
 - Traumatic brain injuries
 - Motor vehicle accidents
 - Slip and falls
 - Toxic exposure
 - Competency to manage one's own affairs
- Clark County Family Court
 - Child custody
 - Parental fitness
 - Parent-child reunification
 - Special Master/Coparenting Coordinator

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- Private Industry
 - Fitness For Duty Evaluations
 - Work place violence potential
- Public Agencies
 - Fitness For Duty evaluations for the Mesquite, Nevada, State of Nevada Department of Public Safety, Henderson, Nevada, State of Nevada Department of Risk Management and City of Las Vegas Personnel Department

1995 - 2002

Psychology Director

NovaCare Pain and Rehabilitation Center

Provide clinical health and rehabilitation psychological services for NovaCare's CARF accredited Pain and Rehabilitation Center's Chronic Pain Management Program including conducting

psychological and neuropsychological evaluations; providing individual and group pain and stress management counseling, biofeedback therapy and psychoeducational lectures; and performing psychological consultation/conferencing with physicians, claims examiners, nurse case managers, rehabilitation counselors, attorneys, hearing officers and appeals officers. Clinic was closed in December 2003.

1995 - present

Post Job Offer Psychological Evaluator

On an as-needed basis, provided pre-employment conditional job offer screening and evaluation services for public safety personnel (police officers, corrections officers and police officer cadets), meeting the standards of the Americans With Disabilities Act of 1990 and Civil Rights Act of 1991.

Served the following police departments:

- 1995 - 1998 - Las Vegas Metropolitan Police Department
- 2005 - present - Mesquite Police Department
- 2006 - present - City of Henderson Police Department

1990 - 1995

Co-Owner/Psychology Director

Injury Management Associates of Nevada, dba Nevada Pain and Rehabilitation Center, Las Vegas, Nevada (sold to NovaCare Outpatient Rehabilitation Division - May, 1995)

The Nevada Pain and Rehabilitation Center was Southern Nevada's first privately owned multidisciplinary CARF accredited rehabilitation center providing evaluation and treatment programs for chronic pain management, injury management, pain counseling, work hardening/work simulation, and singular service medical, psychological, physical and occupational therapy treatments primarily for industrially injured workers.

Clinical services provided included, for industrially injured workers, conducting psychological, presurgical and neuropsychological evaluations; providing individual and group pain and stress management counseling, biofeedback therapy and patient education lectures; performing psychological consultation/conferencing with physicians, claims examiners, nurse case managers, rehabilitation counselors, judges, attorneys, hearing officers and appeals officers.

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Administrative duties included, in association with partner, Chief Executive Officer and Chief Financial Officer, assisted in planning, organizing and directing the medical, paramedical and support staff of fifty employees; preparing and administering the corporate budget; approval of purchase of capital items and supplies; recruiting, hiring and training of staff, specifically psychologists, test examiner, and biofeedback therapist; setting work standards and evaluating employee performance; establishing policies and procedures; participating the senior management team and executive committee meetings; maintaining public contact with referring sources; and coordinating the public relations and marketing efforts.

1985 - 1994

Owner/Consultant

Children's Oasis Schools, Inc.
Las Vegas, Nevada

Co-owner with spouse of two preschool and day care centers located in Spring Valley and The Lakes, Las Vegas. The Spring Valley School had a continuous enrollment of 100 children and The Lakes School served an average of 220 children. As owner, facilitated the recruitment and supervision of directors for the two schools, prepared and administered the corporate budget, and helped organize and implement the school curriculum. The Spring Valley School was sold in December, 1990 and The Lakes School was sold in April, 1994.

1978 - 1989

Chief Psychologist

Jean Hanna Clark Rehabilitation Center
Las Vegas, Nevada

Performed the duties of Chief Psychologist in a multidisciplinary rehabilitation center owned and operated by the State Industrial Insurance System (SIIS).

Clinical duties included providing injured workers psychological, presurgical and neuropsychological evaluations; individual and group pain and stress management counseling, biofeedback therapy and psychoeducational lectures; and performing psychological consultation with physicians, claims examiners, nurse case managers, rehabilitation counselors, judges, attorneys, hearing officers and appeals officers.

Administrative duties include: planning, organizing and directing services; recruiting, hiring and training a staff of four psychologists, one test examiner, one biofeedback therapist, and four secretaries; setting work standards and evaluating employee performance; establishing policies and procedures; serving on the senior management team and executive committee; maintaining public contact with referring sources; and contributing to public relations and marketing efforts.

1971 - 1978

Chief Psychologist

Clark County Juvenile Court
Las Vegas, Nevada

Performed the duties of Chief Psychologist for Clark County Nevada's Juvenile Court with juvenile delinquents, children in need of supervision, and abandoned, neglected, and abused children.

Clinical services included conducting psychological evaluations used in court placement disposition; provided individual, group and family counseling; performed psychological consultation/conferencing with the probation, parole, institutional and judicial departments; collected and analyzed data for research and evaluation designs of federally funded court programs; and provided continuing education seminars for staff and educational instruction for youthful offenders and their parents.

Administrative duties included planning, organizing and directing services; preparing and administering the department budget; ordering supplies and equipment; facilitating the planning and writing of Federal Grant proposals; coordinating work activities and maintaining extensive contact with other court services and community agencies; recruiting, hiring and training of psychological services staff; setting work standards and evaluating employee performance; implementing employee counseling, disciplinary or termination procedures where appropriate; collected, analyzed and utilized data in administrative and department accountability studies; serving on the Director's Senior Management Team.

1969 - 1971

Adult Education Instructor

Work Incentive Program (partnership program between the Department of Employment and the Department of Family Services)
Los Angeles City Schools, Los Angeles, California

Teacher of basic education subjects, such as math, reading, English grammar and spelling to welfare recipients in a federally funded program located in South Central Los Angeles (Watts area). Upon successful completion of this educational remediation program, recipients were referred for vocational rehabilitation training leading to re-entering the job market.

1968 - 1969

Employment Counselor

Department of Employment
East Los Angeles, California

Provided employment counseling and vocational testing with adults and teenagers for job development and placement services in the predominantly Hispanic community in east Los Angeles, California. Administered and interpreted the General Aptitude Test Battery (GATB).

1967 - 1968

High School Teacher/Coach

Black-Foxe School, Los Angeles, California

Teacher of biology and general science subjects for students in grades 9-12. Also served as a varsity track coach and counselor/faculty advisor to junior and senior classes.

SUPPLEMENTARY EMPLOYMENT HISTORY:

Media Consulting:

2002 - Present

Associate Producer - Ask Rita Television Show
Martin Bergman and Rita Rudner, Producers

Part-Time College Teaching:

1976 - 1984

Park College School for Community Education:
Parkville, Missouri

- Adjunct professor of Psychology in the off campus program located at Nellis Air Force Base, Nevada.
- Taught at least one undergraduate psychology class per semester from the following curriculum offerings: Theories of Personality, Counseling Theory, Tests & Measurements, Special Topics in Social Psychology and Independent Study.
- Served as the Resident Academic Director providing curriculum accountability, teacher evaluations, and teacher recruitment services in association with the resident program administrator.

1978 - 1989

Nova University
Las Vegas, Nevada

- Instructor in the off-campus graduate education curriculum taught in Las Vegas, Nevada.
- Taught classes in Stress Management, Human Sexuality, Parental Counseling, Exceptional Children, Educational Theory Into Practice and Administration and Supervision.
- Performed mentor and advisor services for students completing their master's project.

1973 - 1976

Clark County Community College
Las Vegas, Nevada

- Part-time Instructor of undergraduate courses.
- Taught courses in criminal justice administration, general psychology, and the psychology of adjustment.

1978 - 1979

New College/Stoner Chiropractic Foundation
Las Vegas, Nevada

- Instructor
- Taught courses in behavioral science applications for chiropractic doctors enrolled in a continuing education program co-sponsored by the Stoner Chiropractic Foundation & New College.

1977

College of Great Falls, Montana
Great Falls, Montana

- Instructor
- Taught a winter quarter class (intense format) titled "Using Community Resources (Including Diversion)" for the State of Montana probation officers, youth institution supervisors, and aftercare workers.

1972 - 1986

University of Nevada, Las Vegas
Las Vegas, Nevada

- Part-time Instructor
- Taught undergraduate course in Stress Management and graduate courses in Family Dynamics, Counseling in Agencies, and Special Problems in Family Dysfunction.

1986 - 1990

Golden Gate University
San Francisco, California

- Part-time Instructor
- Taught graduate level courses in research design and statistics in the MBA/MPA program located off campus at Fort Irwin, California; Edwards Air Force Base, California; Nellis Air Force Base, Nevada; and George Air Force Base, Victorville, California.

Training and Consultation Services:

Provided educational seminars and organizational consulting for the following clients:

- Illinois Probation Council, 1976 - 1978
- National Council of Juvenile & Family Court Judges, 1976 - 1978
- Tropicana Hotel, 1986 - 1988
- EG&G, 1981 - 1986
- Sands Hotel, 1988
- Mardi Gras Best Western Hotel, 1981 - 1989
- Clark County School District, 1974 - 1978
- Home of the Good Shepherd, 1976
- Furnace Creek Inn (Death Valley), 1989 - 1996
- Nevada Industrial Commission, 1979 - 1987

PROFESSIONAL MEMBERSHIPS/ACTIVITIES:

- Member - American Psychological Association
Division memberships:
 - Counseling Psychology
 - Clinical Neuropsychology
 - Psychologists in Independent Practice
 - Family Psychology
- Nevada State Psychology Association:
 - 1991 - 1992: Treasurer and Executive Committee Member,
 - 2001 - 2002: President elect and Executive Committee member,
 - 2002 - 2003: President and Executive Committee member,
 - 2003 - 2004: Past President and Executive Committee member.
- The American Pain Society
- International Association for the Study of Pain
- Society for Behavioral Medicine
- International Neuropsychology Society
- National Academy of Neuropsychology
- Coalition of Clinical Practitioners in Neuropsychology (Charter Member)

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- Reitan Society (Charter Member)
- Association for Applied Physiology and Biofeedback
- The American Association for Marriage & Family Therapy (Clinical Member)
- Phi Delta Kappa - University of Southern California Chapter
- Phi Kappa Phi - University of Southern California Chapter
- The American Academy of Pain Management
- Program Committee Member (term: 1997 - 2000) - Division of Counseling Psychology of the American Psychological Association

PUBLICATIONS:

- | | |
|---|---|
| Mortillaro, Louis F. | <u>Mastering Math: Manual For Testing and Reinforcement Exercises</u> , Santa Ana, California: Methods Research Associates, Inc. 1971. |
| Trione, Verdun and
Mortillaro, Louis F. | "Measuring Professional Performance of Counselors by Objectives" in Trione, <u>Field Events and Theory for Counselors</u> , Xerox College Publishing, Lexington, 1975, pp. 278-285. |
| Mortillaro, Louis F.
and Carmany, James P. | "Service Accountability Model for the Juvenile Justice System," <u>Juvenile Justice</u> , May 1975, Vol. 26, No. 2, pp. 35-39. |
| Mortillaro, Louis F. | "The Behavioral Accountability Program," <u>Juvenile Justice</u> , August, 1975, Vol. 26, No. 3, pp. 24-30. |
| Mortillaro, Louis F. | "Behavioral Negotiation Process," <u>The Group Leader's Workshop</u> , No. XXIII, November 1977, pp. 5-6. |
| Mortillaro, Louis F. | "The Use of Psychological Services in a Juvenile Court Setting," <u>Juvenile Justice</u> , May 1978, Vol. 29, No. 2, pp. 7-12. |
| Mortillaro, Louis F. | "An Analysis of California Psychological Inventory Factors in Predicting and Differentiating between Juvenile Delinquents and Status Offenders," Unpublished Doctoral Dissertation, San Diego, California, June 1978. |
| Mortillaro, Louis F.
and Stoner, Fred L. | "Personal Evaluation of Doctors of Chiropractic Enrolled in a Continuing Education Program," <u>The Digest of Chiropractic Economics</u> , November/December, 1978, Volume 21, Number 3, pp. 24-25. |
| Fisher, Ronald, Mortillaro, Louis. F.,
and Johnson, Donald | "A Discussion on the Behavioral Medicine Approach to the Treatment of Chronic Back Pain," <u>Nevada Personnel and Guidance Journal</u> , November 1979, Vol. 1, pp. 15-23. |
| Mortillaro, Louis F. | "A Coordinated Personnel System for Hiring Chiropractic Assistants and Chiropractic Technicians," <u>The ACA Journal of Chiropractic</u> , June 1980, Vol. 17, No. 6, pp. 30-32. |

MEMBERSHIP ON COMMUNITY BOARDS (Past and Present):

Youth Charities of Southern Nevada
Big Brothers/Big Sisters of Southern Nevada (past President)
Boys & Girls Club of Southern Nevada
HELP, Inc.
Nevada Association for the Handicapped
Mispah House
Nevada Network Against Domestic Violence
Fraternal Order of the Desert Big Horn Sheep
Nevada Boys & Girls Club of Henderson, Nevada

STATE BOARD OF PSYCHOLOGICAL EXAMINERS APPOINTMENT:

Nevada State Board of Psychological Examiners
First Term: December 14, 1992 to June 30, 1995
Second Term: July 1, 1995 to June 30, 2000
President of Board: July 1, 1998 to June 30, 2000

MEDIA APPEARANCES:

Interviews for local television newscasts
Interviews on local radio shows

HONORS AND AWARDS:

Congressional Recognition - Hon. Jon C. Porter (U.S. Congressman) - Recognition as one of the original founders of Big Brothers & Big Sisters of Nevada (11/05/05)
Psychologist of the Year, Nevada State Psychological Association (2003)
Outstanding Service Award - State of Nevada Board of Psychological Examiners (1992-2000)
Outstanding Service Award - Board of Directors, Boys & Girls Club of Henderson, Nevada 2004
Outstanding Service Award - Board of Directors, Boys & Girls Club of Southern Nevada (1992)
Outstanding Service Award - Board of Directors, Big Brothers/Big Sisters of Southern Nevada (1978/1983)
Track Coach of the Year - Prep League in Los Angeles, California (1968)
Outstanding Student Legislator - Loyola University of Los Angeles, California (1965)

PRESENTATIONS:

- 1971 - Present Presentation of numerous in-service training sessions for governmental agencies/private businesses on a variety of psychological issues
- 1976 Youth in Trouble Conference: The Adolescent With Learning Disabilities, Las Vegas, Nevada November 4-6, 1976
Presentation: "The Agencies Speak"
- 1977 Third Annual Western Regional Conference: "Humanistic Approaches in Behavior Modification" Las Vegas, Nevada March 10-12, 1977
Chairperson: Homework in Counseling & Psychotherapy: The Use of Systematic Planned Assignments to Promote Transfer and Enhance Efficiency
- 1978 APGA Convention - Washington, D.C., March 20-24, 1978 "The Behavioral Accountability Program"
- 1979 APGA Convention - Las Vegas, Nevada April 2-5, 1979
"The Behavioral Assessment Model: Counselor and Client Accountability Before the Fact"
"An Analysis of California Psychological Inventory Factors in Differentiating and Predicting Between Status Offenders and Juvenile Delinquents"

- 1999 CCBA Family Law Seminar
New Approach: Child Custody Evaluations and Alternative Solutions
February 5, 1999
- 1999 Nevada State Psychological Association Annual Conference Facilitator: Ethical Issues in
Clinical Practice, May 21, 1999
- 2003 17th Annual Low Back Pain Conference, Las Vegas, Nevada
June 27-29, 2003
Program Title: Psychological Testing: Short & Long Version
- 2006 State Bar of Nevada 17th Annual Family Law Conference
Program Title: Child Custody: A Local Perspective
Served as a presenter/panel discussant
March 17, 2006, Ely, Nevada
- 2006 Nevada Rehabilitation Center's Continuation Education Class
Las Vegas, Nevada, April 20, 2006
Program Title: Psychological Injuries Due to Auto Accidents
- 2007 U.S. District Court - District of Nevada 2007 District Conference
Program Title: Anger Management to Reduce Stress & Avoid Ethical Problems
Served as guest speaker May 3, 2007, Las Vegas, Nevada
- 2007 The National Divorce Skills Institute - 2007
Program: The Role of The Child Custody Evaluation, Common Diagnostic Tools Used and
How Their Function is Carried Out
Served as guest speaker, September 10, 2007, Las Vegas, Nevada.

001
PALM LAW FIRM, LTD.
PATRICIA PALM
STATE BAR NO. 6009
1212 CASINO CENTER BLVD.
LAS VEGAS, NV 89104
PHONE: 702-386-9113
FAX: 702-386-9114
EMAIL: patricia.palmlaw@gmail.com
ATTORNEY FOR DEFENDANT O'KEEFE

FILED

AUG 02 2010

Anna S. Schmitt
CLERK OF COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,
Plaintiff,

vs.

BRIAN K. O'KEEFE,
Defendant

Case No.: C250630

Dept. No.: XVII

**NOTICE OF MOTION AND MOTION BY DEFENDANT O'KEEFE
FOR DISCOVERY**

COMES NOW Defendant Brian K. O'Keefe, by and through his attorney,
Patricia Palm of Palm Law Firm, Ltd., and hereby moves this Honorable Court
for an order granting discovery as requested herein.

This Motion is made and based upon the record in this case, including
the papers and pleadings on file herein, NRS Chapter 174, the Constitutions of
the United States and the State of Nevada, the points and authorities set forth

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1 herein, and any argument of counsel at the time of the hearing on this Motion.

2 Dated this 2nd day of August, 2010.

3 PALM LAW FIRM LTD.

4 

5 Patricia Palm, Bar No. 6009

6 1212 Casino Center Blvd.

7 Las Vegas, NV 89104

8 (702) 386-9113

9 Attorney for Defendant O'Keefe

10 **NOTICE OF MOTION**

11 TO: THE STATE OF NEVADA, Plaintiff,

12 TO: DAVID ROGER, DISTRICT ATTORNEY, Attorney for Plaintiff

13 PLEASE TAKE NOTICE that the undersigned will bring on the above and
14 foregoing **Motion by Defendant O'Keefe for Discovery** on the 12 day of
15 August, 2010 at the hour of 8:15 a.m., or as soon thereafter as counsel
16 can be heard.

17 DATED this 2nd day of August, 2010.

18 PALM LAW FIRM LTD.

19 

20 Patricia Palm, Bar No. 6009

21 1212 Casino Center Blvd.

22 Las Vegas, NV 89104

23 (702) 386-9113

24 Attorney for Defendant O'Keefe

POINTS AND AUTHORITIES
PROCEDURAL HISTORY

The State charged Defendant Brian K. O'Keefe with murder with use of a deadly weapon. He entered a plea of not guilty and invoked his right to a speedy trial. The State filed a motion to admit evidence of other crimes, which O'Keefe opposed. The Court ruled that the State could introduce evidence of threats to the alleged victim Victoria Whitmarsh that witness Cheryl Morris claims were made by O'Keefe, and his demonstration of proficiency at killing with knives, which Morris claims to have witnessed. The Court further ruled that the State could introduce certified copies of O'Keefe's prior 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 is permitted to introduce only the details of when O'Keefe was convicted, in which jurisdiction, and the name of the offenses, and with the felony domestic battery, the fact that Whitmarsh had testified as a State's witness in that case. 3/16/09 TT 2-10.

The instant case was tried before this Honorable Court beginning March 16, 2009. After five days of trial, on March 20, 2009, the jury returned a verdict finding O'Keefe guilty of second degree murder with use of a deadly weapon. On May 5, 2009, this 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.

O'Keefe timely appealed to the Nevada Supreme Court. After briefing, the Court reversed O'Keefe's conviction, agreeing with him that the district court "erred by giving the State's proposed instruction on second-degree murder because it set forth an alternative theory of second-degree murder, the charging document did not allege this alternate theory, and no evidence supported this theory." The Court explained, "the State's charging document

1 did not allege that O'Keefe killed the victim while he was committing an
2 unlawful act and the evidence presented at trial did not support this theory of
3 second-degree murder." O'Keefe v. State, NSC Docket No. 53859, Order of
4 Reversal and Remand (April 7, 2010). The Court further stated, "The district
5 court's error in giving this instruction was not harmless because it is not clear
6 beyond a reasonable doubt that a rational juror would have found O'Keefe
7 guilty of second-degree murder absent the error." Id. at 2.

8 After remand to this Court, trial was reset to begin on August 23, 2010.

9 The parties have been cooperating in discovery; however, in an effort to
10 preserve O'Keefe's rights, including his right to a favorable standard of review
11 on appeal, if any, he is now specifically requesting the discovery items set forth
12 below.

13 DISCOVERY REQUESTED

14 Defendant BRIAN K. O'KEEFE, hereby requests that this Honorable
15 Court order the Clark County District Attorney's Office to supply or make
16 available the following:

17 1. All written, transcribed, or recorded statements, confessions, or
18 admissions made by Defendant to any person, or copies thereof;

19 2. The substance of any other statements made by Defendant which
20 the prosecution intends to use as evidence at the trial of this case, specifically
21 including any conversations or correspondence overheard or intercepted by any
22 jail personnel or other inmates;

23 3. Copies of all tapes and recorded statements from all witnesses and
24 Defendant, as well as copies of the recorded phone calls or jail visits in a
25 format that can be played on cassette or CD or DVD player;

26 4. The most recent names and addresses of all persons who have given
27 written, recorded, video and/ or oral statements or communications in the
28

1 course of this case, including, but not limited to any current addresses for any
2 of the lay witnesses in this case;

3 5. Copies of statements given by any State lay witness on any case,
4 specifically including any reports of said information prepared by any law
5 enforcement agent;

6 6. All reports and results of scientific tests including, but not limited to,
7 complete reports of fingerprint comparisons, DNA and any other scientific
8 analysis of physical evidence, and any records of requests for such testing to be
9 done;

10 7. Any photographs in the State's possession including, but not limited
11 to, all photographs taken of the alleged victim, the scene of the crime, ariel
12 photographs, photo enlargements of latent prints or other evidence, and all
13 photographs the State intends to introduce as evidence;

14 8. Any evidence which would tend to exculpate Defendant including, but
15 not limited to:

16 (a) The most recent names and addresses of any and all witnesses who
17 could provide exculpatory evidence to the defense and are known to the State,
18 though the State does not intend to call them at trial.

19 (b) Current NCICs, Pre-Sentencing and/or Probation reports and any
20 other information or documents in the State's possession or available to the
21 State regarding the background, arrest record (state or federal), criminal record
22 (state and federal), pending criminal actions (state or federal), of the deceased
23 and witnesses in this case. The defense specifically requests that the State be
24 required to check the current NCIC information on its lay witnesses and allow
25 the Defense to view that information;

26 (c) The immigration records of all lay witnesses, if any;
27
28

1 (d) All written or taped statements, correspondence, or memorandum
2 concerning any promise of immunity, any promises of leniency, any
3 suggestions of leniency or immunity, any proposed attempts to influence the
4 court or the District Attorney's office with reference to leniency concerning any
5 witness who is expected to testify at trial, the reference to any case of which all
6 of the persons referred to in this paragraph are, or were, a suspect, if the
7 promises or suggestions, or attempts to influence or leniency related to or were
8 in exchange for, such persons' statements, present or past, against Defendant,
9 the names and addresses of all persons present during any such statements,
10 promises, proposals or attempts to exert influence on behalf of the persons
11 mentioned in this paragraph.

12 9. Copies of all police reports, impound reports, reports regarding the
13 use of force, diagrams, sketches, surveillance tapes, and medical reports in the
14 actual or constructive possession of the District Attorney's Office, the Las
15 Vegas Metropolitan Police Department, the Sheriff's Office, the FBI, and I.C.E.
16 This request includes but is not limited to any reports or records documenting
17 O'Keefe's mental or physical condition, including intoxication, at the time of his
18 arrest and his initial interrogation by homicide detectives. It also includes but
19 is not limited to a copy of the crime scene impound report prepared by CSA
20 Maldonado.

21 AUTHORITIES

22 A trial court has wide discretion in permitting discovery. See, Marshall v.
23 District Court, 79 Nev. 280, 382 P.2d 214 (1963). Pursuant to NRS
24 174.235(1)(a), Defendant O'Keefe is entitled to receive copies of any written or
25 recorded statements, confessions or admissions made by him or any State's
26 witness. That statute states, in part, that the prosecuting attorney shall permit
27 the defendant to inspect, copy or photograph any
28

1 [w]ritten or recorded statements or confessions made by the
2 Defendant, or any written or recorded statements made by a
3 witness the prosecuting attorney intends to call during the case in
4 chief of the State, or copies thereof, within the possession, custody
5 or control of the State, the existence of which is known, or by the
6 exercise of due diligence may become known, to the prosecuting
7 attorney

8 O'Keefe submits knowledge of any oral statements is as critical as
9 knowledge of written statements in preparing an adequate defense.
10 Fundamental fairness and the absence of any compelling reason for non-
11 disclosure require revelation of any oral statements made by the defendant
12 which the prosecution intends to introduce in its case in chief. State v.
13 Johnson, 28 N.J. 133, 145 A.2d 313 (1958), cited in ABA Standards for
14 Criminal Justice - Discovery and Procedure Before Trial, p. 258.

15 Additionally, constitutional due process guarantees under the Fifth and
16 Fourteenth Amendments of the United States Constitution, as well as pursuant
17 to the Nevada Constitution, article 1, section 8, require the State to provide a
18 criminal defendant with discovery to include all exculpatory evidence in its
19 possession. See generally Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194
20 (1963); Roberts v. State, 110 Nev. 1121, 1133, 881 P.2d 1, 8 (1994)
21 (recognizing that state and federal constitutional due process requires
22 disclosure by the prosecution of evidence that would enable effective cross-
23 examination and impeachment). The State must disclose evidence "if it
24 provides grounds for the defense to attack reliability, thoroughness, and good
25 faith of the police investigation, to impeach credibility of the state's witnesses,
26 or to bolster the defense case against prosecutorial attacks[,]" and this
27 obligation is not limited to evidence that will be admissible at trial. Mazzan v.
28 Warden, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000) (citing Kyles v. Whitley, 514
U.S. 419, 442 n.13, 445-51, 115 S. Ct. 1555 (1995)). Furthermore, the State's

1 scientific experiments made in connection with the particular case, or copies
2 thereof, within the possession, custody or control of the State, the existence of
3 which is known, or by the exercise of due diligence may become known to the
4 prosecuting attorney." See also NRS 174.234(2) (addressing notice
5 requirements related to expert witnesses). This evidence would also be subject
6 to disclosure under Brady as well as the District Attorney's open file policy.

7 Disclosure of any photographs or other police reports or records made in
8 investigating the alleged crime is required pursuant to Brady, the District
9 Attorney's open file policy, and NRS 174.235(1)(c), requiring that the State
10 allow inspection of "[b]ooks, papers, documents, tangible objects, or copies
11 thereof, which the prosecuting attorney intends to introduce during the case in
12 chief of the State and which are within the possession, custody or control of the
13 State, the existence of which is known or by the exercise of due diligence may
14 become known, to the prosecuting attorney."

15 CONCLUSION

16 Defendant O'Keefe respectfully requests that this Court order the State to
17 produce the above-requested discovery within a reasonable time so that
18 O'Keefe may present an effective defense at trial.

19 DATED this 2nd day of August, 2010.

20 PALM LAW FIRM LTD.

21 

22 Patricia Palm, Bar No. 6009
23 1212 Casino Center Blvd.
24 Las Vegas, NV 89104
25 (702) 386-9113
26 Attorney for Defendant O'Keefe
27
28

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2 PALM LAW FIRM, LTD.
3 PATRICIA PALM, ESQ.
4 NEVADA BAR NO. 6009
5 1212 CASINO CENTER BLVD.
6 LAS VEGAS, NV 89104
7 Phone: (702) 386-9113
8 Fax: (702) 386-9114
9 Email: Patricia.palmlaw@gmail.com
10 Attorney for Brian O'Keefe

FILED

AUG 2 2 15 PM '10

[Signature]
CLERK OF COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

9 STATE OF NEVADA,

10 Plaintiff,

11 vs.

