

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

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4 **BRIAN KERRY O'KEEFE,**)

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Supreme Court No. **Electronically Filed**
Apr 08 2011 09:15 a.m.
District Court Case No. C250630
Tracie K. Lindeman

EIGHTH JUDICIAL DISTRICT
COURT; THE HONORABLE
MICHAEL P. VILLANI,
DISTRICT COURT JUDGE,

Respondents,

And

THE STATE OF NEVADA,

Real Party in Interest.

APPENDIX

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

VOLUME 14

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CLERK OF THE COURT

1 **OPPS**
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DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,)
10 Plaintiff,)
11 -vs-)
12 BRIAN K. O'KEEFE)
13 Defendant.)

Case No: 08-C-250630
Dept. No: XVII
Date: January 13, 2011
Time: 8:15 a.m.

14 **STATE'S OPPOSITION TO DEFENDANT'S MOTION TO**
15 **PRECLUDE THE STATE FROM INTRODUCING AT**
16 **TRIAL IMPROPER EVIDENCE AND ARGUMENT**

17 COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through
18 CHRISTOPHER J. LALLI, Chief Deputy District Attorney, and hereby opposes the
19 Defendant's Motion to Preclude Evidence and Argument. This Opposition is made and
20 based upon all the papers and pleadings on file herein, the attached points and authorities in
21 support hereof, and oral argument at the time of hearing, if deemed necessary by this
22 Honorable Court.

23 DATED this 12th day of January, 2011.

24 DAVID ROGER
25 Clark County District Attorney
26 Nevada Bar #002781

27 BY /s/ Christopher J. Lalli
28 CHRISTOPHER J. LALLI
Chief Deputy District Attorney
Nevada Bar #005398

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 On November 5, 2008, Brian K. O’Keefe (hereinafter “the Defendant”) murdered
3 Victoria Whitmarsh by stabbing the right side of her chest. The knife he used to kill Victoria
4 sliced through various vital organs. It was also apparent that the much-larger Defendant had
5 badly beaten Victoria. Weighing seventy pounds less than him, her body was badly bruised
6 at autopsy. On January 3, 2011, the Defendant filed the instant Motion to Preclude the State
7 from Introducing at Trial Improper Evidence and Argument. This Opposition follows.

8 **ARGUMENT**

9 **1. Defendant’s Third Attempt to Deny the State from Presenting Evidence of**
10 **His Motive and Intent Should be Denied**

11 Prior to the commencement of the first trial, on February 2, 2009, the State filed a
12 Motion to Admit Evidence of Other Crimes. (A copy of that Motion is attached hereto as
13 Exhibit 1.) In that Motion, the State sought judicial authorization to call Cheryl Morris as a
14 witness in its case-in-chief. Morris had given a statement to the police and had testified at a
15 preliminary hearing with respect to certain information about the Defendant. Also in its bad
16 acts motion, the State sought to introduce evidence from a case in which the Defendant had
17 been convicted pursuant to a jury verdict. The State argued, “The case [C207835] was tried
18 before a jury before the Honorable Valorie Vega on September 19, 2005, *with Mrs.*
19 *Whitmarsh testifying against the Defendant.*” Exhibit 1 at 8 (emphasis added). The Motion
20 continued: “The State now respectfully requests that evidence with regards to the
21 Defendant’s conviction in C207835 be admitted in its case-in-chief.” *Id.*

22 That Motion was argued before His Honor on March 16, 2009. (A transcript of those
23 proceedings is attached to the Defendant’s instant Motion as Exhibit A.) After hearing
24 argument by the State and the Defendant, the Court ruled:

25 I think the prior acts here and the statements are relevant to the
26 charge. With the testimony under oath they’ve been proven by
27 clear and convincing evidence. And Mr. Pike, I do find that the
28 probative value is not substantially outweighed by the prejudicial
effect of this, so I’m going to allow that testimony to come in.

1 Defense Exhibit A at 8. After the ruling, the State further informed the parties of its intent
2 with respect to referencing Victoria in the bad-acts case. "The only detail I'm going to go
3 into with regards to the prior DV obviously is *who the witness was that testified against him*
4" *Id.* at 11 (emphasis added). Moreover, the Defendant has now made it perfectly clear
5 that Victoria did, in fact, testify against the Defendant in that case by attaching her testimony
6 to his instant Motion as Exhibit D.

7 Counsel for the Defendant wants to engage in a game of semantics about whether
8 Victoria actually testified "against" the Defendant. However, it is pretty clear the Defendant
9 perceived that Victoria was testifying against him based upon his statements to Cheryl
10 Morris. He understood the impact of Victoria's testimony and the need for it to obtain a
11 conviction against him. If the Defendant is inclined to elicit the substance of Victoria's
12 testimony, the State would welcome that opportunity and ask the Court to grant its bad acts
13 motion filed on January 6, 2011.

14 The Defendant also wants to litigate – for a third time – the admissibility of Cheryl
15 Morris's testimony. The Defendant casts her testimony as "much expanded" and "greatly
16 expended" so as to include bad acts. Def.'s Mot. at 9. This is simply not the case. The
17 record of these proceedings clearly shows that Morris has previously testified that the
18 Defendant killed other individuals, not in the sense of murder, but as a member of the
19 military. *See* Transcript of Preliminary Hearing, December 17, 2008, at 68 (attached hereto
20 as Exhibit 2). The manner in which the Defendant could kill someone was elicited in the
21 first trial. *See* Transcript of Jury Trial of March 17, 2009, at 17-18 (attached hereto as
22 Exhibit 3). Morris also previously testified that the Defendant was attracted to Victoria
23 because she was submissive. *See* Exhibit 3 at 15-17. Morris has previously testified that a
24 lock had been placed on her bedroom door, something that *in no way* can be construed as
25 "character evidence." *See* Exhibit 3 at 18.

