IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN KERRY O'KEEFE,)) Petitioner,)) **EIGHTH JUDICIAL DISTRICT COURT; THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE,**)) Respondents,) And)) **THE STATE OF NEVADA,**)) Real Party in Interest.)	Supreme Court No. _____ District Court Case No. C250630

APPENDIX

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

VOLUME 13

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INDEX

VOLUME	DOCUMENT NAME/FILE DATE	PAGE NO.
6	TRANSCRIPT AUGUST 12, 2010 (11/23/10)	873-877
12	TRANSCRIPT SEPTEMBER 16, 2010 (2/4/11)	2240-2245
14	TRANSCRIPT JANUARY 13, 2011 (2/4/11)	2433-2448
14	TRANSCRIPT JANUARY 18, 2011 (2/4/11)	2539-2544
14	TRANSCRIPT JANUARY 20, 2011 (2/4/11)	2545-2587
5	VERDICT (3/20/09)	693
12	VERDICT SUBMITTED TO JURY BUT RETURNED UNSIGNED (9/2/10)	2233-2234

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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 THE STATE FROM INTRODUCING AT TRIAL IMPROPER EVIDENCE AND ARGUMENT

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 for an Order precluding the State from introducing at trial improper evidence and argument which is irrelevant and overly prejudicial and would violate O'Keefe's constitutional rights to due process and a fair trial.

This Motion is made and based upon the following Points and Authorities, all papers and documents on file in these proceedings, the attached Exhibits, and any argument as may be had at the time of hearing.

Dated this 31 day of January, 2011.

PALM LAW FIRM, LTD.

Patricia A. Palm, Bar No. 6009

MCJ

NOTICE OF MOTION

TO: STATE OF NEVADA, Plaintiff; and

TO: DAVID ROGER, District Attorney, Attorney for Plaintiff

YOU WILL PLEASE TAKE NOTICE that the undersigned will bring on the above and attached **MOTION BY DEFENDANT O'KEEFE TO PRECLUDE THE STATE FROM INTRODUCING AT TRIAL IMPROPER EVIDENCE AND ARGUMENT** on the 13 day of JAN, 2011, at the hour of 8:15 .m., in Department No. XVII of the above-entitled Court, or as soon thereafter as Counsel may be heard.

DATED this 13th day of January, 2011.

PALM LAW FIRM, LTD.

By: PATRICIA PALM
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POINTS AND AUTHORITIES
PROCEDURAL HISTORY/FACTS

The State charged Defendant Brian K. O'Keefe with murder with use of a deadly weapon for the alleged November 5, 2008 killing of Victoria Whitmarsh. On January 20, 2009, he entered a plea of not guilty and invoked his constitutional and statutory rights to a speedy trial. On February 2, 2009, 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 Whitmarsh through witness Cheryl Morris, a woman whom O'Keefe had dated then rejected. Morris claimed that O'Keefe stated a desire to kill Whitmarsh and also demonstrated to Morris his proficiency at how to kill with knives. The Court further ruled that the State could introduce O'Keefe's prior Judgment of Conviction for felony domestic battery involving Whitmarsh. Further, if O'Keefe testified, then the State could prove his other prior felony convictions. Pursuant to the Court's ruling, the State was permitted to introduce only the details of when O'Keefe was convicted, in which jurisdiction, and the names of the offenses, and with the felony domestic battery, the fact that Whitmarsh had testified against him in that case. 3/16/09 TT 2-16, Exh. A (attached).

This case was first tried before this 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, "[T]he State's charging document did not allege that O'Keefe killed the victim while he was committing an unlawful act and the evidence presented at trial did not support this

theory of second-degree murder." O'Keefe v. State, NSC Docket No. 53859, Order of Reversal and Remand (April 7, 2010). The Court further stated, "The district court's error in giving this instruction was not harmless because it is not clear beyond a reasonable doubt that a rational juror would have found O'Keefe guilty of second-degree murder absent the error." Id. at 2.

After remand to this Court, O'Keefe continued to assert his rights to a speedy trial, and the case was retried beginning August 23, 2010. During that trial, the State introduced new bad act evidence and arguments never before noticed and/or ruled upon. The retrial ended with a hung jury. Again, O'Keefe invoked his speedy trial rights and the case was set to begin a third trial on January 24, 2011.

This Honorable Court has heard this trial twice previously, and as recently as August 2010. Thus, only the facts necessary to resolution of the issues raised herein are set forth anew, and they are so set forth in conjunction with the arguments below.

In addition to all issues that O'Keefe has previously raised in these proceedings and preserved for any future proceedings, O'Keefe asserts the following.

ARGUMENT

O'Keefe requests rulings from this Court prohibiting the State from introducing, and requiring the State to instruct its witnesses to refrain from introducing, improper other act evidence and other irrelevant and overly prejudicial evidence and argument, on the grounds that O'Keefe's right to a fair trial is jeopardized when the State makes repeated attempts to influence the jury with inadmissible evidence and improper argument.

The Fifth, Sixth and Fourteenth Amendments to the United States Constitution, as well as the Nevada Constitution, article 1, section 8, protect a criminal defendant's right to a fair trial, at which he may confront and cross-examine witnesses and present evidence in his defense. Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065 (1965); Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038 (1973); U.S. Const., amend. 5, 6 and 14; Nev. Const. art. 1, sec. 8.

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

> 1. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.
>
> 2. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time or needless presentation of cumulative evidence. . . .

Additionally, "[a]bsent certain exceptions, evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion. Further, evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." Taylor v. State, 109 Nev. 849, 853, 858 P.2d 843, 846 (1993). If the State wishes to prove that character or other act evidence is admissible under NRS 48.045(2), for the purpose of establishing proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, the State must prove how these exceptions to the general rule "specifically relate to the facts of this case. A mere recitation of the statute is not sufficient justification for the admission of prior acts." Id. at 854, 858 P.2d at 846. In addition, the State "may not present character evidence as rebuttal to a defense which the accused has not yet presented." Id. at 854, 858 P.2d at 847; Roever v. State, 114 Nev. 867, 871, 963 P.2d 503, 505 (1998) ("[T]he bad character testimony should never have been introduced because it was not in rebuttal to a defense made by the accused." (citing NRS 48.045(1)(a)).

> "'Before an issue can be said to be raised, which would permit the introduction of such evidence so obviously prejudicial to the accused, it must have been raised in substance if not in so many words, and the

> issue so raised must be one to which the prejudicial evidence is relevant. The mere theory that a plea of not guilty puts everything material in issue is not enough for this purpose. The prosecution cannot credit the accused with fancy defenses in order to rebut them at the outset with some damning piece of prejudice.'"

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

The Nevada Supreme Court recognizes that the use of character evidence to convict a defendant is extremely disfavored in our criminal justice system. Such evidence is likely to be prejudicial and irrelevant and forces the accused to defend against vague and unsubstantiated charges. It may improperly influence the jury and result in the accused's conviction because the jury believes he is a bad person. The use 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 appeal. See Taylor, 109 Nev. at 854, 858 P.2d at 847 (citing Berner v. State, 104 Nev. 695, 696-97, 765 P.2d 1144, 1145-46 (1988)).

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1. **The State should be precluded from introducing evidence or argument to show that the alleged victim Victoria Whitmarsh testified "against" O'Keefe in the prior felony domestic battery case C207835.**

This Court ruled prior to the first trial of this matter that the evidence of O'Keefe's felony domestic battery conviction in C207835 and Cheryl Morris's testimony that O'Keefe expressed hatred and a desire to kill Whitmarsh for testifying against him in that case would be admissible in the State's case in chief, as this was relevant to the charge of open murder. 3/16/09 TT (Exh. A), at 2-11. In conjunction with this evidence, the Court ruled that Cheryl Morris's claims that O'Keefe had demonstrated to her how he could kill people with knives was admissible and did not constitute bad act evidence. Id. at 16. The defense sought to exclude this evidence during the retrial of this matter on a charge of second-degree murder; however, this Court denied the defense's request. See Notice of Motion and Motion, Exh. B (attached hereto); 8/19/10 TT at 2; Order, Exh. C (attached hereto).

During the retrial for second-degree murder, the prosecutor argued in closing, "she did take three years of his life because you know that defendant was previously tried, convicted and sent to prison after Victoria testified *against him* for battering her previously." 8/31/10 TT 93, ll. 15-16. The prosecutor also argued that Victoria Whitmarsh *"stood right here and in a courtroom like this one and testified against the defendant."* 8/31/10 TT at 153-54.

A transcript of Whitmarsh's testimony in C207835, however, demonstrates that Whitmarsh testified that O'Keefe did not commit a domestic battery as charged in that case. See Exh. D (Victoria Whitmarsh's testimony during September 2005 Jury Trial in C207835, pp. 18-24). Accordingly, the State should not be permitted to introduce evidence or argue that Whitmarsh actually testified *against* O'Keefe. If the State introduces the fact of Whitmarsh's testimony, O'Keefe should be permitted to introduce the fact that the testimony was favorable to him, on the basis that Whitmarsh's actual testimony impeaches Cheryl Morris's claims that O'Keefe hated Whitmarsh for testifying against him. Such introduction should not open the door to any other evidence to

support the prior conviction itself, because O'Keefe is not challenging the conviction. He has a right, however, to impeach Morris's claims that he expressed hatred of Whitmarsh because she testified against him. If necessary, a limiting instruction can be given so that the jury only considers Whitmarsh's favorable testimony for its proper purpose.

2. Based upon the most recent and much expanded testimony of Cheryl Morris, and argument relating thereto, this Court should reconsider its previous ruling and preclude or limit the testimony and argument.

The State did not seek permission to introduce Morris's allegations about O'Keefe's statements and demonstrations regarding killing with knives as prior bad act evidence at the first trial because the State did not believe it was bad act or character testimony. 3/16/09 TT, Exh. A, at 15-16. At that time, the evidence was limited to Cheryl Morris's claim that O'Keefe had claimed proficiency with knives and could kill someone with a knife. When the defense raised the issue, the Court ruled that the evidence did not show a bad act and that Morris would be allowed to testify regarding the same. 3/16/09 TT (Exh. A), at 14-16.

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

Prior to the second trial, the defense again sought to exclude this evidence. See Exh. B (attached hereto), Motion filed July 21, 2010. The Court heard argument on the motion and ruled that the evidence was relevant and should be admitted. 8/19/10 TT 2; see also Exh. C (Order filed September 9, 2010, p.1). During the first trial, all parties operated under the assumption that O'Keefe could introduce evidence of the loving and

forward looking relationship of O'Keefe and Whitmarsh during the period after he was released from prison. 3/16/09 Transcript at 12; 3/16/09 TT 259 (Jimmy Hathcox testimony that during period of time Whitmarsh and O'Keefe lived at El Parque they appeared to be an open and loving couple); 3/19/09 TT 19-21 (testimony of Louis DeSalvio that Whitmarsh and O'Keefe seemed very upbeat in the fall of 2009). During the retrial in August, 2010, the State sought to limit the evidence that O'Keefe could introduce as rebuttal to the evidence from Cheryl Morris regarding O'Keefe's alleged hatred of Whitmarsh. 8/26/10 TT at 11-21. The Court limited the defense to asking what the witnesses saw during the relevant time period (versus opinion on the couple's interaction), so as to not open the door to cross-examination on other prior bad acts. Id. at 21; 8/25/10 TT at 114.

During the retrial, however, Morris greatly expanded on the claims she earlier made during her statement to the police, her preliminary hearing testimony and her first trial testimony. At the retrial, the State elicited several *actual* bad acts and bad character evidence through Morris's testimony: i.e., that O'Keefe had killed people before, that he had been kicked out of his abode, that he had yelled at Whitmarsh, and evidence that Morris was afraid of O'Keefe. Morris also implied through her testimony that O'Keefe was interested in resuming a relationship with her at the time of Whitmarsh's death. Furthermore, for the first time, Morris testified that O'Keefe had demonstrated yet another way of killing people, never before mentioned: slicing someone across the throat. 8/26/10 TT at 56.

Specifically, Morris testified that O'Keefe would become angry over being sent to prison based upon a trial involving Whitmarsh. Id. at 29-30. He would say he hated the bitch and wanted to kill her. He did this multiple times. Id. at 30. During the same conversations, he would tell her about his experience in the military killing people. Id. He would talk about it and say it was either kill or be killed and he would talk about the kind of weapon he would use. Id. He said the military trained him to kill. Id. He was very equipped for hand to hand combat, basically using a knife. He would describe killing someone by taking a knife and shoving it upwards toward their sternum and

pulling up. Or perhaps coming up from behind and taking the knife from the left side of the neck to the right side. Id. at 31. The evidence of prior killings is extremely prejudicial and not relevant to any issue in this case. It goes way beyond evidence pertinent to O'Keefe's skill or training, and depicts O'Keefe as an actual killer. Moreover, because of the discrepancies between these allegations and all former testimony and statements, and Morris's obvious motive to lie as a spurned lover, her allegations about O'Keefe are now so incredible that they cannot meet the clear and convincing standard for bad act admissibility. Furthermore, the alleged ability to kill a person with a knife by an upward slice from the chest or a slice across the throat is irrelevant to this case where the alleged victim was killed by a puncture type stab wound under her armpit that went directionally from front to back and downward. See 3/18/09 TT 103, 118 (description of wound). Nothing occurred here which is close to the gutting or upward sternum area slicing or neck slicing about which Morris now contends O'Keefe had bragged. The State has shown no relevance, i.e., the evidence makes no fact of consequence more or less probable. Additionally, the evidence tends to show that O'Keefe acted consistent with a character trait of being obsessed with killing with knives and that he has killed before and is a killer. This is pure bad act or character evidence, and is highly inflammatory and unfairly prejudicial, and it must be excluded in order to protect O'Keefe's constitutional rights to a fair trial.

Morris also testified for the first time that O'Keefe got "kicked out" of the trailer he was living in. 8/26/10 TT at 28. Whether O'Keefe was evicted is irrelevant to any fact of consequence here, and the implication that grounds existed to evict him constitutes improper bad act evidence. The evidence's only use is improper: to show bad character.

Morris further testified at the retrial that O'Keefe was attracted to Whitmarsh because she was submissive. If he yelled at her, she'd do whatever he asked. Id. at 32. Yelling at Whitmarsh constitutes improper bad act evidence, which is more prejudicial than probative. Whether Whitmarsh was submissive also constitutes

improper character evidence, which the State is attempting to use to show conformity with this character trait at the time in question.

Morris also testified for the first time that one week prior to the incident at issue, O'Keefe had called her asking her to come over, but she refused. Id. at 38. This was obviously introduced to raise a question about the health of the relationship between O'Keefe and Whitmarsh. However, it is obviously suspect, given that it has never been mentioned before during Morris's statement, or her three prior testimonies. Given the incredible nature of this evidence, it should be excluded as suspect and more prejudicial than probative.

Finally, Morris testified that after she and O'Keefe moved into the El Parque apartment, then split up, she moved her things into the bedroom and had maintenance put a lock on the bedroom door. 8/26/10 TT 36. This evidence is irrelevant to any fact of consequence here and is overly prejudicial. It implies that Morris herself was afraid of O'Keefe and that there was reason for this – his dangerous character. Accordingly, it is improper character evidence, and is irrelevant and overly prejudicial.

3. The State should be precluded from introducing evidence of the costs related to the expert witnesses and improperly disparaging these experts.

During its cross-examination of defense expert George Schiro, the State inquired regarding Schiro's billing for each time this case went to trial. Schiro testified that he charged about $6,300 for the first testimony, and $5,000 or so for the second, for a total of 11,300. 8/27/10 TT 61. During rebuttal closing argument, Mr. Lalli referred to Schiro: *"He's the defendant's high-paid expert from Louisiana."* 8/31/10 TT 144. Lalli further argued that the amount of money Schiro was paid was relevant to his credibility, and that he was "*paid over $10,000 – $10,000 to walk into this courtroom and say what he did."* Id. at 145. *"His total – bill in this case was over, over $10,000. And when someone is getting that kind of money, do you think that they might extend themselves a little bit? Do you think it's out of the realm of possibility that they might give you just a*

little more because it's a business." Id. As to Dr. Grey, Lalli argued, *"Dr. Grey came all the way from Utah to tell us that he could not rule out suicide."* 8/31/10 TT at 159.

These types of comments on experts being from other jurisdictions and their fees constitute improper disparagement of defense experts. See Butler v. State, 120 Nev. 879, 899, 102 P.3d 71, 85 (2004) (citing Sipsas v. State, 102 Nev. 119, 125, 716 P.2d 231, 234-35 (1986); McGuire v. State, 100 Nev. 158, 677 P.2d 1060, 1064 (1984)). Further, the fact that O'Keefe has had to undergo two prior trials is not due to any fault of his. Therefore, it is unfair for the State to refer to the cumulative costs of presenting the experts again. As the State's above arguments contemplate, the higher the cost, the more likely the jury will make an inference that the experts' opinions are for sale. This Court should preclude the State from introducing evidence relating to the costs of prior trials and from making improper argument to disparage defense experts.

4. This Court should preclude the State from arguing or introducing evidence related to domestic violence syndromes, effects or dynamics or the general cause of fighting against domestic violence.

Prior to the first trial, the State indicated that it would not introduce evidence of domestic violence, except for the prior conviction for felony battery, and even that evidence was to be limited. 3/16/09 TT 2-3, 12, Exh. A.

Despite the prior rulings of this Court, and the understandings of the parties, during the 2010 retrial, the State repeatedly introduced the issue of domestic violence as a psychological syndrome, a community problem and cause. For example, during voir dire, the State inquired of jurors whether they felt domestic violence was a "community problem." The Court ruled that the State could not talk about domestic violence syndromes or define that term. 8/23/10 TT (partial transcript), p. 16.

In closing argument, the prosecutor stated, *"An anonymous domestic violence survivor once made this observation. If you can't be thankful for what you have, be thankful for what you have escaped."* 8/31/10 TT 32. In rebuttal closing argument, the prosecutor argued, *"It was Ralph Waldo Emerson who said all violence, all that is dreary, all that repels is not power. It is the absence of power. In battering Victoria in*

the hours leading up or the minutes leading up to her ultimate death, the defendant didn't show us what kind of power he has. He showed us how weak he is. Men who beat women." 8/31/10 TT 132. The prosecutor further argued, *"Mary Gianocos who is the director of Voices against violence once said. . . everything we know. . . ."* A defense objection to this argument was sustained. The prosecutor continued, *"Everything we know about domestic violence is that it is about power and controlling people."* 8/31/10 TT 161.

It is improper for the State to rely on psychological syndromes, effects or dynamics of abuse or domestic violence because there is no evidence which is admissible for the purpose of showing that O'Keefe had the character traits of an abuser or that Whitmarsh had the character traits of a victim. NRS 48.061 specifically prohibits the use of such evidence against an accused to prove the basis of the charge. That statute provides:

> (1) Except as otherwise provided in subsection 2, evidence of domestic violence and expert testimony concerning the effect of domestic violence, including, without limitation, the effect of physical, emotional or mental abuse, on the beliefs, behavior and perception of the alleged victim of the domestic violence that is offered by the prosecution or defense is admissible in a criminal proceeding for any relevant purpose, including, without limitation, when determining:
>
> (a) Whether a defendant is excepted from criminal liability pursuant to subsection 7 of NRS 194.010, to show the state of mind of the defendant.
>
> **(b)** Whether a defendant in accordance with NRS 200.200 has killed another in self-defense, toward the establishment of the legal defense.
>
> 2. *Expert testimony concerning the effect of domestic violence may not be offered against a defendant pursuant to subsection 1 to prove the occurrence of an act which forms the basis of a criminal charge against the defendant.*
>
> **3.** As used in this section, "domestic violence" means the commission of any act described in NRS 33.018.