12 BRIAN K. O'KEEFE,

13 Defendant.

CASE NO: C250630

DEPT NO. XVII

DATE:

TIME:

RECEIPT OF COPY

17 I, the undersigned, acknowledge that on this 2 day of
18 August 2010, I received a true copy of the **NOTICE OF MOTION AND**
19 **MOTION BY DEFENDANT O'KEEFE FOR DISCOVERY.**

COUNTY DISTRICT ATTORNEY
200 Lewis Ave., 3rd Floor
Las Vegas, NV 89155

By: *KH*

FILED

AUG 02 2010

Ann L. Sullivan
CLERK OF COURT

001
PALM LAW FIRM, LTD.
PATRICIA PALM, ESQ.
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Fax: (702) 386-9114
Email: Patricia.palmlaw@gmail.com
Attorney for Brian O'Keefe

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

BRIAN K. O'KEEFE,

Defendant.

CASE NO: C250630

DEPT NO. XVII

DATE:

TIME:

**NOTICE OF MOTION AND MOTION BY DEFENDANT O'KEEFE TO
SUPPRESS HIS STATEMENTS TO POLICE, OR, ALTERNATIVELY, TO
PRECLUDE THE STATE FROM INTRODUCING PORTIONS OF HIS
INTERROGATION**


COMES NOW Defendant, Brian K. O'Keefe, by and through his attorney, Patricia Palm of Palm Law Firm, Ltd., and hereby moves this Honorable Court for an order suppressing O'Keefe's statements to police during custodial questioning on the bases of Miranda violation and unknowingly and involuntarily waiver of Miranda rights. In the event that the Court is not inclined to grant suppression of O'Keefe's statements during the recorded interrogation by homicide detectives, O'Keefe seeks a ruling precluding the State from introducing portions of the interrogation which are unfairly prejudicial.

This Motion is made and based upon the record in this case, including the papers and pleadings on file herein, the Constitutions of the United States

1 and the State of Nevada, the points and authorities set forth below, and any
2 argument of counsel at the time of the hearing on this Motion.

3 Dated this 2nd day of August, 2010.

4 PALM LAW FIRM, LTD.

5 
6
7 Patricia Palm, Bar No. 6009
8 1212 Casino Center Blvd.
9 Las Vegas, NV 89104
10 Phone: (702) 386-9113
11 Fax: (702) 386-9114
12 Attorney for Defendant O'Keefe

11 **NOTICE OF MOTION**

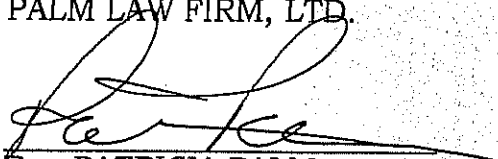
12 TO: STATE OF NEVADA, Plaintiff; and

13 TO: DAVID ROGER, District Attorney, Attorney for Plaintiff

14 YOU WILL PLEASE TAKE NOTICE that the undersigned will bring on the
15 above and foregoing **NOTICE OF MOTION AND MOTION BY DEFENDANT**
16 **O'KEEFE TO SUPPRESS HIS STATEMENTS TO POLICE, OR,**
17 **ALTERNATIVELY, TO PRECLUDE THE STATE FROM INTRODUCING**
18 **PORTIONS OF HIS INTERROGATION** on the 12 day of August, 2010, at
19 the hour of 8:15 .m., in Department No. XVII of the above-entitled Court, or as
20 soon thereafter as counsel may be heard.
21

22 DATED this 2nd day of August, 2010.

23 PALM LAW FIRM, LTD.

24 
25
26 By: PATRICIA PALM
27 Nevada Bar No. 6009
28 1212 Casino Center Blvd.
Las Vegas, NV 89104
(702) 386-9113
Attorney for Defendant O'Keefe

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POINTS AND AUTHORITIES
PROCEDURAL HISTORY

The State charged Defendant Brian K. O'Keefe with murder with use of a deadly weapon. He entered a plea of not guilty and invoked his right to a speedy trial. The State filed a motion to admit evidence of other crimes, which O'Keefe opposed. The Court ruled that the State could introduce evidence of threats to the alleged victim Victoria Whitmarsh that witness Cheryl Morris claims were made by O'Keefe, and his demonstration of proficiency at killing with knives, which Morris claims to have witnessed. The Court further ruled that the State could introduce certified copies of O'Keefe's prior 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 is permitted to introduce only the details of when O'Keefe was convicted, in which jurisdiction, and the name of the offenses, and with the felony domestic battery, the fact that Whitmarsh had testified as a State's witness in that case. 3/16/09 TT 2-10.

The instant case was tried before this Honorable Court beginning March 16, 2009. After five days of trial, on March 20, 2009, the jury returned a verdict finding O'Keefe guilty of second degree murder with use of a deadly weapon. On May 5, 2009, this 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.

O'Keefe timely appealed to the Nevada Supreme Court. After briefing, the Court reversed O'Keefe's conviction, agreeing with him that the district court "erred by giving the State's proposed instruction on second-degree murder because it set forth an alternative theory of second-degree murder, the charging document did not allege this alternate theory, and no evidence

1 supported this theory." The Court explained, "the State's charging document
2 did not allege that O'Keefe killed the victim while he was committing an
3 unlawful act and the evidence presented at trial did not support this theory of
4 second-degree murder." O'Keefe v. State, NSC Docket No. 53859, Order of
5 Reversal and Remand (April 7, 2010). The Court further stated, "The district
6 court's error in giving this instruction was not harmless because it is not clear
7 beyond a reasonable doubt that a rational juror would have found O'Keefe
8 guilty of second-degree murder absent the error." Id. at 2.

9 After remand to this Court, trial was reset to begin on August 23, 2010.

10 STATEMENT OF FACTS

11 The prior trial testimony in this case showed that Brian O'Keefe and
12 Victoria Whitmarsh met in a treatment facility in 2001. 3/17/09 TT 18,
13 3/19/09 TT 183-84. They dated and co-habitated off and on and had what
14 could be described as a very tumultuous relationship. 3/19/09 TT 186-90. In
15 2004, O'Keefe was convicted of burglary for entering into the couple's joint
16 dwelling with the intent to commit a crime against Whitmarsh. O'Keefe was
17 sentenced to probation. He was later convicted of felony domestic battery
18 against Whitmarsh, and he went to prison in 2006. 3/18/09 TT 139-40,
19 3/19/09 TT 187-88. Whitmarsh testified as a State's witness in the domestic
20 battery case. 3/18/09 TT 139.

21 When O'Keefe was released from prison in 2007, he met and began a
22 relationship with Cheryl Morris. 3/17/09 TT 10, 3/19/09 TT 189. He would
23 often speak to Morris about his previous relationship with Whitmarsh, and
24 even expressed to her that he still had strong feelings for Whitmarsh. 3/17/09
25 TT 13-14, 37. Morris claimed at trial that O'Keefe said he was upset with
26 Whitmarsh because she put him in prison and he said he wanted to "kill the
27 bitch." 3/17/09 TT 14-17. Morris testified that O'Keefe left at one point to be
28 with Whitmarsh, and then telephoned Morris, asking her to move out of their

1 jointly shared apartment so Whitmarsh could move in. 3/17/09 TT 11. Morris
2 testified that Whitmarsh got on the phone with her during that call and told
3 her she had decided to resume her relationship with O'Keefe. The two of them
4 appeared to be a loving couple and were open about their relationship.
5 3/16/09 TT 259, 3/19/09 TT 18-21, 30-36.

6 At about 10:00 p.m. on the evening of the incident, in November 2008, a
7 neighbor who lived in the apartment below O'Keefe and Whitmarsh heard what
8 she described as thumping and crying noises coming from upstairs. 3/16/09
9 TT 185-88. The noise became so loud that it woke her husband, Charles
10 Toliver, who was in bed next to her. Id. at 186-200. Toliver went upstairs to
11 inquire about the noise and found the door to O'Keefe's apartment open. Id. at
12 206-209. He yelled inside to get the occupants' attention, at which time
13 O'Keefe came out of the bedroom and shouted at Toliver to "come get her!" Id.
14 at 209-10. When Toliver entered the bedroom, he saw Whitmarsh lying on the
15 floor next to the bed and saw blood on the bed covers. Id. at 210. O'Keefe was
16 holding her and saying "baby, baby, wake up, don't do me like this." Id. at
17 210, 224. O'Keefe did not stop Toliver from going in the apartment or
18 otherwise fight with him. Id. at 224. Toliver left the apartment immediately
19 and shouted at a neighbor who was outside to call the police. Id. at 213. He
20 also brought Todd Armbruster, another neighbor, back upstairs. Id. at 214.
21 O'Keefe was still holding Whitmarsh and told Armbruster to get the hell out of
22 there. Id. at 215. Armbruster called 911. Id. at 238. He thought that O'Keefe
23 was drunk. Id. at 240, 245.

24 By this time, shortly after 11:00 p.m., police had arrived on the scene.
25 3/16/09 TT 215, 3/17/09 TT 65. When they entered the bedroom, they found
26 Whitmarsh lying on the floor next to the bed and an unarmed O'Keefe cradling
27 her in his arms and stroking her head. 3/17/09 at 87, 96. The police believed
28 Whitmarsh to be dead and ordered O'Keefe to let go of her, but he refused. Id.

1 at 51-52, 60-61, 87. The officers eventually subdued him with a taser gun
2 and carried him out of the bedroom. Id. 88. O'Keefe was acting agitated, id. at
3 73, the officers testified that he had a strong odor of alcohol on him, and he
4 appeared to be extremely intoxicated. Id. at 127-28, 3/18/09 TT 170-76.
5 Much of his speech was incoherent, but at one point he said that Whitmarsh
6 stabbed herself and he also said that she tried to stab him. 3/17/09 TT 56,
7 85, 92. They arrested him and brought him to the homicide offices. 3/17/09
8 TT 177. Subsequent to his arrest, O'Keefe gave a rambling statement indicating
9 he was not aware of Whitmarsh's death or its cause. 3/18/09 TT 133. Police
10 interrogated him at 1:45 a.m., at which time he was crying, raising his voice,
11 talking to himself, and slurring. Detective Wildemann stated that during the
12 interrogation O'Keefe smelled heavily of alcohol, and when police took
13 photographs of him at about 3:55 a.m., they had to hold him upright to steady
14 him. 3/18/09 TT 146-49. Wildemann said it was pretty obvious that O'Keefe
15 had been drinking, however, law enforcement did not obtain a test for his
16 breath or blood alcohol level either before or after the interrogation. Id.

17 Whitmarsh had also been drinking on the date of the incident, and at the
18 time of her death, her blood alcohol content was 0.24. 3/18/09 TT 94, 117.
19 She died of one stab wound to her side and had bruising on the back of her
20 head. Id. at 93, 103. Medical Examiner Dr. Benjamin testified that
21 Whitmarsh's toxicology screen indicated that she was taking Effexor and that
22 drug should not be taken with alcohol. Id. at 109. Whitmarsh had about three
23 times the target dosage of Effexor in her system. 3/19/09 TT 94-96. The
24 combination of Effexor and alcohol could have caused anxiety, confusion and
25 anger. 3/19/09 TT 95-96. Whitmarsh also had Hepatitis C and advanced
26 Cirrhosis of the liver, which is known to cause bruising with only slight
27 pressure to the body. 3/18/09 TT 93-97. Whitmarsh's body displayed multiple
28 bruises at the time Dr. Benjamin examined her and the bruises were different

1 colors, but she could not say that they were associated with Whitmarsh's death
2 or otherwise say how long ago Whitmarsh sustained the bruises. 3/18/09 TT
3 115. DNA belonging to O'Keefe and to Whitmarsh was found on a knife at the
4 scene. 3/18/09 TT 62-67.

5 O'Keefe testified. 3/19/09 TT 177. He acknowledged his problems with
6 alcohol and described his history with Whitmarsh. Id. at 177-93. He disputed
7 Morris's claim that he said he wanted to kill Whitmarsh, but he acknowledged
8 being angry with her. Id. at 190. It was Whitmarsh who called O'Keefe and
9 initiated their renewed relationship. Id. at 191. He was aware that Whitmarsh
10 had Hepatitis C when she moved into his apartment. Id. at 197-98. In
11 November, 2008, Whitmarsh was stressed because of her financial condition.
12 3/20/09 TT 17. A couple of days before the incident at issue here, Whitmarsh
13 confronted O'Keefe with a knife. Id. at 18-19. She had been drinking and was
14 on medication. Id. O'Keefe had not been drinking that night and was able to
15 diffuse the situation. Id. at 19. On November 5, 2008, O'Keefe learned that he
16 would be hired for a new job and had two glasses of wine to celebrate. Id. at
17 21-24. O'Keefe and Whitmarsh went to the Paris Casino where they both had
18 drinks. Id. at 24-25. They returned home, and she was upset and went
19 upstairs while he reclined in the passenger seat of the car for a period of time.
20 Id. at 26-28. He went upstairs and then smoked outside on a balcony while
21 she was in the bathroom. Id. at 29-30. He then went in the bedroom and saw
22 Whitmarsh coming at him with a knife. Id. at 33. He swung his jacket at her
23 and told her to get back. Id. He knew that she was mad at him about a lot of
24 things. Id. He grabbed the knife, she yanked it and cut his hand. Id. at 33.
25 They struggled for a period of time. Id. at 33-36. During the struggle, she held
26 the knife and fell down, he fell on top of her and then he realized that she was
27 bleeding. Id. at 35-37. He was still drunk at this point and was trying to figure
28 out what happened. Id. at 37. He tried to stop the bleeding and panicked. Id.

1 at 39. He tried taking care of Whitmarsh and asked his neighbor to call
2 someone after the neighbor came into his room. Id. at 40. He became agitated
3 when the neighbor brought another neighbor up to look at Whitmarsh, who
4 was partially undressed, rather than calling the paramedics. Id. at 41. O'Keefe
5 denied hitting or slamming Whitmarsh. Id. at 42. He testified that he did not
6 intentionally kill Whitmarsh, but felt responsible because he drank that night
7 and he should not have done so. Id. at 49.

8 ARGUMENT

9 O'Keefe requests a ruling from this Court suppressing his statements to
10 LVMPD Officer Ballejos and his statements during the recorded interrogation
11 by homicide detectives on the grounds that the admission of these statements
12 at trial would violate his Fifth and Fourteenth Amendment rights pursuant to
13 Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966), as well as his rights
14 to a due process and a fair trial under the 14th Amendment, and the similar
15 provisions of Nevada Constitution, article 1, section 8.

16 The Fifth Amendment to the United States Constitution, made applicable
17 to the states through the Fourteenth Amendment provides that "[n]o person . . .
18 shall be compelled in any criminal case to be a witness against himself." U.S.
19 Const. amend. V. "Under the self-incrimination clause of the Fifth Amendment
20 to the United States Constitution, statements made by a suspect during police
21 interrogation are inadmissible unless the suspect received a prior *Miranda*
22 warning." Boehm v. State, 113 Nev. 910, 912, 944 P.2d 269, 270 (1997). The
23 Nevada Constitution, article 1, section 8, provides even greater protection than
24 the United States Constitution. See id. at 912-13, 944 P.2d at 270-71
25 (concluding that the Nevada Constitution provides greater protection than the
26 federal constitution on the issue of jailhouse informant interrogation).

27 A suspect's statements during a custodial interrogation are not
28 admissible unless *Miranda's* procedural requirements have been

1 followed. In particular, the subject of a custodial interrogation
2 must be advised of the right to remain silent, the right to consult
3 with and have an attorney present during any interrogation, and
4 police must inform the suspect that any statements made during
the interrogation can be used as evidence against [him].

5 Dewey v. State, 123 Nev. 483, 490, 169 P.3d 1149, 1153 (2007) (citing
6 Miranda, 384 U.S. at 444, 473-74, 86 S. Ct. 1602).

7 Here, when O'Keefe spoke with Ballejos, he was in handcuffs and
8 awaiting transport to the jail. Thus, he was in custody and entitled to be given
9 his Miranda warnings prior to questioning. He was not given Miranda
10 warnings, and the questions regarding his relationship with Whitmarsh and
11 her identity do not qualify as "routine booking questions" exempt from
12 Miranda's warning requirements.

13 As Justice Rose noted in his dissent in Nika v. State, 113 Nev. 1424,
14 951 P.2d 1047 (1997) (Rose, J., dissenting and addressing error sua sponte):

15 [A] well established line of cases has created an exception to the
16 Miranda rule for "routine booking questions" because such
17 questions are not related to the investigation of the case and serve
18 a legitimate administrative need. Pennsylvania v. Muniz, 496 U.S.
19 582, 601, [] (1990), United States v. Booth, 669 F.2d 1231, 1238
20 (9th Cir. 1981); Franks v. State, [] 486 S.E.2d 594, 597 (Ga. 1997).
21 Routine booking questions are limited to biographical data
22 necessary to complete booking or pretrial services." Muniz, 496
23 U.S. at 601 []; see also Franks, 486 S.E.2d at 597 (stating that
24 basic biographical data is limited to a suspect's name, age,
25 address, educational background, marital status, and any other
26 information required to complete an arrest form).

27 Id. at 1446-47, 951 P.2d 1061-62 (citation omitted). Moreover, due to the
28 potential for abuse by police using the guise of seeking objective or neutral
information, the ultimate test for whether questioning constitutes an
interrogation is "whether, in light of all the circumstances, the police should

1 have known that a question was reasonably likely to elicit an incriminating
2 response." Booth, 669 F.2d at 1238.

3 In this case, the questions about Whitmarsh had nothing to do with
4 administrative booking needs. Moreover, Ballejos knew that O'Keefe was
5 extremely intoxicated and possibly mentally ill. See his use of force report
6 attached hereto as Exhibit A, pp. 2, 4 ("Officer assessment of citizen condition:
7 *Mentally Ill/Under the Influence*"; Sgt. Newberry's comment, "*O'Keefe appeared*
8 *to be extremely intoxicated*"). He also knew that O'Keefe had just been tased
9 twice with 50,000 volts of electricity and dropped on his head. 3/17/09 TT,
10 135-36, 141-42. O'Keefe's condition created a likelihood that any questioning
11 about Victoria and his relationship to her was reasonably likely to elicit an
12 incriminating response. Further, there was no exigency which could have
13 possibly justified Ballejos's questioning of O'Keefe without Miranda.

14 According to Ballejos's own recorded statement, after AMR checked out
15 Whitmarsh, O'Keefe was moved downstairs, and Ballejos continued to try to
16 talk to him. O'Keefe gave his name, and then gave her name "Victoria
17 Whitmarsh" and said they had been dating for several years. Ballejos never got
18 a specific time frame. Ballejos's Voluntary Statement, p 6 (attached hereto as
19 Exh. B). Ballejos noted that it took about thirty (30) minutes to get the last
20 and first names and birthdates from O'Keefe, and that when they asked for her
21 name, he said Veronica, then he changed it to Victoria. Exh. B, at 10.
22 Ballejos himself must have considered his questioning interrogation because in
23 his statement he notes that he took a class in interrogation recently, and he
24 noted that O'Keefe's facial expressions were not appropriate to his statements
25 expressing sadness. Exh. B, at 9.

26
27 At the preliminary hearing, Ballejos testified that O'Keefe was put on his
28 belly on the catwalk, and Ballejos tried to speak with him there. PHT 34. He

1 was assigned the duty to interview O'Keefe apparently because he is "a C.I.T.
2 officer" and O'Keefe "was very angry." PHT 34-35. He only talked with O'Keefe
3 on the catwalk a few minutes, then O'Keefe was put downstairs, and Ballejos
4 tried to speak to him again. PHT 35. O'Keefe smelled heavily of alcohol. PHT
5 35. O'Keefe gave the name Veronica instead of Victoria. PHT 37.

6 At trial, Ballejos testified that he was asking O'Keefe for information on
7 Victoria's name, date of birth and social for purposes of assisting her if she
8 went to the hospital. O'Keefe was not answering those questions but
9 responded with statements about the officers being mad at him. Then
10 downstairs he "gave false information about Victoria's actual identity . . . he
11 gave two different names Victoria Whitmore, and Victoria Whitmarsh."
12 3/17/09 TT 122-25.

13 According to dispatch records, medical responders found that Victoria
14 was dead about two (2) minutes after O'Keefe was in custody. Thus, there was
15 no medical emergency which could justify any interrogation of O'Keefe, even
16 assuming that Nevada recognized such an exigency exception to Miranda. See
17 911 Dispatch record, Exh. C, pp. 2 (23:13 "subj's been tazed... taking him into
18 custody at this time"; 23:18 (11:18 p.m.) "confirmed 419" (attached hereto).
19 Other records confirm that the medical responders cleared the scene at 23:20
20 (11:20 p.m.) after finding Whitmarsh dead.

21 By the time Ballejos got the above information from O'Keefe, LMVPD
22 officers knew that Whitmarsh was dead. Thus, using an alleged exigency as a
23 guise to continue questioning O'Keefe was improper. A search warrant would
24 be sought and result in recovery of her identification from her wallet inside her
25 purse at the scene. There was no exigency, and even if there were, it would
26 have justified the search of her purse for reliable identification before any
27 questioning of an extremely drunk and dazed defendant. It is interesting to
28

1 note that the State relied heavily on the questionable evidence from Ballejos
2 related to his questioning of O'Keefe to incriminate O'Keefe and show malice.
3 DDA Graham engaged in the following colloquy with Ballejos:

4 Q. In your duties as an officer, is one of your duties trying
5 to gather information about the descendant [sic] or the injured
6 victim at the scene?

7 A Yes

8 Q Okay. And was there anybody there that you knew of
9 that may have that information for you?

10 ...

11 A Mr. O'Keefe

12 Q Okay. So if trying to gather information, I assume to
13 assist in the medical assistance of Victoria -

14 A Yes

15 ...

16 Q And in doing so, did you ask the defendant questions to
17 try to gather that information to help assist you in determining
18 who she was?

19 A I did.

20 Q Okay. You indicated, Officer, that he had given you false
21 information at the beginning.

22 A Yes.

23 Q Did you determine at all whether or not he actually knew
24 Victoria?

25 ...

26 A He stated they were in a dating relationship for several
27 year. [sic]

28 ...

Q . . . What did you do then when you failed in gathering
information from *the only person you knew at the scene that was
able to give you that information?*

[Objection sustained]

Q. *After the defendant indicated that he dated her for over
years, it is safe, I assume, to assume that he would be the one
person that could provide all the necessary information on her
medical, on her identity, et cetera?*

[Objection sustained].

3/17/09 TT 126-29.

The evidence which the State relies on to show malice toward Whitmarsh
was illegally obtained in violation of Miranda and its use violates O'Keefe's due

1 process rights under the state and federal constitutions. In addition, this line
2 of questioning by the prosecutor amounts to presentation of false evidence in
3 violation of due process, since the prosecution knows that Whitmarsh was
4 dead and there was no exigency.

5 The defense seeks suppression of all of O'Keefe's statements to Ballejos
6 during the on the scene non-Mirandized questioning and Ballejos's impressions
7 of O'Keefe's demeanor during that questioning.

8 Moreover, as suppression would be meaningless if not respected, O'Keefe
9 requests that Ballejos be admonished prior to his testimony by the Court not to
10 volunteer testimony that is nonresponsive to questions or is otherwise
11 inadmissible. As was noted at the bench prior to his previous trial testimony,
12 during the preliminary hearing, Ballejos volunteered nonresponsive testimony
13 and had to be admonished by the justice court to answer the questions put to
14 him. See PHT at 24 ll. 18-25, 25 ll. 1-16, 34 ll. 5-15, 34 ll. 24 to 35 ll. 7. At
15 the previous trial, the defense requested the State be required to admonish him
16 prior to his testimony. Nevertheless, during his trial testimony, Ballejos again
17 interjected improper responses to questioning. See, e.g., 3/17/09 TT at 113 ll.
18 2-6, 114 ll. 2-6, 116 ll. 9-15, 122 ll. 15-22, 124 ll. 9-13, 124 ll. 15 to 125 ll.
19 125. When defense counsel is forced to constantly object, it appears as though
20 the defense has something to hide and creates the danger of prejudice to the
21 defense. Thus, O'Keefe requests that this Court admonish this particular
22 witness ahead of time to refrain from volunteering information not responsive
23 to the questions asked in order to prevent a due process violation.

24
25 Next, O'Keefe seeks suppression of his recorded interrogation by
26 homicide detectives.¹ Again, at the time of his arrest, the use of force report
27

28 ¹Along with a courtesy copy of this Motion, O'Keefe is submitting to this Court's
chambers for review a copy of the interrogation transcript and video.

1 indicates that police believed that O'Keefe was extremely intoxicated. The 911
2 call by Todd Armbruster who entered the apartment indicates that he shared
3 this impression. The recording of this call was admitted at the previous trial as
4 State's Exhibit 2. 3/16/09 TT at 238. O'Keefe had also been tased and
5 dropped on his head at approximately 2313 (11:13 p.m.). 3/17/10 TT at 101.
6 Thereafter, O'Keefe was put in a vehicle where he fell asleep. He was
7 transported to the homicide offices and a videotape was started while he sat in
8 an interview room. The video started at 1:23 a.m. 3/17/09 TT 135-36, 141-
9 42, 3/18/10 TT 141. The interrogation started at 1:45 a.m.

10 The Miranda warnings were given as follows:

11 Q Detective: "You have, you have the right to remain silent.
12 Anything you say can be used against you in a court of law. You
13 have the right to the presence of an attorney. If you cannot afford
14 an attorney one will be appointed before questioning. Do you
15 understand these rights, Brian? Do you understand what I read
16 you? You been in the system.

17 A Ah, yes I do but you know what, can you give me the charges?
18 What is the offense?

19 Q You're not being charged with anything.

20 [continued conversation off topic]

21 Q Do you understand what I read to you? You haven't even
22 answered that yet.

23 A My Miranda rights?

24 Q Uh huh.

25 A Hum.

26 Q Is that a yes or a no?

27 A I don't know, maybe you should read it to me one more time.
28 No, I understand 'em detective.

1 The interrogation then continued until 2:01 a.m., then broke until 3:06
2 a.m. The resumed interrogation continued until 3:28 a.m. 3/18/09 TT at 141.
3 CSA Dan Ford came to O'Keefe's DNA and clothing at 3:55 a.m. Id. at 142.

4 The video of the interrogation shows that O'Keefe slurred his words
5 throughout the interrogation, his answers were nonsensical and rambling, he
6 talked to himself and rested on the table and side rail during the break, and he
7 had to be steadied and assisted by officers when he changed clothing and put
8 on the jail booties at the conclusion of the interrogation. Detectives must have
9 suspected that O'Keefe might be too intoxicated to fully understand what was
10 happening, since they sought to take advantage of any confusion by lying to
11 him about Whitmarsh being dead until nearly the end of the interrogation.
12 Even assuming he may have been sobering up during the hour-long break
13 detectives decided to take, they did not re-advise him or seek a new waiver
14 before restarting the interview. Even after the break O'Keefe continued to slur
15 his words and to be unsteady on his feet. The interrogation concluded with
16 Detective Wildemann stating. "You might wanna open the door actually, he
17 might be a fucking nut." Interrogation Transcript, p. 34.

18
19 The Nevada Supreme Court relied on Miranda to recognize that "a heavy
20 burden rests on the government to demonstrate that the defendant knowingly
21 and intelligently waived his privilege against self-incrimination and his right to
22 . . . counsel. . . . This Court has always set high standards of proof for the
23 waiver of constitutional rights [and these high standards apply] to in-custody
24 interrogation." Anderson v. State, 109 Nev. 1129, 1133, 865 P.2d 318, 320
25 (1995) (quoting Miranda, 384 U.S. at 475, 86 S. Ct. 1602 (citation omitted)).