26 The Defendant wants to attack any minor inconsistency in Morris's testimony and
27 claim that it is "expanded" or a bad act. The simple truth of the matter is that the more often
28 a witness testifies, the more inconsistencies can be found from one transcript to the next.

1 These matters are for cross-examination, not exclusion.

2 The Defendant also wrongly criticizes the State for making fair argument based upon
3 the bruising found on Victoria's body after her death. During the course of the trial, Doctor
4 Felicia Benjamin testified that the bruises on Victoria's body were in various stages of
5 healing. Moreover, some of the bruising on Victoria's body was found in areas indicating
6 that it was purposefully caused as opposed to accidentally suffered. Based upon these facts,
7 the State properly argued that Victoria "had been roughly handled in an ongoing [fashion]."
8 See Transcript of Trial of August 31, 2010, at 155.

9 The State is certainly entitled to explain the injuries Victoria suffered through the
10 testimony of a medical examiner and through the use of photographic evidence. It is
11 impossible to do this without also referencing older non-accidental bruising on Victoria's
12 body. The *res gestae* doctrine allows the State to present the "complete story" when
13 presenting such evidence.

14 NRS 48.035(3) states the following:

15 Evidence of another act or crime which is so closely related to an
16 act in controversy or a crime charged that an ordinary witness
17 cannot describe the act in controversy or the crime charged
18 without referring to the other act or crime shall not be excluded,
but at the request of an interested party, a cautionary instruction
shall be given explaining the reason for its admission.

19 The Nevada Supreme Court dealt with this issue in *Bellon v. State*, 121 Nev. 436 (2005). In
20 *Bellon*, the court explained:

21 The State may present a full and accurate account of the crime,
22 and such evidence is admissible even if it implicates the
23 defendant in the commission of other uncharged acts. However,
24 the "complete story of the crime" doctrine must be construed
25 narrowly. Accordingly, we have stated that "the crime must be
26 so interconnected to the act in question that a witness cannot
27 describe the act in controversy without referring to the other
crime." We now reiterate that admission of evidence under NRS
48.035(3) is limited to the statute's express provisions. Under
the statute, a witness may only testify to another uncharged act or
crime if it is so closely related to the act in controversy that the
witness cannot describe the act without referring to the other
uncharged act or crime.

28 *Id.* at 441.

1 The situation described in *Bellon* is precisely present in the instant case. The State is
2 entitled to “present a full and accurate account” of the acute injuries Victoria suffered at the
3 time of her death. In utilizing photographs of her body, a jury will necessarily see other,
4 older bruising. It is impossible to present the acute injury without the jury seeing the older
5 injury. Therefore, all of the bruising is admissible under the *res gestae* doctrine codified in
6 NRS 48.035(3).

7 Moreover, the Defendant has already once tried to exclude evidence of injuries not
8 necessarily “tied into this [murder] event.” See Transcript of Proceedings of March 16,
9 2008, at 293. After brief argument on the issue during the first trial, the Court decided to
10 hear from the medical examiner before deciding whether to exclude photos of bruising. *Id.*
11 at 296. When the medical examiner did eventually testify, the Court allowed the photos into
12 evidence and permitted the medical examiner to testify regarding all of the injuries. See
13 Transcript of Proceedings of March 18, 2008, at 87-106.

14 **2. The State is Permitted to Impeach and Comment upon the Credibility of**
15 **Defense Witnesses**

16 During the cross-examination of defense expert George Schiro, the State inquired as
17 to the amount of money he had been paid for his testimony. He testified that the amount was
18 in excess of \$11,000. This fact was then used in closing argument to challenge the
19 credibility of the witness. It is wholly proper to cross-examine an expert witness on the
20 amount of his compensation to establish bias. See *Collins v. Wayne Corp.*, 621 F.2d 777,
21 783 (5th Cir. 1980), *superseded by rule on other grounds as stated in Mathis v. Exxon Corp.*,
22 302 F.3d 448 (5th Cir. 2002); *Cary Oil Co., Inc. v. MG Refining & Marketing, Inc.*, 257
23 F.Supp.2d 751, 756 -757 (S.D.N.Y. 2003).

24 When the Defendant claims that the State violated *Butler v. State*, 120 Nev. 879
25 (2004), and *Sipsas v. State*, 102 Nev. 119 (1986), he fails to appreciate the difference
26 between disparaging a witness and merely arguing credibility. Indeed, it is permissible for a
27 prosecutor to argue the credibility of a witness. *Rowland v. State*, 118 Nev. 31, 39 (2002).
28 A prosecutor may argue the evidence and inferences before a jury so long as he does not

1 heap verbal abuse on the witness or characterize the witness as a perjurer or fraud. *Yates v.*
2 *State*, 103 Nev. 200, 204-05 (1987). A prosecutor may demonstrate to the jury through
3 inferences from the record that testimony of a witness is untrue or biased. *See Ross v. State*,
4 106 Nev. 924, 927 (1990). The arguments made by the State regarding Schiro were intended
5 to attack his credibility and certainly did not characterize him as a “perjurer or fraud.”

6 With respect to Doctor Todd Grey, a medical examiner from the State of Utah, the
7 State argued that his testimony was of limited value because it did not conclusively advance
8 any particular theory but simply “rule[d] out suicide.” It is difficult to fathom how anyone
9 could construe such an argument as disparaging.

10 **3. References to Domestic Violence in a Future Trial is Proper and Relevant**

11 The Defendant argues that the issue of domestic violence is not relevant in this
12 domestic violence homicide. *See* Def.’s Mot. At 12-15. He argues that the State somehow
13 engaged in misconduct by making references to domestic violence in its opening statement
14 and closing argument. Try as he might, it is impossible to ignore the domestic violence
15 elephant in the room.

16 NRS 48.061 provides that “evidence of domestic violence and expert testimony
17 concerning the effect of domestic violence, including, without limitation, the effect of
18 physical, emotional or mental abuse, on the beliefs, behavior and perception of the alleged
19 victim of the domestic violence that is offered by the prosecution or defense is admissible in
20 a criminal proceeding for any relevant purpose”¹ Pursuant to NRS 48.061, references to
21 domestic violence are entirely proper and appropriate.