(Emphasis added.) Subsection 2 above makes it clear that the State's reliance on the dynamics of abusive relationships to prove its case is improper. Additionally, it is misconduct for a prosecutor to appeal to the conscious of the community or societal concerns because the jurors' only proper focus should be on whether the State has proved its charge. See Atkins v. State, 112 Nev. 1122, 1138-39, 923 P.2d 1119 (1996) (Rose, J., concurring), overruled on other grounds by Berjano v. State, 122 Nev. 1066, 1076, 146 P.3d 265 (2006).

The arguments above and similar arguments by the State must be precluded. They are improper and violate O'Keefe's constitutional right to a fair trial. These types of arguments rely not upon actual admissible evidence, but upon prejudices that the jurors may have about men who beat women. Here, the prior felony conviction was only first admitted for the purpose of proving, in combination with Morris's claims, that O'Keefe had a motive to kill Whitmarsh. As this is now a second degree murder, the evidence could only be relevant to show intent/malice. However, the improper comments and arguments, which seek to convince the jurors that O'Keefe or Whitmarsh acted in conformity with a character traits of a person in an abusive relationship, tip the previous balancing determinations made by this Court, making overwhelmingly prejudicial the admission of the prior judgment of conviction evidence and Morris's testimony regarding other bad acts and O'Keefe's alleged skill at killing with knives.

The State also made reference to Whitmarsh's bruising in various stages of healing and argued that this indicated that she *"had been roughly handled in an ongoing bashing."* 8/31/10 TT at 155. This is clearly improper bad acts evidence and is especially prejudicial in light of the fact that the defense had been limited from introducing evidence from its witnesses to show that O'Keefe and Whitmarsh had a loving relationship in the days and weeks before the incident at issue. There was no evidence to support any claim of domestic violence in the days and weeks before the incident, and the evidence at trial clearly showed that Whitmarsh's physical condition, combined with alcohol abuse provided an innocent explanation for any healing bruises.

The State should be precluded from making such improper and unsupported claims in the upcoming trial.

5. **This Court should preclude the State from inquiring about O'Keefe's 2005 convictions for non-support of his children, as these do not qualify for admission under NRS 50.095.**

Evidence of O'Keefe's prior convictions for non-support is not admissible for impeachment purposes. Although this issue was overlooked by counsel during O'Keefe's first trial, and the evidence was admitted by the defense, O'Keefe raises it here to avoid any reliance by the State upon the prior defense miscalculation.

NRS 50.095(1) provides: "For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is admissible but only if the crime was punishable by death or imprisonment for more than 1 year under the law under which the witness was convicted." O'Keefe's 2005 convictions for two counts of non-support in Ohio resulted from no contest pleas under Ohio Revised Code Section 2919.21(A)(2) and (G)(1), which provided for a maximum penalty of one year imprisonment. See Exh. E (Attached). O'Keefe was actually sentenced to nine (9) months on each count. Id. Therefore, these convictions are not admissible for impeachment in Nevada.

CONCLUSION

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

DATED this 1st day of January, 2011.

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EXHIBIT A

COPY

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DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

THE STATE OF NEVADA, Plaintiff, vs. BRIAN KERRY O'KEEFE, Defendant.	CASE NO. C-250630 DEPT. NO. 17 **Transcript of Proceedings**

BEFORE THE HONORABLE MICHAEL VILLANI, DISTRICT COURT JUDGE

MONDAY, MARCH 16, 2009

JURY TRIAL - DAY 1

APPEARANCES:

FOR THE PLAINTIFF: PHILLIP SMITH, ESQ.
STEPHANIE GRAHAM, ESQ.
Deputy District Attorneys

FOR THE DEFENDANT: RANDALL H. PIKE, ESQ.
PATRICIA A. PALM, ESQ.
Special Public Defenders

COURT RECORDER:

MICHELLE RAMSEY
District Court

TRANSCRIPTION BY:

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Littleton, CO 80120
(303) 798-0890

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

LAS VEGAS, NEVADA, MONDAY, MARCH 16, 2009, 9:26 A.M.

(Court called to order)

(Outside the presence of the jury)

THE COURT: All right, this is C-250630, State of Nevada versus Brian O'Keefe. Is it O'Keefe or O'Keefe?

THE DEFENDANT: O'Keefe, sir.

THE COURT: O'Keefe, all right. Mr. Pike, his attorney, Mr. Smith and Ms. Graham for the State. The State's motion to admit evidence of other crimes.

MR. SMITH: And Judge, I'm paying attention to you.

THE COURT: All right. Proceed. Proceed.

MR. SMITH: Judge, it's the State's position that the testimony of Cheryl Morris at the preliminary hearing clearly establishes at that the defendant had a motive to kill Ms. Witmarsh (phonetic) and that the defendant relayed to Cheryl Morris that he had a deep seeded animosity towards Ms. Witmarsh for testifying against him at a previous battery domestic violence trial.

Our proffer would be that we intend to call a detective who would be able to testify that he obtained certified copies of the Judgment of Conviction from that domestic violence charge showing that he was, in fact convicted.

Also, he would be able to testify that he personally determined the length of his prison sentence because, as I

stated in my motion, the defendant specifically stated to Cheryl Morris that Ms. Witmarsh had taken away three years his life.

So we would -- we would put the detective on to say that he did investigation into the defendant's criminal records at the Nevada Department of Corrections and it did, in fact, reveal that he spent three years in prison.

So the State submits that we have certainly met the burden that it has probative value, especially because this is an open murder charge. To support a conviction of first degree murder the State has to show deliberation and premeditation and intent.

And with the defendant making statements that he specifically wanted to "kill the bitch" because she had testified against him, I submit that this is clearly a motive evidence contemplated by NRS 48.045.

That being said, it's the State's position that your Honor has to weigh the probative value versus the prejudicial value. I submit that it is certainly more probative than prejudicial because it clearly establishes motive. The State is not going to make any argument that he's necessarily a bad guy because of that. It's simply one part of the entire story of this case, and I submit that it should certainly be admitted into evidence.

THE COURT: All right. Mr. Pike?

MR. PIKE: Thank you, your Honor. For the record, in anticipation of this -- this issue coming in, we conducted a thorough cross-examination of Cheryl Morris at the time of the preliminary hearing so that there would be a record and you could actually read the full transcript as to what she was going to say. That's the reason we don't have to actually have witnesses called in at this point in time because the -- as you can see from the documents that have been filed, this is not a case that has a great deal of varied issues in it, would (sic) have developed a number of them.

In relationship to this one, this -- you're dealing with Cheryl Morris. Cheryl Morris is a girlfriend of the defendant that was an interim girlfriend after he had gotten out of prison, and they had established a relationship. Cheryl and Mr. O'Keefe, in fact, had resided together, were boyfriend and girlfriend, they had shared a joint account, they bought a car together, they had done a number of things like that. And she is a jilted girlfriend in that as soon as the deceased in this, Victoria Witmarsh re-contacted Mr. O'Keefe -- and he did not contact her. He did not seek her out. He did not attempt to reestablish the relationships after this.

But he -- Mrs. Witmarsh contacted him. They reestablished a relationship. If -- if this had any probative value it would be in a case where the issue of the identity of an individual who had killed Mrs. Witmarsh may be at issue.

This is -- this is a couple that had reestablished themselves. They'd been very public about their reuniting. He -- Mr. O'Keefe had taken her to the union hall where they had worked together. They were a couple to the neighbors around the apartment where they had been. They were -- had gone into a -- my client was involved in a rehab program through the union at MINDS. So he had gone forward in relationship to them appearing together, and Mrs. Witmarsh had appeared with him during that period of time.

There is a reason why hearsay statements are considered as inherently unreliable unless they meet certain criteria. And this is certainly one, because it is not -- the issue is not whether this was a planned homicide or anything like that.

In fact, given the alcohol -- the obvious intoxication of Mr. O'Keefe at the time, the intoxication and drug -- and overdosage not to the extent of death, but a high amount of an anti-depressant along with the .24 alcohol level in the deceased as a result of the autopsy. It appears that these two were -- were not anywhere near their normal state of mind during that period.

So for a jilted girlfriend to come in and say he told me that he was -- you know, he would kill her because of this, I think is far more prejudicial than probative because she has her own motives for doing that.

THE COURT: Well doesn't this -- the State's presented it as motive -- purpose of motive or intent of your client. Doesn't it relate to that? Because I think -- if the court or if the jury and the court believes the former girlfriend and she had said that the defense -- and I'm -- she took, you know, three years out of my life and he's got a ax to grind, isn't that relevant to motive and intent?

MR. PIKE: It would be if this was -- appeared to be a premeditated type of criminal offense where he was trying to hide from police, or establish an alibi or do anything at all like that. In circumstances where we have two drunk people involved in it, I just don't -- I don't see where it meets that probative versus prejudicial test.

THE COURT: All right. Anything further, Mr. Smith?

MR. SMITH: Judge, my reply would be Mr. Pike has raised some issues that are right for cross-examination when Ms. Morris gets on the stand. But the point here is if the State made a prima facie showing that it does have probative value and that it outweighs the prejudicial value, and I think it does.

Surely there are several interpretations as to what the evidence is going to show in this case, but the State is entitled to a little deference if we can show that our theory of the case supports the probative value of that testimony, and it, in fact, does.

Furthermore, the fact that he -- the defendant didn't try and establish an alibi or anything of that nature, I mean, we hear that premeditation can be as quickly as successive thoughts of mind. And I'm sure your Honor can think of a theory that State could put forward that uses testimony of Ms. Morris, despite the fact that the defendant did not give an alibi or didn't do any of the things that Mr. Pike put forward that one would normally expect in a case of premeditation and deliberation. I submit that we've met our burden and it should come in.

THE COURT: Anything further, Mr. Pike?

MR. PIKE: No, your Honor.

THE COURT: Mr. Pike, were you the defense attorney? Did you cross-examine this witness at the lower stage?

MR. PIKE: Yes, I was, your Honor.

THE COURT: Okay.

MR. PIKE: The -- in --

THE COURT: She made these statements, correct, under oath?

MR. PIKE: Pardon?

THE COURT: She made these statements?

MR. PIKE: She did make those --

THE COURT: She relayed the -- right.

MR. PIKE: -- statements under oath and they were subject to cross-examination. The -- the statement about

taking three years out of his life, Mr. O'Keefe spent basically a year in custody in Clark County Detention Center. While that was pending Ms. -- Mrs. Witmarsh visited him in -- in jail, also in prison and then reconnected with him afterwards.

They -- their relationship really didn't end for a period of three years. So if the court is going to allow it in, then I'm going to have to have kind of a wide range on the investigation of the detective in relationship to visitation logs, Mrs. Witmarsh's contact with him. It does present a -- a bit of the Gordian knot or a messy situation as far as examination. And I don't think it's -- it's so -- it's so insightful that it would -- it becomes a -- a hot poker of probative value for the State.

THE COURT: All right. I think the prior acts here and the statements are relevant to the charge. With the testimony under oath they've been proven by clear and convincing evidence. And Mr. Pike, I do find that the probative value is not substantially outweighed by the prejudicial effect of this, so I'm going to allow that testimony to come in. And we start in 20 minutes; is that correct?

MR. PIKE: That's correct, your Honor. In relationship to this, we've got -- if we could go ahead and take some time and take care of some housekeeping matters for the trial.

As the court has seen, we have exchanged our proposed jury instructions. I filed a hard copy, or provided a hard copy to the clerk. In addition to that, the documents, as part of the reciprocal discovery that I provided to counsel, I've made a -- a list of exhibits and have provided those to the clerk also.

THE COURT: All right.

MR. PIKE: In anticipation in this case, it -- the trial may go where Mr. O'Keefe may decide to testify or not testify. In the event that he does elect to testify, we do have some issues in relationship to a prior conviction of a burglary in which the charging documents indicated the burglary was for purposes of a sexual assault. The sexual assault was found to be -- there was insufficient evidence to support the sexual assault allegations. And at that offense, he was just convicted of a burglary and a misdemeanor battery.

If he takes the stand, we will go ahead and preview the conviction for the burglary and the battery. Although, if -- since the court has issued the ruling that -- that battery's probably going to come forward.

I'm going to request that before the State be allowed to further impeach in relationship to the burglary, that because we will establish that within the ten year time period and since we will establish it, that there really is nothing to impeach. And if there is any portion of the sexual assault

that comes in in relationship to that, of which he was acquitted, then we'd be bringing a motion for a mistrial.

And I don't anticipate the State's going to do that. I'm just -- I'm just telling you there's some -- there's a couple hot issues that you need to be aware of that are in the --

MR. SMITH: There are some land mines --

MR. PIKE: -- past.

MR. SMITH: -- in this case.

MR. PIKE: There are.

MR. SMITH: There are plenty of land mines.

MR. PIKE: And there --

THE COURT: You're not going to do that, Mr. Smith, are you?

MR. SMITH: I'm not going to go into the sexual assault. Judge, I'm going to keep my impeachment, if he testifies with regards to his prior felonies, as sanitary as possible. When were you convicted, what jurisdiction and what was the crime, that's it. Even with the DV third.

THE COURT: All right. That's all you're allowed to do.

MR. SMITH: The only details, Judge -- I'm sorry, I just want to make sure --

MR. PIKE: That's okay. No, no, this is what --

MR. SMITH: -- Randy knows.

MR. PIKE: -- it's for.

MR. SMITH: The only detail I'm going to go into with regards to the prior DV obviously is who the witness was that testified against him, because that -- I mean, that kind of comes in. But other than that, the other convictions I'm going to stay away from them with the exception of what's allowed by law.

THE COURT: Can you make sure your witness doesn't blurt something out?

MR. SMITH: And I certainly won't bait him.

MR. PIKE: And then in relationship --

THE COURT: You know, we had a mistrial --

MR. PIKE: Yeah.

MR. SMITH: Right.

THE COURT: -- in the next department first witness.

MR. SMITH: First witness. Well, we don't anticipate that happening here.

MR. PIKE: We don't. We -- and in relationship to the -- the other issues, there are some prior, of course, because it is a -- was a third offense domestic violence, there were two prior misdemeanor convictions for battery domestic violence. I guess, we're just going to have to kind of deal with those if Mr. O'Keefe takes the stand in relationship to whether they're going to bring them in as other bad acts. If they're just going to stick to the felonies, then we won't, but

I don't --

MR. SMITH: And again, I'm not going to ask the defendant about any of his priors, with the exception of ones that are -- have already been deemed admitted. But, of course, the State reserves his right to cross-examine him if were the defendant to open the door, as it were, to any -- any acts he may have allegedly committed against Mrs. Witmarsh.

MR. PIKE: That's correct, and we have -- and may the --

THE COURT: I'm sure you've counseled your client carefully.

MR. PIKE: We have. If fact, Ms. Palm is present here. In going through this, we've indicated to Mr. O'Keefe that those misdemeanors may not be used as impeachment materials unless he opens the door by indicating that there was never any problems him and Mrs. Witmarsh, or we're trying to just stick to prospective Lee from when they reunited after he got out of prison this time, which -- and I think if we can successfully do that, then we're not going to have an issue with the prior DVs except for the -- the one felony as motive.

And if during cross-examination there's anything that's blurted out or Mr. O'Keefe elects to talk about that, then it kind of -- it opens the door for State. So as they're being careful with their witnesses, Mr. O'Keefe, if he'll pay attention right now during trial then he'll understand the --

the potential land mines or doors that he will open.

THE COURT: Mr. O'Keefe, do you understand what your attorney just stated?

THE DEFENDANT: Yes, your Honor, I do.

THE COURT: Okay, because if you blurt something out or you don't listen to the question carefully and answer something that's not being asked, you may open the door, and it's going to -- perhaps the other domestic violence issues will come in, and I'm sure that will adversely impact your case.

MR. PIKE: And the one other --

THE COURT: Do you understand that, sir?

THE DEFENDANT: Yes, I do, your Honor.

THE COURT: All right.

THE DEFENDANT: I do.

THE COURT: Okay.

THE DEFENDANT: I do have something I'd like it mention, if I may.

THE COURT: Well, why don't you talk to Mr. Pike first see if you want to advise the court of it.

MR. PIKE: In relationship to -- again, back to Cheryl Morris. Now, there are two aspects of the testimony, and I didn't cover one of it. The Court's ruled on the aspect in relationship to the mow testify.

The other is the means. As the transcript indicated,

we went through and because she was saying that he would -- that Mr. O'Keefe said that he would threaten her or would kill her, she demonstrated that he would stab her with a knife, or he said that he would stab her with a knife in the sternum, the center of the sternum which I'm pointing at right now for the record and which she pointed to at the time of the preliminary hearing.

In fact, the -- the death producing wound is under the armpit forward with the -- the blade facing back towards the back, the cutting edge facing back towards that. So that is dissimilar enough that I -- I think that that portion of the testimony is not -- is not probative and certainly is prejudicial if it's says he's going to do it with a knife and then pointing to a specific area that is, given the size of the victim in this case, is probably no more than a foot away.

MS. PALM: And your Honor, if I could just clarify that for a second because her -- she made statements that he had told her and demonstrated to her how he would kill people with a knife. That, I think, is completely irrelevant and had nothing to do with Victoria Witmarsh. She never said that he was going to do that exactly to Victoria Witmarsh. Just that she had said he said he was going to kill Victoria Witmarsh. Those are two separate things.

So in reference to him demonstrating how he would kill people with the knife, we would ask that they caution her

not to go into that because that hasn't been noticed as a bad act, as well as any prior domestic violence against her has also not been noticed.

MR. PIKE: We've done that.

MS. PALM: Okay.

MR. PIKE: Yeah.

MS. PALM: Sorry, I was late to the game.

MR. SMITH: Judge -- Judge, the defendant's stating to another person that he has the ability to kill somebody in a specified means is not a bad act. It's not a crime to say -- for instance, if I'm a sniper and I'm in the Marine Corp., and I tell one of my friends, "You know, I'm really good with a 30 odd 6 from 500 yards," it's not a crime.

But then if I go ahead and use -- and kill somebody with that same means, certainly the Government in prosecuting me should be able to use evidence that I indicated that I have a proficiency at killing somebody in that manner. That's not a bad act, and that's our position. That's why we didn't file the motion -- we didn't file a motion saying, you know, we should be able to get in that the defendant or stated to Ms. Morris that he has a proficiency with knives and can use them. That's not a bad act.

THE COURT: I'm not interpreting it as a bad act, so --

MR. SMITH: And so Ms. Morris should certainly be

allowed to testify to that.

THE COURT: I'm going -- she will be allowed to testify to that.

MR. SMITH: Thank you.

THE COURT: Anything else, Mr. Pike?

MR. PIKE: No, your Honor.

THE COURT: Ms. Palm? Anything else, Mr. Smith?

MR. SMITH: We have one thing, Judge. One of our officers, Christopher Hutcherson, when he arrived at the scene, the defendant made some spontaneous statements. Specifically the one that we want to address is one where the defendant allegedly stated to Officer Hutcherson, "Let's go, let's do the ten years."

It's the State's position that that's a statement showing a consciousness of guilt. Now, I know it's kind of a double whammy in that the defendant is saying "let's do the ten years", which if it comes out in that fashion, the jury would then be given evidence regarding sentencing.

So what the State wanted to suggest with the defense counsel's agreement, and with your Honor even ruling that it's admissible, is that Officer Hutcherson be allowed to say something to the effect that the defendant stated, "Let's go, let's do the prison time," or "Let's go, let's do something like that."

But to sanitize it where he doesn't say the quantity

EXHIBIT B

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FILED
JUL 21 2010
CLERK OF COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA, Plaintiff, vs.	CASE NO: C250630 DEPT NO. XVII DATE: Aug 3, 2010
BRIAN K. O'KEEFE, Defendant.	TIME: 8:15a

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

Dated this 21st day of July, 2010.

PALM LAW FIRM, LTD.