26 A confession is not voluntary unless it is the product of a rational
27 intellect and a free will. Factors considered in determining voluntariness
28 include the age of the accused, his education and intelligence, any advice

1 concerning constitutional rights, the length of the detention, the repeated and
2 prolonged nature of any questioning, the use of physical punishment such as
3 deprivation of food and sleep, and prior experience with law enforcement.
4 Passama v. State, 103 Nev. 212, 213-14, 735 P.2d 321, 322 (1987). The validity
5 of a Miranda rights waiver must be determined through an examination of the
6 particular facts and circumstances of each case. Anderson, 109 Nev. at 1133,
7 865 P.2d at 320.

8 "It is a violation of due process to admit into evidence a statement that is
9 involuntary because of *extreme intoxication*, such as where a defendant was so
10 intoxicated that he was unable to understand the meaning of his comments.
11 State v. Hicks, 649 P.2d 267, 275 (1982). Cf. State v. Rivera, 733 P.2d 1090,
12 1097 (Ariz. 1987) (affirming lower court's ruling admitting statements where
13 that court found defendant was not intoxicated to such a degree to make his
14 statements inadmissible, noting that he smelled of alcohol but *walked*
15 *normally, did not have slurred speech, and was coherent* and able to talk);
16 Anderson, 109 Nev. at 1134, 865 P.2d at 320 (upholding finding of knowing
17 and voluntary waiver where defendant stated he understood, agreed to talk,
18 was responsive to questions, *appeared to be coherent and aware of the*
19 *importance of his statements*, and failed to present any evidence that he was
20 intoxicated or medicated to such an extent that he was unable to understand
21 the meaning of his comments); Falcon v. State, 110 Nev. 530, 874 P.2d 772
22 (1994) (concluding that the State met its burden to show valid waiver where
23 defendant was interviewed 11 ½ hours after the crime was reported and 6 ½
24 hours after arrest, was *not observed to be incoherent* or incapable of
25 understanding the consequences of what was being said to him, exhibited none
26 of the classic symptoms of intoxication or being under the influence of
27
28

1 controlled substance, sat up straight in his chair and responded to questions
2 with no difficulty).

3 Here, it was obvious that O'Keefe was still extremely intoxicated at the
4 time of his interrogation. He had been at the time of his arrest, according to
5 Ballejos's use of force report. During the interrogation, he was not rational or
6 responsive to the questioning and at times was incoherent. He slurred his
7 words throughout the interrogation and even at the conclusion of it, he had to
8 be steadied on his feet. The totality of evidence in this case, therefore, shows
9 that O'Keefe did not knowingly and voluntarily waive his Miranda rights, as his
10 decision to speak with detectives was not the result of rational intellect and free
11 will.

12 Even if the Court declines to order suppression of the entire recorded
13 interrogation, portions of it must be as they are improper under the rules of
14 evidence and/or are unfairly prejudicial. The following portions are objected to
15 on this basis:

16 A. P.2, question: "You been in the system before, right? You've talked to
17 police officers before? [improper bad act reference]

18 B. P.3, question: "You were combative," "apparently when the officers came
19 in a struggle ensued, okay, and you . . . kind of, ah, combative is what I
20 was told." [relies on hearsay]

21 C. P.4, response: "could it be because they run my prior record with me and
22 my so called fiancé?" . . . "Domestic violences. What do you think?"
23 [improper bad act reference]

24 D. P.6, response: "I got out of prison. . . I did all my probation things."
25 [same]

26 E. P.10, response: "I went through this crap before. Fuckin' cops." [same]

27 F. P.12, response: "I already went through this." [same]

1 G. P.13, response: "I was with Victoria and we had a lot of shit happen and I
2 went to jail and I went to prison. I fought my cases. I spent three, four
3 years and I got out. . . I did everything the court said. I satisfied.
4 [same]

5 H. P.14, response: "I went to prison," . . . "after a year and the court order
6 was". . . "if you look in my closet, detective, you'd be surprised the
7 reports, everything I filed, fought the ___ Always supreme court."
8 [improper bad act reference]

9 I. P. 14, response: "If you go into . . . my closet in the spare bedroom, . . .
10 and you open up my files that I filed, they done told me I could be an
11 attorney. Anyway, you'll see the documents that I . . . I requested,
12 sequestered and all that. Did all paperwork. Found DNA. Mixture of
13 DNA. However, Mr. O'Keefe ___ there was a mixture of DNA."
14 [improper bad act reference]

15 J. P.15, question: "Brian, Brian, you're talking about a case from ___."
16 [same]

17 K. P.15, response: "Bucky Buchanan and Sally Loehrer are the judge of the
18 district court. ___ told me ___, Susan...I hate her, the fucking
19 prosecutor. Oh, Ross Miller, Secretary of State, now Secretary of State.
20 I was the last case that he lost." [same]

21 L. P.16, response: "The judge and everybody told me be careful of the
22 woman you fuckin look for, or the woman you want to be with. [same]

23 M. P.17 response: "But let's don't forget some factors that might come up.
24 For instance, my last attorney was Bucky Buchanan." [same]

25 N. P.18, question: "Don't order her around." [improper bad act, opinion,
26 comment, invades province of the jury]
27
28

1 O. P.18, question: "you made statements earlier that she stabbed herself,
2 then you made different statements" [based on hearsay]

3 P. P.24, question: "Stop acting ridiculous." [inappropriate vouching, opinion
4 or comment, invades province of jury]

5 Q. P.25, question: "You're being utterly ridiculous." [same]

6 R. P.27, response: "Did time, 22 months in CCDC." [improper bad act]

7 S. P.29, question: "You're being ridiculous." [inappropriate vouching,
8 opinion or comment]

9 T. P.31, question: "Are you really that shocked? You told Charles that she
10 was dead." [based on hearsay].

11 U. P.32, question: "You know what a nor-uh, a rational person goes hey,
12 officers, they walk out, they greet them and they say come in. They're
13 not combative. They're not incoherent. A normal person wants that
14 person helped. They don't have a stand-off in the apartment for 15
15 minutes."

16 Response: "Detective, a standoff in the apartment? This is the way you're
17 being told?"

18 Question: "Yeah." [relies on hearsay, improper vouching, opinion,
19 comment, invades the province of the jury].

20 V. P.33, question: "You do know. You do know. It's time to accept
21 responsibility for what happened in there. Okay?" [inappropriate
22 vouching, opinion or comment, invades province of jury]

23 W. P.24, question: "No neighbor tells us that. No neighbor tells us that you
24 were screaming somebody call. They had to go up and see you." [relies
25 on hearsay]

26 X. P.24, question: "They said you said she's dead. Come and get her, she's
27 dead." [relies on hearsay].
28

1 Y. P.34, question, "You might wanna open the door actually, he might be a
2 fucking nut." [inappropriate vouching, opinion or comment].

3 NRS 48.015 provides that "relevant evidence" means evidence having any
4 tendency to make the existence of any fact that is of consequence to the
5 determination of the action more or less probable than it would be without the
6 evidence." NRS 48.025(2) recognizes that "[e]vidence which is not relevant is
7 not admissible." Moreover, NRS 48.035 provides in part that:

8 1. Although relevant, evidence is not admissible if its probative
9 value is substantially outweighed by the danger of unfair prejudice,
10 of confusion of the issues or of misleading the jury.

11 2. Although relevant, evidence may be excluded if its probative
12 value is substantially outweighed by considerations of undue
13 delay, waste of time or needless presentation of cumulative
evidence. . . .

14 Additionally, "[a]bsent certain exceptions, evidence of a person's
15 character or a trait of his character is not admissible for the purpose of proving
16 that he acted in conformity therewith on a particular occasion. Further,
17 evidence of other crimes, wrongs or acts is not admissible to prove the
18 character of a person in order to show that he acted in conformity therewith."
19 Taylor v. State, 109 Nev. 849, 853, 858 P.2d 843, 846 (1993).

20 The Nevada Supreme Court recognizes that the use of character evidence
21 to convict a defendant is extremely disfavored in our criminal justice system.
22 Such evidence is likely to be prejudicial and irrelevant and forces the accused
23 to defend against vague and unsubstantiated charges. It may improperly
24 influence the jury and result in the accused's conviction because the jury
25 believes he is a bad person. The use of such evidence to show a propensity to
26 commit the crime charged is clearly prohibited by the law of this state and is
27 commonly regarded as sufficient ground for reversal on appeal. See Taylor,
28 109 Nev. at 854, 858 P.2d at 847 (citing Berner v. State, 104 Nev. 695, 696-97,

1 765 P.2d 1144, 1145-46 (1988)). Even where other-act evidence is relevant to a
2 permissible purpose and proven by clear and convincing evidence, a court
3 should still exclude it if its probative value is substantially outweighed by the
4 danger of unfair prejudice. Roever v. State, 114 Nev. 867, 872, 963 P.2d 503,
5 505-06 (1998).

6 Although this Court has ruled that O'Keefe's prior conviction is
7 admissible in the State's case in chief (O'Keefe continues to assert his objection
8 to this evidence), the above statements referring to his prior cases are outside
9 the scope of the court's ruling limiting admissibility to the fact of the conviction
10 versus any underlying details. These statements constitute evidence of
11 inadmissible bad acts. Additionally, multiple mentions of the prior conviction
12 compound the prejudice that naturally attaches to the conviction.
13 Furthermore, O'Keefe's statements regarding police, prosecutors and judges in
14 unrelated matters are irrelevant and prejudicial. In the remaining references
15 above highlighted, detectives improperly reference hearsay and/or give
16 opinions on whether O'Keefe is being ridiculous and inappropriately ordering
17 them around, on what a normal or rational person would have done in the
18 same circumstances, on whether he should take responsibility for what
19 happened, and on whether he is a "fucking nut." These references invade the
20 province of the jury and constitute impermissible vouching, opinion or
21 comment on the evidence.

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EXHIBIT A

000848

Use of force IA number: UOF2008-0214 Received: Nov 06, 2008

Case number: LLV081105003918

Type of service being performed at time of incident: Extraction

Reason for use-of-force: No Entry By Officer

Officer assessment of citizen condition: Mentally Ill/Under Influence

Citizen was injured: No

Citizen was taken to hospital: No

Citizen was charged/arrested in relation to the incident: Yes Charges:

Officer was injured: No

Officer was taken to hospital: No

Involved citizen:

Brian Kerry Okeefe

Resistance(s):

IO-Eratic

CR-Loud/Screaming

IO-Argumentative

IO-Visibly Upset

CR-Silent Refusal

Injuries/conditions:

2F (Front Torso)

Charges against citizen in relation to the incident:

Homicide

Linked address(s):

Home Address: 5001 El Parque W. C/35 Las Vegas NV 89148 -

Officers involved:

PO-3 Jeremiah J Callejas [08406]

Officer current info:

Division: CPD

Bureau: BOAC

Section:

Snapshot - officer information at time of incident:

Badge/ID no:

Division: CPD

Bureau: BOAC

000849

Section:
 Squad: BA42
 Shift: 3
 Rank/Title: PO-2
 Age: 31 Years of employment: 4 Years with unit:
 In uniform: Off duty: Off duty employed:

Use(s) Of Force:

TASER: Effective
 Less-lethal/CED force-related
 Accidental discharge: No
 Device was displayed only: No
 Arc display: No
 Direct/drive stun contact: No
 # of drive stuns: 0
 Injury caused: No
 Location of injury:
 Projectile/probe contact: Yes
 # air cartridges used: 1
 # cycles through probes: 2
 # dart hits: 2
 Total # darts fired: 2
 Injury caused: No
 Darts penetrated subject's skin: Yes
 Subject wearing heavy clothing: No
 Location of projectile/probe contact: 2F (Front of Torso)

Officer witnesses:

PO-2 Richard A Fonbuena [06834]

Officer current info:

Division: CPD
 Bureau: BOAC
 Section:

PO-2 Sean L Taylor [08718]

Officer current info:

Division: ISD
 Bureau: F/PROP
 Section: FIN

PO-2 Brian Santarossa [06930]

Officer current info:

Division: VPD
 Bureau: SEAC
 Section:

PO-2 Todd W Conn [08101]

Officer current info:

Division: SOD
 Bureau: TRAFF
 Section: TRAF

SGT Daniel A Newberry [04936]

Officer current info:

Division: CPD
Bureau: SOAC
Section:

Summary:

I was operating as a member of Golden Area Command's Problem Solving Unit when details of a call involving a woman who had been stabbed at the listed address. Upon arrival I made contact with the Crisis Intervention Team (CIT) officer, T. Conn. Officer Conn was inside apartment #35 attempting to call out a male, later identified as Brian O'Keefe 03/14/63 from a back bedroom. O'Keefe indicated the injured woman was in the bedroom and needed medical assistance. Officer Conn calmly and repeatedly asked O'Keefe to come out from the bedroom so paramedics could enter the room and render aid to the female. O'Keefe refused and instead called officers into the room in a challenging manner. "I'm not coming out; you come in here!", said O'Keefe. From experience it felt as if O'Keefe was attempting to bait officers into the bedroom possibly lying in wait.

From our position, Officer Conn, Taylor and I could not see deep enough into the room without exposing ourselves. What was observable to me was the bed which had disturbed sheets covered in a dark red material which I believed to be blood.

Sgt. D. Newberry positioned himself at the base of the bedroom doorway to execute a quick peak around the corner assessing the situation. A four man element consisting of Officers Conn, Taylor, Newberry and I entered the room. I was designated as the non-lethal option officer while the others provided lethal cover. The non-lethal option I carried in my plain clothes capacity was a can of Capsicum. Being of no use in this circumstance, I instead took a Electronic Control Device from Officer Conn.

Upon entry into the bedroom I saw an Asian female adult lying on her back with red material which again I believed to be blood on her torso and the floor where she lay. O'Keefe was laying next to the female partially occluding her body with his own. Officer Conn began to give verbal commands to O'Keefe. O'Keefe responded by shouting over Officer Conn's instructions and there was no indication of compliance.

It was my belief the female was in critical need of medical assistance and O'Keefe was jeopardizing our ability to render such aid. On first sight of availability, I announced my intention to discharge the Electronic Control Device (ECD). Working in a confined space, Officer Taylor was able to apply handcuffs to O'Keefe's left wrist during the initial cycle. O'Keefe continued to struggle and refused to surrender his right arm to Officer Taylor. During his struggling, O'Keefe was smothering the female's body and did not acknowledge my warning in which I clarified continued struggling would force me to cycle the ECD a second time.

O'Keefe tensed his body and was covered in the female's blood. Officers could not control his body movements or his free hand unless O'Keefe was brought into compliance. I cycled the ECD a 2nd time which allowed Officer Taylor to handcuff the right hand. O'Keefe tensed his body once again making it difficult to remove him from the bedroom so we could bring medical into the apartment. Officers T. Hatchett and B. Santarossa assisted by grabbing limbs and O'Keefe was carried out onto the catwalk outside the apartment door.

When/where:

Date/time occurred: Nov 05 2008 23:14

Incident location: 5001 El Parque W. C/35 Las Vegas NV 89148 Predict: U3
County: City of Las Vegas

Status/assignment information:

Status: Completed

Opened: Assigned: Due: Completed: 03/04/2009

Disposition:

Unit assigned: Un-assigned
Handled at field/unit level: No
Investigator assign: Un-assigned

000851

Supervisor assign: Un-assigned
Source of Information: Blue Team Routing

Organizational component(s):

Division: CFD
Bureau: SOAC
Squad: BA42
Shift: 3

BlueTeam chain routings

Nov 06, 2008 03:29: Sent from PO-2 Jeremiah J Ballejos [08406] to SGT Daniel A Newberry [04956]

Instructions:

For Your Review

Reviewed Nov 06, 2008 03:55

Decision: Approved

Reviewer comment:

On 11/5/2008 I was present when Officer Ballejos took the stated actions. I had designated a four man element to enter the room to protect the life of a critically injured woman. Officer Ballejos was designated as the less than lethal officer and he was given officer Conn's ECD. Officer Ballejos deployed the ECD after repeated commands for O'Keefe to move away and let go of the victim. The suspect refused. After the first ECD cycle O'Keefe quickly retracted his right arm and would not surrender it to officers. Officer Ballejos then delivered the second cycle and O'Keefe was taken into custody.

O'Keefe received small cut's from the barb impact on his left chest and abdomen. The Barbs were pulled free while removing O'Keefe from the bedroom and later found on the carpet of the living room. O'Keefe appeared extremely intoxicated and continued to be erratic and emotional in his behavior. O'Keefe was not asked questions due to his involvement in a possible homicide.

Photo's of O'Keefe's injuries and the probe impacts were taken by ID and downloaded into the DIMS system.

The Taser X26, unknown serial number, was taken by homicide and downloaded at the homicide office. The ECD cartridge, unknown serial number, and barbs were left inside the crime scene and impounded by ID as evidence.

After speaking with the officers involved and witnessing the actions of officer Ballejos I feel that the actions taken were the minimal amount of force necessary to take O'Keefe into custody and were within department policy. I feel the actions taken by Officer Ballejos would stand up to the three pronged test of Graham vs. Connor.

Nov 06, 2008 03:55: Sent from SGT Daniel A Newberry [04956] to LT Theodore R Snodgrass [01624]

Instructions:

ECD incident from Homicide at 5001 El Parque

000852

Reviewed Nov 15, 2008 21:01

Decision: Approved

Reviewer comment:

Approved as Acting Captain

Nov 17, 2008 : Sent from INVSP Lillian G Sylvia [05144] to LT Theodore R Snodgrass [01634]

Instructions:

Lt., There is no Taser Download attached to this report. Please route it back to Sgt. Dan Newberry. He needs to download the Taser report to his computer. Save it in either Microsoft Image Writer (.tif) or Adobe Acrobat (.pdf), whichever his computer has. Then attach it to the UCF report in one of those formats and route it back through the Chain. Thank you. Lily

Reviewed Nov 17, 2008 16:09

Decision: Not approved
See Narrative

Reviewer comment:

Please download the Taser data

Nov 17, 2008 16:09: Sent from LT Theodore R Snodgrass [01634] to SGT Daniel A Newberry [04956]

Instructions:

Please download the tazer data.

Reviewed Feb 25, 2009 14:22

Decision: Approved

Feb 25, 2009 14:22: Sent from SGT Daniel A Newberry [04956] to ANALYST Melissa L Pugh [09604]

Instructions:

here is the one we discussed back in Jan during training. I will forward the email to you with the corrupted data

Reviewed Feb 25, 2009 15:41

Decision: Approved

Entered via BlueTeam by: PO-2 Jeremiah J Ballojes [08406] on Nov 06, 2008 at 02:35

EXHIBIT B

000854

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT
PAGE 1

EVENT #: 081105-3918

SPECIFIC CRIME: HOMICIDE

DATE OCCURRED: 11-05-08

TIME OCCURRED: 2301 HRS.

LOCATION OF OCCURRENCE: 5001 EL PARQUE, APT. C35

CITY OF LAS VEGAS

CLARK COUNTY

NAME OF PERSON GIVING STATEMENT: OFFICER JEREMIAH BALLEJOS, P#8406

DOB:

SOCIAL SECURITY #:

RACE:

SEX:

HEIGHT:

WEIGHT:

HAIR:

EYES:

WORK SCHEDULE:

DAYS OFF:

HOME ADDRESS:

HOME PHONE:

WORK ADDRESS:

WORK PHONE:

BEST PLACE TO CONTACT:

BEST TIME TO CONTACT:

The following is the transcription of a tape-recorded interview conducted by DETECTIVE T. IVIE, P#6405, LVMPD HOMICIDE SECTION, on 11-06-08 at 0147 hours.

Q. Operator, this is Detective T. Ivie, P#6405. I'm conducting a taped voluntary statement in reference to an attempt murder with deadly weapon which occurred under Event #081106-3918, at approximately 2301 at 5001 El Parque, ah, Las Vegas, Apartment C35, ah, Las Vegas, Nevada 89149. Ah, person giving the statement is Officer J. Ballejos, B-A-L-L-E-J-O-S, P#8406, call sign 8U77. Today's date is 11-06 of '08, approximately 0147 hours. Ah, this statement is given, ah, at

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT
PAGE 2

EVENT #: 081105-3918

STATEMENT OF: OFFICER JEREMIAH BALLEJOS

5001 El Parque, Las Vegas, Nevada 89146. Officer Ballejos, can you say your first and last name for me?

A. Jeremiah Ballejos.

Q. And were you working tonight as a Las Vegas Metropolitan Police Department officer?

A. Yes.

Q. And how were you, how were you working tonight?

A. Ah, as part of, ah, Bolden Area Command's Problem Solving Unit.

Q. And is that a plainclothes capacity?

A. Yes.

Q. All right. Can you tell me about—a little bit about what happened tonight and how you got the call and, and, ah, what actually transpired?

A. Ah, we were just—we started monitoring the call. It came out as a, uh, like a 911 call. Um, somebody was calling for help, saying that there was a person that, ah, was—had been stabbed and was bleeding, uh, inside the apartment. Ah, so we came to see if we could, ah, help out at all. Um, when we showed up here, well we pulled up behind, ah, fire and there were, ah, several marked units already arrived inside the parking lot. Ah, so we just—we went to the location of the apartment. Ah, there were residents standing outside their doors, ah, trying to find out what was going on, and, ah, officers were already inside the apartment, ah, challenging

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VOLUNTARY STATEMENT
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EVENT #: 081105-3918

STATEMENT OF: OFFICER JEREMIAH BALLEJOS

somebody that was in a back bedroom, ah, of the apartment. Um, there was a CIT officer, Officer Conn, that was already, ah, had already established communication, ah, with the, the male voice inside the room. Ah, I'm a CIT also so you know in certain situations it's—if we—if you have that opportunity it's always good to have two CIT officers, ah, so you can coach each other or you know bump heads if you get stuck with, you know you run into a wall. Um, so I stacked up behind him and, ah, tried to see what he could see and listen to what was being said, what was going on, and, ah, from his, you know standing behind him what we could see in the deep, from the deep south end of the living room, ah, looking into this bedroom was, ah, what looked like, ah, a lot of blood. Um, the sheets were, you know, just soaked with a, a red substance. Looked like blood to me. And, ah, could hear the voice coming from, ah, deep into the room, so we didn't have a, a, a line of sight on the person or the, the injured person. Officer Conn was telling, ah, this guy that he needed to come out, ah, so we—you know ____ (unintelligible), he needed to come out so the ambulance and could come in and try to take care of the woman that was in there. Um, it seemed...you know they were hesitant, ah, initially because it almost seemed...you could hear it in his voice, the way he was saying well you come in here. Um, like he was trying to bait, ah, bait us to come in. So, ah, Sgt. Newberry, um, he slowly, slowly worked his way to the north side of the living room, where he got to the, ah, door stop and was able to do a quick peek, ah, to see, um,

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EVENT #: 081105-3918

STATEMENT OF: OFFICER JEREMIAH BALLEJOS

the female and the male lying on the floor, ah, deep in the north part of the bedroom. Um, my non-lethal option was OC spray, which wasn't, was of no use in a case like this. Ah, Officer Conn, ah, gave me his taser instead, so we had a lethal option and a non-lethal option when we stacked up and--to go into the room to get this, ah, guy into custody and remove him from the, ah, bedroom so that the ambu--or AMR could get in there and take care of this person. Ah, so we went in. Ah, Officer Conn was with me and Officer Taylor. Ah, those are the two officers I remember being inside the room with me. Um, we enter. Ah, Officer Conn starts giving him verbal commands. Um, he--as Officer Conn's trying to give these verbal command, ah, Brian is...or the, the guy laying on the floor with the victim, um, is shouting back at him, like almost shouting over him. So you can--just gave the impression that whatever, ah, Officer Conn is saying is just--this guy's not hearing, because he's, he's, he's trying to drawnd [sic] it out or his, you know his--whatever he's saying is more important. Um, ____ (unintelligible) looking in, ah, he's kind of, ah, the female's laying on her back. Ah, looked like a Fili...ah, well he says she's Filipino but when I saw her she looked like an Asian female, ah, black hair, um, eyes open, mouth agape, um, wearing a black tee shirt. Ah, from about, ah, her mid--her belly or torso, ah, down, ah, all I saw was skin so it didn't appear, you know just at a glance, that she was--had any clothes on. Uh, on her skin I could see, ah, splotches of, of a red substance which I assumed to be blood. Um, he's, ah...that

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STATEMENT OF: OFFICER JEREMIAH BALLEJOS

the male is laying next to her, uh, on the floor, like partially covering her body with, with his, ah, left knee and his right leg is down touching—in contact with the floor, um, and he's kind of shielding her it almost seems from us. Um, I continue to give him verbal commands. He's not responding. You know he's actually, ah, pulling on her shirt, saying, ah, don't look at her, don't look at her. Um, we're really worried at this point. I'm worried at this point that whatever condition she's in the longer we wait the worse it's gonna be. Ah, so when I see an opportunity to, ah, he exposes his torso, ah, I fire with the, ah, ECD, um, a prong going into his, ah, upper torso, one going into his lower torso. Ah, Officer Taylor steps in, is able to get his, ah, left hand behind his back and in a handcuff, while the, ah, the ECD cycles. Um, but he still has his right hand free. After the cycle completes and he starts a hand around, won't give it up, ah, as more verbal commands are being given, he's warned that, ah, you know he's gonna be tased again. Ah, he's not listening to those commands, ah, won't give his hand up and we still don't have him under control. She's, ah, you know if she's injured she's still bleeding. So, ah, I cycle the, the ECD again to allow Officer Taylor to take control of that hand. He gets both hands handcuffed. Um, Officers, ah, Fonbuena and I don't know the officer's name, step in to the room at that point to grab hold of ankles and, ah, the other two officers grab hold of the arms and he's moved out into the living room, ah, from the bedroom. Get up, ah, he's set down on the carpet where they can get a better hold of him and he's removed

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STATEMENT OF: OFFICER JEREMIAH BALLEJOS

entirely from the, ah, 'cause where he is, right in that living room, AMR can't move their, ah, all their equipment or themselves. He's just right in the line of, ah, of that main pathway. So he's removed entirely out into the catwalk, ah, put there, down there on his belly. Um, try and get information from him. Ah, his name, her name. Ah, trying to tell him that, you know, we need her birth date and stuff, ah, blood type and all that so the paramedics can work on him. Ah, he's not responding to me at first, did not respond to me at first. Ah, starts crying a little bit and stops and he says well you guys are mad at me, aren't you and I said well what do you mean? He said well I didn't, I didn't do this, man, she tried to stab me. And, ah, you know just kinda left it at that. Um, AMR went up right immediately after we'd gotten him out-out, ah, you know within a couple minutes of after we got him out of the apartment. I don't know what the outcome or when she was pronounced or anything like that. Ah, he was moved downstairs here where I continued to try and talk to him. He, ah, got down here and told me his name was Brian O'Keefe. Her name was Victoria, ah, Whitmarsh and they had been dating for, ah, several years. I never got a specific time frame from him. Um, but that's about it. I don't know what, ah...

Q. Okay. ____ (unintelligible), ah, there's just a few questions. Basically you're on patrol tonight as a unmarked unit. You hear the call come out as, as like a 911 disconnect, 404A, right?