22 It is also permissible for the State to develop and rely upon domestic violence themes
23 in its opening statement and closing argument. Experts in trial advocacy recognize the
24 importance and propriety of developing themes when addressing the jury:

25
26
27 ¹ The Defendant woefully misconstrues the meaning of NRS 48.061. A more elaborate discussion of this
28 statutory provision, including its legislative history, is discussed in the State’s 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 filed on January
6, 2011. This discussion can be found on pages 14-22.

1 Just as your theory must appeal to logic, your theme must
2 appeal to moral force. A logical theory tells the trier of fact the
3 reason that your verdict must be entered. A moral theme shows
4 why it should be entered.

5
6 A theme is a rhetorical or forensic device. It has no
7 independent legal weight, but rather it gives persuasive force to
8 your legal arguments.

9 Steven Lubet, *Modern Trial Advocacy: Analysis and Practice* 9 (National Institute for Trial
10 Advocacy 2d ed. 1997) (1993). Another author explained the importance of introducing
11 your case to the jury in opening statement this way: "A good beginning is just a sentence or
12 two long and does three things: -Focuses on people. -Gets jurors listening. -Arouses a
13 sense of justice and fair play." David Ball, *Theater Tips and Strategies for Jury Trials* 103-
14 04 (National Institute for Trial Advocacy 2d ed. 1997) (1994).

15 Moreover, courts have recognized that developing themes by use of quotations and
16 rhetorical devices is altogether proper. For example, in *State v. Thompson*, 832 A.2d 626,
17 644-45 (Conn. 2003), the prosecutor characterized evidence adduced by the defendant
18 during the trial as a fantasy world akin to that encountered by Alice, both in Wonderland and
19 through the looking glass. The prosecutor argued that in order to believe the defendant's
20 theory of the case, the jury would have to "step through the looking glass and follow the
21 white rabbit down into the rabbit hole. It's only in this fantasy world that truth is stranger
22 than fiction." *Id.* at 644. The Connecticut Supreme Court explained that the advocacy used
23 by the prosecutor was proper:

24 The mere fact that the prosecutor employed the rhetorical
25 device of incorporating a literary theme into his closing argument
26 did not render his remarks improper. *Accord State v. Cotton*, 774,
27 825 A.2d 189 (Conn. Ct. App. 2003) (reference to Lewis
28 Carroll's *Through the Looking Glass* was not improper). As we
stated earlier in this opinion, "[t]he occasional use of rhetorical
devices is simply fair argument." *State v. Reynolds*, 824 A.2d
611 (Conn. 2003), *reprinted at* 836 A.2d 224. Through his
literary allusions to Lewis Carroll's "topsy-turvy" imaginary
worlds, in which the irrational prevailed over the logical, the
prosecutor argued in effect that in order for the jury to believe
the defense witnesses, it would have to suspend logic and ignore
the weight of the evidence. This was mere rhetorical flourish and
not improper argument.

1 *Id.* at 644-45 (internal citations refined).

2 Of course, there is nothing magical about the foregoing. It is what every first year
3 law student is taught about giving opening statements and closing arguments. It is a
4 rudimentary lesson of being an effective advocate and presenting a compelling opening
5 statement or closing argument. The dark days of beginning an opening statement with "An
6 opening statement is a roadmap ..." are long gone. The State's use of quotations regarding
7 domestic violence in its opening statement and closing argument were altogether proper.

8 **4. Defendant's Convictions for Criminal Non-Support of Dependents**

9 After reviewing the Defendant's Entry of Sentence and related documents as well as
10 relevant Ohio law, the State agrees with the Defendant that these convictions do not meet the
11 criteria of NRS 20.095(1).

12 **CONCLUSION**

13 Based upon all of the foregoing, the State respectfully prays that the Defendant's
14 Motion to Preclude the State from Introducing at Trial Improper Evidence and Argument,
15 except with respect to his convictions for Criminal Non-Support of Dependents, be denied.

16 DATED this 12 day of January, 2011.

17 DAVID ROGER
18 Clark County District Attorney
Nevada Bar #002781

19 BY */s/ Christopher J. Lalli*
20 CHRISTOPHER J. LALLI
21 Chief Deputy District Attorney
22 Nevada Bar #005398
23
24
25
26
27
28

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of the above and foregoing, was made this 12th day of January, 2011, by facsimile transmission to:

PATRICIA PALM, ESQ.
FAX: 386-9114

/s/Deana Daniels
Secretary for the District Attorney's
Office

Exhibit 1


CLERK OF THE COURT

0332
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
PHILLIP N. SMITH, JR.
Deputy District Attorney
Nevada Bar #010233
200 South Third Street
Las Vegas, Nevada 89155-2211
(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 TO ADMIT
EVIDENCE OF OTHER CRIMES**

DATE OF HEARING: 02/10/2009

TIME OF HEARING: 8:00 AM

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through PHILLIP N. SMITH, JR., Deputy District Attorney, and files this Notice of Motion and Motion to Admit Evidence of Other Crimes.

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.

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1 Perhaps most importantly, it was a relationship that was rife with domestic violence
2 upon Mrs. Whitmarsh at the hands of O'Keefe. This all culminated on November 5, 2008 at
3 approximately 11:00 p.m., when LVMPD dispatch received a 911 call from Robin Kolacz,
4 the manager of the "Casa Salvatore" apartments located at 5001 El Parque Avenue. Robin
5 stated that the female in apartment C-35 was lying inside the apartment and there was blood
6 everywhere. Police officers and medical personnel responded to the apartment complex.
7 Patrol officers arrived at the apartment and found the front door open. Officers challenged
8 the apartment and a male, later identified as O'Keefe, yelled at them to come in. The
9 officers cleared the front room and could hear O'Keefe talking from the master bedroom.
10 Officers continued to talk to O'Keefe, attempting to get him to come out of the bedroom;
11 however, he refused. O'Keefe's actions made officers believe O'Keefe was attempting to
12 "bait" them into the room for a confrontation. Officers from the Crisis Intervention Team
13 approached the bedroom and observed O'Keefe holding the victim, identified as Victoria
14 Whitmarsh.