Patricia Palm, Bar No. 6009
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NOTICE OF MOTION

TO: STATE OF NEVADA, Plaintiff; and

TO: DAVID ROGER, District Attorney, Attorney for Plaintiff

YOU WILL PLEASE TAKE NOTICE that the undersigned will bring on the above and foregoing **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** on the 3 day of August, 2010, at the hour of 8:15 A.m., in Department No. XVII of the above-entitled Court, or as soon thereafter as counsel may be heard.

DATED this 21st day of July, 2010.

PALM LAW FIRM, LTD.

By: PATRICIA PALM
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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 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

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

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

STATEMENT OF FACTS

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

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

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

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

By this time, shortly after 11:00 p.m., police had arrived on the scene. 3/16/09 TT 215, 3/17/09 TT 65. When they entered the bedroom, they found Whitmarsh lying on the floor next to the bed and an unarmed O'Keefe cradling her in his arms and stroking her head. 3/17/09 at 87, 96. The police believed Whitmarsh to be dead and ordered O'Keefe to let go of her, but he refused. Id. at 51-52, 60-61, 87. The officers eventually subdued him with a taser gun and carried him out of the bedroom. Id. 88. 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 170-76. Much of his speech was incoherent, but at one point he said that Whitmarsh stabbed herself and he also said that she tried to stab him. 3/17/09 TT 56, 85, 92. They arrested him and brought him to the homicide offices. 3/17/09 TT 177. Subsequent to his arrest, O'Keefe gave a rambling statement indicating he was not aware of Whitmarsh's death or its cause. 3/18/09 TT 133. Police interviewed him at 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

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

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

O'Keefe testified. 3/19/09 TT 177. He acknowledged his problems with alcohol and described his history with Whitmarsh. Id. at 177-93. He disputed Morris's claim 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. Id. at 191. He was aware that Whitmarsh had Hepatitis C when she moved into his apartment. Id. at 197-98. In November, 2008, Whitmarsh was stressed because of her financial condition. 3/20/09 TT 17. A couple of days before the incident at issue here, Whitmarsh confronted O'Keefe with a knife. Id. at 18-19. She had been drinking and was on medication. Id. O'Keefe had not been drinking that night and was able to 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

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

ARGUMENT

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

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

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

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

> 1. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.
>
> 2. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time or needless presentation of cumulative evidence. . . .

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

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

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

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

The Nevada Supreme Court recognizes that the use of character evidence to convict a defendant is extremely disfavored in our criminal justice system. Such evidence is likely to be prejudicial and irrelevant and forces the accused to defend against vague and unsubstantiated charges. It may improperly influence the jury and result in the accused's conviction because the jury believes he is a bad person. The use 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

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

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

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

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

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

///

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

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

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

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

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

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

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

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

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

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

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

During the previous trial, the State introduced testimony from transportation officer Hutcherson that O'Keefe told him to "turn that nigger music off" and said "I don't listen to nigger music." 3/17/09 TT 179, 251. This testimony came as a surprise to the 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:

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

3/18/09 TT 2-8.

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

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

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

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

However, the excited utterance hearsay exception is justified by the concept that 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.

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

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

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

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

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

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

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

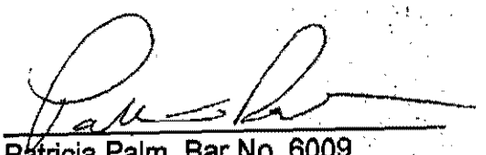
reh'g, 114 Nev. 100, 952 P.2d 431 (1998). Here, O'Keefe should not be further burdened by the violation of his rights during the previous trial, and to allow the fact of the previous trial, conviction, or appeal into evidence would taint his right to a fair retrial.

CONCLUSION

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

DATED this 21st day of July, 2010.

PALM LAW FIRM, LTD.



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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: Teresa Lader

EXHIBIT C

ORDR
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FILED
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CLERK COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA, Plaintiff, vs. BRIAN K. O'KEEFE, Defendant.	CASE NO: C250630 DEPT. NO: XVII DATE: TIME:

ORDER GRANTING, IN PART, AND DENYING, IN PART, 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

This matter having come before the Court on August 17, 19 and 20, 2010, on a Notice of Motion and Motion by Defendant O'Keefe, to which an Opposition was filed by the State, and the Court having heard argument and been fully advised in the premises, and good cause appearing therefore;

IT IS HEREBY ORDERED that the Motion is GRANTED, in part, and DENIED, in part, as follows:

A. As to the request to preclude the State from introducing evidence showing that O'Keefe had claimed to Cheryl Morris that he could kill anyone with a knife and had demonstrated how he would kill with knives: The Court finds that this evidence is relevant to the issues in the case, and that it should be admitted; therefore, the Defendant's request is DENIED.

B. As to the request to limit the State to presenting the Judgment of Conviction for felony domestic battery with the redaction to omit reference to the concurrent sentence in another case, i.e., C207835: the Court finds such redaction appropriate; therefore, the Defendant's request is GRANTED.

C. As to the Defendant's request to preclude the State from introducing any evidence of a sexual assault allegation related to Defendant's prior burglary conviction: the Court finds such preclusion appropriate; therefore, the Defendant's request is GRANTED.

D. As to the Defendant's request that the State be precluded from introducing the term "Sexual Assault Kit" or making any reference to any sexual assault in the trial: the Court finds such preclusion warranted; therefore, the Defendant's request is GRANTED, and the parties will instead reference the kit as a "DNA collection kit."

E. As to the Defendant's request that the State be precluded from introducing photographs of Victoria Whitmarsh's bruises: the court finds that the evidence indicates that blunt force trauma, which is consistent with self-defense or an attack, is relevant to the issues in the case; therefore, the Defendant's request is DENIED.

F. As to the Defendant's request that the State be precluded from introducing any evidence of racial slurs by Defendant: the court finds such preclusion is proper; therefore, the request is GRANTED.

G. As to the Defendant's request that the State be precluded from introducing the hearsay statement of Charles Tolliver "Baby, he done killed that girl": the Court finds that such preclusion is warranted; therefore, the Defendant's request is GRANTED and the State's will not introduce this hearsay statement.

H. As to the Defendant's request to preclude the State from introducing through a homicide detective an expert opinion on the nature of O'Keefe's wounds: the Court finds that the State has withdrawn its request to present the testimony as "expert" opinion, however, the opinion of the officer is appropriate as a lay opinion; therefore, the defendant's request to preclude the opinion is DENIED.

I. As to the Defendant's request to preclude the State from introducing evidence regarding the prior trial, conviction or appeal: the Court finds that such preclusion is proper; therefore, the request is GRANTED.

IT IS SO ORDERED this 3 day of Sept August, 2010.

MICHAEL P. VILLANI

DISTRICT COURT JUDGE

Respectfully submitted by:
PALM LAW FIRM, LTD.

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FILED

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CLERK

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DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

BRIAN K. O'KEEFE,

Defendant.

CASE NO. C250630
DEPT. NO. XVII

RECEIPT OF COPY

RECEIPT OF COPY of Order Granting, in Part, and Denying in Part, 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 filed September 9, 2010, is hereby acknowledged.

DATED: 9.14, 2010.

DISTRICT ATTORNEY'S OFFICE

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

A Correct.
Q You're here because the State subpoenaed you and made you come to court today --
A Right.
Q -- isn't that correct? Pass the witness.
Q -- isn't that correct? Pass the witness.

CROSS-EXAMINATION

BY MS. DUSTIN:
Q Miss Whitmarsh the State asked if you have had any ongoing contact with Mr. O'Keefe, do you remember?
A I'm sorry?
Q The State asked if you've had contact with Mr. O'Keefe since this happened. You have, haven't you?
A Yes, correct.
Q Have you written him some letters?
A Yes.
Q Okay. Do you recall in your letters stating that he didn't hit you that night?
A I don't remember. I need to see the letter.
MS. DUSTIN: If I could approach, Your Honor.
THE COURT: Again, which -
MS. DUSTIN: I've already had it pre marked. I'm going to approaching with Defendant's Proposed Exhibit A.
MR. O'BRIEN: Miss Dustin which one is that?
MS. DUSTIN: (Indicating)
...

BY MS. DUSTIN:
Q Miss Whitmarsh, I'm handing you what is marked as Defendant's Proposed Exhibit A. Do you recognize that?
A Yes, it's my handwriting.
Q Okay. And can you describe in general terms what that particular [illegible]
Q Okay. And can you describe in general terms what that particular document is?
A It's my letter.
Q Um-huh. And you wrote this letter to who?
A To Brian, yeah.
Q Okay. Can I direct your attention to -- the page (indicating). Can you tell me what you -- can you review that? Does that refresh your recollection of what you might have written in a letter to the Defendant?
A Yeah, I recall it now.
Q Okay. Did you happen to write that Mr. O'Keefe did not hit you that night on April 2nd?
A Yes.
Q Now, Miss Whitmarsh you noted that you'd been drinking that night, right?
A Yeah, I did admit it, yes.
Q And you started drinking before the first verbal argument began, right?
A We were both drinking, right.
Q Did you continue drinking after Mr. O'Keefe left the apartment with the police officers?
A No, I remember that point no.

Q Okay. Were you intoxicated when the second incident happened where you had put the chair and Mr. O'Keefe wanted to come back in to get his cell phone and money, were you still intoxicated at that time?
A I don't remember.
Q Okay. Now, Miss Whitmarsh, you wanted this matter resolved, right?
A Right.
Q You wanted Mr. O'Keefe to take a deal on this, right?
A I just don't want to be here.
Q Do you remember writing a letter to him where you just asked: Can't you just make a deal with these people?
A Yeah, 'cause I don't really want to be here.
Q Okay. And that you knew that he didn't want to take a deal because he wanted to keep his integrity?
A That's what he said, yes.
Q Okay. Court's indulgence. Now, Your Honor, referring back to Defendant's Proposed Exhibit A may I approach one more time?
THE COURT: All right.
Q Now, Miss Whitmarsh, you previously testified -- this is a letter by you to the Defendant, correct?
A Right.
Q And can you note the date of this letter?
A August 25, 2005.
Q And you mailed this to the Defendant, is that correct?
A Right.

MS. DUSTIN: Your Honor, I move for admission of Defendant's Proposed Exhibit A.
MR. O'BRIEN: No objection.
THE COURT: Granted.
BY MS. DUSTIN:
Q Now, Miss Whitmarsh, we talked about potentially another letter, isn't that correct?
A Right.
MS. DUSTIN: Your Honor, can I approach the witness?
THE COURT: Has this one been marked also?
MS. DUTSIN: This -- it should be Defendant's Proposed Exhibit -
THE CLERK: B.
MS. DUSTIN: -- B but we did have a 2 accidentally marked on there.
THE COURT: Okay. Does it still say 2?
MS. DUSTIN: Yes. If you'd like I can correct it.
THE COURT: Would you take it back to the clerk for correction.
MS. DUSTIN: I'm now approaching with what is marked as Defendant's Proposed Exhibit B.
THE COURT: You may.
BY MS. DUSTIN:
Q Now, Miss Whitmarsh, can you identify this document for me, please?
A It's a letter that I wrote.
Q Okay. And who did you write it to?
A Brian.

Q Okay. And can you tell me what the date is of that letter?
A July 28th.
Q Of what year?
A 2005.
Q And I would like to refresh your recollection of this particular
A 2005.
Q And I would like to refresh your recollection of this particular paragraph [indicating].
A Yes.
Q Okay. And isn't it true in this letter you particularly asked the Defendant to make a deal with these people?
A Yes.
Q And isn't it true in this letter you also said that you knew that he wanted to maintain his integrity?
A Yes.
MS. DUSTIN: Your Honor, I move for admission of Defendant's Proposed Exhibit B.
MR. O'BRIEN: No objection.
THE COURT: Granted.
MS. DUSTIN: Court's indulgence.
BY MS. DUSTIN:
Q Now, Miss Whitmarsh, I know this is difficult because it happened a little while ago but back on April 2nd you called the police two times, isn't that correct?
A Yes.
Q And isn't it true based upon your testimony earlier you contacted the police because you just wanted Mr. O'Keefe to leave the apartment?

A That's correct.
MS. DUSTIN: Nothing further, Your Honor.
MR. O'BRIEN: Could I see the defense's exhibits, please.

REDIRECT EXAMINATION

BY MR. O'BRIEN:
BY MR. O'BRIEN:
Q Miss Whitmarsh let's talk about these letters for a moment. The August 20 or, I'm sorry, the July 28th of this year letter. Did you not tell Mr. O'Keefe in that letter that you were not going to testify and that you had told him that before?
A I don't recall.
Q You don't recall. Can I approach, Your Honor.
THE COURT: Yes, you may.
THE WITNESS: Which one?
BY MR. O'BRIEN:
Q Let's take a look at your letter real fast.
A [Reviewing exhibit] Yes.
Q You told him that then: Like I said before, I am not going to testify?
A Yes, correct.
Q You told him you loved him and you missed him, is that correct?
A Yes.
Q And you told him that: I know you're thinking paranoid that I'm just going to disappear on you, well, I'm still here waiting, hoping to see you soon. Is that correct?
A Yes.

Q Let's talk about Defense Exhibit A, the letter from August 28th. You talk in there a little bit about the DA's office trying to subpoena you for this case and you were not being cooperative in that process, isn't that correct?
A Yeah, 'cause I didn't want to be here.
Q Okay. And you told him: I will tell them what happened that night I do not remember. Isn't that correct?
A Yeah, I don't remember.
Q And you repeated it again: I can't remember what happened?
A Right.
Q Isn't that correct?
A [Nods]
THE COURT: Is that a yes?
THE WITNESS: Yes.
BY MR. O'BRIEN:
Q And you signed or your initialed I with a heart U, I love you; isn't that correct?
A On that letter?
Q Right.
A I have to see it, I don't recall.
Q Okay. If I can approach again, Judge.
THE COURT: You may.
THE WITNESS: [Reviewing exhibit] Yes, yes.
MR. O'BRIEN: Nothing further.
THE COURT: Recross.
MS. DUSTIN: Just a couple follow-up questions.

RECROSS-EXAMINATION

BY MS. DUSTIN:
Q Miss Whitmarsh in both these letters you noted that the State was threatening you, isn't that correct?
A Yeah, I feel threatened, yes, 'cause like I say I didn't want to be here but I have to.
Q And they were "the District Attorney was using scare tactics" on you?
A Well, I did get a call, yes. They said if I don't appear I have to be – might be arrested.
Q And that they – I'm sorry. And they kept coming to your work place?
A They came to my work place, right.
Q And they threatened that they would throw you in jail if you didn't come today, isn't that correct?
A Yes.
Q Now, the District Attorney just said in your letter from August 28th, which is Defendant's Exhibit A that you noted you couldn't really remember what happened, isn't that correct?
A Right.
Q Would you remember if somebody hit you?
A Of course.
Q So when you say that you couldn't remember what happened and then you later in that same sentence said that Mr. O'Keefe did not hit you, you would remember if he did hit you that night, correct?

A That's correct.

MS. DUSTIN: Nothing further, Your Honor.

THE COURT: Redirect?

MS. O'BRIEN: No, Your Honor.

THE COURT: You may step down from the stand. Oops.

MS. O'BRIEN: No, Your Honor.

THE COURT: You may step down from the stand. Oops.

I almost did it. I've got to ask if the jury has any questions before you go out the door, hold on a second. Did the jury have any questions that they wish to ask? If you have a question I need you to raise your hand. No questions. Okay. Thank you.

State may call its next witness.

MR. O'BRIEN: Judge the State would call Dan Holley.

THE COURT: Okay.

DANIEL HOLLEY

(having been called as a witness, being first duly sworn, testified as follows:)

THE CLERK: State your name and spell it for the record, please.

THE WITNESS: Daniel Holley, H-o-l-l-e-y.

THE COURT: State may proceed.

MR. O'BRIEN: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. O'BRIEN:

Q Good afternoon, sir.

A Good afternoon.

Q How are you currently employed?

A I'm employed as a detective with the Las Vegas Metropolitan Police Department.

Q And how long have you been so employed?

A Twenty-two years.

Q And in what capacity do you work for the Las Vegas Metropolitan Police Department?

A I work as a member of the family crimes section and do specifically intimate partner crimes, domestic violence, stalking between intimate partners.

Q How long have you been doing that assignment?

A I've been six years this time around and four years my last time in the bureau.

Q And what sort of training do you have that helped you attain your current assignment?

A I've attended hundreds of hours of training all over the country reference stalking and all types of sexual assault, intimate partner violence between husband and wife or anybody with some kind of intimate relationship. I train in the police academy and I train our Citizens Police Academy, medical doctors and nurses groups, folks in Nevada are considered to be mandatory reporters of domestic violence.

Q And how often do you do such teachings?

A Oh, several times a year. I'm affiliated also as a member of the Southern Nevada Domestic Task Force and through that there's a lot of training offered and a lot of training that we're asked to give statewide.

Q Do you belong to any other associations or have any other affiliations?

A Not worked related, no.

Q Now just so we're clear have you testified in domestic violence type cases before?

A Hundreds I'm certain.

Q And do you always testify as an officer who has responded on the scene?

A In many cases, yes, I do.

Q In every case though?

A No.

Q And in fact you were not the responding officer on this case, is that correct?

A I was not.

Q And you have not reviewed the reports or the files in this case?

A I have not, I have not looked at any reports nor have I spoken with anybody involved with this case except yourself.

Q In your years of experience and training and having taught on the issue of domestic violence can you tell the jury a little bit about the dynamics of domestic violence?

MS. DUSTIN: Objection, Your Honor, he has not moved to admit this particular witness as an expert.

MR. O'BRIEN: Judge, in Nevada we don't move to admit people as experts we simply lay their foundation of qualifications and move right into questioning.

THE COURT: Overruled.

MS. DUSTIN: And just as a follow-up, Your Honor, I think I'm entitled to voir dire him before he starts testifying as an expert witness?

THE COURT: Do you wish to take on voir dire? You may.

MS. DUSTIN: Thank you.

VOIR DIRE EXAMINATION

BY MS. DUSTIN:

Q Detective Holley --

A Yes.

Q -- have you ever been barred from being an expert witness in a domestic violence case?

A I have.

Q Was it just last week?

A Yes.

Q In the Eighth Judicial District Court of Nevada?

A In this very hallway.

MS. DUSTIN: Your Honor, I think the very fact that just last week he was denied as being an expert I think brings into some serious issues whether he can qualify to testify as an expert still.

MR. O'BRIEN: Judge, I just have one follow-up question.

Detective Holley have you also been qualified to testify as an expert in the District Court?

THE WITNESS: Many times.

MR. O'BRIEN: Judge, the fact that one judge did not want to allow Detective Holley to testify doesn't mean that this Court should not allow him to testify. He's been qualified in the past. He has the training and experience and he can help the jury understand the issues in question here, that's all the statute requires.

EXHIBIT E

ORIGINAL

FILED

IN THE COURT OF COMMON PLEAS OF FAIRFIELD COUNTY, OHIO

2005 MAY 11 AM 9:11

RON DALSER
CLERK OF COURTS
FAIRFIELD COUNTY, OHIO

IN COMPUTER

STATE OF OHIO,

Plaintiff,

vs.

Case No. 04-CR-237
SETS 7006332188
JUDGE RICHARD E. BERENS

BRIAN K. O'KEEFE,
DOB: 3-14-63
SSN: 530-76-7555

Defendant.

ENTRY OF SENTENCE

Date of Conviction: After Indictment filed August 6, 2004

Offense and Degree: Criminal Non-Support of Dependents F5 - 2 Counts

Sentence	**9 months in appropriate penal institution** **Concurrent on each Count** **Community Control Sanctions** **Credit for Fifty-Three (53) Days**
Fine:	**-0-** **Costs**

On August 6, 2004, the Grand Jury met and issued a Two Count Indictment charging the Defendant, Brian K. O'Keefe, with Criminal Non-Support of a Dependent on Two Counts, a violation of Ohio Revised Code Section 2919.21(A)(2) and (G)(1), being a felony of the Fifth Degree.