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STATEMENT OF: OFFICER JEREMIAH BALLEJOS

- A. As it—it came out as a 404.
- Q. Okay.
- A. And—but the details was of a person who had been stabbed, was bleeding.
- Q. And that's here at 5001 El Parque?
- A. Yes.
- Q. Apartment C35?
- A. Uh huh.
- Q. All right. You get here, there's other patrol officers already here. You arrive here with, ah, Sgt. Newberry and Officer Conn?
- A. Ah, Sgt. Newberry and Officer Taylor.
- Q. Officer Taylor. Excuse me. At which point you go into the apartment or go up to the apartment, there are other officers already inside the apartment and they're challenging the apartment and there's a male voice that's not complying. Um, at some point you guys do make entry and go into the apartment and into the back bedrooms where you see, ah, can you describe that to me, what you see in that back bedroom a little bit better?
- A. Yeah, when we get, ah, up the stairs and to the, ah, the doorway, the door's open. Ah, the living room, ah, all the lights are off and so you're, you're vision is _____ drawn directly or immediately back to this bedroom with the lights on. Ah, white sheets, ah, just soaked in a real, uh, a red material [sic], um, with like I said, uh, I,

000861

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STATEMENT OF: OFFICER JEREMIAH BALLEJOS

I seen just from experience was just looked like blood to me, ah, lots of blood. Um, and so we, you know we try and cut the pie and get, ah, a best line of sights so you can look deep into the bedroom as you can, uh, from where Officer Conn was when we arrived, but you just had no...I...we could...had no line of sight of him, just the voice telling us, um, not responding to the request from Officer Conn to come out but, ah, saying well you come in here, you come in here. And it was just creepy the way he was saying it. Uh, you know ____ (unintelligible) like well let's see what we can do to--if we can formulate some type of plan but not--we're not just gonna go walking in there 'cause the, of the, ah, possibilities. But, ah...

Q. Okay. Once you make entry into that back bedroom you see, you know, you take this guy who verbally identified himself later as Brian.

A. Yeah.

Q. Is there anybody else besides him and the female laying there on the floor, is there anybody else in the apartment that you found hiding or anything like that?

A. No.

Q. No one else was located?

A. No.

Q. And then as, basically this, this white male he's un--uncooperative, he, ah, the ECD is used to take him into custody, he's then rushed out, ah, medical comes up and

000862

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STATEMENT OF: OFFICER JEREMIAH BALLEJOS

you start talking to him and he makes an utterance that you—that officers are mad at him and that the female came at him with a knife.

A. Right.

Q. And that they are in some sort of dating relationship for many years and that type of stuff.

A. Yes.

Q. Okay. Is there anything else that you can think of that might be pertinent that I have not asked you or that you may think is pertinent to the, to this investigation?

A. Um, like I said, I thought it was strange that, ah, you know that it kind of...I'd taken this class interviewing _____(unintelligible) interviewing interrogation and, ah, through that training we just kinda looked at, um, people's facial expressions not matching their, uh, the emotion that they're trying to sell to you and, ah, he seemed like, you know just his facial features were, which were like anger or, ah, you know, he was trying...um, didn't match the emotion of, ah, of sadness that he was trying to portray through his voice and you know it just seemed weird to me that, you know, ah, for somebody that he's in this relationship to—for so long to of killed themselves [sic], um, or he—when we moved him downstairs he basically went, ah, sat in the back of the patrol car and fell asleep. I just thought that was strange. But, um...

Q. And this Brian, this white male, do you know if he was intoxicated or not?

000863

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT
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EVENT #: 081105-3918

STATEMENT OF: OFFICER JEREMIAH BALLEJOS

- A. Ah, he smelled real heavily of, ah, alcohol.
- Q. Did you ever ask him if he had anything to drink?
- A. No, he just...really hard to talk to. Um, and to solicit some of that infor--you know just a small piece of information we got from him, ah, was over, you know, a 30 minute period, to get the first and last name, birth dates. Ah, when we asked, when we actually asked, ah, what the females name was, the first name he gave us was Veronica, um, and then you know later, ah, when we tried to confirm it he said well okay, it's Victoria.
- Q. Is there anything else you can think ____ (unintelligible)?
- A. No, no.
- Q. Operator, this concludes this taped voluntary statement. Again, today's date is November 6, 2008, approximately 0203 hours. Thank you.

THIS VOLUNTARY STATEMENT WAS COMPLETED AT 5001 EI PARQUE, ON THE 6th DAY OF NOVEMBER, 2008 AT 0203 HOURS.

TI:sd
08V1276

000864

EXHIBIT C

000865

EVENT SEARCH

HEREBY CERTIFY that this is a full,
true and correct copy of the original
on file with the Las Vegas Metropolitan
Police Department.

RESEARCH ASSISTANT, Communications Bureau

EVT : LLV081105003918

LOC : CASA SALVATORE

ADDR: 5001 EL PARQUE AVE

CADD: APT 2

MAP : 0252168

P/U : 1U4

DATE: 08/11/05

911 : Y

TYPE: 420

BLDG: C

XST : 2001 S DECATUR BLVD

CNAM: ROBIN/NBR

S/B : U3

OFF1: 6683

INIT: 23:01:38

CLSE: 22:23:58

PRI : 0

APT : 35

CITY : LV

CPHONE: 7621401

SRA : J210

OFF2 :

AREA : I2

DISP : L

23:02:2971 EU	IN FRM-	TO-LV8480	28	LV8480
23:02:2975 CM	2ND HAND F/ ANOTHER NBR... FEM LAYING INS APT & BLOOD EVERYWHERE.. UNK WH		28	LV8480
23:02:2985 CM	AT OCC'D... LL		28	LV8480
23:02:2999 CM	Original Location : CASA SALVATORE		28	LV8480
23:03:1587 CM	28// NBR FOUND DOOR WIDE OPEN & FEM LAYING ON GROUND INS// UNK LOC OF N		28	LV8480
23:03:1595 CM	BR NOW 2303HRS		28	LV8480
23:03:1931 US 1U4	USAS5001 EL PARQUE AVE	404	22	LV8363
23:03:1948 US 1U6	USAS5001 EL PARQUE AVE	404	22	LV8363
23:03:1970 EU 1U4	PU FRM-	TO-LV/1U4	22	LV8363
23:03:3122 US 1U4	USER5001 EL PARQUE AVE	404	00	LV6683
23:03:4058 US 7U6	USAS5001 EL PARQUE AVE	404	22	LV8363
23:03:4353 US 7U6	USER5001 EL PARQUE AVE	404	00	LV8250
23:03:4765 CM	7U6 ENR CODE /2303HRS		22	LV8363
23:03:5584 EU 1U4	CA FRM-36:07:29N,115:12:27W	TO-APT 2	28	LV8480
23:03:5598 US 1U1	USAS5001 EL PARQUE AVE	404	22	LV8363
23:04:0065 CM	1U1 ENR CODE /2303HRS		22	LV8363
23:04:0190 CM	28// NBR "GREG" STILL INS APT,, NFI/NFD 2304HRS		28	LV8480
23:04:0437 EU 1U4	BI FRM-	TO-C	28	LV8480
23:04:0869 EU 1U4	CN FRM-CRICKET 858-882-9301	TO-ROBIN/NBR	28	LV8480
23:04:1123 US 7U3	USAS5001 EL PARQUE AVE	404	22	LV8363
23:04:2307 US 1U6	USER5001 EL PARQUE AVE	404	00	LV12996
23:04:2834 EU 1U4	FA FRM-N	TO-Y	28	LV8480
23:04:4537 CM	28// MED ENR/HOLDING SHORT 2304HRS		28	LV8480
23:04:4802 US 3U55	USAS5001 EL PARQUE AVE	404	22	LV8363
23:05:1169 US 1U3	USAS5001 EL PARQUE AVE	404	22	LV8363
23:05:2344 CM	1U3 ENR CODE /2305HRS		22	LV8363
23:05:2807 US 3U66	USAS5001 EL PARQUE AVE	404	22	LV8363
23:05:3017 CM	28/ NEG PREV FOR APT 2305HRS		28	LV8480
23:05:4288 US 7U6	USAS5001 EL PARQUE AVE	404	00	LV8250
23:05:4587 CM	43/ REC F/ ANOT MALE IN COMPLEX, NBR TOLD THIS PR IS 417 RELATED,	2305	43	LV7287
23:05:4596 CM	HRS		43	LV7287
23:06:0144 US 1U1	USAS5001 EL PARQUE AVE	404	00	LV8101
23:06:0521 US 1U2	USAS5001 EL PARQUE AVE	404	22	LV8363
23:06:0534 DP 1U2	USAS5001 EL PARQUE AVE	404	22	LV8363
23:06:2137 CM	43/ IS BTWN MALE/FEM INSIDE PER NBR BEEN 415'G F/ AT LEAST 30 MINS		43	LV7287
23:06:2383 CM	3U55 CRED ARVB /2306HRS		22	LV8363

23:06:5067 CM	3U55/ MALE INSIDE YELLING REFG TO COME OUT OF BEDROOM /2306HRS	22	LV8363
23:06:5322 CM	43/ THIS PR ADV'D SUBJ LIVES IN APT 19 BRIAN, EXTREMELY 408, WOULD NOT L	43	LV7287
23:06:5331 CM	ET NBRS INTO APT TO CHK ON FEM 2306HRS	43	LV7287
23:07:0686 CM	43/ OFCRS W/ FEM, MALE PR HUNG UP 2307HRS	43	LV7287
23:07:0943 US 738	USAS5001 EL PARQUE AVE	22	LV8363
23:07:1178 US 738	USAS5001 EL PARQUE AVE	22	LV8363
23:07:2182 US 1U3	USAS5001 EL PARQUE AVE	00	LV13016
23:07:3382 US 1U4	USAS5001 EL PARQUE AVE	00	LV6683
23:07:4343 CM	7U6 MALE IS BARRICADED // GIVING VERBAL COMMANDS TO HIM NOW /2307HRS	22	LV8363
23:07:4698 US 738	USAS5001 EL PARQUE AVE	00	LV6234
23:07:5471 US 765	USAS5001 EL PARQUE AVE	22	LV8363
23:08:0483 CM	765/ SHUT DOWN ANY UNIT ROLLING CODE /2308HRS	22	LV8363
23:08:4537 US 1U6	USAS5001 EL PARQUE AVE	00	LV12996
23:09:1950 CM	3U55/ MALE ADVG FEM STABBED HERSELF BUT HE'S NOT COOPERATING WITH UNITS	22	LV8363
23:09:1958 CM	/2309HRS	22	LV8363
23:09:4373 CM	765/ SUBJ INSIDE CLAIMING THAT FEM STABBED HERSELF AND THAT SHE IS 419 A	22	LV8363
23:09:4382 CM	T THIS TIME /2309HRS	22	LV8363
23:09:4728 US 1W4	USAS5001 EL PARQUE AVE	22	LV8363
23:09:5144 US 3U44	USAS5001 EL PARQUE AVE	22	LV8363
23:10:0073 CM	1U2 WAS ENR CODE @ 2307HRS	22	LV8363
23:10:0618 CM	1W4 SHUT DOWN CODE @ 2307HRS	22	LV8363
23:10:1123 US 719	USAS5001 EL PARQUE AVE	22	LV8363
23:10:5757 CM	27 / FD ADV'D NEG C/4 FOR MED 2310HRS	22	LV8363
23:11:0515 CM	22/SUPS ADV'D OF POSS 419 UPDATE /2311HRS	27	LV9461
23:11:2714 CM	1U2 ENR FOR CIT IF NEEDED VIA AM 2308HRS	22	LV8363
23:11:3235 US 3U	USAS5001 EL PARQUE AVE	22	LV8363
23:11:3674 US 1U5	USAS5001 EL PARQUE AVE	22	LV8363
23:12:1792 US 1U5	USAS5001 EL PARQUE AVE	22	LV8363
23:13:0238 US 3U	USAS5001 EL PARQUE AVE	00	LV9312
23:13:2605 CM	7U3/ SUBJ'S BEEN TAZED...TAKING HIM INTO CUSTODY AT THIS TIME /2313HRS	00	LV9637
23:13:4196 CM	13/367WC/DOC NOTPEAGED 2315 HRS	22	LV8363
23:13:5462 CM	7U3 NEED MED TO EXPEDITE //KEEP RED FOR NOW /2313HRS	13	LV6157
23:14:5211 US 8U77	USAS5001 EL PARQUE AVE	22	LV8363
23:15:0217 CM	8U77 C/4 TO LIFT RED // STANDING BY FOR MEDICAL /2314HRS	22	LV8363
23:15:1767 US VC32	USAS5001 EL PARQUE AVE	22	LV8363
23:15:3132 US 738	USAS5001 EL PARQUE AVE	31	LV7478
23:15:4757 US 724	USAS5001 EL PARQUE AVE	00	LV6234
23:16:1658 US AIR4	USAS5001 EL PARQUE AVE	22	LV8363
23:16:1665 US 8U	USAS5001 EL PARQUE AVE	12	LV9740
23:16:1673 DP AIR4	USAS5001 EL PARQUE AVE	43	LV7287
23:16:1678 DP 8U	USAS5001 EL PARQUE AVE	212	LV9740
23:17:3723 CM	719/ ADV WC THAT HAD TO TAZE SUSP THAT WAS WITH FEM AND APPRS SHE MAY GO	243	LV7287
23:17:3731 CM	419 .. STILL WAITING ON MED /2317HRS	22	LV8363
23:17:5287 US AIR4	USCL	22	LV8363
23:17:5301 DP AIR4	USCL	22	LV8363
23:18:3436 CM	765/ CONFD 419 /420 /2318HRS	222	LV8363
23:18:5220 CM	22/SUPS ADV'D VIA GROUP AM OF UPDATE /2318HRS	22	LV8363
23:19:0401 US 724	USAS5001 EL PARQUE AVE	22	LV8363
23:20:1193 US 367WC	USAS5001 EL PARQUE AVE	00	LV6238
23:21:4091 US 367WC	USAS5001 EL PARQUE AVE	23	LV0984
23:22:1515 CM	REQ ID 2322	23	LV7811

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23:22:2308 CM	1U2 STARTING INCIDENT LOG /2322HRS		
23:23:0770 CM	S23/367WC VC MC AND PIO CASSELL NOTEPAGED 2123		22 LV8363
23:23:4918 US 1W4	USAR5001 EL PARQUE AVE	404	23 LV0984
23:23:5226 US 3U55	USAR5001 EL PARQUE AVE	404	22 LV8363
23:23:5238 US 3U66	USAR5001 EL PARQUE AVE	404	22 LV8363
23:24:0706 US 1W4	USCL	404	22 LV8363
23:25:3320 US MC3	USAS5001 EL PARQUE AVE	404	00 LV9660
23:25:3824 US MC5	USAS5001 EL PARQUE AVE	404	23 LV0984
23:25:4486 US MC2	USAS5001 EL PARQUE AVE	404	22 LV8363
23:26:1749 US 1U5	UR	404	22 LV8363
23:26:2578 US 3U66	USCL	404 LLV081105003999	22 LV8363
23:26:5704 CM	13/ BILL CASSELL PIO ACK LL 2326 HRS	404	00 LV9624
23:27:5623 US MC3	USER5001 EL PARQUE AVE	404	13 LV6157
23:28:4126 US MC5	USER5001 EL PARQUE AVE	404	00 LV2995
23:28:5505 US 367WC	USERUnit Transferred To LVBA	404	00 LV6817
23:29:1191 US MC2	USER5001 EL PARQUE AVE	404	22 LV8363
23:29:1330 US VC32	USER5001 EL PARQUE AVE	404	08 LV8335
23:30:1057 US 367WC	USAR5001 EL PARQUE AVE	404	08 LV8335
23:30:5701 US 567MC	USAR5001 EL PARQUE AVE	404	00 LV4926
23:31:0450 US 1U2	USAR5001 EL PARQUE AVE	404	22 LV8363
23:31:0466 DP 1U2	USAR5001 EL PARQUE AVE	404	22 LV8363
23:31:4801 US 8U	USAR5001 EL PARQUE AVE	404	222 LV8363
23:31:4812 DP 8U	USAR5001 EL PARQUE AVE	404	22 LV8363
23:31:5192 US 765	USCL	404	222 LV8363
23:32:0540 US 7U3	USAR5001 EL PARQUE AVE	404	22 LV8363
23:33:5397 US 3U44	USCL	404	22 LV8363
23:35:5866 CM	724/ STAGING AREA/CP IS SOUTH PLOT OF 5001 EL PARQUE AVE /2335HRS	404	00 LV9635
23:41:5929 US 3U	UR	404 LLV081105004081	22 LV8363
23:43:2969 US 672VC	USAS5001 EL PARQUE AVE	404	46 LV8477
23:44:2794 US MC5	USAR5001 EL PARQUE AVE	404	00 LV6817
23:44:2912 US MC5	USAR5001 EL PARQUE AVE	404	00 LV6817
23:44:3389 US MC2	USAR5001 EL PARQUE AVE	404	00 LV7585
23:45:0900 US 367WC	USAR5001 EL PARQUE AVE	404	00 LV4926
23:55:5116 US 672VC	USAR5001 EL PARQUE AVE	404	22 LV8363
23:57:2777 US MC3	USAR5001 EL PARQUE AVE	404	22 LV8363
00:02:5835 CM	23/SGT SHOEMAKER ACK LL 0002 HRS		22 LV8363
00:06:2635 US VC32	USAR5001 EL PARQUE AVE	404	13 LV6157
00:12:2946 US 567MC	USCL	404	08 LV8335
00:13:0930 US MC2	USCL	404	00 LV4040
00:14:0051 US C18	USAS5001 EL PARQUE AVE	404	00 LV7585
00:14:0062 DP C18	USAS5001 EL PARQUE AVE	404	35 LV3767
00:14:1050 US 315H	USER5001 EL PARQUE AVE	404	235 LV3767
00:18:0000 US 503H	USER5001 EL PARQUE AVE	404	35 LV3767
00:18:2246 US C18	USER5001 EL PARQUE AVE	404	35 LV9264
00:18:2265 DP C18	USER5001 EL PARQUE AVE	404	22 LV8363
00:20:1630 US H23	USAS5001 EL PARQUE AVE	404	222 LV8363
00:22:0833 US CS5	USAS5001 EL PARQUE AVE	404	01 LV8681
00:22:5625 US H19	USER5001 EL PARQUE AVE	404	35 LV9264
00:23:0323 US H12	USER5001 EL PARQUE AVE	404	35 LV9264
00:23:3886 US H08	USAS5001 EL PARQUE AVE	404	15 LV5512
00:23:5378 US H08	USER5001 EL PARQUE AVE	404	35 LV9264
			22 LV8363

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00:23:5769 US CS5	USAR5001 EL PARQUE AVE	404	22	LV8363
00:24:0016 US H23	USAR5001 EL PARQUE AVE	404	22	LV8363
00:27:4577 US VC34	USAR5001 EL PARQUE AVE	404	22	LV8363
00:27:4603 US VC35	USAR5001 EL PARQUE AVE	404	22	LV8363
00:27:4854 US VC34	USCL	404	22	LV8363
00:27:4962 US VC35	USCL	404	22	LV8363
00:28:1220 US CS5	USAR5001 EL PARQUE AVE	404	00	LV3731
00:29:0443 US 503H	USAR5001 EL PARQUE AVE	404	35	LV9264
00:29:5773 US VC31	USAR5001 EL PARQUE AVE	404	22	LV8363
00:29:5936 US VC31	USCL	404	22	LV8363
00:32:2397 US 738	USCL	404	00	LV6234
00:34:1728 US C18	USAR5001 EL PARQUE AVE	404	35	LV9264
00:34:1737 DP C18	USAR5001 EL PARQUE AVE	404	235	LV9264
00:34:2425 US H12	USAR5001 EL PARQUE AVE	404	35	LV9264
00:36:1839 US H26	USAR5001 EL PARQUE AVE	404	35	LV9264
00:38:4512 US H19	USAR5001 EL PARQUE AVE	404	35	LV9264
00:39:4746 US H23	USAR5001 EL PARQUE AVE	404	35	LV9264
00:42:4593 US H08	USAR5001 EL PARQUE AVE	404	35	LV9264
00:43:3411 US 1U2	UR	404	22	LV8363
00:43:3427 DP 1U2	UR	404	222	LV8363
00:44:5516 US CS5	USAR5001 EL PARQUE AVE	404	00	LV3731
00:50:4755 US H26	USAR5001 EL PARQUE AVE	404	35	LV9264
00:55:3963 US 315H	USAR5001 EL PARQUE AVE	404	22	LV8363
00:57:0468 US VC32	USCL	404	28	LV8480
01:00:5296 US MC5	USCL	404	21	LV9269
01:07:5417 US 724	USCL	404	00	LV6238
01:08:5250 US 1U6	USTBBUREAU	404	00	LV12996
01:11:5709 US 1U6	USABBUREAU	404	00	LV12996
01:12:0972 US 1U6	USAO420 OFFICE	404	22	LV8363
01:12:0982 US 7U6	USAO420 OFFICE	404	22	LV8363
01:25:0644 US BU79	USAR5001 EL PARQUE AVE	404	22	LV8363
01:26:1091 US 672VC	USCL	404	28	LV8480
01:31:2022 US MC3	USCL	404	00	LV2995
01:31:2024 US MC3	D FRM-	404	1	00
01:31:2031 CM	H-UNITS		00	LV2995
01:31:2037 US MC3	TYCL404 420		00	LV2995
01:58:1333 US 3U55	USTOBAC		00	LV2995
02:02:4474 US 8U	USCL	404	00	LV6930
02:02:4487 DP 8U	USCL	404	22	LV8676
02:07:3882 US 3U55	USCL	404	222	LV8676
02:21:5095 US 8U77	USAOBAC	404	00	LV6930
02:21:5109 US 719	USAOBAC	404	22	LV8676
02:21:5113 US 8U79	USAOBAC	404	22	LV8676
02:32:3060 US 315H	USCL	404	22	LV8676
02:41:4016 US 7U3	USCL	404	24	LV9741
02:50:2619 US 1U3	USCL	404	00	LV6834
03:03:0312 US 367WC	USCL	404	00	LV13016
03:35:3756 US 8U79	USCL	404	00	LV4926
03:35:4299 US 8U77	USCL	404	44	LV7680
04:10:0265 US C40	USAR5001 EL PARQUE AVE	404	44	LV7680
04:57:0525 US C40	USCL		24	LV6548
			00	LV13205

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RESEARCH ASSISTANT

05:00:4192 US 1U6	USTBCCDC			
05:01:0938 US 7U6	USTBCCDC	404		00 LV12996
05:10:1423 US 719	USCL	404		00 LV8250
05:10:1436 US 719	D FRM-	404		06 LV7811
05:11:1894 US 1U6	USABCCDC		TO-K	1 06 LV7811
05:29:4492 US 7U6	USCL	404		00 LV12996
05:51:0906 CM		404		00 LV8250
05:51:3262 CM	1U6 VIA AM REF HAZMAT TO CLEAN HIS VEH AT BOLDEN 421C BLOOD			22 LV2357
05:53:4807 CM	ABSOLUTE DECON ENR ETA 30 0551HRS			22 LV2357
05:53:4816 CM	22//CORRECTION 1U6 REQ HAZMAT AT BAC AT 0700 FOR HIS VEH...ABSOLUTE DEC			22 LV2357
05:59:5005 US 1U6	ON ADV'D OF 0700 TIME 0553HRS			22 LV2357
05:59:5017 US 1U6	USCL			00 LV12996
06:21:5303 US 503H	D FRM-	404	TO-A	1 00 LV12996
06:22:4813 US 1U1	USADOFFICE	404		35 LV4258
06:57:5210 CM	USCL	404		00 LV8101
07:09:5448 US 2U13	REQ DAY RELIEF			22 LV4803
07:09:5466 DP 2U13	USAS5001 EL PARQUE AVE	420		22 LV4803
07:11:4190 US H19	USAS5001 EL PARQUE AVE	420		222 LV4803
07:25:4676 US 2U13	USCL	404		35 LV4258
07:25:4696 DP 2U13	USAR5001 EL PARQUE AVE	420		00 LV9490
07:29:5559 EU 1U4	USAR5001 EL PARQUE AVE	420		200 LV9490
07:29:5564 CM	D FRM-		TO-L	1 00 LV6683
07:29:5623 US 1U4	HOMOCIOE			00 LV6683
07:30:1361 US 2U13	USCL	404		00 LV6683
07:30:1374 DP 2U13	USCL	420		00 LV9490
07:36:2031 US H26	USCL	420		200 LV9490
07:48:2913 US CSS	USCL	404		35 LV4258
08:25:1574 US C18	USCL	404		00 LV3731
08:25:1593 DP C18	USCL	404		35 LV7288
11:12:2506 US H23	USCL	404		235 LV7288
12:18:0573 CM		404		35 LV4803
14:09:5925 EU 1U4	C4 AT OFFC			35 LV4803
16:48:4410 US H12	AR FRM-BA		TO-I2	22 LV9261
19:02:2797 US H08	USCL	404		35 LV7275
22:23:5836 US 503H	USCL	404		35 LV8358
		404		18 LV8623

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Police Department.

RESEARCH ASSISTANT, Communications Bureau

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DECLARATION OF RESEARCH ASSISTANT, CUSTODIAN OF RECORDS CONCERNING
LAS VEGAS METROPOLITAN POLICE DEPARTMENT RECORDINGS OF EMERGENCY
"911" CALLS (TAPE AND COMPUTERIZED MATERIALS)

I, Leslie Loretto, hereby declare under the penalty of perjury:

1. That I am an employee of the Las Vegas Metropolitan Police Department, Las Vegas, Nevada and in such capacity, I act as the Custodian of Records for the records and recordings of 911 calls made to the Las Vegas Metropolitan Police Department.

2. That all calls made to 911 are recorded by the Las Vegas Metropolitan Police Department onto DVDs and into computerized records which materials are maintained for approximately one year.

3. That I have examined the recordings made by the Las Vegas Metropolitan Police Department and that I have discovered that on November 5, 2008 a call was made in reference to an event at 5001 El Parque Ave at or near 2301 hours.

4. That I have made an exact, true, accurate and complete reproduction of the above described call to 911 onto a CD and have printed an exact, true, accurate, and complete reproduction of the computerized information concerning this call. That I have written the Event Number 081105003918 onto that CD. I then sealed that CD into an envelope, attached this declaration and the computerized information concerning that call to that envelope and wrote my name and the same Event Number on the outside of that envelope.

5. That the original recording of the call (DVD and computer entries) by the Las Vegas Metropolitan Police Department was made at the time the call was received by the Las Vegas Metropolitan Police Department and that the recording was made by a person with knowledge in the course of a regularly conducted business activity of the Declarant or of the office of the Declarant.

6. That such recording of the 911 calls made to the Las Vegas Metropolitan Police Department are a regular practice of the Las Vegas Metropolitan Police Department and are part of the activities of the Las Vegas Metropolitan Police Department and the recording of the 911 calls are matters observed pursuant to a duty imposed by law.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: November 19, 2008

Signature: _____

CUSTODIAN OF RECORDS

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DECLARATION OF RESEARCH ASSISTANT, CUSTODIAN OF RECORDS CONCERNING
LAS VEGAS METROPOLITAN POLICE DEPARTMENT RECORDINGS OF RADIO TRAFFIC
(TAPE AND COMPUTERIZED MATERIALS)

I, Leslie Loretto, hereby declare under the penalty of perjury:

1. That I am an employee of the Las Vegas Metropolitan Police Department, Las Vegas, Nevada and in such capacity, I act as the Custodian of Records for the records and recordings of 911 and 311 calls made to and radio tapes recorded by the Las Vegas Metropolitan Police Department.

2. That all calls made to 911 are recorded by the Las Vegas Metropolitan Police Department onto DVDs and into computerized records which materials are maintained for approximately one year.

3. That I have examined the recordings made by the Las Vegas Metropolitan Police Department and that I have discovered that on November 5, 2008 radio traffic was given in reference to an event at 5001 El Parque Ave at or near 2301 hours.

4. That I have made an exact, true, accurate and complete reproduction of the above described radio traffic onto a CD and have printed an exact, true, accurate, and complete reproduction of the computerized information concerning this call. That I have written the Event Number 081105003918 onto that CD. I then sealed that CD into an envelope, attached this declaration and the computerized information concerning that radio traffic to that envelope and wrote my name and the same Event Number on the outside of that envelope.

5. That the original recording of the radio traffic (DVD and computer entries) by the Las Vegas Metropolitan Police Department was made at the time the call was received by the Las Vegas Metropolitan Police Department and that the recording was made by a person with knowledge in the course of a regularly conducted business activity of the Declarant or of the office of the Declarant.