15 Officers could see that there was blood on the bed. O'Keefe first told officers Mrs.
16 Whitmarsh was dead, then stated she was alive and demanded officers enter to help her.
17 O'Keefe still refused to move away from the victim. Not knowing if Mrs. Whitmarsh was
18 still alive, officers entered the bedroom to expedite the removal of O'Keefe, so medical
19 could render aid. O'Keefe refused to comply with officer's orders to move away from Mrs.
20 Whitmarsh; he therefore received one cycle from an electronic control device (ECD).
21 O'Keefe still refused to comply and received an additional cycle from the ECD.
22 Subsequently, O'Keefe complied with the officers' commands and was taken into custody
23 and removed from the bedroom, enabling medical personnel to enter and attend to Mrs.
24 Whitmarsh. Medical personnel determined Mrs. Whitmarsh was deceased. Medical
25 personnel and officers exited the apartment. The area was cordoned off with crime scene
26 tape, and homicide detectives and criminalistics personnel were requested to the scene.
27 Homicide detectives arrived and a telephonic warrant was requested.

28 ///

1 Mrs. Whitmarsh appeared to have a stab wound on her right side under the arm pit
2 area, an injury to the middle knuckle of her left hand, and an injury to her right index finger.
3 Mrs. Whitmarsh was lying on her back on the floor and was nude from the waist down. The
4 bed linens were saturated with blood and there was a bloody black-handled kitchen knife
5 (approximately 8 inches long) lying on the bed. O'Keefe was taken to the homicide office
6 and advised of his rights per the Miranda decision, which he stated he understood. Homicide
7 detectives spoke with O'Keefe who stated he did not know what happened to Mrs.
8 Whitmarsh. O'Keefe stated only he and Mrs. Whitmarsh were in the apartment but he did
9 not know where all the blood came from. O'Keefe also stated he had been drinking
10 throughout the day of November 5, 2008. Detectives spoke to Charles and Joyce Toliver,
11 who live directly below O'Keefe. Joyce stated she heard loud thumping noises in the
12 apartment above that began around 10:00 p.m. The noises continued and eventually woke
13 up Joyce's husband, Charles. Charles used a broom to strike the ceiling in an attempt to
14 have the upstairs neighbors, O'Keefe and Mrs. Whitmarsh, quiet down.

15 When the thumping noise continued, Charles went up to apartment C-35. Charles
16 found the front door of the apartment open and yelled in to O'Keefe. O'Keefe called for
17 Charles to "come in and get her, she's dead." Charles entered the apartment and walked to
18 the master bedroom. Charles only saw Mrs. Whitmarsh and O'Keefe in the apartment.
19 Charles looked into the bedroom and saw O'Keefe standing over the body of Mrs.
20 Whitmarsh. O'Keefe was attempting to lift Mrs. Whitmarsh at the waist. Mrs. Whitmarsh
21 was naked from the waist down and did not appear to be moving. Charles could see blood
22 all over the bed and there was a black-handled knife lying on the bed. Charles ran from the
23 room to the apartment manager's apartment, spoke to Todd Armbruster (Robin's boyfriend)
24 and told him to call the police. Jimmy Hathcox, who lives in apartment 36, next to O'Keefe
25 and Mrs. Whitmarsh, also heard loud thumping from apartment 35 at approximately 10:00
26 p.m. Hathcox stated he went outside of his apartment and saw O'Keefe standing outside of
27 his apartment. O'Keefe looked at Hathcox strangely and walked back into his apartment.
28

1 Hathcox stated the next thing he heard was people yelling and he opened the door and
2 saw Charles Toliver and Todd Armbruster standing in front of O'Keefe's door. The men
3 told Hathcox, "he killed her and there's blood all over the place." Todd Armbruster stated
4 that Charles Toliver came to his door and told him to call the police. Toliver told Todd that
5 he thought the girl in apartment 35 was dead. Todd went up to apartment 35, entered the
6 apartment, and saw O'Keefe bent over Mrs. Whitmarsh and blood on the bed. O'Keefe
7 looked up, saw Todd and took a swing at him and told him to "get the fuck out of here" (or
8 words to that effect). Todd left the apartment, went to apartment C-37, and phoned the
9 police. Detectives noted a large amount of blood on O'Keefe's clothing and hands, an
10 incised wound on his right index finger and two abrasions on his forehead. O'Keefe also had
11 several long scratch marks on his back at the belt line. O'Keefe was photographed and his
12 clothing was impounded. O'Keefe was arrested and transported to the Clark County
13 Detention Center, where he was booked for Murder with Use of a Deadly Weapon.

14 On November 6, 2008, at approximately 9:00 a.m., an autopsy was performed on the
15 body of Mrs. Whitmarsh at the Clark County Coroner's Office by Dr. Jacqueline Benjamin.
16 Mrs. Whitmarsh had several bruises on her body including three on her left upper arm. Dr.
17 Benjamin noted a single stab wound just under the victim's right arm pit. The wound looked
18 to have been made by a single edged knife with the sharp edge of the knife pointed towards
19 the victim's back. Dr. Benjamin concluded that the wound was approximately 4.25 inches
20 long and traveled downward and forward. Upon completion of the autopsy, Dr. Benjamin
21 found that Mrs. Whitmarsh died from a single stab wound and the manner of death was a
22 homicide. During the interview of O'Keefe, O'Keefe was insistent he had called 911.
23 Detectives checked all the phones at the scene and none of them had a call to 911 or to the
24 non-emergency police number.