On April 29, 2005, the Defendant entered a plea of "No Contest" to the Two Count Indictment.

On April 29, 2005, Jeffrey F. Bender, Special Assistant Prosecuting Attorney, appeared on behalf of the State of Ohio, and the Defendant, Brian K. O'Keefe, appeared with his counsel, James A. Fields. The Defendant advised the Court that he was entering a plea of "No Contest" to Count One and Count Two of the Indictment.

Prior to the Court's acceptance of the Defendant's plea, the Court personally addressed the Defendant and advised the Defendant of all the

information and rights required by Rule 11 of the Ohio Rules of Criminal Procedure. The Defendant indicated to the Court that he understood these rights and waived them orally and in writing. The Defendant further stated on the record that he is a citizen of the United States.

The Court further advised the Defendant of the sentence that could be imposed upon him in the event of a conviction of the offenses to which he was pleading. The Court advised the Defendant concerning his eligibility for community control sanctions. The Court further advised the Defendant that violations of any community control sanction sentence could lead to a more restrictive sanction, a longer sanction, or a prison term.

The Defendant indicated to the Court that he understood these rights and waived them orally and in writing. After a Statement of Facts from the State, the Court then determined and found the Defendant, Brian K. O'Keefe, Guilty to Count One and Count Two as charged in the Indictment.

The Court continued with sentencing. The Defendant orally and in writing waived a separate sentencing hearing. The Defendant's sentencing was held pursuant to Ohio Revised Code 2929.19. Jeffrey F. Bender, Special Assistant Prosecuting Attorney, and Attorney James A. Fields, counsel for the Defendant, were present, as was the Defendant, Brian K. O'Keefe, who was afforded all rights, pursuant to Criminal Rule 32. The Court has considered the record, oral statements, any victim impact statement, and presentence report prepared, as well as the principles and purposes of sentencing under Ohio Revised Code 2929.11 and has balanced the seriousness and recidivism factors of Ohio Revised Code 2929.12.

The Court finds that the Defendant is Guilty on Count One and Count Two of the Indictment and the Defendant has been convicted of two Counts of Criminal Non-Support of Dependents, a felony of the 5th degree, in violation of Ohio Revised Code 2919.21(A)(2).

The Court sentences the Defendant to nine (9) months on each Count in the appropriate penal institution to be served concurrent. The Court does not impose a fine. Defendant shall pay costs.

The Court finds that the minimum sentence is not adequate in this case. The Court finds that there was a continuous course of conduct over years creating a high child support arrears compared with the support order. Further, a minimum sentence would not adequately reflect the seriousness of the Defendant's conduct.

After consideration of the factors enumerated in ORC Sections 2929.12 and 2929.13, the Court finds that imposition of the remaining prison term is not mandatory or necessary at this time, and that community control sanctions are adequate to punish the Defendant. Specifically, and as indicated on the record, the Court finds that:

1) Community control sanctions will adequately punish the Defendant and protect the public because the factors against recidivism outweigh those indicating recidivism; and

2) Community control sanctions do not demean the seriousness of the offense because the factors decreasing seriousness outweigh those increasing seriousness.

Wherefore, the Court **ORDERS** that community control sanctions be imposed, for not more than five (5) years, subject to the supervision of the Adult Probation Department under any terms and conditions that they deem appropriate. The Defendant shall immediately report to the Adult Probation Department any intended changes in address and/or employment. The Defendant shall abide by all laws, ncluding, but not limited to, the laws related to firearms and dangerous rdinances. The Defendant is allowed to leave the State of Ohio to return to Las gas, Nevada only. The Defendant has pending matters in Las Vegas and the Court ll review transfer in one hundred twenty (120) days.

The Court grants the Defendant fifty-three (53) days credit for time served against Count One and Count Two sentences.

The Court further **ORDERS** the Defendant to report to the Adult Probation Department, as required by the Department, and pay any supervision fees, pursuant to ORC Section 2929.18(A)(4). The Defendant shall pay the costs of prosecution of this case as determined by the Fairfield County Clerk of Courts. Judgment is hereby granted in favor of the State of Ohio against the Defendant for said costs. The Defendant's bond shall be forfeited for costs and any remainder to the Defendant, Brian K. O'Keefe.

IT IS FURTHER ORDERED that Defendant as a specific provision of his sanctions shall pay his child support as follows: as ordered in Domestic Relations Division of the Common Pleas Court, Case No. 92-DR-0367, shall maintain regular payments of current and arrears until arrears are satisfied. Said payments shall continue as ordered unless modified by an order of Domestic Relations Court.

Costs to Defendant, Brian K. O'Keefe.

JUDGE RICHARD E. BERENS

APPROVED BY:

Jeffrey F. Bender 0037109
Special Assistant Prosecuting Attorney
Fairfield County CSEA

James A. Fields 0040350
Attorney for Defendant, Brian K. O'Keefe

CLERK'S CERTIFICATE

The State of Ohio, Fairfield County, ss:

I, the undersigned Clerk of Courts of said county, hereby certify that the foregoing is a true and correct copy of the original Entry of Sentence filed with me 5/11/2005

WITNESS my hand and official seal this 21 day of Nov. 2008

Deborah Swalley
Clerk of Courts

By Deborah L. Pitts
Deputy

IN THE COURT of COMMON PLEAS OF FAIRFIELD COUNTY, OHIO

State of Ohio.

vs.

COMMUNITY CONTROL STIPULATIONS AND AGREEMENTS

BRIAN K. O'KEEFE
Defendant

CASE NO. 04 CR 238

It appears to the satisfaction of the Court that the character of the Defendant and the circumstances of the case are such that the Defendant is not likely to engage in an offensive course of conduct, if he will conform to certain conditions set forth hereinafter, and the public good does not demand or require that said Defendant be immediately incarcerated; thereupon, the execution of sentence upon said Defendant is hereby suspended and said Defendant is placed on community control for a period of 5 years if said Defendant agrees to accept the terms. Stipulations and agreements of said sanctions as stated hereinafter:

1. You are not to leave the State of Ohio without the written consent of the Court.

2. You are to notify the Court before you change your address.

3. You are to maintain regular employment. You are to furnish a good day's work for your employer. You are not to quit your job nor change your employment without the prior consultation with, and approval of, this Court.

4. You are to support and care for yourself and all other persons for whose support you are legally responsible.

5. You are to maintain good behavior, conduct yourself in a proper manner at all times, and obey all laws of the state, laws of the United States and all local laws.

6. You are to be in your home by ten o'clock every night and are not to leave before five o'clock in the morning unless your employment (as it appears in our records) requires it.

7. You are not, without the consent of the Court, to associate with persons of bad reputation, those with criminal records, or anyone on Probation or Parole and you are not to associate with any person or persons who may cause you to weaken in your efforts to live an honest, law-abiding and useful life.

8. You are to report to the Court in person as directed by your community control officer.

(If for any reason you are unable to report at the time indicated, communicate with the Community Control Officer without delay. (Telephone 687-7048)

X _____
Defendant

9. You are not to own or operate a motor vehicle or secure a driver's or operator's license without first obtaining the permission of this Court. If such permission is granted, you shall immediately submit to this Court, for its records: (I) your operator's license, (2) the Certificate of Title, (3) the license number, (4) the vehicle registration and (5) your insurance policy for any such vehicle. You are to notify the Court before any changes are made to the above and keep the Court informed of such changes without delay.

10. You are to pay a fine in the amount of $ 0 plus the court costs. You are to make complete restitution to all parties injured or damaged by your conduct. The amount of restitution, as determined by the Court, will include a poundage fee of 2%. You will also pay supervision fees, as ordered by the Court. not to exceed $50.00 per month. Your Community Control Officer will work out a payment schedule with you, which you will be expected to follow.

11. Defendant is to spend 0 days/months in the Fairfield County Jail.

12. Defendant is to spend 0 days in Community Service.

13. You are not to have any firearms or dangerous weapons or ordinance in your possession at any time.

14. You shall not provide false information or withhold information from the Court or any Community Control Officer .

15. You shall complete a literacy program, if required, and obtain your high school diploma or GED if you have not graduated from high school.

16. You will-comply with any changes or additional terms imposed upon you by agreement or order of the Court during the period of your community control. The right to impose additions, special conditions and further instructions beyond the terms herein specified and outlined is fully and completely reserved to the Court. Such changes shall be in writing and shall become apart of the sanctions of your community control.

17. You are not to become intoxicated or go to places where intoxicating beverages are sold as a major part of their business. You are not to use narcotics, illegal or habit forming drugs without a doctor's prescription. You are to avoid persons who possess, use or sell such drugs and places where such drugs are illegally possessed, sold or used.

18. You are ordered to submit to any type of counseling, testing and/or treatment, at your cost, as may be ordered by the Court or the Community Control Officer. Pursuant to Section 2949.11 of the Ohio Revised Code, Drug Testing fees will be paid directly to the County Probation Fund to offset the expense of urinalysis testing. Testing fees shall be paid at the time of each test as administered.

19. **FOR SEX OFFENDERS.** You will not have, possess, or view, any pornographic material, including adult or child pornography, either in print form, video, or downloaded by computer, to include material such as Playboy, Penthouse, or like materials. You shall not possess, in any manner, pictures of children under the age of 18. Further, you shall not photograph any person under the age of 18, under any circumstances.
You will participate in treatment as prescribed by Court approved treatment providers. You shall comply with all the treatment requirements.

x _____
Defendant

STIPULATIONS AND AGREEMENTS

A. I have read the "Community Control Sanctions". I fully understand the terms thereof and I accept community control and agree to abide by the terms stated herein.

B. I furthermore agree to permit the Court, or the person in charge of Community Control in this Court and their agents appointed by them, to completely investigate and check my activities.

C. I furthermore consent to my being questioned by any probation officer and I consent to and shall submit to a search of myself, my property and my residence which includes common areas within and areas within the residence that are exclusive to me, at any time by such officers.

D. I furthermore consent to any entry into my motor vehicle as to the fact of my having been placed on Community Control by this Court, during the period of my community control.

E. I furthermore authorize any police officer or a person having charge of Community Control matters who has knowledge of or observes any violations of the terms of my Community Control, to apprehend me and take me into custody for said violations and present my case in a timely manner before this Court.

F. I furthermore agree, if the Court shall so direct, that I will submit myself to and cooperate with a psychiatrist, medical doctor or other medical or psychological specialist. I hereby agree to pay for said services and I do hereby authorize and direct said doctor, psychological or other medical specialist to submit a complete report of his findings, prognosis and recommendations to this Court.

G. I further understand that failure to adhere strictly to the terms, stipulations and agreements of Community Control could result in the termination of said Community Control and be sentenced to a term in prison based upon my conviction.

H. Special Conditions:

X _____ 4-29-05
Defendant

Signed in our presence:

_____ _____

_____ _____

The Defendant herein, having accepted Community Control Sanctions, the stipulations and agreements indicated above is hereby placed on community control for a period of 5 years.

Date: 4/29/05 _____
Judge

CLERK'S CERTIFICATE

The State of Ohio, Fairfield County, ss:

I, the undersigned Clerk of Courts of said county, hereby certify that the foregoing is a true and correct copy of the original Community Control + Stipulations filed with me 5/11/2005

IN TESTIMONY my hand and official seal this 21 day of Nov 2008

Deborah Swalley
Clerk of Courts

By Deborah L. Fibbs
Deputy

FILED

IN THE COURT OF COMMON PLEAS, FAIRFIELD COUNTY, OHIO

2005 APR 29 PM 3:30

CASE NO. 04 CR 237

IN COMPUTER

RON BALSER
CLERK OF COURTS
FAIRFIELD COUNTY, OHIO

THE STATE OF OHIO :

vs. : WAIVER UPON PLEA OF NO CONTEST

BRIAN K. O'KEEFE, :

Defendant. :

I, Brian K. O'Keefe, being a citizen of the United States, do hereby admit and declare that I have been fully informed by the Court concerning the following matters:

1. My right to a jury trial, my right to confront the witnesses who may appear against me, to have compulsory process for obtaining witnesses in my favor, and my right to require the State to prove my guilt beyond a reasonable doubt at a trial where I cannot be compelled to be a witness against myself.

2. If the Court accepts a plea of guilty or no contest it must then proceed with entering judgment and sentencing.

I understand that the maximum penalties are as follows:

Counts One and Two, Criminal Non-Support of a Dependent, in violation of Section 2919.21(A)(2) of the Ohio Revised Code and carrying a maximum penalty of 6, 7, 8, 9, 10, 11 or 12 months in a penal institution in the State of Ohio and a fine of up to $2,500.00 on each county. Court costs, restitution and other financial sanctions may be imposed against me, pursuant to Revised Code 2929.18.

I understand that if this Court imposes a prison term, I will also be subjected to a period of post-release control for up to 3 years after my release from imprisonment.

If this Court is not required by law to impose a prison sanction, it may impose a community control sanction or non-prison sanction upon me. If I violate the rules or conditions of such a community control sanction, the Court may extend the time for which I am, subject to this sanction up to a maximum of 5 years, impose a more restrictive sanction or impose a term of imprisonment for up to the maximum term allowed for the offense(s) set out above.

Having been advised of the above matters, I do hereby, in open Court, waive my right to a trial by

jury and to require the State to prove my guilt beyond a reasonable doubt; my privilege against self-incrimination; my right to confront the witnesses against me; and my right to have compulsory process to obtain witnesses in my behalf. With permission of the Court, I hereby withdraw my former plea of "not guilty" and enter a plea of "no contest" to the crime as charged in the Indictment and as stated above.

No promises or threats have been made to me by anyone to induce me to enter a plea or pleas of guilty to the offense(s) set forth above.

Signed this 29 day of April, 2005.

WITNESSES:

Defendant

CLERK'S CERTIFICATE

The State of Ohio, Fairfield County, ss:

I, the undersigned Clerk of Courts of said county, hereby certify that the foregoing is a true and correct copy of the original Waiver filed with me 4/29/2005

In witness my hand and official seal this 21 day of Nov 2008

Deborah Smalley
Clerk of Courts

By Deborah L. Pitts
Deputy

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CLERK OF THE COURT

NOTC

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
LIZ MERCER
Deputy District Attorney
Nevada Bar #0010681
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

BRYAN O'KEEFE,
#1447732

Defendant.

CASE NO: C-08-250630
DEPT NO: XVII

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

TO: BRYAN O'KEEFE, Defendant; and

TO: PATRICIA 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.) SUNDBURG, ANDREA, Will testify as an expert in battered women's syndrome, power and control dynamics, and the cycle of abuse, generally.

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

BY _____
DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of SUPPLEMENTAL NOTICE OF EXPERT WITNESSES, was made this 3rd day of January, 2011, by facsimile transmission to:

PATRICIA PALM ESQ
FAX #386-9114

/s/ T. SCHESSLER
Secretary for the District Attorney's Office

Andrea Sundberg
PO Box 620716
Las Vegas, NV 89122

Phone: 702-990-3460
Fax: 702-990-3461
E-mail: andreasundberg@gmail.com

EDUCATION
Kent State University
Kent, Ohio
BA Criminal Justice With a focus on Sociology

University of Nevada Las Vegas
Las Vegas, Nevada
Master in Public Administration
2006-Current

AWARDS, FELLOWSHIPS, GRANTS
Townhall II
Kent, Ohio
Outstanding Advocacy Services 1999

State of Nevada Attorney General's Office
Appreciation Award for service on Committee of Domestic Violence 2007

POSITIONS HELD

November 2007—Current
Executive Director
Nevada Coalition Against Sexual Violence

Primary Duties are to work throughout the State of Nevada on the implementation of services to assist survivors of sexual assault.

November 2002—November 2007
Community Education and Outreach Manager
S.A.F.E. House

Responsible for creating and conducting educational seminars on the issue of domestic violence for law enforcement, professionals, and members of the community. Worked on legislative issues and provided testimony before the state legislature on pending legislation affecting victims of domestic violence.

July 2000—May 2002
Cleveland Rape Crisis Center
Justice System Advocate

Assisted survivors of sexual assault whose cases were progressing through the legal system and conducted educational seminars on the crime of sexual assault; worked on the 24 hour crisis hotline.

CONFERENCE PRESENTATIONS

"Sexual Assault and Domestic Violence Education Schools"
Adolescent Sexual Health Conference
Las Vegas, NV
January 2008

"Sexual Assault and Domestic Violence Curriculum Development in Schools"
Nevada Network Against Domestic Violence
Reno, NV
September 2007

"Sexual Assault and Domestic Violence Education Schools"
National Organization for Victim Assistance
Reno, NV
July 2008

"Working Together to Eliminate Voice Against Women"
Nevada Coalition Against Sexual Violence
Las Vegas, NV
June 2006

CERTIFCATES
Police Officer Standardized Training (POST) Certified Instructor for Domestic Violence, Sexual Assault, and Victims Rights
State of Nevada

VOLUNTEER EXPERIENCE
Townhall II Crisis Line Worker and Sexual Assault Response Team
Townhall II Board of Directors
Victims Resource Center Laurelwood Hospital Crisis Line Worker
Portage County Domestic Violence Protocol Council
Portage County Crime Victims Rights Week Committee
Kent State University Student Advisory Council
Cuyahoga County Council on Sex Offender's Issues
Coordinated Community Response Council
Prevent Child Abuse Nevada Advisory Board
Southern Nevada Domestic Violence Task Force
NNADV Violence and Disability Assessment Team
NNAVD Teen Dating Violence Initiative

AHEC of Southern Nevada Board of Directors
State Of Nevada Committee on Domestic Violence
Cuyahoga County Children's Mental Health Consortium
State of Nevada Domestic Violence Prevention Council

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CLERK OF THE COURT

0332
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
CHRISTOPHER LALLI
Nevada Bar #005398
Chief Deputy District Attorney
LIZ MERCER
Deputy District Attorney
Nevada Bar #0010681
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

BRIAN O'KEEFE,
#1447732

Defendant.

Case No. C250630

Dept No. XVII

NOTICE OF MOTION AND MOTION *IN LIMINE* TO ADMIT EVIDENCE OF OTHER BAD ACTS PURSUANT TO NRS 48.045 AND EVIDENCE OF DOMESTIC VIOLENCE PURSUANT TO 48.061

DATE OF HEARING: 01/20/2011
TIME OF HEARING: 8:00 AM

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through CHRISTOPHER LALLI, Chief Deputy District Attorney, and LIZ MERCER, Deputy District Attorney, and files this Notice of Motion and Motion to Admit Evidence of Other Bad Acts Pursuant to NRS 48.045 and Evidence of Domestic Violence Pursuant to NRS 48.061.

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This Motion 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.

NOTICE OF HEARING

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will bring the foregoing motion on for setting before the above entitled Court, in Department XVII thereof, on the 20th day of January, 2011, at the hour of 8:00 o'clock a.m., or as soon thereafter as counsel may be heard.

DATED this _____ day of January, 2011.

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

BY /s/ LIZ MERCER
LIZ MERCER
Deputy District Attorney
Nevada Bar #0010681

POINTS AND AUTHORITIES

STATEMENT OF FACTS

On November 5, 2008, Victoria Whitmarsh was killed by a single stab wound inflicted by Defendant Brian O'Keefe. Defendant was charged with one count of Open Murder with Use of a Deadly Weapon. At the first jury trial in this case, Defendant was convicted of Second Degree Murder with Use of a Deadly Weapon. The case was subsequently reversed by the Nevada Supreme Court and retried. Upon retrial of this case, the jury hung. In each of the trials of this matter, Defendant presented a defense of self-defense and/or accident. The case is presently set for jury trial on January 24, 2011.