6. That such recording of the radio traffic transmitted on the Las Vegas Metropolitan Police Department radio channels are a regular practice of the Las Vegas Metropolitan Police Department and are part of the activities of the Las Vegas Metropolitan Police Department and the recording of the radio traffic are matters observed pursuant to a duty imposed by law.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: November 19, 2008

Signature: _____

CUSTODIAN OF RECORDS

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Nov 23 10 20 AM '10

Ann L. Sullivan
CLERK OF DISTRICT COURT

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5 DISTRICT COURT
6 CLARK COUNTY, NEVADA
7

8 THE STATE OF NEVADA,

9 Plaintiff,

10 vs.

11 BRIAN KERRY O'KEEFE,

12 Defendant.
13

CASE NO. C250630

DEPT. XVII

14 BEFORE THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE

15 THURSDAY, AUGUST 12, 2010

16 **RECORDER'S TRANSCRIPT OF HEARING RE:**

17 **ALL PENDING MOTIONS**
18

19 APPEARANCES:
20

21 For the State:

CHRISTOPHER LALLI, ESQ.,
Assistant Deputy District Attorney
STEPHANIE GRAHAM, ESQ.,
Deputy District Attorney

22
23
24 For the Defendant:

PATRICIA PALM, ESQ.,

25 RECORDED BY: MICHELLE L. RAMSEY, COURT RECORDER

1 LAS VEGAS, NEVADA; THURSDAY, AUGUST 12, 2010

2
3 [Proceeding commenced at 8:14 a.m.]
4

5 THE COURT: 250630, Ms. Palm is here for the Defendant. Mr. Lalli for --
6 and Ms. -- Mr. Lalli for the State and Ms. Campbell -- Graham. I'm sorry, Ms.
7 Graham.

8 We have some various motions on for this morning.

9 MS. PALM: Yes, Your Honor. I think that we had spoken to your law clerk
10 and the ones that were not going to be moved to calendar call per our agreement
11 were the -- the motion for an evidentiary hearing on the CCDC recording motion as
12 well as the discovery motion and the other motions will be on calendar call.

13 MR. LALLI: That's my understanding, Your Honor.

14 THE COURT: Okay, so the motion about CCD [sic] records are on for
15 today?

16 MR. LALLI: Yes.

17 MS. PALM: That's on for today.

18 THE COURT: All right. I've reviewed it. All right.

19 MR. LALLI: Yes.

20 MS. PALM: And as far as that goes, Your Honor, I want to thank Mr. Lalli for
21 doing the investigation that he did because that is what we wanted and as long as
22 those witnesses are going to testify to that under oath, we accept that and there's no
23 reason for a hearing, so we'll withdraw our request for hearing on that matter.

24 THE COURT: Okay. I'm just going to take that off calendar. And the other
25 motion?

1 MS. PALM: The other motion is for discovery. We just wanted to make sure
2 that we had everything including everything exculpatory and I understand the State
3 is opposing the NCIC. With respect to that, quite a few of the State's witnesses
4 have not all of them have a criminal history I'm speaking of the lay witnesses and I
5 don't know what's happened within the last year since trial. They have better
6 access to that than we do. As well as those witnesses are -- are gone in the wind as
7 far as we know because we went to the apartment where everybody used to live
8 and nobody is there any more. They didn't have forwarding addresses on them, so
9 we particularly want addresses on the witnesses 'cause I'd like to interview them
10 prior to trial. I understand the State's saying they have those, so I would like them
11 and I would like to have them check the NCIC because I want to know if there's any
12 felony convictions within last year.

13 MR. LALLI: Well, Your Honor, just a couple of things. Number one, I
14 certainly understand what our ethical obligations are pursuant to Brady and Giglio
15 and certainly take those seriously and we'll comply with the duties that those cases
16 impose upon our office.

17 Second of all with respect to particular witnesses, I don't think it is
18 incumbent upon us to search out witnesses and then provide defense counsel with
19 their whereabouts. Defense counsel certainly has the where with all to get an
20 investigator and to track down witnesses just like we do. And so I don't think its
21 incumbent upon us to provide that information.

22 MS. PALM: And, Your Honor, if I could just respond to that. The statute that
23 talks about the information says you will provide the name and addresses of the
24 witnesses; that's so that we can interview them and I do have an investigator. She
25 did get us trace on all these witnesses and none of them can be found.

1 THE COURT: How about providing the last known address that you have,
2 Mr. Lalli? It should be on a list of witnesses that you previously prepared.

3 MR. LALLI: Yes.

4 MS. PALM: And, Your Honor, they're saying they have served them already,
5 so I think they have their current addresses.

6 MR. LALLI: Well, we might have -- we might have phone information and it
7 could very well be these witnesses don't want to be contacted by the defense, so I'm
8 not sure it's incumbent upon us to provide phone numbers or cellphone information
9 or that sort of information when perhaps the Defendant has access to it. I just don't
10 think its incumbent upon us to do the defense investigation for them.

11 THE COURT: I'm going to -- I think it's appropriate to at least turn over the
12 last known address that you have for these individuals. On the issue of NCIC
13 records, I think it's appropriate that you provide information of any witness that has a
14 felony conviction.

15 MR. LALLI: Within the ten year span?

16 THE COURT: Yes.

17 MR. LALLI: We will do that.

18 MS. PALM: Thank you, Your Honor.

19 MR. LALLI: Thank you.

20 THE COURT: Thank you. So the motion's granted to that extent. If you can
21 prepare the Order, Ms. Palm, and have Mr. Lalli sign off approved as to form and
22 content?

23 MS. PALM: Thank you.

24 THE COURT: Thank you. Any other issues on this case?

25 MR. LALLI: Not that I foresee, Your Honor. I think everything else will be

1 resolved at calendar call. We certainly anticipate being prepared for trial the week
2 thereafter.

3 THE COURT: And how many days -- if this does go to trial, how many days
4 will the parties expect it to take?

5 MR. LALLI: Well the last time it was tried, I think it was about five days. I
6 anticipate roughly the same.

7 MS. PALM: As do I.

8 THE COURT: All right. Thank you.

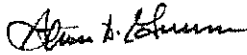
9 MS. PALM: Thank you.

10 [Proceeding concluded at 8:18 a.m.]
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19 * * * * *
20

21 ATTEST: I hereby certify that I have truly and correctly transcribed the audio/video
22 proceedings in the above-entitled case to the best of my ability.
23
24
25

Michelle Ramsey
Court Recorder/Transcriber


CLERK OF THE COURT

1 **NOTC**
2 **DAVID ROGER**
3 Clark County District Attorney
4 Nevada Bar #002781
5 **STEPHANIE A. GRAHAM**
6 Deputy District Attorney
7 Nevada Bar #0010058
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,)

10 Plaintiff,)

CASE NO: C250630

11 -vs-)

DEPT NO: II

12 BRIAN O'KEEFE,
13 #1447732)

14 Defendant.)

15 **SUPPLEMENTAL NOTICE OF EXPERT WITNESSES**
16 [NRS 174.234(2)]

17 TO: BRIAN O'KEEFE, Defendant; and

18 TO: PATRICIA PALM ESQ, Counsel of Record;

19 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the STATE OF
20 NEVADA intends to call the following witnesses in its case in chief:


21 1.) DETECTIVE MARTY WILDEMANN, Las Vegas Metropolitan Police
22 Department. Will testify as to his opinion regarding the nature of injury to Defendant's hand.
23 Detective Wildemann has been with the Las Vegas Metropolitan Police Department for
24 22 1/2 years. For the past 8 1/2 years, Detective Wildemann has been assigned to Homicide
25 and has worked over 200 cases with 25% of those cases involving stabbings.

26 The substance of each expert witness' testimony and a copy of all reports made by or
27 at the direction of the expert witness has been provided in discovery.

28 ///

1 A copy of each expert witness' curriculum vitae, if available, is attached hereto.
2
3

4 BY



DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

5
6
7
8 CERTIFICATE OF FACSIMILE TRANSMISSION
9

10 I hereby certify that service of SUPPLEMENTAL NOTICE OF EXPERT
11 WITNESSES, was made this _____ day of August, 2010, by facsimile transmission to:

12
13 PATRICIA PALM
Deputy Public Special Defender
14 FAX #455-6273

15
16 /s/T. Schessler
17 Secretary for the District Attorney's
18 Office
19
20
21
22
23
24
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28

FILED

AUG 16 2010

Adam J. Johnson
CLERK OF COURT

001
PALM LAW FIRM, LTD.
PATRICIA PALM, ESQ.
NEVADA BAR NO. 6009
1212 CASINO CENTER BLVD.
LAS VEGAS, NV 89104
Phone: (702) 386-9113
Fax: (702) 386-9114
Email: Patricia.palmlaw@gmail.com
Attorney for Brian O'Keefe

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

BRIAN K. O'KEEFE,

Defendant.

CASE NO: C250630

DEPT NO. XVII

DATE:

TIME:

**NOTICE OF MOTION AND MOTION BY DEFENDANT O'KEEFE
TO PRECLUDE EXPERT TESTIMONY**

COMES NOW, the Defendant, BRIAN O'KEEFE, by and through his attorney, PATRICIA PALM of PALM LAW FIRM, LTD., and hereby moves this Honorable Court to preclude the State's witness Detective Marty Wildemann from offering his opinion regarding "the nature of injury to Defendant's hand," during the trial of this matter.

This Motion is made and based upon all the papers and pleadings on file

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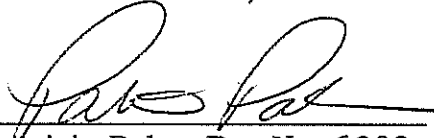
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1 herein, the attached Declaration, and any oral argument at the time set for
2 hearing this Motion.

3 DATED this 16th Day of August, 2010.

4 PALM LAW FIRM, LTD.

5 
6
7 Patricia Palm, Bar No. 6009
8 1212 Casino Center Blvd.
9 Las Vegas, NV 89104
10 Phone: (702) 386-9113
11 Fax: (702) 386-9114
12 Attorney for Defendant O'Keefe

13 **NOTICE OF MOTION**

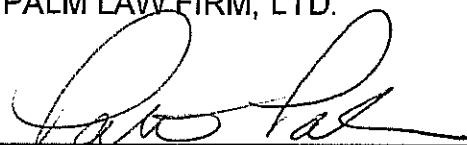
14 TO: STATE OF NEVADA, Plaintiff; and

15 TO: DAVID ROGER, District Attorney, Attorney for Plaintiff

16 YOU WILL PLEASE TAKE NOTICE that the undersigned will bring on the
17 above and foregoing **MOTION BY DEFENDANT O'KEEFE TO PRECLUDE EXPERT**
18 **TESTIMONY** on the 19 day of August, 2010, at the hour of 8:15.m., in
19 Department No. XVII of the above-entitled Court, or as soon thereafter as
20 counsel may be heard.

21 DATED this 16th day of August, 2010.

22 PALM LAW FIRM, LTD.

23 
24 By: PATRICIA PALM
25 Nevada Bar No. 6009
26 1212 Casino Center Blvd.
27 Las Vegas, NV 89104
28 (702) 386-9113
Attorney for Defendant O'Keefe

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DECLARATION

PATRICIA A. PALM makes the following declaration:

1. I am an attorney duly licensed to practice law in the State of Nevada; I am the attorney representing Defendant O'Keefe in this matter.

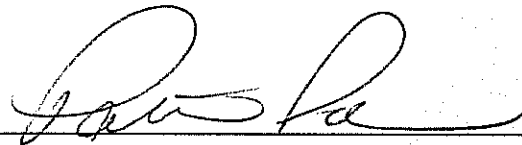
2. That on July 29, 2010, well within the time for noticing expert witnesses, O'Keefe filed and served upon the State his Supplemental Notice of Expert Witnesses.

3. That not until the late afternoon of Friday, August 13, 2010, did the State provide to this counsel a Supplemental Notice of Witnesses via email, which notice listed "Detective Marty Wildemann," who "Will testify as to his opinion regarding the nature of injury to Defendant's hand." The notice further states, "Detective Wildemann has been with the Las Vegas Metropolitan Police Department for 22 ½ years. For the past 8 ½ years, Detective Wildemann has been assigned to Homicide and has worked over 200 cases with 25% of those involving stabbings."

4. No Curriculum vitae is attached to the notice.

I declare under penalty of perjury that the foregoing is true and correct. (NRS 53.045).

EXECUTED this 16th day of August, 2010.



PATRICIA A. PALM
Bar No. 6009

[illegible]

As asserted in the attached affidavit, O'Keefe filed and served his Supplemental Expert Witness Notice well within the time for noticing expert witnesses. The State failed to serve its notice until there was one working day before calendar call. No curriculum vitae have been provided with the State's notice. Therefore, the State has failed to comply with the statutory notice requirement and should be precluded from presenting this and any other "expert" testimony which has not been properly and timely noticed. See NRS 174.295 (providing that court may impose sanctions, including prohibiting a

1 party from introducing in evidence material not disclosed in compliance with
2 NRS 174.234).

3 Additionally, Detective Wildemann is not qualified to offer an "expert
4 opinion" on the nature of wounds or injuries. NRS 50.275 provides that "[i]f
5 scientific, technical or other specialized knowledge will assist the trier of fact to
6 understand the evidence or to determine a fact in issue, a witness qualified as
7 an expert by special knowledge, skill, experience, training or education may
8 testify to matters within the scope of such knowledge."

9 In Hallmark v. Eldridge, 124 Nev. ___, 189 P.3d 646 (2008), the Nevada
10 Supreme Court set forth the factors applicable to the determination of allowing
11 expert testimony. In that case, the Court determined that the district court
12 abused its discretion in allowing a physician with an engineering background
13 to testify as a biomechanical expert. The court stated, "the testimony did not
14 assist the jury in understanding the evidence as the testimony was not based
15 on reliable methodology." Id. at ___, 189 P.3d at 648. The Court stated that
16 when considering whether to admit expert testimony on a subject,
17

18 the witness must satisfy the following three requirements: (1) he or
19 she must be qualified in the area of "scientific, technical or other
20 specialized knowledge" (the qualification requirement); (2) his or
21 her specialized knowledge must "assist the trier of fact to
22 understand the evidence or to determine a fact in issue" (the
23 assistance requirement); and (3) his or her testimony must be
24 limited 'matters within the scope of [his or her specialized]
25 knowledge" (the limited scope requirement).

26 Id. at ___, 189 P.3d at 650 (citation omitted). When determining whether the
27 *qualification requirement* is met, the court should consider: (1) formal schooling
28 and academic degrees, (2) licensure, (3) employment, and (4) practical
experience and specialized training. These factors are not exhaustive and may
vary in weight or not apply, depending on the case. Id. at ___, 189 P.3d at 650-
51.

1 In considering whether the *assistance requirement* has been met, a
2 district court should consider whether the opinion is (1) within a recognized
3 field of expertise, (2) testable and has been tested, (3) published and subjected
4 to peer review, (4) generally accepted in the scientific community (which is not
5 always determinative), and (5) based more on particularized facts rather than
6 assumption, conjecture or generalization. Id. at 651-52.

7 Here, Detective Wildemann fails the first prong of the test. There are no
8 curriculum vitae attached to the State's notice to show that Wildemann has
9 any special qualifications such as formal schooling or degrees, licensure,
10 employment, practical experience or specialized training in the area of the
11 nature of injuries. Therefore, there is no need to go further. He has no
12 expertise by which he could assist the jury or within which his testimony can
13 be confined. See also Lord v. State, 107 Nev. 28, 33-34, 806 P.2d 548, 551
14 (1991) (a detective's opinion based on his experience as to the
15 significance/cause of injuries on the defendant was improper, the detective was
16 not qualified to give an expert opinion, and layperson opinion is not an
17 appropriate vehicle to illuminate the cause of injuries).

18
19 In sum, based on the State's failure to timely comply with the
20 requirements of NRS 174.234(2), and based on Detective Wildemann's lack of
21 expertise in addressing the nature of injuries or wounds, this Court should
22 preclude the State from offering him as an expert and prevent him from giving
23 his opinion on the nature or cause of the wounds in this case.

24 ///

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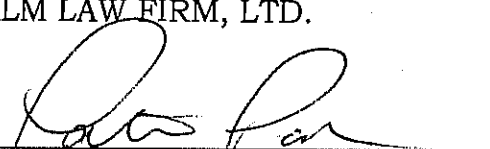
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CONCLUSION

For the reasons stated above, Brian O'Keefe respectfully requests this Honorable Court issue an order precluding the State from introducing at trial evidence or testimony from its proposed expert Marty Wildemann related to the nature of any injuries in this case.

Dated this 16th day of August, 2010.

PALM LAW FIRM, LTD.

By 
PATRICIA A. PALM, #6009
1212 Casino Center Blvd.
Las Vegas, NV 89104
(702) 386-9113

RECEIPT OF COPY

RECEIPT OF COPY of the above and foregoing MOTION BY
DEFENDANT O'KEEFE TO PRECLUDE EXPERT TESTIMONY is hereby
acknowledged this 16 day of August 2010.

Terrell Bussan
DA Reception

1 NOTC
2 PALM LAW FIRM, LTD.
3 PATRICIA PALM, ESQ.
4 NEVADA BAR NO. 6009
5 1212 CASINO CENTER BLVD.
6 LAS VEGAS, NV 89104
7 Phone: (702) 386-9113
8 Fax: (702) 386-9114
9 Email: Patricia.palmlaw@gmail.com
10 Attorney for Brian O'Keefe

FILED

AUG 16 8 55 AM '10

Alfred J. ...
CLERK OF COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

9 STATE OF NEVADA,
10 Plaintiff,

11 vs.

12 BRIAN K. O'KEEFE,
13 Defendant.

CASE NO: C250630

DEPT. NO: XVII

DATE:

TIME:

15
16 **DEFENDANT'S SUPPLEMENTAL NOTICE OF WITNESSES**

17 **TO: THE STATE OF NEVADA, Plaintiff, and**

18 **TO: DAVID ROGER, District Attorney, Attorney for Plaintiff**

19 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE THAT The
20 Defendant, BRIAN O'KEEFE, by and through his attorney, PATRICIA PALM of
21 PALM LAW FIRM, LTD., intends to call the following witnesses, in addition to
22 those witnesses listed on previously filed notices, in his case in chief:
23

24 Skye Campbell

Campbell Investigations
2961 Industrial Rd., Ste. 113
Las Vegas, NV 89109

26 Dorothy Robe

424 SaraJane Lane,
Las Vegas, NV 89107

28 Dodge Slagel

1090 Wigwam Pkwy. Ste. 100

1
2 COR AMR

Henderson, NV 89074

3 4701 Stoddard Rd., Modesto
CA 95353

4 COR LVF&R

5 500 N. Casino Center Blvd.
Las Vegas, NV 89101

6 COR MINES & ASSOC.

7 10367 W. Centennial Rd., Ste.
100, Littleton, CO 80127

8 COR Military Personnel Records

9 9700 Page Ave., St. Louis, MO
63132

10 COR M.J. DEAN CONSTRUCTION CO.
101

5055 W. Patrick Lane, Ste.

11 Las Vegas, NV 89118

12 COR PERINI Bldg. Co.

13 2955 N. Green Valley Pkwy.
Henderson, NV 89014

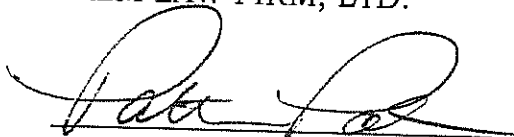
14 COR for Unemployment Debit Card Acct.
15 Through NV Dpt. Of Emp. Training & Rehab.

2800 E. St. Louis Ave., Las
Vegas, NV 89713

16
17 These witnesses are in addition to those previously noticed and for
18 whom a separate Notice has been filed.
19

20 Dated this 16th day of August, 2010.

21 PALM LAW FIRM, LTD.

22 
23

24 Patricia Palm, Bar No. 6009
1212 Casino Center Blvd.

25 Las Vegas, NV 89104

26 Phone: (702) 386-9113

27 Fax: (702) 386-9114

28 Attorney for Defendant O'Keefe

///

///

RECEIPT OF COPY

I, the undersigned, acknowledge that on this 16 day of Aug.
_____ 2010, I received a true copy of the foregoing DEFENDANT'S
SUPPLEMENTAL NOTICE OF WITNESSES.

CLARK COUNTY DISTRICT ATTORNEY
200 Lewis Ave., Las Vegas, NV 89155-1212

By: 

ORIGINAL

FILED

AUG 16 2010

Stephanie A. Graham
CLERK OF COURT

RSPN
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
Stephanie A. Graham
Deputy District Attorney
Nevada Bar #0010058
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

08C250630
RSPN
Response
894515



THE STATE OF NEVADA,

Plaintiff,

-vs-

Brian Kerry O'Keefe,
#1447732

Defendant.

CASE NO: C250630

DEPT NO: XVII

STATE'S RESPONSE TO DEFENDANT'S MOTION TO PRECLUDE THE STATE
FROM INTRODUCING AT TRIAL OTHER BAD ACTS OR CHARACTER
EVIDENCE AND OTHER EVIDENCE THAT IS UNFAIRLY PREJUDICIAL OR
WOULD VIOLATE HIS CONSTITUTIONAL RIGHTS

DATE OF HEARING: August 17th, 2010

TIME OF HEARING: 8:15 AM

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through
Stephanie A. Graham, Deputy District Attorney, and hereby submits the attached Points and
Authorities in Opposition to Defendant's Motion to Preclude the State From Introducing at
Trial Other Bad Acts or Character Evidence and Other Evidence that is Unfairly Prejudicial
or Would Violate His Constitutional Rights.

This response is made and based upon all the papers and pleadings on file herein, the
attached points and authorities in support hereof, and oral argument at the time of hearing, if
deemed necessary by this Honorable Court.

RECEIVED

AUG 16 2010

CLERK OF THE COURT

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1 **POINTS AND AUTHORITIES**

2 **A. Defendant's statement to Cheryl Morris that he is "capable of killing anyone**
3 **with a knife" and his disturbing demand of Cheryl to play the role of victim to**
4 **demonstrate his ability to slice someone open with a knife are relevant to the State's**
5 **theory of the case and are otherwise admissible under Nevada law.**

6 Cheryl Morris began dating Defendant in January 2008. 3/17/10 Trial Transcript 10
7 [hereinafter "TT"]. Their relationship abruptly ended in August 2008 when Defendant
8 reunited with Victoria Whitmarsh. *Id.* During Defendant's seven month relationship with
9 Cheryl Morris, he spoke about his disdain for Victoria Whitmarsh on a daily basis;
10 sometimes three or four times a day. 3/17/10 TT 14.

11 More Specifically, Cheryl has consistently maintained that Defendant stated to her on
12 more than one occasion that he "hated" Victoria for testifying against him, she "put him in
13 jail," she is "poison" and she "took three years of his life away." 12/17/08 Preliminary
14 Hearing Transcript 69-70 [hereinafter "PHT"]; 3/17/10 TT 21. Further, Defendant made
15 numerous statements to Cheryl declaring his desire "kill the bitch." 12/17/08 PHT 70;
16 3/17/10 TT 15. According to Cheryl Morris, during their brief seven month relationship,
17 "Victoria was always there", and Defendant spoke of little else. 3/17/10 TT 29. Except, of
18 course, *knives*. 12/17/08 PHT 69; 3/17/10 TT 17.

19 Defendant requests this court to preclude the State from eliciting testimony from
20 Cheryl Morris with regard to Defendant's statements touting his proficiency with knives and
21 his capability to kill anyone with a knife. Defendant claims that the statements should be
22 precluded because they are irrelevant, highly inflammatory and overly prejudicial. Despite
23 Defendant's claim, under Nevada law, the statements are admissible.

24 **1. The statements are relevant to the State's theory of the case.**

25 NRS 48.015 defines "relevant evidence" as evidence having any tendency to make
26 the existence of any fact that is of consequence to the determination of the action
27 more or less probable than it would be without the evidence.

28 Although the State is barred from seeking a conviction of First Degree Murder in this
case, the State steadfastly maintains that the death of Victoria Whitmarsh was not an
accident or self-defense; rather Defendant intended to murder Victoria and he had a motive

1 to do so. Defendant, on the other hand, claims that Victoria's death was an accident that
2 occurred as a result of self-defense. There is no evidence whatsoever to corroborate
3 Defendant's theory of the case aside from his self-serving testimony. The fact that Defendant
4 previously demonstrated his proficiency/capability of killing someone with a knife tends to
5 disprove any Defense of mistake or accident. According to Cheryl Morris, during her brief
6 relationship with Defendant, he was obsessed with Victoria and how much he hated her. The
7 State contends it is no coincidence that Victoria was stabbed to death by Defendant.
8 Therefore, testimony of Defendant's statements regarding knives tends to make the existence
9 of a fact that is of consequence to the determination of the action more or less probable than
10 it would be without the testimony.

11 **2. The probative value of the statements outweighs the prejudicial effect.**

12 NRS 48.035(1) provides, although relevant, evidence is not admissible if its probative
13 value is substantially outweighed by the danger of unfair prejudice, of confusion of the
14 issues or of misleading the jury. Based on the State's theory of the case Defendant was
15 obsessed with Victoria, hated her and he had a motive to kill Victoria: he had previously
16 gone to prison for beating her as a result of Victoria's testimony against him.

17 Indeed, the State recognizes that the statements sought to be excluded are prejudicial.
18 However, relevant evidence is not simply rendered inadmissible because of its "highly
19 prejudicial nature...the best evidence often is!" See United States v. Parker 549 F.2d 1217 at
20 1222. (9th Cir. 1977).

21 Defendant is being tried for Second Degree Murder with Use of a Deadly Weapon.
22 The deadly weapon used was a knife. It is incumbent upon the state to prove malice
23 aforethought beyond a reasonable doubt as an element to the offense charged. Therefore,
24 Defendant's statements regarding knives have *significant* probative value to the State's case
25 outweighing any danger of unfair prejudice.

26 **3. The statements fall within an Exception to Hearsay**

27 Pursuant to NRS 51.035, Cheryl Morris may testify as to Defendant's statements during
28 the State's case-in-chief as the statements are an exception to the hearsay rule as statements

1 of a party opponent.

2 Therefore based on the foregoing, the Statements are admissible under Nevada law and
3 the State should not be precluded from presenting admissible evidence.

4 **B. The State has no opposition to Defendant's request for redaction to omit the**
5 **reference to "concurrent" sentencing contained within the Judgment of Conviction in**
6 **case number C207835X.**

7 **C. The State has no intention of introducing or eliciting evidence of Sexual Assault**
8 **charges stemming from case # C202793X during its case-in-chief.**

9 However, should evidence relating to the sexual assault become relevant and/or
10 otherwise admissible to impeach and/or to rebut evidence presented during the Defendant's
11 case-in-chief or become relevant as a result of cross-examination; the State will seek the
12 appropriate ruling.

13 **D. This Court should not preclude the use of the accurate term, "Sexual Assault**
14 **Kit" by medical professionals called to testify in this case.**

15 The term "sexual assault kit" is not unduly prejudicial but rather an accurate term of
16 art used by medical professionals to describe a group of evidence gathering tools used for a
17 special purpose. In the instant case, a sexual assault kit was utilized during the autopsy of
18 Victoria Whitmarsh. No evidence of a sexual assault could be determined

19 The Defendant claims that the use of the accurate term "Sexual Assault Kit" is highly
20 prejudicial and seeks to preclude the State from introducing the "term" during retrial.
21 Essentially, the Defendant is requesting this Court to direct the State to admonish members
22 of the legal profession from using terminology which is common parlance within their field
23 of expertise. Requesting those in the medical professional to agree to call a "Sexual Assault
24 Kit" something other than what it is seems absurd. Further, because the accurate term is
25 common parlance among the medical field, it is not unlikely that even if admonished,
26 medical professionals could inadvertently make reference to the "Sexual Assault Kit."