25 On November 20, 2008, Cheryl Morris gave a statement to the detectives assigned to
26 the case. Cheryl Morris stated she had a dating relationship with O'Keefe prior to Mrs.
27 Whitmarsh moving in with him at the 5001 El Parque address. Ms. Morris stated she and
28 O'Keefe dated for several months (starting in early 2008) and in June or July of 2008 she

1 and O'Keefe moved into the El Parque address. At this point, the relationship was going to
2 be platonic. Ms. Morris said she slept in the master bedroom and O'Keefe slept on the
3 couch. Ms. Morris said she and O'Keefe had an agreement that they would share the
4 apartment as roommates, and after four (4) days O'Keefe called her and said he was bringing
5 Mrs. Whitmarsh home to live with them. Ms. Morris, not amenable to such a living
6 situation, left the house and only returned to recover her property. Ms. Morris said that
7 during the course of their relationship, O'Keefe would always talk about his prior
8 relationship with Mrs. Whitmarsh and how he loved her and couldn't live without her.

9 Ms. Morris stated when O'Keefe would drink he would become angry and abusive,
10 and he would also talk about how Mrs. Whitmarsh had ruined his life and would state that he
11 wanted to kill her (specifically because she had testified against him and "sent [him] to
12 prison" in case C207835) and that she (Mrs. Whitmarsh) was "poison." She stated that he
13 said this several times over several different occasions. O'Keefe also told Ms. Morris that he
14 liked Mrs. Whitmarsh because she was "submissive." Ms. Morris related how O'Keefe
15 would tell her about his training in the military and how he would demonstrate on her how
16 he could kill someone easily using a knife. Ms. Morris also indicated that in a conversation
17 with O'Keefe subsequent to the murder, he stated to her that "all he remembered" was him
18 being asleep on the couch and being woken up by something sharp poking him in the side
19 and Mrs. Whitmarsh standing over him, "and the next thing he knew, she was bleeding" (or
20 something to that effect).

21 The Defendant has an extensive history of violence against this victim. On January 7,
22 2003, the Defendant was arrested for slapping the victim, causing her to have a bloody nose.
23 This injury was observed by police officers. The Defendant ultimately pled guilty to
24 Resisting a Police Officer in the Las Vegas Justice Court in case 03M00410X. On
25 November 14, 2003, the Defendant got into an argument with Mrs. Whitmarsh which
26 became physical when he grabbed her by the arm, pushed her down, struck her in the head
27 with his fist, and then strangled her with one hand. He then got a pillow and attempted to
28 smother her with it, but was interrupted by the next-door neighbor responding to Mrs.

1 Whitmarsh's screams and knocking on the door. The neighbor came in and took Mrs.
2 Whitmarsh to her apartment, whereupon the Defendant broke into and entered the neighbor's
3 apartment through her front window. Police officers in the vicinity heard the commotion
4 and took the Defendant into custody. The Defendant ultimately pled guilty to Battery
5 Constituting Domestic Violence in the Las Vegas Justice Court in case 03M25901X.

6 On November 26, 2003, police responded to Mrs. Whitmarsh's home in order to do a
7 "welfare check" whereupon they came in contact with both her and the Defendant. The
8 police observed that Mrs. Whitmarsh "had been severely beaten." Although initially
9 uncooperative, Mrs. Whitmarsh ultimately stated to police that the Defendant had beaten her.
10 The Defendant was charged with Battery Constituting Domestic Violence in the Las Vegas
11 Justice Court in case 03M26791X, but the charges were ultimately dismissed as part of a
12 package negotiation. On April 2, 2004, Mrs. Whitmarsh called the police because the
13 Defendant had accused her of being unfaithful and slapped her repeatedly, breaking her
14 glasses. On April 3, 2004, the Defendant again accused Mrs. Whitmarsh of being unfaithful
15 and slapped her. She ran to the apartment manager's office and the Defendant chased her
16 there. The manager called the police, and the Defendant was taken into custody. The
17 Defendant ultimately pled guilty to Battery Constituting Domestic Violence in the Las Vegas
18 Municipal Court in case C581783A.

19 On May 29, 2004, the Defendant again accused Mrs. Whitmarsh of being unfaithful
20 to him. He then battered Mrs. Whitmarsh and apparently forced her to have sex with him.
21 After the Defendant "passed out," Mrs. Whitmarsh contacted a security guard at their
22 residence, and he in turn contacted the police. This incident ultimately led to charges of
23 Battery with Intent to Commit Sexual Assault, Sexual Assault, Attempt Sexual Assault, and
24 Burglary being filed against the Defendant in case C202793. The case was tried before a
25 jury before the Honorable Sally Loehrer on October 25, 2004, with Mrs. Whitmarsh
26 testifying against the Defendant. The Defendant was convicted of Battery (a misdemeanor)
27 and Burglary and sentenced to credit for time served for Battery and 24 to 120 months for
28 Burglary—suspended for an indeterminate term of probation not to exceed five (5) years.

1 The April 2, 2004 incident ultimately led to a charge of felony battery domestic violence
2 (based on two prior convictions) being filed against the Defendant in case C207835. The
3 case was tried before a jury before the Honorable Valorie Vega on September 19, 2005, with
4 Mrs. Whitmarsh testifying against the Defendant. The Defendant was convicted and
5 sentenced to 24 to 60 months in prison. He was released in April 2008.

6 The State now respectfully requests that evidence with regards to the Defendant's
7 conviction in C207835 be admitted in its case-in-chief.