PRIOR DOMESTIC VIOLENCE

Event Number 030107-0129

Defendant and Victoria engaged in a verbal argument on January 7, 2003, when Defendant became jealous. The two had been drinking. Victoria attempted to calm Defendant down but it did not work. Defendant began to slap Victoria in the face repeatedly causing her to get a nose bleed. Police were contacted and when they responded, they observed that Victoria still had an active nose bleed. Defendant was charged in Las Vegas Justice Court Case No. 03M00410X. Ultimately, Defendant pled guilty to obstructing a police officer.

Event Number 030804-2025

On August 4, 2003 Defendant and Victoria were at the Albertson's on Silverado when Victoria advised Defendant that she did not feel well. The two returned to their apartment. When they got to their apartment, Defendant carried Victoria on her stomach and Victoria asked him not to because she was afraid it would make her throw up. Defendant then dropped her on her back and said he did not care. Victoria told Defendant that he hurt her and Defendant became upset. Defendant then poured water on Victoria and told her she would be fine. Victoria became frightened and went to the office to call 911. The disposition of this incident is unknown.

Event Number 031114-0539

Three months later, on November 14, 2004, Victoria and Defendant began to argue over money matters. At approximately 8:20 p.m., Defendant arrived at Victoria's residence. Once inside, the two argued again and Defendant grabbed Victoria by the arm, pushed her down in the kitchen area, struck her on the head with his fist, and then choked her with one hand while smothering her with a pillow. The next door neighbor, Honey Mott, heard the commotion and knocked on the door. Mott heard yelling and screaming. A few minutes passed and Victoria unlocked the door. Mott grabbed Victoria and took her to her apartment. Defendant immediately went to Mott's residence, broke out the front window

and entered Mott's apartment. Mott and Victoria went into the bedroom area attempting to exit through the bedroom window. Police officers in the vicinity heard the commotion and breaking glass and responded to the apartment. Defendant was arrested at the scene. Officers noted bruising on Victoria as well as redness around her neck and a lump on her head. Defendant was charged in Las Vegas Justice Court Case No. 03M25901X and ultimately pled guilty to Battery Constituting Domestic Violence.

Event Number 031126-0903

Just days after the November 14, 2004 beating, police were called to the residence of Defendant and Victoria yet again. On November 26, 2003, Officers were dispatched to the couple's home for a welfare check. Upon arrival, the apartment manager unlocked the door for officers. When officers made contact with Victoria, she was covered in bruises and appeared to have been beaten severely. With Defendant speaking over her, Victoria initially claimed she "fell." However, once the officers separated the parties, Victoria began to cry and told Officer Penny that Defendant drinks whiskey, gets violent, and beats her. Victoria claimed the injuries were from two (2) or three (3) days prior. When advised that neighbors reported hearing the two engaged in a dispute that day, Victoria stated that Defendant was yelling at her about her ex-husband. Officers then confronted Victoria with information they received from the neighbors indicating that the neighbors heard Defendant beating her, at which time Victoria looked away, began to cry, and stated that it was her fault. Victoria would not elaborate any further. Officers noted that some of the bruising was old, but some looked fresh.

Detective Hodson was eventually able to obtain the details of the incident from Victoria on December 18, 2003 in a written Voluntary Statement. Victoria recounted that following the brutal November 14 beating, she called her ex-husband and daughter and went to stay with them. Once Defendant was released from jail, two (2) days after the November 14 incident, he began calling her and leaving her messages. Because Victoria needed to get some of her belongings from Defendant, she agreed to meet with him. Defendant went to where Victoria was staying, and she got into the car with Defendant. They returned to their

residence. The two began to discuss their relationship and Victoria told Defendant that she could not continue to be in a relationship with him if he was going to continue being violent with her. Defendant then asked her why she was back with her husband, grabbed her by the right hand and threw her into the wall. Then, Defendant punched her on the left side of her face. Victoria's left eye immediately began to swell and she felt excruciating pain. Victoria asked him why he hit her. **Defendant told her that no one else could have her because she is his, that if he found out she was with someone else, he would kill her and, that if she tried to leave him, he would hunt her down until the end of time.** Defendant then grabbed her by the hair and repeatedly bashed her head into the cabinet door. Victoria told Defendant to stop and tried to push him away. Defendant began choking her so hard it caused her to cough. Defendant shouted at her, "So, you want to fight back. Let's see if you can." Victoria tried to calm him. He grabbed her hair again, dragged her by the hair, and then knocked her on the ground. Defendant shouted at her, **"I will kill you if I find out you're cheating on me**!" At that point, Defendant began repeatedly punching Victoria over and over again. Then, he got up and started kicking her in the ribs and back. Victoria could not breathe because of the intensity of the pain. Defendant stopped beating her and she begged him to take her to the hospital but he refused. When Victoria tried to escape, Defendant grabbed her and told her she better not leave or he would do something to her. He took all of the clothes that she was wearing, except for her panties so that she could not leave. Defendant kept her there for several days. **On the day the police responded (November 26) when Victoria told Defendant that the police were there, he told her that she better tell them she fell or else.** Defendant was charged with Battery Constituting Domestic Violence in Case No. 03M26791X but the case was ultimately dismissed as part of a packaged negotiation.

Event Number 040402-3158

On April 2, 2004, Defendant and Victoria became involved in a verbal dispute because Defendant believed Victoria was unfaithful. Defendant struck her in the face with the palm of his hand. Victoria ran out of the apartment and called 911. Because there was

no visible injury, no arrest was made. However, Defendant was escorted from the residence he shared with Victoria by Officer Price with the Las Vegas Metropolitan Police Department and instructed to not return for twenty-four (24) hours. At approximately 11:00 p.m., that same date, Defendant returned to residence, burst through the door open and entered. A verbal argument again ensued. Defendant then began slapping Victoria with open hands on both sides of her face, breaking her glasses in the process. A neighbor who heard the noise telephoned police. Defendant fled the area prior to Officer Price's arrival. When Price responded, he found Victoria crying, in fear, with a visible injury to her face. Defendant was subsequently charged with battery constituting domestic violence, third offense in Case No. C207835. After Jury Trial, Defendant was convicted of the charge and sentenced to twenty-four (24) to sixty (60) months in the Nevada Department of Corrections.

Event Number 040403-1089

On April 3, 2004, Defendant returned to the apartment and began shouting at Victoria for calling the police on him the day prior and continued to accuse her of being unfaithful. Defendant then slapped Victoria across the face and tried to corner her. Victoria was able to escape, fled from the apartment and ran to the apartment office. The manager, Linda Eggleston, heard Victoria screaming, "Help me! Help me!" Eggleston was able to grab Victoria and pull her into her office and lock the door. Then, they called the police. Officer Rumery contacted Defendant at the couple's apartment and he was arrested for two (2) counts battery constituting domestic violence – one for the April 2 incident and one for the April 3 incident. Defendant was charged for both incidents in Las Vegas Municipal Court Case No. C581783A and pled guilty to Battery Constituting Domestic Violence.

Event Number 040529-2232

In the late hours of May 28, 2004/early morning hours of May 29, 2004, Victoria and Defendant got into a verbal argument. The police were once again called to the couple's residence and Defendant left for a cooling off period. Later on May 29, 2004 dispatch received a call from the Budget Suites management office where Defendant and Victoria resided reporting a domestic incident between the two (2). Security advised dispatch that

Victoria was very upset and bleeding from the mouth.

Victoria spoke with dispatch and relayed that in addition to being beaten by Defendant, he also forced her to have anal intercourse with him. Patrol responded to the Budget Suites and made contact with Victoria and Defendant who had been placed into custody by security prior to Metro's arrival. Patrol also observed that Victoria was visibly upset and crying. Victoria advised them that Defendant beat her and subjected her to sexual contact. Patrol contacted Detective Moniot who responded to UMC where Victoria was transported.

When Detective Moniot made contact with Victoria, she was very withdrawn, visibly upset, crying vigorously, and holding herself around her mid-section. Detective Moniot also observed that she was walking "gingerly." Victoria complained of severe rectal pain from being anally penetrated. While speaking with Victoria, Detective Moniot also noticed that there was a significant amount of hair from Victoria's head on her upper body. Victoria stated that it was a result of Defendant pulling out her hair.

During the course of Detective Moniot's taped interview of Victoria, she detailed the circumstances of Defendant's brutal attack. According to Victoria, the two had been having problems because of Defendant's drinking problems and his thoughts that she was unfaithful. Victoria advised Detective Moniot that she suffered abuse at Defendant's hands many times over the several preceding years, but that she always took him back because he sweet talked her. On the evening of May 28, 2004, the two were at Texas Station bowling and drinking. The two got into an argument because Defendant was drinking too much and Victoria wanted him to stop and go home. Victoria ended up walking home alone.

Victoria contacted security at Budget Suites to obtain an escort to her room because she was afraid of Defendant. Security walked her to their room and found Defendant present. Security called Metro due to the domestic issues. Metro responded and asked Defendant to leave for the night. Victoria went to sleep for the night and awoke some time after noon when Defendant began knocking on the door. She did not want to allow Defendant inside, but he stated that he just needed to get his belongings because he had

someone coming to pick him up. Victoria ultimately allowed Defendant inside.

When Defendant entered the room, he immediately began behaving aggressively and accusing Victoria of having sex with other individuals. Defendant struck her about the head, face, and body repeatedly. He then pushed her onto the couch and forced her to perform oral sex on him. Victoria complied because she feared for her life. Then, Defendant forced her to engage in vaginal intercourse for a short time before demanding anal intercourse. Defendant forced her to engage in anal intercourse, telling her that rectum felt loose and he believed she was sleeping with other men. Defendant ejaculated inside of her anus.

Approximately half an hour later, Defendant forced her to perform oral sex on him and submit to vaginal intercourse again. Additionally, he once again forced her to engage in anal intercourse. Victoria convinced Defendant to stop because she wanted to use the restroom. Victoria went to the restroom and would not come out. She waited until Defendant fell asleep, got dressed, left the room quietly and got security.

During the course of the follow-up investigation, Detectives learned that Security Officer Besse was first contacted by Victoria who was very upset and had blood on her face. Besse went to the couple's room and found Defendant passed out in the bed, completely naked. Due to the gravity of the situation, Besse placed Defendant in custody.

CSA Horn responded to the scene and discovered that the scene was consistent with Victoria's version of events. Specifically, he located a white and black Zebra print dress with fecal matter and blood on it and a pair of blue shorts with fecal matter and blood on it. Those were the clothing items worn by Victoria after the first and second assaults.

Victoria also underwent a SANE exam at UMC which was administered by Linda Ebbert. Nurse Ebbert noted multiple sites of bruising all over Victoria's body and a laceration to her upper lip. Additionally, she observed several deep lacerations to Victoria's anus. The injuries were consistent with Victoria's version of events.

Defendant was ultimately charged with multiple counts of Sexual Assault, Attempt Sexual Assault, Burglary, and Assault and Battery. Following a jury trial, Defendant was found guilty of Burglary and Battery.

ARGUMENT

I.

EVIDENCE CONCERNING PRIOR INSTANCES OF DOMESTIC VIOLENCE IS ADMISSIBLE PURSUANT TO 48.045 AND 48.061.

The State seeks to admit evidence concerning Defendant's prior instances of domestic violence committed against Victoria pursuant to NRS 48.045 and NRS 48.061 as evidence of motive (ill-will), intent, and absence of mistake. Additionally, the State seeks to admit the evidence to provide a much needed context for the facts and circumstances of Victoria's killing. The State respectfully submits that the jury should not be forced to judge the facts and circumstances of the events of November 5, 2008 in a vacuum. Rather, the jury should be entitled to fully understand the dynamics of the relationship between Defendant Brian O'Keefe and Victoria Whitmarsh. More specifically, the State submits that the prior incidents of domestic violence against Victoria manifest malice/ill-will toward Victoria which is a material issue in this case. Furthermore, the evidence is relevant to the Defendant's intent and/or the absence of mistake at the time of the stabbing (i.e. Was the stabbing intentional?). Additionally, the evidence is particularly relevant to rebut a claim that Victoria's death was "accidental" and/or committed in "self-defense." As set forth more fully below, this Court has the authority to introduce such evidence pursuant to NRS 48.045 and the Domestic Violence Statute, NRS 48.061.

A.

THE EVIDENCE IS ADMISSIBLE PURSUANT TO NRS 48.045(2) AS PROOF OF MOTIVE, INTENT, AND ABSENCE OF MISTAKE

Section 48.045(2) of the Nevada Revised Statutes provides:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Prior to admitting such evidence, the State must establish that (1) the prior act is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the

evidence is more probative than prejudicial. Cipriano v. State, 111 Nev. 534, 541, 894 P.2d 347, 352 (1995), overruled on other grounds by State v. Sixth Judicial District Court, 114 Nev. 739, 964 P.2d 48 (1998). With regard to a determination of prejudice:

> "prejudicial" is not synonymous with "damaging." **Rather, evidence is unduly prejudicial...only if it "uniquely tends to evoke an emotional bias against the defendant as an individual and...has very little effect on the issues"** or if it invites the jury to prejudge "a person or cause on the basis of extraneous factors." **Painting a person faithfully is not, of itself, unfair.**

People v. Johnson, 185 Cal.App.4th 520, 534 (2010). The admissibility of prior bad acts is within the sound discretion of the trial court and will not be overturned on appeal unless the decision is manifestly wrong. Canada v. State, 104 Nev. 288, 291-293, 756 P.2d 552, 554 (1988).

In Fields v. State, -- Nev. --, 220 P.3d 709 (2009), the Nevada Supreme Court affirmed the District Court Judge's determination to admit evidence that the Defendant owed debts to the victim and that he had previously engaged in a conversation about killing a man to whom he owed money. The Nevada Supreme Court agreed with the District Court's decision that such evidence was admissible as proof of motive, to disprove his contention that he was just an innocent bystander to his wife's scheme, and to prove identity.

Likewise in Ledbetter v. State, 122 Nev. 252, 262-263, 129 P.3d 671, 678-679 (2006), the Supreme Court held that it was proper for the District Court to admit evidence of other bad acts to establish the Defendant's motive to repeatedly subject his stepdaughter to sexual assaults. The bad act evidence in that case consisted of evidence that Defendant sexually assaulted other young female members of his own family. In reaching its decision, the Court noted that the evidence was relevant to motive, proven by clear and convincing evidence (due to four (4) different witness' testimony) and highly probative as it showed Defendant's sexual attraction to, and an obsession with, young female members of his family.

Most on point is Hogan v. State, 130 Nev. 21 (1987), wherein the Nevada Supreme Court upheld the trial court's determination to admit evidence of a prior domestic violence

incident committed by Defendant against the victim in the days preceding her murder. In Hogan, the trial court admitted evidence that several days prior to the murder, Defendant dropped the victim to the ground from shoulder height. In affirming the District Court's ruling, the Nevada Supreme Court recognized that such evidence was "other acts" evidence pursuant to NRS 48.045(2) which was properly admitted to establish "ill-will as a motive to the crime." Hogan v. State, 130 Nev. 21, 23 (1987).

Other jurisdictions have also permitted the admission of evidence concerning prior acts of domestic violence pursuant to "other acts" statutes in murder cases as evidence of motive/ill-will, intent, absence of mistake, etc. For instance, in People v. Bierenbaum, 301 A.D.2nd 119, 748 N.Y.S.2d 563 (2002), the defendant was charged with murdering his wife, who disappeared in 1985. His wife's body was never recovered and the case against him was circumstantial. The trial court admitted evidence that throughout the course of the marriage, the relationship between the two was volatile. In addition, it admitted evidence that Defendant choked her to the point of unconsciousness on at least one occasion, and that he had been physically violent with her on many occasions. On appeal, the defendant challenged the admission of such evidence and claimed that it was improperly admitted "propensity" evidence. However, the reviewing Court recognized that the evidence was relevant to intent and stated:

> **[T]he proof here evinces defendant's intent to focus his aggression on one person, namely, his wife—his victim. That key factor in the context of marital or other intimate relationships frequently differentiates domestic violence assaults and homicides—wherein prior bad acts have often been deemed admissible during the People's direct case—from other cases wherein evidence of past assaultive behavior against people other than the victim has most properly been precluded. In the former, the previous aggression principally indicates intent, or motive, or identity; whereas in the latter it can predominately give rise to an inference of propensity.**

Id. (emphasis added). It also acknowledged that the evidence of prior abuse evinced that the defendant was motivated and had intent to harm the victim.

Similarly, in Benjamin v. Kentucky, 266 S.W.3d 775 (2008), a case almost identical

the one presently before this Court, the Supreme Court of Kentucky found that evidence of Defendant's prior assault against the decedent was properly admitted as evidence of his motive and absence of mistake. In Benjamin, the evidence established that the relationship between the defendant and victim was riddled with discord and that the two often fought after consuming alcohol together. The two had recently broken-up, but on the night of the murder were together, drinking again. While together, the two began to argue over the victim's alleged infidelities. Ultimately, Defendant strangled the victim to death. At the trial, the Defendant claimed he acted in self-defense but could remember very little of the details leading up to her death because of his alleged intoxication. In reviewing the trial court's decision to admit evidence of the prior assault, the Court found that it was relevant in that it tended to prove the defendant intentionally murdered his wife, had a motive to do so, and that the killing was not a mistake. Id. at 791.

Likewise, in People v. Illgen, 145 Ill.2d 353, 366-367, 583 N.E.2d 515, 52, 164 Ill.Dec. 599, 604 (1991), the court upheld a trial court's decision to admit evidence that throughout the course of the marriage of the defendant and victim, the defendant was violent and abusive. The Court determined that "the evidence of the defendant's prior assaults on the victim was probative of the defendant's criminal intent." It further noted that "evidence which shows that an event was not caused by accident tends to show that it was caused intentionally." Id. at 367, citing, 2 D. Louisell & C. Mueller, Federal Evidence § 140, at 224-25 (1985) (defining intent as "merely the absence of an accident").) It concluded that the defendant's prior unprovoked assaults on his wife tended to negate the likelihood that the shooting was an accident and thereby tended to prove his intent. Importantly, it recognized:

> Whereas the shooting incident, standing alone, might appear accidental, when considered together with the evidence of the defendant's prior unprovoked attacks upon his wife, the circumstances suggest that the shooting was deliberate and not accidental. This evidence, taken together with other evidence in the case, tends to make it more probable that the defendant acted with the criminal intent required for murder and less probable that his actions were inadvertent or the product of an innocent state of mind.

Id at 367. Additionally, the Court reasoned that the evidence was also relevant to proof of motive, "in this case, a hostility showing him likely to do further violence. Id. at 367. ("Here, the evidence that the defendant physically assaulted his wife throughout their marriage was relevant to show their antagonistic relationship and, thus, tended to establish the defendant's motive to kill her.").

The Supreme Court of Vermont has also held that such "evidence was relevant...to portray the history surrounding the abusive relationship, providing the needed context for the behavior in issue." see also, State v. Laprade, 184 Vt. 251, 256 (2008), citing State v Sanders, 168 Vt. 60, 716 A.2d 11 (1998). Furthermore, it has acknowledged that such evidence is relevant in cases where a defendant claims self-defense. Id., citing, State v. Hendricks, 173 Vt. 132, 143, 787 A.2d 1270, 1279 (2001). The Laprade Court noted that without admitting such evidence in domestic violence cases, the jury would be left without knowledge of the context in which the acts occur and would not be able to understand the victim's actions or inactions. Id. at 259.