27 Defendant has failed to show how reference to a "term of art" is highly prejudicial
28 especially since the evidence gathered was favorable to the Defendant with respect to any
signs of a sexual assault. Therefore Defendant's request on this point should be denied.

1 E. Autopsy photos showing the condition of Victoria's body at the time of her death
2 were properly admitted by this Court during Defendant's previous trial and there is no
3 basis to exclude them now.

4 The decision to admit autopsy photographs as evidence lies within the sound discretion
5 of the court. Turpen v. State, 94 Nev. 576, 577 (1978). Such a decision of the trial court
6 will not be reversed absent a showing of abuse of discretion. Ybarra v. State, 100 Nev. 167,
7 172 (1984). In Robins v. State, 106 Nev. 611, 623 (1990), the court upheld the trial judge's
8 decision to allow autopsy photographs of a badly beaten little girl. The court held:

9 We have reviewed the challenged photographs and although they
10 are indeed graphic and troubling to human sensibility, they were
11 not prejudicial. The photographs depicted exactly what Dr.
12 Hollander described and were undoubtedly helpful in assisting the
13 jury to understand the nature and the gravity of the wounds
14 inflicted upon Brittany by Robins. The trial court did not abuse
15 its discretion; the photographs were properly admitted into
16 evidence.

17 In the instant case, Defendant claims that the admission of autopsy photos depicting
18 Victoria's bruised body should be excluded because they are highly prejudicial and there is
19 no nexus between the bruises on her body and the cause of Victoria's death. True enough,
20 the cause of Victoria's death was a stab wound to the chest. 3/18/10 TT 99. However,
21 Defendant's claim that Dr. Benjamin "admitted that none of the bruises could be linked to
22 the incident leading to [Victoria]'s death" is a gross misstatement of Dr. Benjamin's
23 testimony.

24 At trial, Dr. Benjamin specifically testified that blunt force trauma caused the bruising to
25 Victoria's body and that the bruises did, in fact, contribute to her death. 3/18/10 TT 98-105.
26 Further, Dr. Benjamin's testimony is supported by the Autopsy Report that states "cutaneous
27 blunt trauma" as a significant condition related to Victoria's death. Based on Dr. Benjamin's
28 testimony and findings, the autopsy photos depicting the bruising on Victoria's body are
relevant to the cause of death and admissible under NRS 48.015. Undoubtedly, the photos
have probative value as they will be "helpful in assisting the jury to understand the nature
and the gravity" of the blunt force trauma which caused the bruising. See Robins, 106 Nev.
At 623.

1 Also, based on witness testimony, it is the State's theory that before Defendant stabbed
2 Victoria to death, he beat her for almost an hour. Clearly, the photos have *significant*
3 probative value in establishing Defendant's motive, intent and state of mind prior to stabbing
4 Victoria to death. With the burden resting on the State to prove malice aforethought beyond
5 a reasonable doubt, the probative value of the photos outweigh any danger of unfair
6 prejudice to the Defendant. NRS 48.035(1). Therefore, there is no basis to exclude the
7 photos under Nevada law.

8 **F. The State concurs that reference to racial slurs made by Defendant to an African**
9 **American Metro Officer after he murdered Victoria are irrelevant to this case.**

10 The State will admonish the officer to make no reference to the Defendant's inappropriate
11 comments to the officer. However, should the statements become relevant and/or otherwise
12 admissible to impeach and/or to rebut evidence presented during the Defendant's case-in-
13 chief or become relevant as a result of cross-examination; the State will seek the appropriate
14 ruling.

15 **G. The hearsay statement, "baby, he done killed that girl," made by Charles Toliver**
16 **to his wife on the night of Victoria's murder is admissible under Nevada law.**

17 The statement Defendant seeks to exclude is admissible as an exception to hearsay. NRS
18 51.095 provides, statements relating to a startling event or condition made while the declarant
19 was under the stress of excitement caused by the event or condition is not inadmissible under
20 the hearsay rule. Additionally, NRS 51.085 provides, a statement describing or explaining
21 an event or condition made while the declarant was perceiving the event or condition, or
22 immediately thereafter, is not inadmissible under the hearsay rule.

23 Charles Toliver and his wife, Joyce, lived in the apartment directly below Defendant and
24 Victoria Whitmarsh. On the night of Victoria's murder Charles Toliver was angry when
25 woken up by loud banging noises and crying coming from Defendant's apartment. See
26 generally, 3/16/10 TT pp 229-245. After about ten to fifteen minutes, Charles left his
27 apartment with the intent to confront the Defendant about the noise. Id.
28

1 Upon approaching the Defendant's apartment, Charles noticed the door was wide open
2 and observed Defendant bent over Victoria's bloody body. Id. Charles immediately yelled
3 to Defendant, "what the hell have you done." Id. Defendant did not respond but instead,
4 gave Charles a crazy look that scared him. Id. Charles immediately yelled to another
5 neighbor to call for help and then returned to his apartment and told his wife Joyce, "baby,
6 he done killed that girl." 3/16/10 TT 224.

7 The State maintains that Charles was under the stress of excitement of a startling event
8 when he made the statement to Joyce. Further, when Charles made the statement, he was
9 describing an event/condition immediately after he perceived the event. So long as a proper
10 foundation is laid during the direct examination of Joyce Toliver, the State can properly
11 elicit the statement pursuant to either NRS 51.095 or NRS 51.085. Therefore, the State
12 requests that this Court reserve its ruling as to this issue until such time as an objection by
13 the Defendant is appropriate.

14 **H. Detective Wildemann is qualified to give his opinion as to the nature and/or cause of**
15 **injury to Defendant's hand as a Lay Witness or in the alternative as an Expert Witness.**

16 NRS 50.265 provides, in pertinent part: if a witness is not testifying as an expert, the
17 witness's testimony in the form of opinions or inferences is limited to those opinions or
18 inferences which are: 1) rationally based on the perception of the witness; and 2) helpful to
19 a clear understanding of the testimony of the witness or the determination of a fact in issue.
20 During Defendant's jury trial, Detective Wildemann testified that, in his opinion, the injury
21 on Defendant's hand was consistent with injuries present on others suspected of murder with
22 use of a knife. Certainly, his testimony concerns the "determination of a fact in issue."

23 Detective Wildemann has been with the Las Vegas Metropolitan Police Department
24 for 22 ½ yrs. For the past 8 ½ yrs, Detective Wildemann has been assigned to Homicide and
25 has worked over 200 homicide cases with 25% of those cases involving stabbings. It would
26 stand to reason then, that Detective Wildemann's opinion, as to the nature of Defendant's
27 injury, was "rationally based on his perception" of the injury. Therefore, The State
28

1 maintains that Detective Wildemann's testimony was proper opinion testimony by a lay
2 witness.

3 However, out of an abundance of caution, the State has noticed Detective Wildemann
4 as an expert witness to testify as to his opinion regarding the nature of injury to Defendant's
5 hand. See NRS 50.275 (a witness qualified as an expert by special knowledge, skill,
6 experience, training or education may testify to matters within the scope of such knowledge);
7 See also State v. Macumber, 112 Ariz. 569, 544 P.2d 1084 (1976), cert. denied, 439 U.S.
8 1006, 99 S.Ct. 621, 58 L.Ed.2d 683 (1978)(an expert need not be a professional but may be a
9 lay person who has special knowledge superior to men in general through actual experience
10 or careful study). In light of Detective Wildemann's experience as a homicide detective he
11 has the special knowledge that would qualify him to give expert opinion testimony.

12 **H. The State does not intend to introduce evidence of a prior trial, conviction or**
13 **reversal occurred in this case.**

14 It is the practice of the State, if referring to previous testimony during a prior Jury
15 Trial to characterize the testimony as that of a "prior proceeding."

16
17 DATED this _____ day of August, 2010.

18 Respectfully submitted,

19 DAVID ROGER
20 Clark County District Attorney
21 Nevada Bar #002781

22
23 BY /s/ STEPHANIE A. GRAHAM

24 Stephanie A. Graham
25 Deputy District Attorney
26 Nevada Bar #0010058
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PATRICIA PALMS Deputy Special Public
Defender
FAX #455-6273

sg/da

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1 OPP

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10 (702) 671-2500
11 Attorney for Plaintiff

FILED

AUG 16 2010

Ann L. Smith
CLERK OF COURT

12 DISTRICT COURT
13 CLARK COUNTY, NEVADA

08C250630
OPPS
Opposition
884523



14 THE STATE OF NEVADA,)

15 Plaintiff,

CASE NO: C250630

16 -vs-

DEPT NO: XVII

17 Brian Kerry O'Keefe,
18 #1447732

19 Defendant.

20 STATE'S OPPOSITION TO DEFENDANT'S MOTION TO ADMIT EVIDENCE
21 PERTAINING TO THE ALLEGED VICTIM'S MENTAL HEALTH CONDITION
22 AND HISTORY, INCLUDING PRIOR SUICIDE ATTEMPTS, ANGER
23 OUTBURSTS, ANGER MANAGEMENT THERAPY, SELF-MUTILATION AND
24 ERRATIC BEHAVIOR.

25 DATE OF HEARING: August 17th, 2010
26 TIME OF HEARING: 8:15 AM

27 COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through
28 Stephanie A. Graham, Deputy District Attorney, and hereby submits the attached Points and
Authorities in Opposition to Defendant's Motion to Admit Evidence and History, Including
Prior Suicide Attempts, Anger Outbursts, Anger Management Therapy, Self-Mutilations and
Erratic Behavior.

This opposition is made and based upon all the papers and pleadings on file herein,
the attached points and authorities in support hereof, and oral argument at the time of
hearing, if deemed necessary by this Honorable Court.

///

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POINTS AND AUTHORITIES

Defendant's Request to Admit the Victim's Medical Records Must be Denied Because Admission of the Information Contained Within the Records Would Constitute the Improper Use of Character Evidence Under Nevada Law.

According to Defendant's theory of the case, the victim, Victoria Whitmarsh, was the initial aggressor and that her death was a result of self-defense and/or accident. Because there is nothing to support his theory other than his self-serving testimony, Defendant requests this Court to allow him to corroborate his theory with Victoria's mental health records. Specifically, Defendant requests that an expert be allowed to offer opinion testimony summarizing Victoria's mental health history and its manifestations based on the content of the records. Remarkably, Defendant indicates that he intends to testify that he has personal knowledge of the specific instances contained in Victoria's mental health records documenting her "prior acts of violence, including violence to herself by cutting/overdosing and her anger problems" even though he was not present when the incidents occurred. Defendant claims the "specific acts" mentioned in the records, corroborate that his only culpability in Victoria's death was simply as an "innocent response to her aggression."

This Court previously ruled that Defendant could certainly testify that Victoria was the initial aggressor pursuant to NRS 48.045 and State v. Daniel, 119 Nev. 498, 78 P.3d 890 (2003). However, this Court specifically ruled that Daniel precluded the use of Victoria's mental health records to corroborate his theory of the case, either through his own testimony or that of an expert (stating the proffered evidence contained within the records did not amount to specific acts of violence towards *another person*). This Court properly excluded Victoria's mental health records during Defendant's first trial; there is no valid legal basis for their admission now.

As a general rule, character evidence is inadmissible to show that a person acted in conformity with their character. NRS 48.045(1). However, evidence that the victim committed specific acts of violence *against others* is admissible, when a defendant raises a claim of self-defense. Daniel v. State, 119 Nev. 498. Evidence of specific acts of violence

1 *against others* can be presented through the defendant's own testimony, through cross-
2 examination of witnesses and with extrinsic evidence of a victim's specific conduct known
3 to the defendant. Id. at 516.

4 In State v. Daniel, the defendant shot four men, two were killed but two survived their
5 injuries. 119 Nev. 504. The defendant was acquainted with all four victims. Id. Initially,
6 defendant denied any involvement in the shootings but ultimately changed his story and
7 claimed he shot the victims in self-defense. Daniel at 506.

8 During his trial, the defendant testified and admitted to the shootings but claimed he
9 acted in self-defense. Id. Further, the defendant testified that three of the victims had
10 reputations for violence and was able to describe specific acts of violence by the victims
11 against others he had personal knowledge of. Id. Additionally, several witnesses testified
12 for the defense, including two LVMPD Detectives, who all testified as to the violent
13 reputation of at least two of the victims. Id.

14 However, the court precluded the defendant from presenting extrinsic evidence,
15 specifically, prior Judgements of Convictions of the victims even though Defendant had
16 personal knowledge of the facts surrounding those conviction. Daniel, at 515. Additionally,
17 the court prevented the defendant from questioning the surviving victims about their specific
18 acts of violence against others during cross-examination. Daniels, at 516. The the court
19 also denied the defendant's request to call witnesses on his behalf to testify to being robbed
20 or assaulted by the victims. Id. Ultimately, the jury rejected the defendant's claim of self-
21 defense and was convicted. Daniel, at 506.

22 The defendant appealed his conviction on multiple grounds. Id. at 507. On appeal,
23 the defendant argued that the District Court abused its discretion by precluding extrinsic
24 evidence offered to corroborate the defendant's testimony as it was relevant to his state of
25 mind when he shot the victims. Daniel, at 515-16. The Nevada Supreme Court agreed and
26 concluded that the evidence was relevant to the defendant's state of mind as to whether he
27 had a reasonable belief that use of force was necessary. Id. at 516. The Court concluded that
28 where a defendant claims he acted in self defense, extrinsic evidence of a victim's specific

1 conduct known to the defendant in the form of prior convictions or in the form of
2 corroborating witness testimony evidencing specific acts of vioemce, is admissible. Daniel at
3 516.

4 In the instant case, Defendant relies on Daniel for the proposition that Victoria's
5 mental health records (containing information regarding prior suicide attempts, anger
6 outbursts, erratic behavior, "cutting" and that her treatment plan included anger
7 management) are admissible as extrinsic evidence to corroborate his claim of self-defense.
8 Defendant's reliance on Daniels is misplaced. The victims in Daniel, had violent reputations
9 for shooting and assaulting others. Additionally, the victims in Daniel had significant
10 criminal histories to support their reputation as evidenced by the fact that two LVMPD
11 Detectives testified as to their violent reputation *against others*. There is no evidence to
12 suggest that Victoria had such a reputation for violence *against others*.

13 Victoria's mental health records do not demonstrate that she had a reputation for
14 violence *against others*; the records are replete of any mention of specific acts of violence
15 *against others*. The fact that the records contain information that Victoria had anger
16 outbursts, was undergoing anger management counseling and had attempted suicide on
17 several occasions does not support, in any way, Defendant's claim that she was dangerous or
18 violent *to others*.

19 Additionally, Defendant's reliance on a trio of cases, all from outside this jurisdiction,
20 in support of his argument to admit the records is without merit. See State v. Stanley, 37 F.
21 3d 85, 90 (N.M. 2001); People v. Salcido, 246 Cal. App. 2d 450, 458-60 (Cal. App. 5th Dist.
22 1966); State v. Jaeger, 973 P.2d 404, 407-08 (Utah 1999). In each of those cases, the
23 defendants sought to introduce evidence of the victim's past suicide attempt history, because
24 the defense in each of those trials was that the victims *were not murdered, but rather*
25 *committed suicide*. See Stanley, 37 F.3d at 90; Salcido, 246 Cal. App 2d at 458-60; Jaeger,
26 973 P.2d at 407-08. Consequently, the courts in those cases found *where the defense of*
27 *suicide* is being raised such evidence is probative because it supports the defendant's theory
28 that the victim died as a result of a successful suicide attempt. See Stanley, 37 F.3d at 90;

1 Salcido, 246 Cal. App. 2d at 458-60; Jaeger, 973 P.2d at 407-08.

2 Here, Defendant does not claim that Victoria committed suicide. Instead, he claims
3 that he killed Victoria in self-defense. The factual circumstances and legal defenses raised in
4 Stanley, Salcido and Jaeger are entirely different than the facts of this case. The issue in this
5 case is not whether it was murder *or suicide*, but rather murder or *self defense*. This trio of
6 decisions, consequently, is irrelevant. There is no legal authority to suggest suicidal
7 tendencies are tantamount to having a propensity for violence *against others*.

8 Based on the fact that Victoria's mental health history does not document a single
9 specific act of violence *against others*, the State fails to see how the records provide any
10 corroborative evidence establishing that Victoria was the initial aggressor.

11 Additionally, the State takes issue with Defendant's claim that during the previous
12 trial the State admitted character evidence of Victoria's reputation of peacefulness.
13 Defendant's claim is simply belied by the record.

14 During the State's case in chief, Cheryl Morris testified as to statements Defendant
15 made to her regarding Victoria. Cheryl Morris asserted that Defendant told her that he liked
16 Victoria because she was "meek" and "submissive." The testimony the State elicited from
17 Cheryl Morris regarding Victoria's meek and submissive nature was not character evidence.
18 Rather, it was the Defendant's own statement offered by party opponent. Given the fact that
19 Cheryl Morris was not acquainted with Victoria, it would be improper to allow Defendant to
20 question Cheryl Morris with regard to Victoria's character without first seeking judicial
21 authorization as required by NRS 48.045(2)(Limiting the admissibility of character evidence
22 to relevant acts, acts proven by clear and convincing evidence, and proving that the evidence
23 sought to be admitted is more probative than prejudicial).

24 ///

25 ///

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27 ///

28 ///

1 For all the foregoing reasons, Defendant's request to admit Victoria's mental health
2 records should be denied.

3
4
5
6 DATED this _____ day of August, 2010.

7 Respectfully submitted,

8 DAVID ROGER
9 Clark County District Attorney
Nevada Bar #002781

10
11
12 BY /s/ STEPHANIE A. GRAHAM

13 Stephanie A. Graham
14 Deputy District Attorney
Nevada Bar #0010058

15 CERTIFICATE OF FACSIMILE TRANSMISSION

16
17 I hereby certify that service of STATE'S OPPOSITION TO DEFENDANT'S
18 MOTION TO ADMIT EVIDENCE PERTAINING TO THE ALLEGED VICTIM'S
19 MENTAL HEALTH CONDITION AND HISTORY, INCLUDING PRIOR SUICIDE
20 ATTEMPTS, ANGER OUTBURSTS, ANGER MANAGEMENT THERAPY, SELF-
21 MUTILATION AND ERRATIC BEHAVIOR, was made this _____ day of August, 2010,
22 by facsimile transmission to:

23
24 PATRICIA PALMS Deputy Special Public Defender
FAX #455-6273

25
26 /s/ T. Schessler
Secretary for the District Attorney's Office


CLERK OF THE COURT

08C250630
noew
Notice of Expert Witnesses
901408



DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

-vs-

BRIAN O'KEEFE,
#1447732

Defendant.

CASE NO: C250630

DEPT NO: II

SUPPLEMENTAL NOTICE OF EXPERT WITNESSES
[NRS 174.234(2)]

TO: BRIAN O'KEEFE, Defendant; and

TO: PATRICA PALM ESQ, Counsel of Record;

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the STATE OF
NEVADA intends to call the following witnesses in its case in chief:

1.) DR. TIMOTHY DUTRA and/or DESIGNEE: Will testify regarding the nature of
victim's injuries.

The substance of each expert witness' testimony and a copy of all reports made by or
at the direction of the expert witness has been provided in discovery.

///

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///

1 A copy of each expert witness' curriculum vitae, if available, is attached hereto.
2
3

4 BY


DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

7
8 CERTIFICATE OF FACSIMILE TRANSMISSION

9
10 I hereby certify that service of SUPPLEMENTAL NOTICE OF EXPERT
11 WITNESSES, was made this _____ day of August, 2010, by facsimile transmission to:

12 PATRICIA PALM ESQ
13 FAX #455-6273
14

15
16 /s/ T. Schessler

17 Secretary for the District Attorney's
18 Office
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Curriculum Vitae

Timothy Franklin Dutra, M.D., M.S., Ph.D.

Personal Data:

Permanent Address: 14689 Fieldstone Ct.
Saratoga, CA 95070
Cellphone: (314) 610-6641
E-Mail: tdmdphd@yahoo.com
Languages: English & Spanish

Board Certifications:

Forensic Pathology
ABP Diplomate and certified, September 9, 2009

Blood Banking and Transfusion Medicine
ABP Diplomate and certified, September 9, 2005

Anatomic and Clinical Pathology
ABP Diplomate and certified, November 11, 1998

Most Recent Fellowship:

Fellowship, Forensic Pathology
St. Louis University
(A.C.G.M.E. accredited: 10/1/08 - 9/30/09)
Program Director: Jane W. Turner, M.D., Ph.D.
St. Louis City Medical Examiner's Office
1300 Clark Avenue
St. Louis, MO 63103

Recent Colleague:

Visiting Colleague, Forensic Pathology
(10/5/09 - 10/31/09)
Servicio Medico Forense
Ninos Heroes #102
Col. Doctores, Del. Cuauhtemoc
Mexico, D.F. 06720
Director: Dr. Felipe Takajashi

Recent Teaching:

Instructor: Physiology Laboratory
Monterey Peninsula College
980 Fremont Street
Monterey, CA 93940

Course Coordinator: Gary Fuller, M.S.
Chair, Biological Sciences

Recent Research:

Co-Investigator: "Marrow Tissue Cultivation ex vivo
in vitro for Blood Cell Collection (animal cell model)"
LABioMed Research Institute
1124 Carson St.
Torrance, CA 90502

Principal Investigator: Samuel French, M.D.
Chief, Anatomic Pathology
Harbor-UCLA Medical Center

Previous Fellowship:

Fellowship, Blood Bank and Transfusion Medicine
University of Wisconsin
(One year, A.C.G.M.E. accredited: 8/1/04-7/31/05)
Director: James S. Malter, M.D.
University of Wisconsin Hospital
800 Highland Avenue
Madison, WI 53792-2472

Previous Pathology Practice:

Post-Certification Pathology Practice (1999 - 2003)
Physician Specialist, Anatomic and Clinical Pathology,
including gross and microscopic surgical pathology,
aspiration cytopathology and bone marrow pathology.
Section Chief of Clinical and Special Chemistry,
Blood Bank and Transfusion Medicine acting Chief,
during absences of BB & TM Section Chief.
Pathology Department
Martin Luther King, Jr. Hospital
12021 S. Wilmington Ave.
Los Angeles, CA 90059

Locum Tenens Practice:

Locum tenens Pathology Practice (9/00, 9/01, 9/02, & 9/03)
One month locum tenens for each of four years, as Acting
Director for a solo practice Pathology Department, including
coverage of surgical pathology and clinical laboratory.
Pathology Department
Orthopaedic Hospital
2400 S. Flower St.
Los Angeles, CA 90007

Current Licensure:

Physician and Surgeon, California, renewal 3/2011
Physician and Surgeon (Temporary Training License),
Missouri, renewal 7/2010
Practitioner, D.E.A., U.S., renewal 7/2011

Educational Degrees:

University: University of California at Berkeley,
B.A. in Chemistry and Zoology, 1968
Medical School: University of Southern California,
M.D., 1972
Graduate School: University of Southern California,
M.S. in Anatomy and Cell Biology, 1986
Graduate School: University of California at Los Angeles,
Ph.D. in Anatomy and Cell Biology, 1983

Professional Societies:

Fellow, National Association of Medical Examiners, 2009 -
Fellow, College of American Pathologists, 1999 -
Fellow, American Society of Clinical Pathologists, 1999 -
Member, American Association
for the Advancement of Science, 1994 -

Professional Training/Practice Chronology:

Internship: Cottage Hospital (Santa Barbara, CA),
rotating internship, 1972-73

Residency: Cottage Hospital (Santa Barbara, CA),
first year, Pathology, 1973-74

General Practice: Santa Barbara, CA, 1974-77. General admission privileges for Cottage and Goleta Valley Hospitals.

General Practice: King City, CA, 1977-78. General admission privileges for George L. Mee Memorial Hospital.

Residency: Highland/Alameda County Hospital (Oakland, CA),
second and third years, General Surgery, 1978-80

Residency: Duke University Medical Center (Durham, NC),
first and second years, Orthopaedics, 1980-82

Residency: Los Angeles County/U.S.C. Medical Center,
third year, Orthopaedics, 1982-83

Graduate School: University of Southern California School of Medicine,
Department of Anatomy and Cell Biology, 1984-86

Graduate School: University of California at Los Angeles School of Medicine,
Department of Anatomy and Cell Biology, 1987-93

Residency: Harbor-U.C.L.A. Medical Center (Torrance, CA),
second through fifth years, Anatomic and Clinical Pathology, 1994-9

Fellowship: Orthopaedic Hospital (Los Angeles, CA), six months of Fellowship, Bone and Soft Tissue Pathology, 1998-99

Pathology Practice: Los Angeles, CA, 1999-2003. Anatomic and Clinical Pathology privileges at King-Drew Medical Center

Fellowship: University of Wisconsin (Madison, WI), one year Fellowship, Blood Banking and Transfusion Medicine, 2004-05

Research Scientist: LABioMed Research Institute, 2005-07. Co-investigator: "Marrow stromal fibroblastic cell cultivation in vitro on de-cellularized bone marrow extracellular matrix"

Instructor: Physiology Laboratory, Fall and Spring semesters, 2007-08
Monterey Peninsula College (Monterey, CA)

Fellowship: St. Louis City Medical Examiner's Office (St. Louis, MO),
one year Fellowship, Forensic Pathology, 2008-09

Teaching Experience:

Teaching Assistant: Anatomy Dissection Laboratory, Fall semester, 1985
University of Southern California School of Medicine
Teaching Assistant: Anatomy Dissection Laboratory, Fall semesters, 1987-88
University of California at Los Angeles School of Medicine
Assistant Lecturer: "Head, Neck, & Dental Embryology", Fall semesters, 1990-91
University of California at Los Angeles School of Medicine
Staff Pathologist: Routinely presented histopathology of cases for review
at the weekly hospital Tumor Board Conferences
Martin Luther King, Jr. Hospital, Los Angeles, CA 1999-03
Staff Pathologist: Routinely presented histopathology case reviews at
subspecialty surgical Resident training conferences
King-Drew Medical Center, Los Angeles, CA 1999-2003
Lecturer: "Blood Banking and Transfusion Medicine", Winter, 2005
University of Wisconsin School of Medical Technology
Instructor: Physiology Laboratory, Fall and Spring semesters, 2007-08
Monterey Peninsula College

Publications:

Dutra, T.F. and Bernard, G.W.: "Size-selective Comparison of Fetal Calvarial
versus Adult Marrow Osteogenic Colony-forming Entities", *Anatomical Record*;
239: 1 - 8; 1994

Dutra, T.F. and Bernard, G.W.: "Post-fracture stimulation of *in vitro* osteogenesis
is not systemic", *International Journal of Oral Biology*; 23: 213 - 217; 1998

Dutra, T. and French, S.: "Marrow stromal fibroblastic cell cultivation *in vitro* on
de-cellularized bone marrow extracellular matrix"; manuscript published in
Experimental and Molecular Pathology on 9/22/2009

Presentations:

Dutra, T.F.: "Cultured Human Circulating Fibrocytes Express CD34 and Endo-
thelial Markers"; Hematopoietic Stem Cell Transplantation (Sixth International
Symposium); San Diego, CA; 4/18-4/18/88

Dutra, T.F.: "Flow Cytogenetics"; Clinical Cytogenetics Program, California State
University at Dominguez Hills; 4/25/01

Dutra, T.F. and Graham, M.A.: Poster presentation: "Big People, Big Hearts:
histochemical and immunohistochemical stain comparisons of hypertrophic heart
sections from morbidly obese decedents, compared with heart sections from age
matched controls"; 43rd Annual Meeting of the National Association of Medical
Examiners; 9/11-9/16/09

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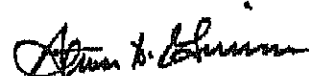
References:

(continued)

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Previously at:
Orthopaedic Hospital
2400 S. Flower St.
Los Angeles, CA 90007

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CLERK OF THE COURT

1 **OPP**

2 **DAVID ROGER**
3 **Clark County District Attorney**
4 **Nevada Bar #002781**
5 **Stephanie A. Graham**
6 **Deputy District Attorney**
7 **Nevada Bar #0010058**
8 **200 Lewis Avenue**
9 **Las Vegas, Nevada 89155-2212**
10 **(702) 671-2500**
11 **Attorney for Plaintiff**

7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**

9 **THE STATE OF NEVADA,**

10 **Plaintiff,**

11 **-vs-**

12 **Brian Kerry O'Keefe,**
13 **#1447732**

14 **Defendant.**

CASE NO: C250630

DEPT NO: XVII

15 **STATE'S OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS HIS**
16 **STATEMENTS TO POLICE, OR, ALTERNATIVELY, TO PRECLUDE THE**
17 **STATE FROM INTRODUCING PORTIONS OF HIS INTERROGATION**

18 **DATE OF HEARING: August 19th, 2010**
19 **TIME OF HEARING: 8:15 AM**

20 **COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through**
21 **Stephanic A. Graham, Deputy District Attorney, and hereby submits the attached Points and**
22 **Authorities in Response to Defendant's Motion to Suppress his Statements to Police, or,**
23 **Alternatively to Preclude The State From Introducing Portions of His Interrogation.**

24 **This response is made and based upon all the papers and pleadings on file herein, the**
25 **attached points and authorities in support hereof, and oral argument at the time of hearing, if**
26 **deemed necessary by this Honorable Court.**

27 **///**

28 **///**

///

1 FACTS

2 Facts relevant to the issues are set forth in the argument below.

3 POINTS AND AUTHORITIES

4 The Statements Defendant made to Officer Ballejos in response to Officer Ballejos'
5 questions of Defendant at the crime scene were not the product of a custodial
6 interrogation under *Miranda* as the questioning was not intended to elicit incriminating
7 statements.