8 **STATEMENT OF THE LAW**

9 NRS 48.045(2) provides:

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

14 See NRS 48.045(2); see also Tinch v. State, 113 Nev. 1170, 1176 (1997). The State will
15 seek to introduce, in its case-in-chief, evidence that the Defendant was arrested and
16 ultimately convicted (due to Mrs. Whitmarsh's testimony) of felony Battery Constituting
17 Domestic Violence in case C207835. The State will also introduce evidence indicating that
18 the Defendant served close to three (3) years in prison as a result of said conviction. The
19 State seeks this evidence to show the Defendant's motive and intent. In the instant case, the
20 Defendant is charged with Open Murder. This charge leaves to the jury the task of
21 determining if the Defendant is guilty of First Degree Murder, Second Degree Murder,
22 Voluntary Manslaughter, or Involuntary Manslaughter. Consequently, the Defendant's intent
23 and motive is highly relevant. The State submits that evidence regarding case C207835 is
24 admissible pursuant to NRS 48.045 for the limited purpose of establishing a motive with
25 regards to first degree murder and/or establishing the Defendant's intent with regards to any
26 lesser degree of homicide. It is anticipated that these will be the key issues in the trial on this
27 matter.

28 ///

1 In order to admit “prior bad act” evidence, the State must establish that (1) the prior
2 act is relevant to the crime charged; (2) the act is proven by clear and convincing evidence;
3 and (3) the probative value of the evidence is not **substantially** outweighed by the danger of
4 unfair prejudice. Tinch, 113 Nev. at 1176. The admissibility of prior bad acts is within the
5 sound discretion of the trial court and will not be overturned on appeal unless found to be
6 manifestly wrong. Id. The Nevada Supreme Court has held that the State may offer
7 evidence in its case-in-chief in anticipation of an expected aspect of the defense. See, e.g.,
8 Overton v. State, 78 Nev. 198, 205-6, 370 P.2d 677, 681 (1962). In the instant case, due to
9 the underlying facts as well as pleadings already filed by the Defendant, it is anticipated that
10 the defense will assert that the Defendant lacked the requisite intent and/or malice for murder
11 due to his voluntary intoxication. Consequently, for the crime that the Defendant is charged
12 with here—Open Murder—an essential element will be the subjective intent of the
13 Defendant.

14 **A. Motive.**

15 At the preliminary hearing, Cheryl Morris (hereinafter “Morris”) testified that the
16 Defendant told her that he “hated” Mrs. Whitmarsh because she previously testified against
17 him, “put him in jail,” and “took three years of his life.” (December 17, 2008 Preliminary
18 Hearing Transcript, at 69-70 [hereinafter “PHT”]). Morris went on to say that because of
19 this, the Defendant stated that he “wanted to kill the bitch.” Id. at 70. Morris testified that
20 the Defendant said this on more than one occasion. Id. The fact that the Defendant was in
21 fact convicted of felony Battery Constituting Domestic Violence in case C207835, and
22 ultimately sent to prison for almost three (3) years due to Mrs. Whitmarsh’s testimony, is
23 corroborative evidence with regards to Morris’ testimony at the preliminary hearing (as well
24 as the statement she gave to the police during the initial investigation). Specifically, it is
25 evidence that clearly establishes a motive (pursuant to the Defendant’s own statements), and
26 is therefore germane to the State’s efforts in securing a first-degree murder conviction. The
27 Nevada Supreme Court has repeatedly upheld the provision of NRS 48.045 that allows the
28 State to introduce evidence of other bad acts in order to establish a motive. See, e.g., Wesley

1 v. State, 112 Nev. 503, 916 P.2d 793 (1996); Lay v. State, 110 Nev. 1189, 886 P.2d 448
2 (1994); Felder v. State, 107 Nev. 237, 810 P.2d 755 (1991); Cavanaugh v. State, 102 Nev.
3 478, 729 P.2d 481 (1986).

4 **B. Intent.**

5 Long ago, the Nevada Supreme Court held that in the trial of an accused, evidence of
6 other crimes is competent when it tends to establish intent. See, e.g., Wyatt v. State, 367
7 P.2d 104, 77 Nev. 490 (1961). Sister states have reached a similar conclusion. For example,
8 in State v. Brewer, 507 P.2d 1009 (Ariz. App. 1973), the defendant was tried and convicted
9 of felony theft of a motor vehicle. At the trial in the matter, the prosecutor introduced
10 evidence that the defendant had possessed a different stolen vehicle the same day he was
11 arrested for the theft of the vehicle he had been charged with. The Arizona Court of Appeals
12 found no error. The court held that the evidence of possession was relevant to the
13 “defendant’s criminal intent or knowledge of his wrongdoing and [was] competent [because
14 it tended] to establish an absence of mistake or accident.” Id. at 1010. Similarly, in Dutton
15 v. State, 94 Nev. 461 (1978), disapproved on other grounds by Gray v. State, 100 Nev. 556,
16 688 P.2d 313 (1984), police conducted an undercover fencing operation called “Operation
17 Switch.” On the day of the incident, the defendant walked into a store with a co-conspirator.
18 Both the defendant and the co-conspirator negotiated the sale to an undercover police officer
19 of a stolen camera and stolen bronzeware. The defendant, however, was charged only with
20 the possession of the stolen camera.

21 At trial, the State introduced evidence that the bronzeware the defendant possessed
22 was stolen the same day as the camera. The district court allowed the evidence, and the
23 Nevada Supreme Court upheld this ruling, reasoning that the evidence was admissible under
24 the complete story of the crime doctrine as well as to counter the defendant’s claim that he
25 did not have knowledge that the camera was stolen. Dutton, 94 Nev. at 464. In Findley v.
26 State, 94 Nev. 212, 577 P.2d 867 (1978), overruled on other grounds by Braunstein v. State,
27 118 Nev. 68, 40 P.3d 413 (2002), the defendant was charged with lewdness with a minor. At
28 trial, the State presented two witnesses (other than the charged victim) who testified that the

1 defendant molested them similarly some nine years earlier. (Implicit in the Court's ruling to
2 allow admission of such evidence was the finding that nine years was not overly remote in
3 time.) The Court affirmed the admission of the evidence to prove intent and absence of
4 mistake or accident. Perhaps most importantly, the Court noted that intent is placed in issue
5 when the defendant pleads not guilty, holding in Overton, *supra*: "[a] plea of not guilty puts
6 in issue every material allegation of the information." Overton, 78 Nev. at 205, 370 P.2d at
7 680. In the instant case, the Defendant has necessarily put every material allegation of the
8 Information in issue.