In light of the foregoing binding and persuasive authority, the State respectfully submits that evidence concerning these prior acts of domestic violence committed against Victoria Whitmarsh by Defendant should be admitted as evidence of motive and intent/absence of mistake. In regard to motive, the evidence is relevant because it establishes ill-will, that he was motivated by a desire to dominate and control her, and/or to get revenge for sending him to prison. Likewise, as in Ledbetter v. State, supra, 122 Nev. at 262-263, the evidence is highly probative of motive because it establishes that over the course of five (5) years, Defendant was fixated on abusing Victoria Whitmarsh. As to intent, the evidence is relevant as it makes it more likely that Defendant intentionally stabbed Victoria Whitmarsh and less likely that the stabbing occurred accidentally or in self-defense as Defendant has previously claimed. See, People v. Illgen, supra, 145 Ill.2d at 366-367. Furthermore, this evidence is not more prejudicial than probative because: (1) the facts of the prior instances are all very similar to the ones present in this case; (2) the incidents are not remote in time from the incident for which he is currently charged; (3) most of them resulted in convictions

(which means that Defendant will not be placed in a position of having to defend those allegations); and, (4) the facts of the prior instances are not more horrendous than the facts of this case.

II.
EVIDENCE OF PRIOR DOMESTIC VIOLENCE SHOULD BE ADMITTED PURSUANT TO NRS 48.061.

Pursuant to NRS 48.061,

> Except as otherwise provided in subsection 2, **evidence of domestic violence** and expert testimony concerning the effect of domestic violence, **including, without limitation, the effect of physical, emotional or mental abuse, on the beliefs, behavior and perception of the alleged victim of the domestic violence** that is offered by the prosecution or defense **is admissible** in a criminal proceeding **for any relevant purpose**, including, without limitation, when determining:
>
> (a) Whether a defendant is excepted from criminal liability pursuant to subsection 7 of NRS 194.010, to show the state of mind of the defendant.
>
> (b) Whether a defendant in accordance with NRS 200.200 has killed another in self-defense, toward the establishment of the legal defense.
>
> 2. Expert testimony concerning the effect of domestic violence may not be offered against a defendant pursuant to subsection 1 to prove the occurrence of an act which forms the basis of a criminal charge against the defendant.
>
> 3. As used in this section, "domestic violence" means the commission of any act described in NRS 33.018.

Prior to the statute's amendment in 2001, it inadvertently limited the use of evidence of prior domestic violence to those cases wherein a criminal defendant claimed to be suffering from battered women's syndrome as a defense to charged crimes. More specifically, prior to its amendment in 2001, the statute read,

> Evidence of domestic violence as defined in NRS 33.018 and expert testimony concerning the effect of domestic violence on the beliefs, behavior and perception of the person alleging the domestic violence is admissible in chief and in rebuttal, when determining:

1. Whether a person is excepted from criminal liability pursuant to subsection 7 of NRS 194.010, to show the state of mind of the defendant.

2. Whether a person in accordance with NRS 200.200 has killed another in self-defense, toward the establishment of the legal defense.

In 2001, prosecutors who were frustrated by the repeated thwarting of their efforts to explain to jurors the cycle of domestic violence and the effects of repeated abuse on victims of domestic violence, urged legislators to amend the statute to its current form. More specifically, when lobbying in support of Assembly Bill 417 during the 71st session, Gemma Waldron, the Legislative Representative for the Washoe County District Attorney's Office and Nevada District Attorney's Association, argued that the bill was much needed due to the unique dynamics of domestic violence cases. Waldron contended that the ability to call an expert in the field of domestic violence, as well as the ability to present the jury with evidence of repeated abuse of the victim by the defendant, would help jurors understand the reaction and behavior of the victim (recanting, minimizing, etc.). See, Minutes of the Meeting of the Assembly Committee on the Judiciary, Seventy-First Session, April 5, 2001; see also, Minutes of the Senate Committee on the Judiciary, Seventy-First Session, May 16, 2001. Assembly Bill 417 was fashioned after California's legislation dealing with the issue. See, Minutes of the Senate Committee on the Judiciary, Seventy-First Session, May 16, 2001. Ultimately the Bill passed the House and the Senate unanimously. Since the statute's enactment in its revised form, the Nevada Supreme Court has yet to address the use of the statute by the State in a published opinion. However, it has permitted the introduction of such evidence in an unpublished opinion. See, Holcomb v. State, 2010 WL 4019626 (Nev. 2010)(upholding District Court's decision to admit testimony of domestic violence expert to explain the varying ages of the injuries to victim).

While there is no binding authority in Nevada concerning the admission of evidence pursuant to NRS 48.061 by the State absent the statute itself, California Courts interpreting and applying California Evidence Code § 1109 (the statute after which NRS 48.061 was apparently modeled) have allowed the introduction of domestic violence evidence in a

variety of instances. For example, in People v. Hoover, 77 Cal.App.4th 1020 (2000), the Court upheld the trial court's decision to admit evidence of previous attacks against the victim by the defendant who was charged with aggravated assault under circumstances involving domestic violence pursuant to § 1109 of the California Evidence Code. In reaching its conclusion the Court examined the intent of the legislature when it enacted § 1109 and noted:

> The [admission of evidence of prior incidents of domestic violence] is particularly appropriate in the area of domestic violence because on-going violence and abuse is the norm in domestic violence cases. **Not only is there a great likelihood that any one battering episode is part of a larger scheme of dominance and control, that scheme usually escalates in frequency and severity. Without [the admission of prior instances of domestic violence], the escalating nature of domestic violence is likewise masked.** If we fail to address the very essence of domestic violence, we will continue to see cases where perpetrators of this violence will beat their partners, even kill them, and go on to beat or kill the next intimate partner. **Since criminal prosecution is one of the few factors which may interrupt the escalating pattern of domestic violence, we must be willing to look at that pattern during the criminal prosecution, or we will miss the opportunity to address this problem at all.** (citing, Assem. Com. Rep. on Public Safety Report (Jun. 25, 1996) pp. 3-4.)
>
> Based on the foregoing, **the California Legislature has determined the policy considerations favoring the exclusion of evidence of uncharged domestic violence offenses are outweighed in criminal domestic violence cases by the policy considerations favoring the admission of such evidence** (emphasis added).

Id. at 1027-1028 (internal citations omitted). In that case, the defendant struck the victim in the nose causing it to break after she informed him that she was involved in a new relationship. The trial court permitted the victim to testify regarding prior incidents of violence wherein the defendant hit her in the face and/or choked her and threatened to kill her. While upholding the Court's determination to admit the evidence under § 1109, the reviewing Court held that the State could have also sought to admit the evidence as proof of

motive, intent, etcetera because it tended to show that Defendant intended to inflict great bodily injury upon her. Id. at 1027.

Similarly, in People v. Johnson, 185 Cal.App.4th 520 (2010), the Court upheld the trial Court's decision to admit evidence of two (2) prior domestic violence related offenses committed by the defendant. Johnson was convicted of attempted first degree murder, firearm assault, injury to cohabitant, felon in possession of a firearm, criminal threats, and mayhem following an incident wherein he shot his ex-girlfriend (Henderson) in the back. Prior to the commencement of trial, the prosecution sought to admit evidence of three (3) prior incidents of domestic violence by defendant.

The first incident was in 1984 when the defendant struck Lynn Webb in the jaw, breaking it in two places. However, because it did not involve the use of a weapon the trial court did not admit it. The second incident was in 1988 against Amanda Floyd whom the defendant dated for a year. Floyd broke up with the defendant after she caught him using drugs and told him to move out. Three (3) weeks later, the defendant tracked Floyd down at her apartment and visited her. They argued again and the defendant threatened to burn down the apartment and kill her. Floyd tried to escape at which point the defendant grabbed her by the hair and said, "Bitch, I'm going to kill you." The defendant put the gun to Floyd's forehead and pulled the trigger, but the gun did not fire. He pulled the trigger two (2) more times as Floyd backed away, but it still did not fire. Floyd then tripped over a chair and covered her face with her arms. The fourth time the defendant pulled the trigger, the gun fired, hitting her in the left elbow. Her arm was broken and the bullet was still lodged in her arm at the time of trial.

The third incident occurred in 1992 and involved Lynn Webb. The defendant and Webb were arguing in front of his mother's house at which time he pulled out a gun. Webb ducked and heard two (2) shots. She looked down and saw she was struck in the leg. Webb's femur was broken and she had to undergo hip surgery. The trial court admitted evidence of the 1988 and 1992 shootings finding the evidence more probative than prejudicial and concluding that it would "assist the trier of fact in determining elements and

issues that will be relevant in this case." People v. Johnson, supra, 185 Cal.App.4th at 530-531.

The reviewing Court in Johnson, in evaluating the Court's determination of probativeness once again examined the legislature's intention in enacting Section 1109 and noted the uniqueness of domestic violence cases.

> The statute reflects the legislative judgment that in domestic violence cases, as in sex crimes, similar prior offenses are 'uniquely probative' of guilt in later accusations...Indeed, proponents of the bill that became section 1109 argued for admissibility of such evidence because of the 'typically repetitive nature' of domestic violence...This pattern suggests a psychological dynamic not necessarily involved in other types of crimes.

Id. at 532. It noted that the principal factor in determining probativeness is the similarity to the charged offense. Furthermore, it determined that the probative value of the prior incidents was great because in each incident Defendant resorted to shooting his girlfriend when she either decided to leave him or engaged in an argument with him. Additionally, Defendant's drug usage was a factor in each incident and each incident resulted in serious injury. The Court also reasoned that the fact that Defendant was convicted in each incident weighed in favor of admissibility, as did the fact that the evidence came from independent sources.

While the Court noted the evidence was inflammatory, it agreed with the trial court's decision that it was less offensive than the allegations in the instant case wherein Defendant lured the victim to the parking lot and shot her in the back in front of children. Id. at 534 (citations omitted)(emphasis added). It also rejected Defendant's contention that the evidence was more prejudicial than probative because the victim was cooperative. Instead, the reviewing Court determined the probativeness should be evaluated independent of the victim's cooperativeness with the principal consideration being the similarity of the incident to the charged offenses. The Court also concluded that the prejudicial impact was diminished by the fact that evidence of the current crime was strong because it was less likely the jury would convict based upon his past misdeeds. Id. at 536.

In addition, the Court declined to find error with the trial court's decision to admit the evidence despite the fact that the events took place more than ten (10) years prior to the charged offenses. It noted that the trial court determined there was a significant issue of intent and found the evidence relevant to intent, motive and lack of mistake. As such, the Court concluded that the trial court properly considered the issues.

Alaska has also enacted a statute similar to that enacted in California and Nevada. See, Alaska R. Evid. 404(b)(4). Following the passage of that statute, the Alaska Court of Appeals developed several factors that the courts are to examine prior to admitting evidence of prior incidents of domestic violence. Those factors include: (1) the strength of the government's evidence that the defendant committed the other acts; (2) the character trait the other acts tend to prove; (3) whether that trait is relevant to any material issue in the case; (4) if so, how relevant; and, (4) how strongly the other acts tend to prove that trait. Bennett v. Municipality of Anchorage, 205 P.3d 1113, 1116 (Alaska App.2009) citing, Bingaman v. State, 76 P.3d 398, 408, 415 (Alaska App.2003). Like California, Alaska requires an evaluation of remoteness and similarity to the charged offenses in determining the probative value of the evidence. Id.

In Bennett v. Municipality of Anchorage, supra, 205 P.3d 1113, the trial court admitted evidence of a prior 2005 attack by the defendant against the named victim because it was relevant to his propensity to attack his wife and then claim self-defense. The charges in Bennett arose from an incident in 2008 wherein the defendant was angry and drinking all day. The two (2) began arguing and the victim began to call the police, at which point the defendant took the phone and threw it against the wall repeatedly until it broke. Then, the defendant started to scream at the victim, held her down by the throat and put his hand over her mouth and nose so she could not breathe. The defendant then struck her in the head several times and slammed her head into the wall.

The victim testified to a 2005 incident in which the defendant struck her repeatedly in the face and choked her causing her to sustain two black eyes, bruises around her neck, and broken blood vessels in her eye. As with the 2008 incident, the defendant was drunk at the

time of the offense. In both the 2005 incident and the 2008 incident for which the defendant was on trial, the defendant claimed self-defense. The Appellate Court upheld the trial court's determination to admit the evidence due to the similarities between the two incidents. It noted that the 2005 incident had some tendency to make more or less probable the defendant's propensity to assault his wife and then claim he acted in self-defense. As such, that character trait was material to the government's case because Bennett's intent—whether he intended to assault the victim or merely acted in self-defense—was the only disputed issue. Id. at 1118.

Illinois has also enacted a statute similar to the above-mentioned statutes. See, 725 ILCS 5/115-7.4. That statute provides that "in a criminal prosecution in which the defendant is accused of an offense of domestic violence evidence of the defendant's commission of another offense or offenses of domestic violence is admissible, and may be considered for its bearing on any matter to which it is relevant." The statute also sets forth the factors a court should consider in determining the admissibility of such evidence. Those specific factors include weighing the probative value against the prejudicial effect, remoteness, factual similarities, and other relevant facts and circumstances. Id.

In People v. Dabbs, 396 Ill.App.3d 622 (2010), the Illinois Court of Appeals was called upon to determine the constitutionality of the statute following Defendant's conviction for domestic battery. During the trial, the Court admitted evidence that Defendant previously abused his ex-wife (not the victim in the case). On appeal, Gregory Dabbs claimed that the statute violated both the Equal Protection Clause and the Due Process Clause. As to the equal protection claim, the Court determined that domestic violence defendants are not a "suspect class;" and, therefore, the statute must only pass the rational basis test. The court adopted the rationale of the California Courts and held that domestic violence is a repetitive and secretive crime that is highly unreported and typically turned into a credibility contest and noted that § 115-7.4 was passed as an attempt to address the difficulties of proof unique to the prosecution of domestic violence cases by strengthening the evidence and promoting the prosecution of such cases. Id. at 627. Ultimately, the Court

concluded that those reasons were sufficient to satisfy the rational basis test. Dabbs' Due Process argument failed because of the safeguards built into the statute – the requirement that the State provide notice to the defendant of its intent to present such evidence and the requirement that the Court weigh the probative value of the evidence against its prejudicial effect.

While the Nevada Supreme Court has yet to interpret NRS 48.061 in a published opinion in which the State has sought to introduce evidence of prior acts of domestic violence, the plain language of the statute indicates that the evidence may be admitted for "any relevant purpose." Furthermore, the legislative history of the statute indicates that the legislative intent was to model the statute after California's equivalent statute (§ 1109). Moreover, it evinces that the intent in amending the statute in 2001 was to permit the State to admit evidence of prior instances of domestic violence to provide context to the relationship between the defendant and the victim in domestic violence cases. Similarly, California and the numerous jurisdictions cited above have liberally interpreted similar statutes and/or general bad acts statutes to authorize the admission of such evidence because of the unique problems faced by the prosecution of domestic violence cases as well as the repetitiveness of domestic violence.

In light of the plain language of NRS 48.061, which states that such evidence may be admitted "for any relevant purpose" as well as the above-cited persuasive authority, the State respectfully submits that evidence concerning the prior acts of domestic violence committed by Defendant against Whitmarsh should be admitted in this case. The evidence is relevant to provide the jury with information concerning the context of the relationship between Defendant and Whitmarsh (State v. Laprade, supra, 184 Vt. 251), to establish Defendant's intent to kill/intentionally stab Whitmarsh (People v. Hoover, supra, 77 Cal.App.4th 1020; People v. Johnson, supra, 185 Cal.App.4th 520; People v. Bierenbaum, supra, 301 A.D.2d 119; State v. Laprade, supra, 184 Vt. at 256), to explain why Whitmarsh would return to Defendant after he went to prison for beating her, as well as to refute Defendant's claim that the stabbing was accidental/done in self-defense (See, Bennett v. Municipality of Anchorage,

supra, 205 P.3d 1113).

Moreover, the prior instances are not remote in time to the charged offenses as they all occurred within the five (5) years leading up to Victoria's killing. Likewise, the acts are similar to the acts charged in this case, which makes them probative to the issue of intent (an intent to abuse/kill as opposed to defend himself). Furthermore, many of the acts the State seeks to introduce resulted in prior convictions, making them less prejudicial as the proof of such acts is strong. Additionally, the State's evidence in this case is strong, making it less likely that the jury will convict Defendant simply because of his past conduct.

CONCLUSION

Based upon all of the foregoing, the State respectfully requests that its Motion *in Limine* to Admit Evidence of Other Bad Acts Pursuant to NRS 48.045 and Evidence of Domestic Violence Pursuant to NRS 48.061 be granted.

DATED this _____ day of January, 2011.

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

BY /s/ LIZ MERCER
LIZ MERCER
Deputy District Attorney
Nevada Bar #0010681

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of the above and foregoing, was made this 6th day of January, 2011, by facsimile transmission to:

PATRICIA PALM ESQ
FAX: 386-9114

/s/ T. SCHESSLER
Secretary for the District Attorney's Office

ts/dvu

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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 DISMISS ON GROUNDS OF DOUBLE JEOPARDY BAR AND SPEEDY TRIAL VIOLATION AND, ALTERNATIVELY, TO PRECLUDE STATE'S NEW EXPERT WITNESS, EVIDENCE AND ARGUMENT RELATING TO THE DYNAMICS OR EFFECTS OF DOMESTIC VIOLENCE AND ABUSE

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 for an Order of Dismissal with Prejudice on the grounds that further trial proceedings are barred by the Double Jeopardy Provisions of the United States and Nevada Constitutions and the Speedy Trial provisions of The United States Constitution and NRS 178.556, and, alternatively, to preclude the State from presenting its new expert witness, Andrea Sundberg, and any testimony, other evidence or argument relating to the dynamics or effects of domestic violence and abuse.

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This Motion is made and based upon the following Points and Authorities, the attached Declaration of Counsel, Exhibit (filed under seal), all papers and documents on file in the record, and any argument as may be had at the time of hearing.

Dated this 7th day of January, 2011.

PALM LAW FIRM, LTD.

Patricia A. Palm, Bar No. 6009
Attorney for Defendant

NOTICE OF MOTION

TO: STATE OF NEVADA, Plaintiff; and

TO: DAVID ROGER, District Attorney, Attorney for Plaintiff

YOU WILL PLEASE TAKE NOTICE that the undersigned will bring on the above and attached **MOTION** on the 20 day of JAN., 2011, at the hour of 9:15 AM .m., in Department No. XVII of the above-entitled Court, or as soon thereafter as Counsel may be heard.

DATED this 7th day of January, 2011.

PALM LAW FIRM, LTD.

By: PATRICIA PALM
Nevada Bar No. 6009
1212 Casino Center Blvd.
Las Vegas, NV 89104
Attorney for Defendant

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 January 3, 2011, the State faxed to this counsel a Supplemental Notice of Expert Witnesses stating that it intended to present the testimony of Andrea Sundberg, as "an expert in battered women's syndrome, power and control dynamics, and the cycle of abuse, generally," in its case in chief at the upcoming retrial of Mr. O'Keefe.

3. That the State's supplemental expert witness notice had no reports attached to it, and the defense is unaware what the expert's opinion would be, if any, or upon what foundation any opinion would be based.

4. That true and correct copies of Whitmarsh's medical records, which the parties have had since the March 2009 original trial in this case, are being simultaneously provided to this Court on a CD as an Exhibit to this Motion with a request to file these under seal.

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

EXECUTED this 7th day of January, 2011.

PATRICIA A. PALM
Bar No. 6009

PROCEDURAL HISTORY

The State charged Defendant Brian K. O'Keefe with murder with use of a deadly weapon for the alleged November 5, 2008 killing of Victoria Whitmarsh. On January 20, 2009, he entered a plea of not guilty and invoked his constitutional and statutory rights to a speedy trial. On February 2, 2009, 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 Whitmarsh through witness Cheryl Morris, a woman whom O'Keefe had dated then rejected. Morris claimed that O'Keefe stated a desire to kill Whitmarsh and also demonstrated to Morris his proficiency at how to kill with knives. The Court further ruled that the State could introduce O'Keefe's prior Judgment of Conviction for felony domestic battery involving Whitmarsh. Further, if O'Keefe testified, then the State could prove his other prior felony convictions. Pursuant to the Court's ruling, the State was permitted to introduce only the details of when O'Keefe was convicted, in which jurisdiction, and the names of the offenses, and with the felony domestic battery, the fact that Whitmarsh had testified against him in that case. 3/16/09 TT 2-16.