8 On November 06, 2008, Officer Ballejos was dispatched to Defendant's apartment in
9 response to a 911 call. The person reporting claimed someone had been stabbed and was
10 bleeding. Upon arriving at the scene, Ballejos joined other officers and made entry into
11 Defendant's living room.

12 All of the lights in the apartment were off except for the light in the bedroom. At this
13 point, Ballejos was able to observe an unknown female lying on the floor, Defendant lying
14 next to the female and white sheets covered in blood.

15 Officers repeatedly issued verbal commands directing Defendant to show his hands
16 and to exit the apartment. At this point, Officers were unaware of the medical condition of
17 the unknown female. Defendant was uncooperative and refused to exit the apartment.

18 Per policy, emergency responders were unable to assist the female until the Defendant was
19 removed, so out of concern for the victim's condition, Ballejos deployed his tazer. Although
20 one prong of the tazer made contact with Defendant, he remained uncooperative and was
21 tazed again. At this point, Officers were able to subdue Defendant, place him in handcuffs
22 and remove him from the apartment. With Defendant removed from the apartment, Medical
23 Response was able to make entry to assist the unknown female.

24 Immediately after removing Defendant from the apartment, and completely unaware
25 of the unknown females condition, Officer Ballejos asked Defendant his name and the
26 female's name. Defendant did not respond to Ballejos questions. Ballejos then explained to
27 Defendant that he needed information regarding the birthdates, blood-types, etc, so the
28 paramedics could render treatment not only to the unknown female but to Defendant as well.

Initially, instead of answering Ballejos' questions, Defendant began to cry a little.

1 Defendant then suddenly stopped crying and spontaneously stated "you are mad at me, aren't
2 you?" Ballejos responded by asking Defendant what he meant. Defendant then
3 spontaneously stated "I didn't do this, man, she tried to stab me." Defendant was not
4 advised of his Miranda rights prior to the questions asked by Ballejos.

5 Under Miranda, a rights advisement is required when a suspect is subjected to a
6 custodial interrogation. Archanian v. State, 122 Nev. 1019, 145 P.3d 1008 (2006). citing
7 Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). "[A]n individual is
8 deemed 'in custody' where there has been a formal arrest, or where there has been a restraint
9 on freedom of movement of the degree associated with a formal arrest so that a reasonable
10 person would not feel free to leave." State v. Taylor, 114 Nev. 1071, 1082, 968 P.2d 315,
11 323 (1998); see Rosky v. State, 121 Nev. 184, 191, 111 P.3d 690, 695 (2005). An
12 interrogation for Miranda purposes "refers not only to express questioning, but also to any
13 words or actions on the part of the police (other than those normally attendant to arrest and
14 custody) that the police should know are reasonably likely to elicit an incriminating response
15 from the suspect." Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297
16 (1980) (footnote omitted).

17 Defendant does not argue that his statements to Officer Ballejos were involuntary. He
18 simply argues that because he was in handcuffs when Officer Ballejos asked him a few brief
19 questions, he was subjected to "custodial interrogation." True enough, Defendant was in
20 handcuffs. Defendant was combative and non-cooperative at the scene. However, asking
21 Defendant his name, date of birth and blood type were simply not questions designed to
22 elicit an incriminating response. Likewise, the question posed to Defendant regarding his
23 relationship with Victoria was nothing other than a qualifying question to determine if
24 Defendant was able to provide her name, date of birth, blood type, etc, so as to provide the
25 necessary information to medical responders on the scene.

26 Despite the fact that Defendant's argument is unfounded based on the absence of
27 "custodial interrogation," Defendant expands his argument in support of suppression by
28 claiming that the questions Ballejos asked had nothing to do with "booking needs" and there

1 was no "exigency" present to justify Ballejos' questions. True enough, the questions were
2 not asked due to "booking needs," however, the fact that an unknown female was lying in
3 Defendant's apartment covered in blood tends to suggest an exigent situation. Under the
4 circumstances, Ballejos' questions were proper, despite the lack of Miranda warning, under
5 the "public safety exception." New York v. Quarles, 467 U.S. 649, 104 S. Ct. 2626 (1984).

6 In Quarles, the Supreme Court recognized a public safety exception to the Miranda
7 requirement, holding that Miranda need not "be applied in all its rigor to a situation in which
8 police officers ask questions reasonably prompted by a concern for the public safety." 467
9 U.S. at 656, 104 S.Ct. at 2632. The Court distinguished between "questions necessary to
10 secure [the police's] own safety or the safety of the public and questions designed solely to
11 elicit testimonial evidence from a suspect." 467 U.S. at 659, 104 S.Ct. at 2633. The Court
12 concluded that voluntary responses to the first type of questions could be admitted, despite
13 the lack of Miranda warnings. See Quarles, 467 U.S. at 657-60, 104 S.Ct. at 2632-33. See
14 also, State v. Ramirez, 178 Ariz. 116, 871 P.2d 237 (1994) (finding that the public safety
15 exception applies to situations where Officer questioning is geared toward eliciting
16 information to determine the need to render assistance to suspected victim of a crime).

17 In State v. Ramirez, officers were dispatched in response to a 911 call where the
18 person reporting indicated that they were awakened by banging, screaming and running
19 noises coming from the apartment below. 871 P.2d 237, 240. Further, the person reporting
20 indicated that they heard a female scream "'Help' me or something like that" and one last

21 "ugly scream." Id. Additionally, the 911 caller reported that after hearing the screams he ran
22 down to the apartment, knocked on the door but received no response. Id. After receiving no
23 response, he attempted to kick down the door but was unsuccessful. Id. He then ran to a
24 window at the back of the apartment and looked into the window of the bedroom, noticed a
25 lamp on the floor and observed a shadow moving in the hallway near the bathroom. Id. He
26 then dialed 911. Id.

27 Officers responded 2 - 3 minutes after receiving the 911 call. Ramirez, 871 P.2 at
28 240. Officers knocked and announced their presence, but no-one responded. Id. Officers

1 went to the back of the apartment looked into the window and observed blood on the
2 window frame and latch. Id. Officers then observed a person enter the bedroom. Id. Officers
3 announced their presence and yelled to Defendant to go the front door. Defendant "grunted"
4 and left the bedroom. Id.

5 Officers remained at the bedroom window and observed Defendant return to the
6 bedroom. Ramirez, 871 P.2 at 240. Once again, officers instructed defendant to go to the
7 front door and unlock it. Id. Defendant did not comply with officers verbal commands. Id.
8 Since Defendant was uncooperative, Officers obtained a pass-key to the apartment from the
9 manager of the apartment complex, returned to the apartment and once again knocked on the
10 door, announced their presence. Ramirez, 871 P.2 at 241. Again, Defendant was instructed to
11 open the door. Id. With no response, Officers used the pass-key provided to them and
12 unlocked the door. Id.

13 Upon entering the apartment officers immediately observed a knife with a bloody
14 handle lying near the front door. Ramirez, 871 P.2 at 240. As they approached the living
15 room officers observed a body lying on the floor. Id. Officers then shouted for Defendant to
16 put his hands on the back of his head. Id. At this point, Officers were able to physically
17 remove him from the apartment. Id. After removing Defendant from the apartment, he was
18 placed in an arm-bar and forced to kneel in the grass a few feet from the front door. Id.
19 Without informing defendant of his Miranda Rights, officers asked Defendant three
20 questions:

- 21 1. "What was going on?" to which Defendant responded "we had a big fight."
- 22 2. "Who else was inside?" to which Defendant replied "My girlfriend and her daughter."
- 23 3. If "anyone was hurt" to which Defendant responded "Yeah, they're hurt pretty bad. We're
24 all hurt pretty bad."

25 Ramirez, 871 P.2 at 244-455.

26 Prior to trial, Defendant moved to suppress the statements because the statements
27 were obtained in violation of his Miranda rights. Id. at 244. In denying, Defendant's motion,
28 the trial court ruled the statements were voluntary... they were not obtained in violation of

1 the Defendant's Fifth and Sixth Amendment rights, and... they were obtained pursuant to
2 public safety concerns of the officers at the time, also concern for the opportunity to rescue
3 anybody that might still be in the apartment, and to protect themselves. Id at 244.

4 Ultimately, Defendant was convicted of two counts of First-Degree Murder. Id at 242.

5 On appeal, Defendant claimed the trial court erred by denying Defendant's motion to
6 suppress statements made in response the Officer's questions at the scene because the
7 questions asked were beyond the scope of the public safety exception recognized by the
8 Supreme Court in Quarles. Ramirez, 871 P.2 at 245.

9 In upholding the trial court's ruling, the Arizona Supreme Court found that although
10 Defendant was clearly in custody when he made the statements in response to officer's
11 questions, the statements were indeed admissible under the public safety exception to the
12 Miranda requirements. Id. The court determined that based on the circumstances when
13 officers arrived on the scene, they did not know what had occurred in the apartment, how
14 many people were involved or whether anyone other than the person lying in the front room
15 needed assistance. Id. The court reasoned that in this case, the officer's questions were
16 directed at discovering what the officers would encounter when they entered the apartment.
17 Id. The court concluded that because the questions were geared toward eliciting information
18 that officers needed to protect themselves and anyone else in the apartment, the statements
19 were admissible under the public safety exception to the Miranda requirements. . Ramirez,
20 871 P.2 at 245.

21 The facts in Ramirez are analogous to the facts in the instant case. When Officers
22 arrived at Defendant's apartment they faced a great deal of uncertainty as to what had
23 occurred. Officers observed an unknown female lying on the floor covered in blood. Officers
24 had a reasonable belief that the female was injured and required medical assistance. As in
25 Ramirez, the questions that Officer Ballejo asked Defendant were geared toward eliciting
26 information that Officers needed to assist the unknown female in the apartment. Therefore, it
27 is reasonable to conclude that the statements Defendant made in response to Officer
28 Ballejo's questions fall within the public safety exception to the Miranda requirements.

1 Additionally, Defendant requests his non-responsive, spontaneous statements to
2 Officer Ballejos be suppressed. Specifically, Defendant claims that the State should be
3 precluded from eliciting testimony from Officer Ballejos that Defendant spontaneously
4 uttered, "you guys are mad at me, aren't you?" However, "spontaneous" or "volunteered"
5 statements of a suspect in custody are admissible despite the absence of prior Miranda
6 warnings. State v. Billings, 84 Nev. 55, 436 P.2d 212 (1968) See also Miranda, 384 U.S. at
7 478, 86 S.Ct. at 1630. Furthermore, Defendant's spontaneous statement is not hearsay if it is
8 offered by the State as a "statement by party opponent." See NRS 51.035 (3)(a).

9 Lastly, Defendant seeks to preclude Officer Ballejos from testifying as to his
10 impressions of Defendant's demeanor during his questioning. There is absolutely no rational
11 or legal basis for this Court to exclude such testimony. NRS 50.265 provides, in pertinent
12 part, a laywitness may testify as to opinions rationally based his/her perception that is helpful
13 in the determination of a fact in issue. Officer Ballejos' opinions as Defendant's demeanor
14 are rationally based on his personal interaction and observation of Defendant at the scene of
15 the crime. With the burden on the State to prove malice aforethought beyond a reasonable
16 doubt, Defendant's demeanor is helpful to the determination of a fact in issue. Therefore, so
17 long as the proper foundation is laid, Ballejos' opinions are admissible.

18 **Defendant's Video/Audio Recorded Statement Conducted by Detective Wildemann was**
19 **Freely and Voluntarily Given and Should not be Suppressed.**

20 From the outset, it should be noted that during Defendant's jury trial, a redacted
21 version (shortening the time) of Defendant's Video/Audio recorded statement was admitted
22 into evidence, played for the jury in its entirety with NO objection by Defendant. 3/18/09 TT
23 133 (State's Exhibit 68 and 69). Interestingly, Defendant now asserts that his statements
24 must be suppressed.

25 Defendant does not argue that Detective Wildemann failed to advise Defendant of his
26 Miranda rights. Nor does Defendant claim that he did not acknowledge/understand his
27 Miranda his rights. Instead, Defendant argues that he was too intoxicated to knowingly and
28 voluntarily waive his Miranda rights and, as a result, his decision to speak with Detective

1 Wildermann was not the result of rational intellect or free will. Fortunately, the statement he
2 seeks to suppress was not only audio recorded but, video recorded as well. And, in this case,
3 *res ipsa loquitur*---"the thing speaks for itself."

4 **Miranda**

5 The prosecutor has the burden to prove that the waiver of a suspect's 5th Amendment
6 Miranda rights was voluntary, knowingly and intelligently made. This burden is on the
7 prosecution by preponderance of the evidence. Falcon v. State, 110 Nev. 530, 874 P.2d 772
8 (1994). This is generally accomplished by demonstrating to the court that the officer advised
9 the defendant of his Miranda rights and at the conclusion of the advisement asked the
10 suspect if he understood his rights. An affirmative response by the suspect normally satisfies
11 the knowingly and intelligent portion of the waiver.

12 The voluntariness prong is normally judged under a totality of the circumstances
13 existing at the time that the rights were read to the defendant. A waiver of rights need not be
14 expressed, i.e., the suspect need not say "I waive my Miranda rights" nor need the officer ask
15 the suspect "do you waive your Miranda rights". It is sufficient if the officer obtains an
16 affirmative response to the question whether the suspect understands the rights that were just
17 read to him. *See generally Tomarchio v. State*, 99 Nev. 572, 665 P.2d 804 (1983); North
18 Carolina v. Butler, 441 U.S. 369, 99 S.Ct. 1755 (1979) (defendant refused to sign the waiver
19 but agreed to talk to the officers. This was an adequate waiver according to the United
20 States Supreme Court). *See also Tague v. Louisiana*, 444 U.S. 469, 100 S.Ct. 652 (1980).
21 *See also, Connecticut v. Barrett*, 479 U.S. 523, 107 S.Ct. 828 (1987), wherein defendant
22 agrees to make oral, but declines written statement.

23 In Mendoza v. State, 122 Nev. 267, 130 P.2d 176 (2006), our Nevada Supreme Court
24 addressed the issue of an explicit waiver and held:

25 A valid waiver of rights under Miranda must be voluntary, knowing, and intelligent. See
26 Miranda, 384 U.S. at 444, 86 S.Ct. 1602; *see also Floyd*, 118 Nev. at 171, 42 P.3d at 259-60.
27 "A waiver is voluntary if, under the totality of the circumstances, the confession was the
28 product of a free and deliberate choice rather than coercion or improper inducement." U.S. v.

1 Doe, 155 F.3d 1070, 1074 (9th Cir.1998) (*citing* United States v. Pinion, 800 F.2d 976, 980
2 (9th Cir.1986)) A written or oral statement of waiver of the right to remain silent is not
3 invariably necessary. See North Carolina v. Butler, 441 U.S. 369, 373, 99 S.Ct. 1755, 60
4 L.Ed.2d 286 (1979). Rather, a waiver may be inferred from the actions and words of the
5 person interrogated. Id.

6 A detective read Mendoza his rights in Spanish, and Mendoza never expressed difficulty
7 understanding the nature of his rights or the content of the subsequent questioning. Further,
8 Mendoza never expressed a desire not to speak. A review of the totality of the
9 circumstances reveals that Mendoza voluntarily, knowingly, and intelligently waived his
10 Miranda rights. Given the wealth of evidence pointing to Mendoza's guilt, even if a Miranda
11 violation occurred, any error in admitting Mendoza's un-Mirandized statement is harmless
12 beyond a reasonable doubt. See Arizona v. Fulminante, 499 U.S. 279, 295-96, 111 S.Ct.
13 1246, 113 L.Ed.2d 302 (1991).

14 Id., 122 Nev. 267, 130 P.2d 176, 181-182.

15 In the instant case, it is clear from Defendant's video/ audio statement that Detective
16 Wildemann read Defendant his Miranda rights and Defendant acknowledged he understood
17 them. See Audio/ Video Recording. The question then remains; did he "knowingly and
18 voluntarily" waive his rights. The answer is yes!

19 Knowing and Voluntary

20 "A confession is admissible only if it is made freely and voluntarily, without
21 compulsion or inducement." Passama v. State, 103 Nev. 212, 213, 735 P.2d 321, 322 (1987)
22 (*citing* Franklin v. State, 96 Nev. 417, 610 P.2d 732 (1980). A confession is voluntary if it is
23 the product of a "rational intellect and a free will." Blackburn v. Alabama, 361 U.S. 199,
24 208, 80 S.Ct. 274, 280 (1960). "To determine the voluntariness of a confession, the court
25 must consider the effect of the totality of the circumstances on the will of the defendant.
26 (citation omitted) The question in each case is whether the defendant's will was overcome
27 when he confessed." Passama, 103 Nev. at 214, 735 P.2d at 323. In Passama, the Nevada
28 Supreme Court, *citing* Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041 (1973),
delineated the following factors to be considered when evaluating the voluntariness of a
confession:

1 the youth of the accused; his lack of education or his low
2 intelligence; the lack of any advice of constitutional rights; the
3 length of detention; the repeated and prolonged nature of
4 questioning; and the use of physical punishment such as the
5 deprivation of food or sleep.

6 Id. at 323.

7 Intoxication

8 Intoxication rarely renders a confession involuntary. See State v. Clark, 434 P.2d 636
9 (ariz. 1967); State v. Hall, 54 Nev. 213, 13 P.2d 624 (1932); Wallace v. State, 84 Nev. 603,
10 447 P.2d 30 (1968); Pickworth v. State, 95 Nev. 547, 553 P.2d 626 (1979). Instead, courts
11 look to the totality of the circumstances when determining whether a confession is
12 involuntary. Id.

13 The Nevada Supreme Court addressed the issue of the voluntariness of a confession
14 in the case of Chambers v. State, 113 Nev. 974, 944 P.2d 805 (1997). In that case the Court
15 upheld the voluntariness of the Defendant's confession even though at the time of giving the
16 confession the Defendant had a .28 blood alcohol, was in the hospital recovering from a stab
17 wound and was believed to have ingested methamphetamine or crack cocaine.

18 Prior to trial, Chambers filed a Motion to Suppress his post-Miranda statements to the
19 police claiming that his statements were not voluntarily given in light of the fact that he was
20 questioned for four hours after having been stabbed, that he was not well rested, and that he
21 was intoxicated. The District Court held that the confession was voluntary and this ruling
22 was upheld by the Nevada Supreme Court.

23 In addressing the voluntariness standard, the Court quoted at length from a previous
24 decision in Passama v. State, 103 Nev. 212 (1998), wherein the Court employed the totality
25 of the circumstances test. The Court stated, "In determining whether a confession is the
26 product of a free will, this Court employs a totality of the circumstances test; the Court must
27 consider the effect of the totality of the circumstances on the will of the Defendant, the
28 question in each case is whether the Defendant's will was overborne when he confessed.
Factors to be considered include; the youth of the accused; his lack of education or his low

1 intelligence; the lack of any advice of Constitutional Rights; the length of detention; the
2 repeated and prolonged nature of questioning; and the use of physical punishment such as
3 the deprivation of food or sleep." Id. at 214.

4 In the instant case, it is undisputed, Defendant had been drinking. Several witnesses
5 testified that he smelled heavily of alcohol and/or appeared to be intoxicated. However, the
6 totality of the circumstances establishes that he was not so intoxicated as to render his
7 statement involuntary.

8 **Totality of Circumstances surrounding the Interview**

9 In the instant case, the youth of Defendant is not an issue. Neither is his lack of
10 education or intelligence. Defendant was 41 yrs old when he murdered Victoria, He
11 graduated from high school and rose to the rank of Sergeant in the United State's Army. See
12 Defendant's Pre- Sentence Investigation Report on file with this Court. Further, Defendant
13 was intimately familiar with the criminal justice system as evidenced by his stealth criminal
14 record. Id. The length of the interview with Detective Wildemann was approximately 1 ½
15 hours in duration, not accounting for several breaks in the questioning. See State's Exhibits
16 68 and 69.

17 Additionally, Detective Wildemann was calm, patient and professional during the
18 questioning; Detective Wildemann did not threaten Defendant and certainly did not
19 physically punish him. Id. In addition, Detective Wildemann provided Defendant with
20 coffee and refills when Defendant asked. Id.

21 Throughout the interview, Defendant appears to understand and comprehend
22 Detective Wildemann's questions. And, despite Defendant's claim to the contrary, his
23 responses were not slurred or incoherent. See, State's Exhibits 68 and 69. Although at times
24 Defendant's statements' to Detective Wildemann were non-responsive, they were certainly
25 not incoherent ramblings but rather spontaneous, voluntary statements. And, "spontaneous"
26 or "volunteered" statements of a suspect in custody are admissible. State v. Billings, 84 Nev.
27 55, 436 P.2d 212 (1968) See also Miranda, 384 U.S. at 478, 86 S.Ct. at 1630.

28 Additionally, during Defendant's trial, he testified on his own behalf. The State

1 contends that Defendant's demeanor during his testimony during trial is *very consistent* with
2 his demeanor during his interview with Detective Wildemann. Again, the State asserts the
3 best evidence is the audio/video statement itself. Therefore, based on the totality of
4 circumstances surrounding the interview and, despite the fact that he had been drinking
5 earlier in the night, Defendant's statement was knowingly and voluntarily given and should
6 not be suppressed.

7 Further, in Nevada, once this Court determines that Defendant's statement lacks any
8 constitutional violations, the final determination of the voluntariness of a statement is left to
9 the jury. Carlson v. State, 84 Nev. 534, 445 P.2d 157 (1968); Grimaldi v. State, 90 Nev. 83,
10 89, 518 P.2d 615 (1974). See also Dawson v. State, 108 Nev. 112, 825 P.2d 593 (1992);
11 Varner v. State, 97 Nev. 486, 634 P.2d 1205 (1981). Having adopted the "Massachusetts
12 Rule," Detective Wildemann will to testify as to the circumstances under which the
13 statement was made. Id. As required by law, this Court must instruct the jury that the State
14 must prove by a preponderance of the evidence that the statement was voluntarily given.
15 Brimmage v. State, 93 Nev. 434, 567 P.2d 54 (1977); Falcon v. State, 110 Nev. 530, 874
16 P.2d 772 (1994); Colorado v. Connelly, 479 U.S. 157, 107 S. Ct. 515 (1986).

17 **Defendant's request to redact portions of his Statement**

18 In anticipation of this Court ruling against suppression of Defendant's statement;
19 Defendant objects to various portions of the statement. With regard to Defendant's request
20 to suppress various questions asked by Detective Wildemann, the questions are not hearsay
21 because the questions are not offered to prove the truth of any matter asserted but offered
22 simply give context to Defendant's responses. NRS 51.035. Additionally, Detective
23 Wildemann will be testifying at trial and is subject to cross-examination with regard to his
24 interview of Defendant. NRS 51.035(2)(not hearsay if the declarant testifies at trial and is
25 subject to cross-examination). Therefore, the questions asked by Detective Wildemann are
26 admissible.

27 With regard to Defendant's various statements during the interview where he
28 references his history of domestic violence with Victoria, refers to being in prison, speaks of

1 court documents associated with a criminal case; these statements are all voluntary,
2 spontaneous statements that were unresponsive to questions posed to him. See State v.
3 Billings, 84 Nev. 55, 436 P.2d 212 (1968) See also Miranda, 384 U.S. at 478, 86 S.Ct. at
4 1630.(spontaneous statements are admissible). Furthermore, the jury will learn of O'Keefe's
5 prior violent history with Victoria through other evidence; this Court has previously ruled
6 that Defendant's prior conviction of Battery Domestic Violence is admissible. Additionally,
7 the statements are statements of a party opponent and are admissible per NRS 51.035(3)(a).

8 Finally, with regard to Detective Wildemann's characterization of Defendant as a
9 "fucking nut," the statement is not offered for the truth of the matter asserted but simply an
10 observation based on Defendant's demeanor. Detective Wildemann will be subject to cross-
11 examination regarding his statement. NRS 51.035(2). For all the foregoing reasons,
12 Defendant's request to redact specific portions of the video-taped interview should be
13 denied.

14
15
16 DATED this _____ day of August, 2010.

17 Respectfully submitted,

18 DAVID ROGER
19 Clark County District Attorney
20 Nevada Bar #002781

21
22 BY /s/ STEPHANIE A. GRAHAM

23 Stephanie A. Graham
24 Deputy District Attorney
25 Nevada Bar #0010058
26
27
28

1 CERTIFICATE OF FACSIMILE TRANSMISSION

2

3 I hereby certify that service of STATE'S OPPOSITION TO DEFENDANT'S

4 MOTION TO SUPPRESS HIS STATEMENTS TO POLICE, OR, ALTERNATIVELY, TO

5 PRECLUDE THE STATE FROM INTRODUCING PORTIONS OF HIS

6 INTERROGATION, was made this _____ day of August, 2010, by facsimile transmission

7 to:

8

9 PATRICIA PALM ESQ

10 FAX #455-6273

11

12

13 /s/ T. Schessler

14 Secretary for the District Attorney's

15 Office

16

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26 sg/da

COPY

FILED

Nov 23 10 20 AM '10

DISTRICT COURT
CLARK COUNTY, NEVADA

Anna L. Williams
CLERK OF THE COURT

THE STATE OF NEVADA,	.	CASE NO. C-250630
Plaintiff,	.	
vs.	.	DEPT. NO. 17
BRIAN KERRY O'KEEFE,	.	
Defendant.	.	Transcript of
.....	.	Proceedings

BEFORE THE HONORABLE MICHAEL VILLANI, DISTRICT COURT JUDGE

ROUGH DRAFT TRANSCRIPT OF
MOTIONS HEARING

TUESDAY, AUGUST 17, 2010

APPEARANCES:

FOR THE PLAINTIFF:	CHRISTOPHER LALLI, ESQ. Assistant District Attorney
FOR THE DEFENDANT:	PATRICIA PALM, ESQ. Special Deputy Public Defender

COURT RECORDER:

MICHELLE RAMSEY
District Court

TRANSCRIPTION BY:

VERBATIM DIGITAL REPORTING, LLC
Littleton, CO 80120
(303) 798-0890

Proceedings recorded by audio-visual recording, transcript
produced by transcription service.