9 Federal courts, applying the Federal Rule of Evidence 404(3)(b)—which is identical
10 to NRS 48.045—also allow such evidence when it is used to establish intent. In United
11 States v. Thomas, 835 F.2d 219 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 1741, 486 U.S. 1010
12 (1988), the Court held that evidence that the defendant had previously written bad checks
13 was admissible to show intent in the prosecution for transporting a security known to have
14 been taken by fraud. In the charged offense, the defendant had written a check on an
15 account that had been closed for six months and subsequently obtained a cashier's check on
16 the strength of that deposit. The prior bad checks were written approximately one year
17 before transaction for which the defendant was on trial. The court concluded that
18 defendant's intent in depositing the bad check was very much in issue, and consequently the
19 admission of the evidence was appropriate.

20 In United States v. Kirk, 528 F.2d 1057 (5th Cir. 1976), the defendant was charged
21 with threatening the life of the President of the United States of America. At trial, the
22 prosecution presented evidence showing that three years earlier the defendant had committed
23 the same offense. The court ruled this evidence to be properly admissible to show the
24 defendant's intent, holding:

25
26 Whether the prior conviction tended to show that defendant made this threat
27 intentionally or as the result of "alcohol taking," was a matter for the jury's
28 determination. The fact that the former offense occurred three years prior to the
offense charged does not make it so remote as to be excluded.

1 Id. at 1061.

2 In United States v. Beechum, 582 F.2d 898 (5th Cir. 1978), a jury convicted the defendant, a
3 substitute letter carrier for the United States Postal Service, of unlawfully possessing a 1890
4 silver dollar that he knew to be stolen from the mails, in violation of 18 U.S.C. Section 1708
5 (1976). To establish that the defendant intentionally and unlawfully possessed the silver
6 dollar, the Government introduced into evidence of two Sears, Roebuck & Co. credit cards
7 found in the defendant's wallet when he was arrested. Neither card was issued to the
8 defendant, and neither was signed. The Government also introduced evidence indicating that
9 the cards had been mailed some ten months prior to the defendant's arrest to two different
10 addresses on routes he had serviced. The Court ultimately held:

11 Where the issue addressed is defendant's intent to commit the offense charged,
12 the relevancy of the extrinsic offense derives from the defendant's indulging
13 himself in the same state of mind in the perpetration of both the extrinsic and
14 charged offenses. The reasoning is that because the defendant had unlawful
15 intent in the extrinsic offense, it is less likely that he had lawful intent in the
16 present offense.

15 Id. at 911.

16 In United States v. DeLoach, 654 F.2d 763 (D.C. Cir. 1980), the defendant was
17 convicted for submitting false applications for labor certification of an undocumented
18 immigrant. The Court allowed admission of testimony of three government witnesses, all
19 undocumented immigrants, that the defendant was a "swindler" who took their money for a
20 false promise to find them jobs and labor certifications and that the conduct occurred over a
21 period encompassing a year and a half prior to the offense charged. The Court held that the
22 testimony was properly admissible. The prosecution argued that the evidence of the other
23 "swindles" related to the ultimate issue of intent and the intermediate issues of knowledge,
24 motive, common plan and absence of mistake and accident. The defendant argued that the
25 prior bad acts were so dissimilar that the only logical inference to be drawn from the
26 admission of them was that he was a bad person who swindles undocumented immigrants,
27 and therefore, he was likely to try to deceive the government. The Court held:

1 These prior acts were instead introduced to show intent. In this case, where
2 intent was the only real issue, and where appellant predictably raised the
3 defense of mistake, the admissible bad acts evidence need not show incidents
identical to the events charged, so long as they are closely related to the
offense and tend to rebut the defense of mistake.

4 Id. at 769.

5 The Court cited three additional factors, which reinforced the admissibility of the extrinsic
6 evidence. The prior acts were introduced to show intent, which was the only real issue. The
7 government had great need for evidence on the issue of intent; and the trial court gave a
8 limiting instruction which properly restricted the jury's use of the evidence.

9 The admission of the other acts in this case is entirely appropriate since the necessary
10 element of the instant crime sought to be proved (the intent and motive to commit a violent
11 act against Mrs. Whitmarsh notwithstanding the Defendant's anticipated claim of voluntary
12 intoxication and the inability to form the requisite intent) cannot be substantially established
13 by other evidence. See, e.g., Jones v. State, 85 Nev. 4, 448 P.2d 702 (1969); Tucker v. State,
14 82 Nev. 127, 412 P.2d 970 (1966). The intent to commit a violent act upon Mrs. Whitmarsh
15 will be a crucial element that the State must prove beyond a reasonable doubt. As such, the
16 evidence here is probative in helping the State meet that substantial burden of proof.

17 **D. Balancing Test.**

18 After a court finds that evidence of other crimes fits within NRS 48.045(2), it must
19 then review the evidence in regard to NRS 48.035.¹ This statute requires a weighing of
20 probative value against prejudicial effect. As stated above, it is anticipated that the defense
21 will argue that the proffered evidence is more prejudicial than probative. In United States v.
22 Parker, 549 F.2d 1217 (9th Cir. 1977), cert. denied, 430 U.S. 971, 97 S.Ct. 1659 (1977), the
23

24
25 ¹ NRS 48.035 provides in pertinent part:

- 26 1. Although relevant, evidence is not admissible if its probative value is substantially
27 outweighed by the danger of unfair prejudice, of confusion of the issues or of
28 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.

1 defendants were convicted of armed bank robbery and one defendant was also convicted of
2 bank larceny. During the course of the trial, evidence was brought in that the defendant had
3 been addicted to heroin for approximately ten years and had been involved in drug
4 counseling during most of that period. The court held that the evidence of defendant's
5 narcotics dealing was admissible to show his motive to commit a robbery. The defendant
6 argued that the prejudicial effect of the extrinsic offense substantially outweighed its
7 probative value. The court stated that "evidence relevant to defendant's motive is not
8 rendered inadmissible because of its highly prejudicial nature The best evidence often
9 is!" Parker, 549 F.2d at 1222.