This case was first tried before this 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, "[T]he State's charging document did not allege that O'Keefe killed the victim while he was committing an unlawful act and the evidence presented at trial did not support this theory of second-degree murder." O'Keefe v. State, NSC Docket

No. 53859, Order of Reversal and Remand (April 7, 2010). The Court further stated, "The district court's error in giving this instruction was not harmless because it is not clear beyond a reasonable doubt that a rational juror would have found O'Keefe guilty of second-degree murder absent the error." Id. at 2.

After remand to this Court, O'Keefe continued to assert his rights to a speedy trial, and the case was retried beginning August 23, 2010. During that trial, the State introduced new bad act evidence and arguments never before noticed and/or ruled upon. O'Keefe moved for a mistrial during that case, based upon prosecutorial misconduct during closing argument. That motion was denied. 8/31/10 TT 163-65, 168-69. The retrial ended with a hung jury. Again, O'Keefe invoked his speedy trial rights and the case was set to begin a third trial on January 24, 2011.

On January 3, 2011, the State faxed to defense counsel a Supplemental Notice of Expert Witnesses stating that it intended to present the testimony of Andrea Sundberg, as "an expert in battered women's syndrome, power and control dynamics, and the cycle of abuse, generally," in its case in chief at the upcoming re-retrial of Mr. O'Keefe. The State's notice had no reports attached to it, and the defense is unaware what the expert's opinion would be, if any, in this area. Moreover, the State had never before noticed an expert or sought permission to present expert testimony or evidence relating to the dynamics and effects of domestic violence or abuse.

RELEVANT FACTS

Preceding the August 2010 retrial, O'Keefe sought to introduce expert testimony and evidence regarding Whitmarsh's diagnosed psychological conditions and mental health history. See August 19, 2010 Motions Hearing Transcript 28-36; 8/23/11 TT 1-11; see also Motion By Defendant O'Keefe to Admit Evidence Pertaining to the Alleged Victim's Mental Health Condition and History, filed 7/21/10; and Court's Exhibit B admitted during the March 2009 trial. In opposition to the defense request for admission of Whitmarsh's various diagnoses, which

included bipolar disorder borderline personality traits, panic attacks with agoraphobia, and anxiety disorder, the prosecutor argued, *"I mean, now what we're going to do is we're going to have a – a shrink come in, I guess, and analyze someone who's dead after the fact."* The Court responded, *"Well, we're not having it at this point."* 8/19/10 Motions Hearing Transcript at 35. The defense argued, in part, that Whitmarsh's prior conduct shown in the medical records was relevant to show alternative reasons why the knife might have been brought into the bedroom and why the neighbors might have heard noises when Whitmarsh was alone in the apartment, and to show a possible non-criminal cause of death and balance the prejudice from the evidence of O'Keefe's prior conviction and Morris's accusations admitted to show intent/motive. The Court ruled that the parties should attempt to determine to which evidence from the medical records they might stipulate. The parties disagreed on a stipulation, and the Court granted in part, the defense's request to present certain facts. However, the Court denied the defense's request to present evidence of Whitmarsh's diagnoses or expert testimony related to these diagnoses. 8/23/10 TT 8-10; 8/24/10 TT 2-11.

During the retrial voir dire, the Court also ruled that the State could not discuss battered women's syndrome. 8/23/10 TT 13-16.

To briefly summarize the basic evidence presented at trial, O'Keefe and Whitmarsh had a dating relationship which began in 2001. In 2006, O'Keefe was convicted of felony domestic battery conviction involving Whitmarsh, and he went to prison. 8/26/10 TT 27; 8/30/10 TT 169. After his release, and in January, 2008, he began dating Cheryl Morris. Later, in June, 2008, he also resumed a relationship with Whitmarsh. 8/26/10 TT 27. By September, 2008, O'Keefe had left Morris in favor of Whitmarsh, and he and Whitmarsh began living together. Id. at 35.

On November 5, 2008, beginning shortly after 9:00 p.m., downstairs neighbors began hearing noise coming from O'Keefe and Whitmarsh's upstairs apartment. 8/26/10 TT 85. There had never been noise up there before; the couple was very quiet. Id. at 85, 91. The only voice heard sounded like a female. Id. at 98.

Charles Toliver went upstairs and found O'Keefe and Whitmarsh in their bedroom; O'Keefe was holding Whitmarsh and talking to her, and she appeared to be unconscious. Id. at 135-38, 152. Charles ran out of the apartment and started hollering for help. Id. at 140. Jimmy Hathcox, who lived next door to O'Keefe and Whitmarsh, had also heard a little ruckus going on, but the walls are paper thin and it did not seem out of the ordinary. Id. at 250-51. Hathcox never heard yelling, and the noises he heard from the apartment could have been someone banging things around in a temper fit. Hathcox heard a bang on the rail outside, looked out and saw O'Keefe entering his apartment. Id. at 253-54. About 15 minutes after Hathcox saw O'Keefe enter the apartment, he heard Toliver yelling for help. Id. at 253.

Police responded but O'Keefe did not obey their commands that he leave Whitmarsh's body. While lying next to Whitmarsh, he was twice tased then arrested. 8/27/10 TT 84-85, 169. It was apparent that he was extremely intoxicated. Id. at 133. He was interviewed, and the redacted interview, was played for the jury. 8/30 TT 180.

Law enforcement found no disarray in O'Keefe's apartment, except for in the bedroom where O'Keefe and Whitmarsh were found. There was a large knife on the bed, and analysis of it showed both Whitmarsh's and O'Keefe's blood. 8/27/10 TT 220; 8/30/10 TT 151-55.

O'Keefe had cuts on his right thumb and finger. 8/27/10 TT 14. Defense expert George Schiro testified that it was more likely that O'Keefe was cut before Whitmarsh received her fatal cut. 8/27/10 TT 32. O'Keefe's cuts could have been caused by grabbing the blade. Id. Schiro also testified that the possibility of an accidental stabbing could not be ruled out. Id. at 44.

Whitmarsh had a psychiatric history which included self-mutilation, anger outbursts, and suicide attempts involving knives. 8/30/10 TT 212-15.

The State's medical examiner, Dr. Benjamin, ruled the cause of death was homicide, but neither she, nor the defense expert medical examiner, Dr. Grey, could

rule out accident or suicide based on the physical evidence. 8/25/10 TT 104, 106; 8/26/10 TT 170-71. Whitmarsh had both healing and acute bruising, but few of the bruises were determined to be acute, and the bruising could have been consistent with bumping into things or being bumped into, and also would have been likely been exacerbated by Whitmarsh's advanced liver cirrhosis and use of alcohol. Her blood alcohol level at the time of death was .24. 8/25/10 TT 78; 8/26/10 TT 161-223.

ARGUMENT

1. DOUBLE JEOPARDY BARS MUST APPLY TO PREVENT RETRIAL.

Double jeopardy bars under the United States and Nevada Constitutions prevent retrial where the prosecution has committed intentional misconduct for the purpose of improving its case upon retrial.

The Double Jeopardy Clauses of the United States and Nevada Constitutions, mandate that no person shall "be subject . . . to be twice put in jeopardy" for the same offense. U.S. Const. amend. V; Nev. Const. art. 1, § 8. Jeopardy attaches when a jury is sworn, and the guarantee against double jeopardy may entitle a defendant who is put to trial to go free if the trial fails to end in a final judgment. See Glover v. District Court, 125 Nev. ___, ___, 220 P.3d 684, 692 (2009). The public has an interest in seeing that verdicts in criminal cases are the result of "'honest deliberation by individuals who are of a mind free from bias and prejudice.'" Glover, 125 Nev. at ___, 220 P.3d at 692 (quoting Merritt v. District Court, 67 Nev. 604, 607, 222 P.2d 410, 411 (1950)).

The Double Jeopardy Clause protects, in part, "the 'deeply ingrained' principle that 'the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.'" Yeager v. United States, ___ U.S. ___, 129 S. Ct. 2360, 2365-66 (2009) (quoting Green v. United States, 355 U.S.

184, 187-188, 78 S. Ct. 221 (1957)) (other citations omitted). See also United States v. Jorn, 400 U.S. 470, 479, 91 S. Ct. 547, 554 (1971). This interest is "implicated whenever the State seeks a second trial after its first attempt to obtain a conviction results in a mistrial because the jury has failed to reach a verdict." Yeager, 129 S. Ct. at 2366.

It is unacceptable for the prosecution to seek tactical advantage by using an aborted proceeding as a trial run for the next. In Arizona v. Washington, 434 U.S. 497, 98 S. Ct. 824 (1978), the Supreme Court stated:

> Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.

Id. at 503-05, 98 S. Ct. at 829-30 (footnotes omitted). The Court further explained that the risk of an innocent being convicted increases with each trial because "even 'subtle changes in the State's testimony, initially favorable to the defendant, may occur during the course of successive prosecutions.'" Id. at 504 n.14, 98 S. Ct. at 829 n.14 (quoting Green, 355 U.S. 184, 187-88).

Normally, the double jeopardy bar does not prevent retrial following a hung jury. See Washington, 434 U.S. 514, 98 S. Ct. 824. However, an exception to this rule is recognized where the prosecutorial misconduct results in a hung jury, and the prosecutor intended to commit such misconduct for the purpose of a tactical advantage upon retrial. See Ohio v. Betts, 2007 Ohio 5533, Ohio App. Lexis 4873, p.23 (2007). In Betts, the same rare factual scenario as the instant case was present, i.e., "the somewhat unusual backdrop of potential double jeopardy implications following the *denial* of the motion for mistrial and the case is then

retried following a hung jury." Ohio App. Lexis 4873, at 10. The court relied on the decision in another procedurally similar case, United States v. Gollamudi, E.D.N.Y. No. CR-91-518, 1993 U.S. Dist. LEXIS 1402 (Jan. 29, 1993), and concluded that prosecutorial misconduct will bar a subsequent retrial where the prosecutor acted with the specific intent either to inspire a motion for a mistrial, or to obtain a conviction where an acquittal was likely. Id. at 10-11. A hearing as to the prosecutor's intent is necessary if there exists a genuine issue in the mind of the trial court concerning the prosecutor's intent. Id. at 12.

Improper advocacy that places prejudicial and inadmissible evidence before the jury can create an unacceptable risk of biased jury deliberations and require a mistrial. Glover, 125 Nev. at ___, 220 P.3d at 692. A defendant need not show prejudice in order to properly invoke the double jeopardy bar. Washington, 434 U.S. at 504 n.15, 98 S. Ct. at 829 n.15. The strictest scrutiny must be applied where there is reason to believe that the prosecutor is using the superior resources of the State to harass or achieve a tactical advantage over an accused. Id. at 507, 98 S. Ct. at 831-32.

Evidence of intentional misconduct here:

Introduction of Improper Evidence and Argument

During the August, 2010 trial, the State repeatedly introduced improper character evidence without first seeking permission as required by Nevada law. NRS 48.015 provides that "relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.025(2) recognizes that "[e]vidence which is not relevant is not admissible." NRS 48.035 provides in part that:

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

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

Additionally, "[a]bsent certain exceptions, evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion. Further, evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." Taylor v. State, 109 Nev. 849, 853, 858 P.2d 843, 846 (1993). Prior to admitting such other act evidence, the State must first bring a "Petrocelli" motion and request a hearing to determine if "(1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." Roever v. State, 114 Nev. 867, 872, 963 P.2d 503, 505-06 (1998) (citing Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997); (Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985)). However, even if the other-act evidence is relevant to a permissible purpose and proven by clear and convincing evidence, a court should still exclude it if its probative value is substantially outweighed by the danger of unfair prejudice. Id. at 872, 963 P.2d at 505-06 (citing Tinch, 113 Nev. at 1176, 946 P.2d at 1064-65.

The Nevada Supreme Court recognizes that the use of character evidence to convict a defendant is extremely disfavored in our criminal justice system. Such evidence is likely to be prejudicial and irrelevant and forces the accused to defend against vague and unsubstantiated charges. It may improperly influence the jury and result in the accused's conviction because the jury believes he is a bad person. The use 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 appeal. See Taylor, 109 Nev. at 854, 858 P.2d at 847.

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Evidence introduced through witness Cheryl Morris:

Here, the State did not seek permission to introduce Morris's allegations about O'Keefe's statements and demonstrations regarding killing with knives as prior bad act evidence at the first trial because the State did not believe it was bad act or character testimony. 3/16/09 TT at 15-16. At that time, the evidence was limited to Cheryl Morris's claim that O'Keefe had claimed proficiency with knives and could kill someone with a knife. When the defense raised the issue, the Court ruled that the evidence did not show a bad act and that Morris would be allowed to testify regarding the same. 3/16/09 TT 14-16.

Morris testified during the first trial that O'Keefe made statements indicating that he was proficient with knives and that he was capable of killing anyone with a knife. According to Morris, he demonstrated how he would kill someone with a knife: "O'Keefe would hold me on one shoulder and have a pretend sort of weapon in his hand, and he would stand there and hold me as ... arm's length and say he would come at me or could come at a person and shove it through the cage – rib cage area and then just pull up pretty much . . . slicing someone open." 3/17/09 TT 17. Morris demonstrated this slicing action on her sternum area. Id. at 17-18. Prior to the second trial, the defense again sought to exclude this evidence. Motion filed July 21, 2010. The Court heard argument on the motion and ruled that the evidence was relevant and should be admitted. 8/19/10 TT 2; Order filed September 9, 2010, p.1.

During the first trial, all parties operated under the assumption that O'Keefe could introduce evidence of the loving and forward looking relationship of O'Keefe and Whitmarsh during the period after he was released from prison. 3/16/09 Transcript at 12; see, e.g., 3/16/09 TT 259 (Jimmy Hathcox's testimony that during period of time Whitmarsh and O'Keefe lived at El Parque they appeared to be an open and loving couple); 3/19/09 TT 19-21 (testimony of Louis DeSalvio that Whitmarsh and O'Keefe seemed very upbeat in the fall of 2009). During the retrial in August, 2010, the State sought to limit the evidence that O'Keefe could introduce

as rebuttal to the evidence from Cheryl Morris regarding O'Keefe's alleged hatred of Whitmarsh. 8/26/10 TT 11-21. The Court limited the defense to asking what the witnesses saw during the relevant time period (versus opinion on the couple's interaction), so as to not open the door to cross-examination on other prior bad acts. Id. at 21; 8/25/10 TT 114.

During the retrial, however, Morris greatly expanded on the claims she earlier made during her statement to the police, her preliminary hearing testimony and her first trial testimony. At the retrial, without seeking permission, the State elicited several *actual* bad acts and bad character evidence through Morris's testimony: i.e., that O'Keefe had killed people before, that he had been kicked out of his abode, that he had yelled at Whitmarsh, and evidence that Morris was afraid of O'Keefe. Furthermore, for the first time, Morris testified that O'Keefe had demonstrated yet another way of killing people, never before mentioned: slicing someone across the throat.

Specifically, Morris testified that O'Keefe would become angry over being sent to prison based upon a trial involving Whitmarsh. 8/26/10 TT 29-30. He would say he hated the bitch and wanted to kill her. He did this multiple times. Id. at 30. During the same conversations, he would tell her about his experience in the military killing people. Id. He would talk about it and say it was either kill or be killed and he would talk about the kind of weapon he would use. Id. He said the military trained him to kill. Id. He was very equipped for hand to hand combat, basically using a knife. He would describe killing someone by taking a knife and shoving it upwards toward their sternum and pulling up. Or perhaps coming up from behind and taking the knife from the left side of the neck to the right side. Id. at 31. This new evidence of prior killings is extremely prejudicial and not relevant to any issue in this case. It goes way beyond evidence pertinent to O'Keefe's skill or training, and depicts O'Keefe as an actual killer. Moreover, because of the discrepancies between these allegations and all former testimony and statements, and Morris's obvious motive to lie as a spurned lover, her allegations about O'Keefe

are now so incredible that they cannot meet the clear and convincing standard for bad act admissibility. Furthermore, the alleged ability to kill a person with a knife by an upward slice from the chest or a slice across the throat is irrelevant to this case where the alleged victim was killed by a puncture type stab wound under her armpit that went directionally from front to back and downward. See 3/18/09 TT 103, 118 (description of wound). Nothing occurred here which is close to the gutting or upward sternum area slicing or neck slicing about which Morris newly testified. The evidence makes no fact of consequence more or less probable. Additionally, the evidence tends to show that O'Keefe acted consistent with a character trait of being obsessed with killing with knives and that he has killed before and is a killer. This is pure bad act or character evidence, and is highly inflammatory and unfairly prejudicial.

Morris also testified for the first time that O'Keefe got "kicked out" of the trailer he was living in. 8/26/10 TT 28. Whether O'Keefe was evicted is irrelevant to any fact of consequence here, and the implication that grounds existed to evict him constitutes improper bad act evidence. The evidence's only use is improper: to show bad character.

Morris further testified at the retrial that O'Keefe was attracted to Whitmarsh because she was submissive. If he yelled at her, she'd do whatever he asked. Id. at 32. Yelling at Whitmarsh constitutes improper bad act evidence, which is more prejudicial than probative. Whether Whitmarsh was submissive also constitutes improper character evidence, which the State was attempting to use to show conformity with this character trait at the time in question.

Finally, Morris testified that after she and O'Keefe moved into the El Parque apartment, then split up, she moved her things into the bedroom and had maintenance put a lock on the bedroom door. 8/26/10 TT 36. This evidence is irrelevant to any fact of consequence here and is overly prejudicial. It implies that Morris herself was afraid of O'Keefe and that there was reason for this – his dangerous character. Accordingly, it is improper character evidence.

Improper Argument relating to Expert Witnesses:

During rebuttal closing argument, the prosecutor referred to defense expert Schiro: *"He's the defendant's high-paid expert from Louisiana."* 8/31/10 TT 144. An objection to this argument was sustained. As to defense expert Dr. Grey, the prosecutor argued, *"Dr. Grey came all the way from Utah to tell us that he could not rule out suicide."* 8/31/10 TT 159.

These types of comments on experts being from other jurisdictions and their fees constitute improper disparagement of defense experts. See Butler v. State, 120 Nev. 879, 899, 102 P.3d 71, 85 (2004).

Improper argument relating to ongoing domestic abuse:

The prosecutor also made reference to Whitmarsh's bruising in various stages of healing and argued that this indicated that she *"had been roughly handled in an ongoing bashing."* 8/31/10 TT 155. The defense objected to this argument, the objection was sustained, and the defense made a motion for mistrial based in part on this improper argument; however this court denied the motion. Id. at 164, 169. This is clearly a reference to inadmissible character evidence and is especially prejudicial in light of the fact that the defense had been limited from introducing evidence from its witnesses to show that O'Keefe and Whitmarsh had a loving relationship in the days and weeks before the incident at issue. As with the notice problems during the original trial, the State gave no notice of its intent to rely on an ongoing domestic abuse theory. There was likewise no evidence to support any claim of domestic violence in the days and weeks before the incident. Indeed, the neighbors claimed that there had never been any noise, and at the prior trial, Hathcox testified that they appeared to be a loving couple. Additionally, the evidence at trial clearly showed an innocent explanation might exist for Whitmarsh's bruising.

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Improper evidence and argument regarding domestic violence:

Prior to the first trial, the State indicated that it would not introduce evidence of domestic violence, except for the prior conviction for felony battery, and even that evidence was to be limited. 3/16/09 TT 2-3, 12. Despite the prior rulings of this Court, and the understandings of the parties, during the 2010 retrial, the State repeatedly introduced the issue of domestic violence as a psychological syndrome, a community problem and cause. For example, during voir dire, the State inquired of jurors whether they felt domestic violence was a "community problem." The defense objected, and the Court ruled that the State could not talk about domestic violence syndromes or define that term. 8/23/10 TT (partial transcript), p. 16.