000929

1 LAS VEGAS, NEVADA, TUESDAY, AUGUST 17, 2010, 8:35 A.M.

2 THE COURT: You're on that, Mr. Lalli, correct?

3 MR. LALLI: Yes, I am.

4 THE COURT: All right.

5 THE CLERK: Page 1.

6 MS. PALM: We have quite a few motions on, your
7 Honor.

8 THE COURT: Well, the -- a couple things. The only
9 motion that I had on opposition to was motion to admit evidence
10 showing the detective has preserved blood and breath alcohol
11 evidence in other cases. That's the only motion that I have an
12 opposition on.

13 MS. PALM: Then I would ask that our other motions be
14 granted.

15 MR. LALLI: Your Honor, it's my understanding that
16 Ms. Graham filed oppositions to the -- to two other motions
17 yesterday.

18 THE COURT: The Odyssey (phonetic) is showing that
19 there were filed, they have not been scanned. I think you
20 should tell everyone in the community we're looking at could
21 even be five to seven days before we can pull it up.

22 MR. LALLI: Okay.

23 THE COURT: And so without a courtesy copy, we're not
24 going to get it --

25 MR. LALLI: I apologize.

ROUGH DRAFT TRANSCRIPT

000930

1 THE COURT: -- the scheduled date.

2 MR. LALLI: It was my understanding that a courtesy
3 copy was sent to chambers, but apparently that was not --

4 THE COURT: No.

5 MR. LALLI: -- the case.

6 THE COURT: So I can handle that one motion, but I
7 know there's three or four others on for today. We can bump
8 those to Thursday if you can just get me the oppositions --

9 MR. LALLI: We will --

10 THE COURT: -- today.

11 MR. LALLI: -- do that, your Honor.

12 THE COURT: Actually, my law clerk just told me he
13 just received the oppositions and which one's we're missing?
14 There was one already set -- actually a motion was set on an
15 OST that was already set for Thursday.

16 MR. LALLI: Yes.

17 THE COURT: And that's the one we don't have an
18 opposition to. The other ones we just received.

19 MR. LALLI: Your Honor, the -- with respect that
20 motion, I think it pertains to whether Detective Wildemann
21 would be noticed as an expert witness. I believe the -- the
22 motion that was set for Thursday addresses that issue.

23 Interestingly, kind of a predicate to that issue is
24 one of the motion that was set today. The Court might recall
25 that during the first trial, Detective Wildemann testified that

1 a cut on the defendant's hand is consistent with him actually
2 using a knife to stab the victim, based upon his years as a
3 police officer and investigating detective and so forth. And
4 he was allowed to render that opinion as a lay witness.

5 What the defense is seeking to do is to preclude that
6 from happening indicating that the witness must be noticed as
7 an expert in order to render that sort of an opinion.

8 So our notice of expert is really filed out of an
9 abundance of caution in response to that issue. It's our
10 position Detective Wildemann in his 22 plus years as an -- as a
11 police officer certainly can render a lay witness opinion as to
12 how a certain cut, whether it is consistent with a stabbing or
13 not.

14 So those two motions actually go hand to hand -- hand
15 in hand in some respect.

16 THE COURT: Okay. Yes, Ms. Palm.

17 MS. PALM: I'm sorry, is the Court allowing him to
18 respond orally --

19 THE COURT: No.

20 MS. PALM: -- to oppose it or --

21 THE COURT: No, I'm not making any decision until
22 Thursday.

23 MS. PALM: Thank you.

24 THE COURT: We can -- we can discuss the one motion
25 about, motion to admit evidence showing the detective has

1 preserved blood and alcohol evidence in the past. So we can
2 deal with that motion. Ms. Palm?

3 MS. PALM: Thank you, your Honor. I -- I think that
4 we -- we did renew that motion because it came up during the
5 last trial kind of on the fly, and we hadn't done a motion
6 ahead of time. So I wanted to make sure that the Court
7 understood our position.

8 We think that this is relevant to the good faith of
9 the prosecution and investigation and the thoroughness of the
10 investigation. All along Mr. O'Keefe has had the theory that
11 the police have minimized his intoxication and we had that with
12 several witnesses. It didn't show up anywhere on the report
13 except for the use of force report, which they withheld until
14 mid-trial last time.

15 So I think that this evidence is very relevant. It's
16 limited what we're asking to do. We're asking about one case.
17 We didn't do discovery on give us every case that you've ever
18 done this kind of testing in. It it's one case that we want to
19 bring out. I think it's important to impeach the officer.
20 Detective Wildemann testified that in his 21 years of
21 experience he had never heard of such a test being done.

22 We have that in Metro's own policy manual, with I've
23 given the DA as discover, it talks about doing that test in a
24 murder case. And we have another case where it was done. It
25 was a recent case. It was from 2008. So I think that it's

1 relevant for impeachment.

2 It's relevant -- whether they did the test or not is
3 relevant to tare good faith and certainly we have -- I don't
4 know if the Court wants to hear why intoxication is relevant
5 since the State sort of threw that in their opposition and I
6 had to reply to it. But the State still has the burden of
7 proving malice and so it goes into our whole impeachment of
8 their malice evidence that they didn't even bother to take his
9 -- his test and preserve that evidence for us, even though they
10 knew he was extremely intoxicated.

11 THE COURT: Did he testify to that? I don't -- I
12 mean, it was some time ago. I don't recall any specific
13 testimony that he felt defendant was, as you had mentioned,
14 extremely intoxicated.

15 MR. LALLI: Did he testify to what, your Honor, I'm
16 sorry?

17 THE COURT: That he felt the defendant was extremely
18 intoxicated?

19 MR. LALLI: Well, I think that a number of witnesses
20 say the defendant is intoxicated. When you look at his
21 voluntary interview with the police, the actual recording, he's
22 acting obnoxious and sophomoric. I mean, he's probably under
23 the influence of something at the time. And it's certainly not
24 something that -- that was hidden.

25 What is critically important, your Honor, really are

1 two points. Number one, the Court's heard argument on this and
2 has ruled to exclude this evidence. So what the defense is now
3 asking the Court to do is to have another look at this and to
4 really change courses. And there -- there's no good reason to
5 do so. Particularly because in the first case there was not a
6 first degree murder verdict. There was a second degree murder
7 verdict.

8 Second degree murder, a general intent crime,
9 certainly NRS 193.220 is applicable here. And basically what
10 that statute says is voluntary intoxication is not a defense.
11 Intoxication in this state is not a defense to a crime unless
12 we're dealing with specific elements or degrees of a crime.

13 So when you look at the classic voluntary
14 intoxication jury instruction that's given, we talk about
15 voluntary intoxication, not a defense to a -- to a crime.
16 However, it may be relevant to degrees of crime. But in any
17 circumstance it cannot reduce murder to manslaughter. Well,
18 that's the only argument here, is that the second degree murder
19 would be reduced to manslaughter.

20 It would be used, according to the defense, to attack
21 malice, which was specifically addressed by our supreme Court.
22 And the defense wants to cite California cases and cases from
23 all over the -- the -- the United States that might look
24 differently on this. But they fail to distinguish a
25 controlling Nevada Supreme Court case that says this is not and

1 has never been the law in Nevada. And what they're talking
2 about is whether voluntary intoxication negates malice.

3 It is not and has never been the law in Nevada.
4 While authorities are not all agreed, the great weight thereof
5 in this country is to the effect that mere intoxication cannot
6 reduce murder to manslaughter. That's our supreme Court to
7 which this Court respectfully is bound.

8 So it's not a defense to a second degree murder case.
9 It's not relevant here.

10 Now, could there be some tangential relevance to
11 whether the defendant voluntarily waived his Miranda rights? I
12 suppose there -- there would be situations where that would be
13 the case. And we're not telling the defense that they
14 certainly can't ask Detective Wildemann did you collect his
15 blood alcohol in some way. Certainly, they can, and Detective
16 Wildemann will have to explain why he didn't in this case.

17 But to take it to the next step and bring in
18 extrinsic evidence of other cases, particularly when voluntary
19 intoxication is not longer a viable defense or a mitigating
20 defense in this case, certainly would do nothing but confuse
21 and mislead the jury. The Court's initial ruling in the first
22 trial was the appropriate one. It is firmly rooted in Nevada
23 law and there is no reason for the Court to change courses and
24 reverse itself.

25 THE COURT: Ms. Palm, anything further?

1 MS. PALM: Your Honor, the rule on extrinsic evidence
2 as stated in the Abbott (phonetic) case that I cited, our Court
3 has said it loses import. The policy behind it is to prevent
4 many trials on little side issues. But when you have a
5 critical issue like credibility, which is a key issue, it loses
6 import and it gives way to the defendant's right to confront
7 and cross-examine witnesses and present a defense.

8 So Mr. O'Keefe does have a right to impeach Officer
9 Wildemann -- Detective Wildemann with his testimony that
10 implicates such tests are never done, they're unheard of. That
11 tends to show that they acted in good faith in not conducting
12 one here. We submit that they did not. It's crucial to our
13 defense and that's why we want this evidence.

14 THE COURT: All right. And also, I understand is
15 that you have some portion of the policy and procedure manual
16 for Metro that may address this issue; is that correct?

17 MS. PALM: That's correct.

18 THE COURT: And you would be free to question the
19 detective on that policy and procedure manual and you can
20 present it to the jury that he -- I mean, if that's the
21 conclusion that should be drawn that he didn't follow the
22 policy and procedure.

23 But my original ruling on this particular issue
24 stands. Nothing has changed in the Court's mind on this issue.
25 So I'm going to deny the motion. And we'll handle all the

1 other motions on Thursday. Is this trial still scheduled to
2 take only five days?

3 MR. LALLI: It is your Honor. And if I could just
4 put two issues on the Court's radar. One pertains to Dr.
5 Benjamin, who was the forensic pathologist in this case. The
6 Court may recall she was actually called to the stand twice.
7 But she performed the autopsy on Victoria's body. She is no
8 longer with the Medical Examiner's Office. We believe at the
9 time the case was subpoenaed and notices of that nature were
10 required to be made that we would certainly have no problem
11 locating her and bringing her in to testify.

12 We have located her. We know that she is in southern
13 California. We have confirmed addresses through the Nevada
14 Department of Motor Vehicles. We have her located and we have
15 made countless contacts to her. I'm still hopeful that by the
16 end of the week we will secure her presence in -- in bringing
17 her back to testify.

18 But as of right now I cannot tell the Court she is
19 signed, sealed and delivered for next week. I certainly do not
20 want to lose the trial date. And as a alternative to that,
21 which I think is somewhat -- somewhat not likely because I do
22 believe that we can get Dr. Benjamin, but as an alternative to
23 it, what routinely happens is that we request that another
24 forensic pathologist from the Medical Examiner's Office be
25 assigned to the case.

1 And so on either Friday or yesterday -- it was on
2 Friday we were notified of an alternative pathologist who would
3 review the report and Dr. Benjamin's prior testimony, and we
4 are -- she -- a notice of that should have been filed or will
5 be filed certainly today.

6 It's our position, even though the notice would be
7 untimely, there's no -- there's in prejudice to the defense.
8 It is the same testimony. It is the same -- it is the same
9 subject matter.

10 The -- arguably it's better for the defense because
11 the pathologist that we've been assigned has never qualified as
12 an expert in the State of Nevada. He's never actually worked
13 on the case. So they certainly have some built-in impeachment.
14 If it poses a problem for the defense, the late filing of the
15 notice, what I would certainly not be opposed to is starting
16 the trial a day or two later to give Ms. Palm all the time that
17 she would need to further prepare for this witness.

18 But I do not believe that it is the sort of witness
19 that would warrant a vacating of the trial. So that was one
20 issue.

21 MS. PALM: Can I respond to that issue --

22 THE COURT: Sure.

23 MS. PALM: -- before he goes forward? We would
24 object to the late notice of a different expert, your Honor.
25 We're entitled to 21 days notice and part of that is so that we

1 can basically investigate the credentials of the expert. We
2 haven't had any kind of notice and I'm preparing for trial now.
3 It's a little late for me to have to go a side investigation on
4 an additional expert.

5 And we would also object under Pulp versus State
6 (phonetic) and Crawford. We have the right to confront and
7 examine Dr. Benjamin on what her medical exam was and we don't
8 have to rely on hearsay statements through another witness. We
9 have a right to Dr. Benjamin, so we would object on both
10 grounds. We would object on Crawford grounds, on confrontation
11 grounds and late notice grounds.

12 MR. LALLI: Well, it's, I mean --

13 THE COURT: When will you know if this witness --

14 MR. LALLI: I'm --

15 THE COURT: -- is going to show up?

16 MR. LALLI: -- literally in consultation with two
17 investigators in my office several times a day on the issue.
18 Most recently it was this morning. So --

19 THE COURT: Well, let's further address it on
20 Thursday. Give you more --

21 MR. LALLI: Very good.

22 THE COURT: -- opportunity to contact your witness,
23 and I would hope the witness would be willing to fly back for
24 one day.

25 MR. LALLI: I'm sure -- I'm sure that it's just a

1 matter of reaching out to her. She's in a -- a studying
2 program at a university there, and I'm sure it's just a matter
3 of -- of us -- the two of us of making actual contact.

4 THE COURT: You said you had a second issue?

5 MR. LALLI: Yes. The other issue, your Honor,
6 pertains to potential bad act evidence and a motion that may be
7 forthcoming. I've notified defense counsel of this issue
8 yesterday. I wanted to notify the Court as well.

9 In preparation for the case we have learned that the
10 defendant, after he was convicted, took the time to write
11 letters to several of the witnesses in this case. And they are
12 letters of a threatening nature. For instance, he sent the
13 Toliver's a letter, and he mentioned to them that they -- words
14 to the effect of they had better be careful because he knows
15 people on the outside.

16 Cheryl Morris, who is a critical witness in the case
17 who testified to the threats that the defendant made of -- of
18 stabbing people to death. She received a note from the
19 defendant curiously on the back of a photograph of -- of -- of
20 part of the bloody crime scene here and -- and issues related
21 to her testifying in the case.

22 What prevents me from bringing forth a motion at this
23 point is none of our witnesses has as of yet been able to
24 actually get their hands on one of these letters. These
25 letters were received some time ago. So I have asked all of

1 them to diligently search for these letters. As soon as I
2 actually have them, I think at that point it would be an
3 appropriate time for me to bring a motion. But I wanted the
4 defense and the Court just to be kind of aware that this could
5 be coming if we can obtain the -- the documents.

6 THE COURT: All right, well, we'll deal with that if
7 it -- if and when you do file a motion.

8 MR. LALLI: Thank you.

9 MS. PALM: And your Honor, I have some -- some
10 issues. With regard to the discovery order of our last
11 appearance, the district attorney had a disagreement with the
12 language of the proposed order, and so we are back to not
13 really being clear on what the order was. It was my
14 understanding that the Court granted our discovery motion with
15 the limitations on NCIC and the addresses of lay witnesses,
16 which they finally provided me yesterday.

17 However, it was Mr. Lalli's understanding that the
18 motion was denied in total with the exception of those two
19 things. So I do have a proposed order if the Court wants to
20 look at it. But we are in disagreement.

21 MR. LALLI: Well, your Honor, what -- what I would
22 ask -- my concern is -- is that the -- the motion as written
23 far exceeded the statutory language of the Nevada Discovery
24 Statute and -- and Brady and Giglio (phonetic). And my concern
25 certainly is -- is not with Ms. Palm. She's been over to our

1 office, she's gone through my files, she's certainly welcome
2 everything that I have.

3 My concern is for post-conviction purposes, if, for
4 instance, there is a jail call that I didn't have that somebody
5 might think is relevant, it could be deemed as me violating the
6 Court's order in this case if it merely says the motion was
7 granted.

8 So what I would ask is specifically the Court ordered
9 us to do two things. Number one is to renew our investigation
10 into whether any of our lay witnesses had prior felony
11 convictions. We have done that, and I've reported that
12 information to Ms. Palm.

13 The other thing the Court asked us to do was to
14 provide updated addresses to Ms. Palm. We've done that with
15 one exception that may or may not be relevant. If ms. Palm
16 believes it is she can bring it up.

17 So we've complied with the Court's order. My only
18 concern is how this order is written. And what I would ask is
19 that the order be written that the motion -- the State's
20 ordered to provide discoveries outlined by the statute, Giglio
21 and Brady and in addition, these two other regards, which we've
22 complied with and -- and call it a day.

23 THE COURT: Ms. Palm, why don't you hand to the
24 marshal your proposed order. I'll have the minutes checked and
25 perhaps even a transcript, and then if we need to modify it or

1 -- we're contact your office to retype it up.

2 MS. PALM: Thank you.

3 THE COURT: All right, anything --

4 MS. PALM: And -- and my concern that is that I --
5 you know, my concern is also for post-conviction. I'm not
6 saying the DA hasn't given us what we've asked for. What I'm
7 saying is we need to preserve it. We've made a specific
8 request for everything under the statute because then you get a
9 different standard of review on appeal, if it turns out to be
10 something that we did not get and had asked for.

11 THE COURT: I understand. Anything else?

12 MS. PALM: Yes. As far as reciprocal discovery, I
13 give the district attorney records today and I -- he has also
14 asked for me to recopy expert -- records that we'd already
15 provided to Mr. Smith because he doesn't have them anymore, and
16 I will be copying those today and providing them to him.

17 And we do have one issue as far as subpoenas. Metro
18 has been refusing our subpoenas. They refused our subpoenas
19 for CSAs and that's all of the CSAs in this case. Mr. Ford,
20 Ms. Collins and Ms. Maldonado. And we did want to present
21 their testimony. The DA is telling me that he did not intend
22 to present their testimony.

23 I have any investigator here, if the Court wants to
24 swear her in, but I can tell you that she went to Metro, they
25 sent her to a bunch of different substations. She was finally

ROUGH DRAFT TRANSCRIPT

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1 able to get most of the officers. She was not able to get the
2 CSAs because they would not accept her subpoenas. They said we
3 had to serve each officer personally. And so in that regard if
4 we're going to have to do that, then I would need their home
5 addresses if Metro's not going to accept the subpoenas, or the
6 DA can produce those witnesses, but we do want to present their
7 testimony at trial. We think they're important.

8 THE COURT: When you go to where they were supposed
9 to be located, they're telling you that -- what are they
10 telling you?

11 MS. PALM: They're not going to take the subpoenas,
12 they're not here right now, you'll have to come back. We have
13 no idea how to locate their witnesses if they won't give us
14 their addresses or take the subpoenas.

15 And the other thing that they told Ms. Campbell
16 (phonetic), as my investigator, is that they have a policy that
17 they will only take subpoenas from the DA or PD. This is an
18 appointed case as far as investigation goes, and it's costing
19 the county an awful lot of money to have her running around
20 like this.

21 She's spent an awful lot of time trying to serve all
22 the officers that we've wanted served. And she cannot sit and
23 park herself outside the CSA building to hopefully catch these
24 CSAs when they're coming in and neither can I. So I don't know
25 what the remedy is for that unless the Court wants to order the

1 State to produce them for trial or order Metro to accept our
2 subpoenas or give us their home addresses.

3 MR. LALLI: Well, I -- I don't have their home
4 address so it's -- it's not as though I can just produce those
5 like we can witnesses. It's -- it's kind of an issue between
6 Ms. Palm and Metro, I presume.

7 THE COURT: Well, you know, the State doesn't have
8 their home addresses. I don't know if that's appropriate that
9 -- that I can order that at this point. Ms. Palm, if you feel
10 you're getting the runaround from Metro's supervisors, you
11 could subpoena someone at Metro who might have that
12 information.

13 I mean, I can't advise you any further than that, but
14 we -- you may know that we've had some issues in this courtroom
15 as far as some law enforcement agencies not complying with
16 subpoenas.

17 And actually, I've had hearings on that issue. And
18 so, I mean, you're free to -- you can figure out who to
19 subpoena as far as who would have that information, whether
20 it's a supervisor or someone in personnel. Then perhaps that
21 might light a fire under someone to cooperate with your
22 investigator.

23 But beyond that, I can't -- there's no other order I
24 can provide at this point. I mean, the State doesn't have home
25 addresses and --

1 MS. PALM: Well, would the Court be willing to order
2 Metro to accept the subpoenas and deliver them to the officers?

3 THE COURT: Well, the problem is I -- I don't know
4 who you serve as far as are they someone in a position to
5 accept a subpoena on behalf of the other officer.

6 MS. PALM: The only ones we're really concerned about
7 are those three CSAs. And if I can't get them by the time of
8 trial, then I guess that I would be satisfied with a
9 preliminary -- or with their trial testimony from the prior
10 trial. But we do want their testimony.

11 THE COURT: Perhaps a subpoena duces tecum might
12 solve your problem to their supervisor.

13 MS. PALM: To bring their bodies?

14 THE COURT: That's up to you. I -- you know, that's
15 -- you can figure out how you can be creative, as creative as
16 you want. If you feel they're playing a game with you, and
17 hopefully they're not, something -- you know, something might
18 get their attention, I don't know. It's up to you. Right now
19 I'm in the -- there's nothing -- I'm not ordering that to some
20 officer at the front desk accept the subpoena for one of these
21 other CSI or CSA individuals. I think there's some avenues
22 open for you. Anything else? I guess, we'll see everybody on
23 Thursday. Can you make sure, Mr. Lalli, that we'll have the
24 opposition for that last motion?

25 MR. LALLI: Yes.

1 THE COURT: Okay.

2 MR. LALLI: Yes, we will.

3 THE COURT: All right, thank you.

4 MR. LALLI: Thank you.

5 MS. PALM: Thank you.

6 (Court recessed at 8:59 a.m.).

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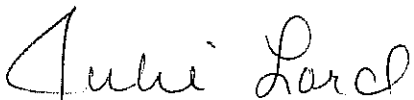
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ACKNOWLEDGMENT

ATTEST: Pursuant to Rule 3C(d) of the Nevada Rules of Appellate Procedure, I acknowledge that this is a rough draft transcript, expeditiously prepared, not proofread, corrected, or certified to be an accurate transcript.

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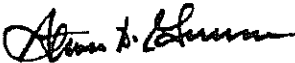
JULIE LORD, TRANSCRIBER

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DATE

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CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

BRIAN K. O'KEEFE,
#1447732

Defendant.

Case No: 08C250630-1

Dept. No: XVII

Date: April 19, 2010
Time: 8:15 a.m.

STATE'S OPPOSITION TO MOTION TO PRECLUDE
EXPERT TESTIMONY

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through CHRISTOPHER J. LALLI, Chief Deputy District Attorney, and hereby opposes the Defendant's Motion to preclude expert testimony. This Opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

DATED this 18th day of August, 2010.

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY /s/ Christopher J. Lalli
CHRISTOPHER J. LALLI
Chief Deputy District Attorney
Nevada Bar #005398

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1 encountered in this case and during the course of his career as a police officer.

2 NRS 50.265 provides:

3 If the witness is not testifying as an expert, his testimony in the
4 form of opinions or inferences is limited to those opinions or
5 inferences which are: (1) Rationally based on the perception of
the witness; and (2) Helpful to a clear understanding of his
testimony or the determination of a fact in issue.

6 Under this statutory provision, Detective Wildemann properly testified that it is not
7 uncommon for a suspect in a stabbing case to cut himself during the course of the killing.
8 Detective Wildemann personally observed the injury on the Defendant's hand and personally
9 worked on many homicide investigations involving stabbings. Therefore, such testimony is
10 rationally based upon his perception as he personally observed the Defendant's injury.
11 Moreover, such testimony is helpful to a clear understand of a fact in issue, namely how the
12 injury was received.

13 It is altogether proper to allow an experienced police officer to provide lay witness
14 opinion under such circumstances. The Nevada Supreme Court has so held in *Meadow v.*
15 *Civil Serv. Bd.*, 105 Nev. 624 (1989). That case involved the termination proceedings of a
16 police officer for using excessive force. During the course of the hearing, a police officer
17 with over fourteen years of experience was allowed to testify that, based upon what he heard,
18 "'it sounded like somebody getting their butt whipped' in the other room" *Id.* at 626.
19 On appeal, Meadow argued that the board erred by allowing the testifying officer to
20 speculate about things that he neither saw nor of which he had personal knowledge. *Id.* at
21 625. This argument was rejected. Relying on NRS 50.265, the court held, "Given Officer
22 Berni's experience, his testimony ... was rationally based upon his perceptions at the time."

23 *Meadow* is analogous to the instant case. Here, Detective Wildemann enjoys over
24 twenty-two years experience as a police officer. He has served as a homicide detective for
25 more than eight years and has personally worked over 200 murder cases. Just as Officer
26 Berni was allowed to render his opinion about what happened in an adjoining room based
27 only upon what he heard, Detective Wildemann should be allowed to render his opinion
28 about the injury he observed on the Defendant's hand. The noticing of Detective

1 Wildemann as an expert is unnecessary.

2 **B. The State Has Not Acted in Bad Faith**

3 Assuming the Court now rules that Detective Wildemann must qualify as an expert
4 before he testifies to the same information he previously testified to, it is not an abuse of
5 discretion for the Court to allow Detective Wildemann to be qualified as an expert in spite of
6 the fact that some provisions of NRS 174.234 have not strictly been complied with. In
7 *Mitchell v. State*, 124 Nev. —, 192 P.3d 721 (2008), the Nevada Supreme Court held that it
8 was not an abuse of discretion for a district court to allow an expert witness to testify where
9 the provisions of NRS 174.234 were not complied with provided the State did not act in bad
10 faith and the defendant did not suffer prejudice to his substantial rights.

11 Mitchell argued on appeal that the trial court abused its discretion in allowing a
12 mental health professional to testify where the State failed to make certain disclosures
13 required by NRS 174.234. *Id.* at 729. The State conceded it did not make the disclosures.
14 *Id.* In analyzing the issue, the Nevada Supreme Court noted that the defendant never
15 claimed the prosecution acted in bad faith. Moreover, there was no prejudice found because
16 the defendant had the ability to review the State's file, to talk to the expert and was aware of
17 the gist of the expert's testimony. *Id.* at 729 and n.24.

18 In this case, there is certainly no bad faith. The State does not believe it is necessary
19 to qualify Detective Wildemann as an expert, especially when he was previously allowed to
20 render the testimony at issue. Furthermore, there is no prejudice to the Defendant. The
21 defense has had access to all of Detective Wildemann's reports as well as his testimony at
22 the preliminary hearing and the previous trial. Moreover, they have had the ability to cross-
23 examine Detective Wildemann on subject while he testified previously. The Defendant
24 would certainly suffer no prejudice from allowing Detective Wildemann to now be qualified
25 as an expert.

26 Relying on *Hallmark v. Eldridge*, 124 Nev. —, 189 P.3d 646 (2008), the Defendant
27 argues that Detective Wildemann should not be allowed to testify on the subject because he
28 does not meet the criteria to be recognized as an expert witness. Indeed, that has yet to be

1 seen. If the issue ripens to the point of qualifying Detective Wildemann as an expert, that
2 decision should be made in a court proceeding after His Honor has heard the plethora of
3 experience accumulated by this seasoned police investigator.

4 **CONCLUSION**

5 Based upon all of the foregoing, the State respectfully prays that the Defendant's
6 Motion to Preclude Expert Testimony be denied.

7 DATED this 18th day of August, 2010.

8 DAVID ROGER
9 Clark County District Attorney
Nevada Bar #002781

10 BY /s/ Christopher J. Lalli
11 CHRISTOPHER J. LALLI
12 Chief Deputy District Attorney
13 Nevada Bar #005398
14
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18 **CERTIFICATE OF FACSIMILE TRANSMISSION**

19 I hereby certify that service of the above and foregoing was made this 18th day of
20 August, 2010, by facsimile transmission to:

21 PATRICIA PALM, ESQ.
22 FAX: (702) 386-9114

23 BY: /s/ Jennifer Georges
24 Secretary for the District Attorney's Office
25
26
27
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User ID: GEORGJE

=====

TO: Name: Patricia Palm, Esq.

Company:

Fax Phone Number: (702) 386-9114

Contact Phone Number:

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