In closing argument, the prosecutor stated, *"An anonymous domestic violence survivor once made this observation. If you can't be thankful for what you have, be thankful for what you have escaped."* 8/31/10 TT 32. In rebuttal closing argument, the prosecutor argued, *"It was Ralph Waldo Emerson who said all violence, all that is dreary, all that repels is not power. It is the absence of power. In battering Victoria in the hours leading up or the minutes leading up to her ultimate death, the defendant didn't show us what kind of power he has. He showed us how weak he is. Men who beat women."* 8/31/10 TT 132. The prosecutor further argued, *"Mary Gianocos who is the director of Voices against violence once said. . . everything we know. . . ."* A defense objection to this argument was sustained. The prosecutor continued, *"Everything we know about domestic violence is that it is about power and controlling people."* 8/31/10 TT 161. The defense made a motion for mistrial based on this improper argument, id. at TT 165, but that motion was denied. Id. at 169.

Counsel should not intentionally refer to or argue on the basis of facts outside the record, as doing so can involve the risk of serious prejudice, with a mistrial as a possible remedy. Glover, 125 Nev. at ___, 220 P.3d at 696. Here, it was misconduct

for the State to rely on psychological syndromes, effects or dynamics of abuse or domestic violence because there is no evidence which was admissible for the purpose of showing that O'Keefe had the character traits of an abuser or that Whitmarsh had the character traits of a victim. Also, NRS 48.061(2) specifically prohibits the use of such evidence against an accused, "Expert testimony concerning the effect of domestic violence may not be offered against a defendant . . . to prove the occurrence of an act which forms the basis of a criminal charge against the defendant." Reliance on the dynamics of abusive relationships to prove this case is improper. Additionally, it is misconduct for a prosecutor to appeal to the conscious of the community or societal concerns because the jurors' only proper focus should be on whether the State has proved its charge. See Atkins v. State, 112 Nev. 1122, 1138-39, 923 P.2d 1119 (1996) (Rose, J., concurring), overruled on other grounds by Berjano v. State, 122 Nev. 1066, 1076, 146 P.3d 265 (2006).

The prosecutor's conduct, whether misconduct or inexcusable negligence, preceding a mistrial must be subjected to the strictest scrutiny because "'the *Double Jeopardy Clause* . . . protect[s] a defendant against governmental actions intended to provoke mistrial requests . . . [or] bad faith conduct . . . [that] threatens the [h]arassment of an accused.'" Glover, 125 Nev. at ___, 220 P.3d at 684 (quoting Washington, 434 U.S. at 508). It is apparent in this case that the prosecution introduced the above challenged evidence and argument with the purpose of goading the defense into seeking a mistrial or tainting the jurors' consideration of the legal evidence. Such misconduct tends to frustrate the public interest in having a just judgment reached by an impartial tribunal and creates the risk that the panel will be tainted. Washington, 434 U.S. *at 512-13, 98 S. Ct. at 834.* The prosecution's bad motive is demonstrated in part by the fact that it now seeks to remedy one of its problems in the prior trial, i.e., that it had not noticed an expert in domestic violence though it wished to present evidence pertaining to domestic violence, generally, in order to bolster its attempt to introduce this improper

character evidence. However, "[t]he prohibition against double jeopardy unquestionably "forbids the prosecutor to use the first proceeding as a trial run of his case." Washington, 434 U.S. at 508, 98 S. Ct. at 831-32 (citing Note, Twice in Jeopardy, 75 Yale L.J. 262, 287-288 (1965)).

2. **THE STATE MUST BE PRECLUDED FROM INTRODUCING NEW EVIDENCE AND EXPERT WITNESS TESTIMONY WHICH WAS NOT PREVIOUSLY TIMELY NOTICED AND WHICH IS OTHERWISE INADMISSIBLE.**

Where the State wishes to introduce expert testimony, notice is required pursuant to NRS 174.234(2), which states:

> If the defendant will be tried for one or more offenses that are punishable as a gross misdemeanor or felony and a witness that a party intends to call during the case in chief of the State or during the case in chief of the defendant is expected to offer testimony as an expert witness, the party who intends to call that witness shall file and serve upon the opposing party, **not less than 21 days before trial** or at such other time as the court directs, a written notice containing:
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> (a) A brief statement regarding the subject matter on which the expert witness is expected to testify and the substance of the testimony;
> (b) A copy of the curriculum vitae of the expert witness; and
> (c) A copy of all reports made by or at the direction of the expert witness.

(Emphasis added.) With this statutory provision, the Nevada Legislature obviously intended to protect defendants' constitutional due process rights and ensure adequate opportunity to prepare to meet the expert's testimony. Notwithstanding the State's failure to properly notice an expert relating to domestic violence dynamics and effects for the original trial, at the very latest, the State should have filed this notice no later than 21 days prior to the first retrial of the case. Even if this Court rules that Double Jeopardy does not prevent the retrial, the very basis for such a ruling lies in the fact that the retrial from a hung jury may be deemed a

continuation of the initial jeopardy that attached when the last jury was empaneled on August 23, 2010. Yeager, 129 S. Ct. at 2365-66 ("the inability to reach a decision "is the kind of 'manifest necessity' that permits the declaration of a mistrial and the *continuation of the initial jeopardy that commenced when the jury was first impaneled*"). Thus, if O'Keefe is not entitled to bar the entire prosecution based on double jeopardy, he must be entitled to preclude the State from starting anew with its witness and evidence notice periods. The retrial is merely a continuation of the former trial, and the ability of the State to notice new expert witnesses ended at the latests 21 days before the empaneling of the last jury.

It would be unfair and inconsistent with the Due Process Clauses of the United States and Nevada Constitutions to allow the State the opportunity to correct prior strategies and bolster its case with additional evidence or witnesses when no good cause is shown for their failure to timely notice this evidence prior to the aborted trial. The due process interest at issue here is analogous to the situation presented in Bennett v. District Court, 121 Nev. ___, 121 P.3d 605 (2005). There, the Nevada Supreme Court ruled that lower court erred in allowing the State to allege new aggravators in support of a death sentence following a change in law which invalidated aggravators found by the jury, where the State had chosen to forego the proposed new aggravators during the notice period proscribed by SCR 250. The Court explained that the required notice-period was designed to protect a capital defendant's due process rights to fair and adequate notice of aggravating circumstances, safeguard against any abuse of the system, and insert some predictability and timeliness into the process. Id. at ___, 131 P.3d at 610. See also Browning v. State, 124 Nev. ___, 188 P.3d 60, 74 (2008) (assuming without deciding that the State might be prevented from presenting new penalty hearing evidence at a second penalty trial, but concluding that minimal additional evidence was actually introduced); cf. State v. Hennessy, 29 Nev. 320, 341, 90 P. 221 (1907)

(recognizing that where a judgment of conviction is reversed on appeal, without addressing all assignments of error, it is proper to give the defense an opportunity to address them and the court an opportunity to correct them prior to a retrial).

The same due process type of considerations apply here. A retrial after a mistrial for a hung jury, to be consistent with due process and not barred by double jeopardy, must be considered a continuation of the previous trial. What it cannot be is a chance for the State to start over with new witnesses and evidence not noticed or tested during prior trials. This would encourage prosecutors, who had not met witness deadlines for whatever reason, to engage in misconduct to attempt to cause a mistrial. Here, the prosecutor certainly did attempt to introduce inadmissible evidence at the last trial. Because that conduct likely tainted the jury's consideration of the evidence and caused the jury to hang versus acquit, the prosecutors cannot be permitted to take advantage of the result to correct the perceived weaknesses in their case. See also McMillian v. Weeks Marine, Inc., 2008 U.S. Dist. LEXIS 76973, pp. 5-6 (D.C. Del., Sept. 30, 2008) (granting award of a new civil trial on damages, but recognizing that an exception to the general rule prohibiting new evidence upon retrial is where a court perceives a manifest injustice in limiting evidence at retrial); Yong ex rel. Yong v. The Nemours Foundation, 432 F. Supp. 2d 439, 441 (D. Del. 2006) ("[A]s a general rule, a retrial should not involve the addition of new issues, evidence, or witnesses."). As the State has failed to comply with the statutory notice requirement, it should be precluded from presenting this new "expert" testimony. See NRS 174.295 (providing that court may impose sanctions, including prohibiting a party from introducing in evidence material not disclosed in compliance with NRS 174.234).

In addition, the State has failed to attach any expert's report to its supplemental notice. As such, the foundation for the expert's knowledge regarding this case is not known to the defense. To the extent that this expert intends to rely on hearsay, her testimony would violate O'Keefe's Sixth Amendment rights as set

forth in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004), Melendez-Diaz v. Massachusetts, 557 U.S. ___, 129 S. Ct. 2527 (2009); Polk v. State, 126 Nev. ___, 233 P.3d 357 (2010). It does not matter whether any other state statute allows for an expert to rely on hearsay, a defendant's Sixth Amendment rights trump such statutes. See Polk v. State, 126 Nev. ___, 233 P.3d 357 (2010) (rejecting argument that because NRS 50.285 allowed an expert to offer opinion based on inadmissible evidence, an analyst could testify to the results of a test performed by a non-testifying analyst).

The introduction of any expert testimony on the subject of the dynamics or effects of domestic violence, such as battered women's syndrome, domestic violence power and control dynamics or the cycle of abuse can only be based on improper use of character acts evidence. The use of such an expert to prove the basis of a charge against a criminal defendant is prohibited by NRS 48.061. That statute provides, in full:

> (1) Except as otherwise provided in subsection 2, evidence of domestic violence and expert testimony concerning the effect of domestic violence, including, without limitation, the effect of physical, emotional or mental abuse, on the beliefs, behavior and perception of the alleged victim of the domestic violence that is offered by the prosecution or defense is admissible in a criminal proceeding for any relevant purpose, including, without limitation, when determining:
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> (a) Whether a defendant is excepted from criminal liability pursuant to subsection 7 of NRS 194.010, to show the state of mind of the defendant.
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> (b) Whether a defendant in accordance with NRS 200.200 has killed another in self-defense, toward the establishment of the legal defense.
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> (2) *Expert testimony concerning the effect of domestic violence may not be offered against a defendant pursuant to subsection 1 to prove the occurrence of an act which forms the basis of a criminal charge against the defendant.*

(3) As used in this section, "domestic violence" means the commission of any act described in NRS 33.018.

(Emphasis added.) Subsection 2 above makes it clear that the State's reliance on the dynamics of abusive relationships to prove its case is improper.

In addition, introduction of such evidence at trial would cause unfair prejudice and confuse the issues and mislead the jury. NRS 48.035(1) (Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.) Victoria Whitmarsh's medical records are attached as a sealed Exhibit to this motion. They demonstrate all of the following:

At the time of her death, she had been previously diagnosed with various serious psychiatric disorders: For example, in 2001, before she met O'Keefe, she was admitted to Monte Vista Hospital following a suicide attempt, and she was diagnosed with major depressive episode, panic disorder with agoraphobia. Exh. at 233, 248, 251. In 2006, while at Monte Vista for another suicide attempt, which occurred while O'Keefe was incarcerated, she was diagnosed with bipolar disorder II, depressed versus recurrent major depressive disorder, and borderline personality traits. Exh. at 6, 13, 17, 136. In 2007, while at Southern Nevada Adult Mental Health, she admitted to past auditory hallucinations. Exh. at 361, 364.

She has been diagnosed with various other health problems, including peptic ulcer disease, hepatitis C, arthritis, underweight and liver cirrhosis. Exh. at 13.

She has a long history of impulse control and anger problems, predating her relationship with O'Keefe and during periods when she was not in a relationship with O'Keefe. In 2001, she was "angry, screaming and 'went berserk' after an argument with her husband and overdosed on pills and cut her wrist." Exh at 11, 27-28, 65. She also reported anxiety attacks and panic-like symptoms, and she expressed her anger by throwing things. Exh. at 250, 275.

In 2006, doctors noted that she had poor anger management, "high moods and problems of anger," "substantial mood swings," "poor impulse control," "anger outbursts," "racing thoughts" and "significant anxiety." Exh. at 5, 10, 11, 28, 64, 134. The substantial mood swings began around 2000 but she had some mood episodes prior to that. Exh. at 134. In 2006, her treatment plan included cognitive behavioral therapy to help her explore her self-destructive behaviors and anger management. Exh. at 14. She reported that she destroys property, and that her triggers to escalating behaviors are "if I don't get what I want & have to repeat myself." Exh. at 64, 134.

Whitmarsh had reported long-term abuse by her husband, including verbal, sexual and physical abuse. During her 2001 admission to Monte Vista, Whitmarsh made reports that: she was the victim of spousal abuse by her husband, "(alcoholic/violent) (phys./sexually & mentally) x 18 years," Exh. at 321; her husband was abusive mentally and physically and he was an alcoholic who would not work, id. at 239; she had a "long history of enabling her husband who is physically abusive," id. at 242; she was aggravated with her husband who was using her, drinks quite heavily and abuses her, and her major stress in her life was her husband, id. at 246-48, 250, 253, 260; she was in a very abusive relationship and did not want to go home after her hospitalization, id. at 285; she had been married for 18 years to an alcoholic/abusive/nonworking husband, id. at 286; her husband had hit her, id. at 291; her husband was verbally abusive, id. at 291; and she wanted to die due to marital discord and financial stress, id. at 376. At the time of her 2002 admission to Monte Vista for drug treatment, she again reported that her husband was an alcoholic, who abused her when drunk; she also reported stress at work and problems in relationship with her estranged husband who is an alcoholic. Id. at 197, 201. In 2006, during her admission to Monte Vista for a suicide attempt while O'Keefe was incarcerated, she reported ongoing conflicts with her estranged husband, her sister and her 21 year old daughter, as well as chronic marital problems with her husband. Exh. at 26, 57. She also reported that she had

been staying with her husband and daughter but her daughter wanted her to leave after her suicide attempt. Id. at 134.

She has a history of suicide attempts after arguments with her husband and during periods in which she had no dating relationship with O'Keefe. These include: two suicide attempts in the 1980s both since she married her husband; one was an overdose on pain medications after a fight with her husband. Exh. at 10, 134; the 2001 attempt, which resulted in her hospitalization at Monte Vista where she met O'Keefe, was her fourth suicide attempt; id. at 250; with respect to the 2001 attempt, she overdosed on pills and lacerated her wrists with a knife; she was frustrated depressed, suicidal and aggravated with her husband who had been using her and drinks quite heavily, id. at 11, 246-48; she "was angry, screaming and 'went berserk' after an argument with her estranged husband," id. at 11, 58, 186, 199, 233-39, 251, 260, 326, 335. In 2006, she overdosed on Xanax and Morphine and cut her wrist, id. at 5, 8-11. In 2007, she was admitted to Southern Nevada Adult Mental Health Services on a Legal 2000 after she felt depressed and took a handful of Tramadol. At the time, she was residing with her husband. Exh. at 361-65.

She has a history of self-mutilation with knives and scissors. Records from her 2001 Monte Vista admission show that she had poor impulse control as control as evidenced by the fact that she cuts herself when angry. Exh. at 271. She reported stabbing herself on her hands in 2006 "because I am not happy with myself." She stated that when she is angry, she will self-mutilate. Id. at 273. In 2006, she reported that she "has been self-mutilating for the past 15 years and stated that she cuts herself when she is angry" and "she cut her left wrist [] with a pair of scissors on September 22, 2006." Exh. at 10, 38, 39.

She had a history of heavy alcohol use and drug dependence. Records show that she abused Lortab, Percocet and Oxycotin and she had been to detox twice: once in 2002, and once in 2006. Exh. at 11, 185-87. The 2002 treatment was for Opiate and Xanax dependence. Exh. at 185-87. In 2006, she was diagnosed with

benzodiazepine dependence, opiate dependence, and alcohol dependence sustained in full remission. Exh. at 6, 13, 17, 136.

The defense has never been notified of any evidence, and is aware of none, showing the Whitmarsh has ever been diagnosed with suffering from battered women's syndrome. Allowing such evidence to be presented now, although the defense has been denied the opportunity to present expert testimony pertaining to Whitmarsh's actual diagnoses, and especially in light of the numerous instances of misconduct by the State and the failure to timely notice such an expert or the basis for any opinions relevant to this case, would violate O'Keefe's due process rights, confuse the issues and mislead the jury, given the documented psychiatric history of Whitmarsh during periods when she was not in a domestic relationship with O'Keefe.

3. O'KEEFE IS ENTITLED TO A DISMISSAL BASED ON THE VIOLATIONS OF HIS CONSTITUTIONAL AND STATUTORY SPEEDY TRIAL RIGHTS.

O'Keefe's has been prejudiced by the multiple trials in this case, having to undergo the stress and anxiety attendant to multiple trials and a lengthy pretrial detention since his arrest on November 6, 2008. His constitutional and statutory rights to a speedy trial have been violated, and he is entitled to dismissal with prejudice. U.S. Const. amend. VI; NRS 178.556(1).

NRS 178.556(1) provides in relevant part, "If a defendant whose trial has not been postponed upon the defendant's application is not brought to trial within 60 days after the arraignment on the indictment or information, the district court may dismiss the indictment or information." This statutory speedy trial right applies to the resetting of a trial following a mistrial. Rodriguez v. State, 91 Nev. 782, 542 P.2d 1065 (1975). Dismissal if the defendant is not brought to trial within 60 days is mandatory if there is not good cause shown for the delay. Anderson v. State, 86 Nev. 829, 477 P.2d 595 (1970); Huebner v. State, 103 Nev. 29, 731 P.2d 1330 (1987). The state has the burden of showing good cause for delay of the trial. Huebner, id.

An accused is not required to show that he was prejudiced by the failure to bring him to trial within 60 days after the finding of an indictment. State v. Craig, 87 Nev. 199, 484 P.2d 719 (1971).

O'Keefe has at all times asserted his right to a speedy trial, and even assuming the Court's calendar constitutes good cause for the January 24, 2011 trial setting, a delay of 145 days from the date the mistrial was declared on September 1, 2010, by its conduct affecting the last trial (and possibly now O'Keefe's ability to go forward with the current setting), the State has caused unexcused delay and further prejudice to O'Keefe.

When the State last presented this case, it was not prepared to present the testimony of a battered women's syndrome expert. It had failed to give any proper notice for such expert. The fact that it seeks to improve its strategies (although upon an illegitimate basis), by taking advantage of the mistrial to notice a new witness, indicates that its prior misconduct was done in bad faith or at least with reckless disregard to O'Keefe's procedural rights. A "trial judge must recognize that lack of preparedness by the Government to continue the trial directly implicates policies underpinning both the double jeopardy provision *and the speedy trial guarantee*." Jorn, 400 U.S. at 485, 91 S. Ct. at 557-58. The State's misconduct and bad intent vitiate any good cause to continue the trial beyond the last trial setting.

Allowing this late-noticed expert would cause even further delay. O'Keefe would need to request approval from the County to retain his own battered women's syndrome expert to counter the State's new evidence. Thus, there is likewise no good cause to allow the State to cause such further delay by allowing its newly noticed expert to present evidence which he could not have presented at the last trial and which is inadmissible as irrelevant and overly prejudicial.

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CONCLUSION

For all of the foregoing reasons, Defendant Brian O'Keefe respectfully requests that this Court grant his Motion to Dismiss with Prejudice, or in the alternative, preclude the State from introducing new evidence, expert testimony or argument relating to the dynamics or effects of domestic violence or abuse, including battered women's syndrome, power and control dynamics, the cycle of abuse, or domestic violence generally.

DATED this 7th day of January, 2011.

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