10 In Tucker v. State, 82 Nev. 127, 412 P.2d 970, (1966), the Nevada Supreme Court
11 elucidated the standard for balancing the probative value versus the prejudicial effect of bad
12 act evidence:

13 The reception of such evidence is justified by necessity and, if other evidence
14 has substantially established the element of the crime involved (motive, intent,
15 identity, absence of mistake, etc.), the probative value of showing another
16 offense is diminished, and the trial court should rule it inadmissible even
17 though relevant and within an exception to the rule of exclusion.

18 Id. at 130, 412 P.2d at 971-972.

19 In the instant case, the only way to show the motive is to actually admit evidence of it. The
20 probative value of admitting evidence with regards to the Defendant's conviction in
21 C207835 is therefore by no means **substantially outweighed** by the danger of unfair
22 prejudice. The State prays that this Court will recognize the necessity and the admissibility
23 of the evidence it now seeks to admit to prove the Defendant's motive and intent in the
24 instant case. The State intends to illustrate by clear and convincing evidence that the
25 Defendant indeed committed the acts which are sought to be admitted, pursuant to Petrocelli
26 v. State, 101 Nev. 46, 692 P.2d 503 (1985). The State intends to do so in an evidentiary
27 hearing prior to trial.

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CONCLUSION

Based upon the foregoing, the State requests the Court grant the State's Motion to Admit Evidence of Other Crimes.

DATED this _____ day of February, 2009.

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

BY /s/ PHILLIP N. SMITH, JR.
PHILLIP N. SMITH, JR.
Deputy District Attorney
Nevada Bar #010233

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CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of the State's Notice and Motion to Admit Other Bad Acts, was made this ____ day of February, 2009, by facsimile transmission to:

PATRICIA PALM, ESQ.
FAX # 455-6265

/s/ Terry Schessler
Secretary for the District Attorney's Office

ts/dvu

Exhibit 2

IN THE JUSTICE'S COURT OF LAS VEGAS TOWNSHIP
CLARK COUNTY, NEVADA

ORIGINAL

FILED

THE STATE OF NEVADA,

Plaintiff,

vs.

BRYAN OKEEFE,

Defendant.

JAN 2 2 23 PM '09
DC Case No. C 200630
CLERK'S COURT
JC Case 08F23348X
Department IX

REPORTER'S TRANSCRIPT
OF
PROCEEDINGS

BEFORE THE HONORABLE JOE BONAVENTURE
JUSTICE OF THE PEACE

Taken on December 17, 2008
At 9:00 a.m.

APPEARANCES:

For the State:

PHILIP SMITH, ESQ.
Deputy District Attorney

For the Defendant:

RANDALL PIKE, ESQ.
PATRICIA PALM, ESQ.
Special Public Defender

Reported by: TOM MERCER, CCR No. 33

MERCER & ASSOCIATES
(702) 388-2973

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JAN 02 2009

CLERK'S COURT

1 A. No.

2 MR. PIKE: Thank you very much.

3 MR. SMITH: Nothing further.

4 THE COURT: Thank you for your time.

5 You're excused.

6

7 MR. SMITH: State next calls Cheryl

8 Morris.

9

10 (Whereupon, the witness was duly sworn.)

11

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

14 THE WITNESS: Cheryl Morris, C-h-e-r-y-l,
15 last name M-o-r-r-i-s.

16

17 DIRECT EXAMINATION

18

19 MR. SMITH:

20 Q. Miss Morris, do you know a person by the name
21 of Bryan Okeefe?

22 A. Yes, I do.

23 MR. PIKE: Stipulate to the identity of
24 Bryan Okeefe.

25 MR. SMITH: Thank you.

1 Q. Were you ever in a dating relationship with
2 Mr. Okeefe?

3 A. Yes, I was.

4 Q. When did that begin?

5 A. January 7.

6 Q. Of this year?

7 A. Of this year, yes.

8 Q. When did it end?

9 A. September 6.

10 Q. Of this year?

11 A. Yes.

12 Q. While you were in a relationship with Mr.
13 Okeefe, did you ever come or become aware of a person
14 named Victoria Whitmarsh?

15 A. Yes.

16 Q. How did that occur?

17 A. He used to talk about her all the time.

18 Q. He being Bryan Okeefe?

19 A. Bryan used to talk about her all the time.

20 Q. When the relationship started in January of
21 2008, where were you living?

22 A. I was living at a friend's house just off of
23 Sara Jane Lane.

24 Q. Where was Mr. Okeefe living?

25 A. Mr. Okeefe was living in a trailer just off

1 of Hinson Street.

2 Q. At some point subsequent to that did you guys
3 share a residence together?

4 A. Off and on I would stay the night, yes.

5 Q. How soon after the relationship began did you
6 guys reside together?

7 A. Probably, I wasn't really residing there
8 because I never kept anything there, I just pretty
9 much stayed the night and I'd go off and do my own
10 thing during the day.

11 Q. At any point did you and him kind of move
12 into your own place?

13 A. We did. That was, I believe, in August.

14 Q. August of 2008?

15 A. I believe so. August 2008, yes.

16 Q. And what was the location of this place?

17 A. 5001 El Parque Avenue.

18 Q. 5001 El Parque?

19 A. Yes.

20 Q. Apartment 35?

21 A. Apartment 35, yes.

22 Q. When you and Mr. Okeefe moved into that
23 apartment, was there anyone else living there at the
24 time?

25 A. No.

1 Q. At some point subsequent to you moving in
2 there, did Mr. Okeefe express a interest in having
3 someone else move in with you guys?

4 A. No, actually I got a phone call.

5 Q. From who?

6 A. From Mr. Okeefe.

7 Q. And what was the substance of that phone
8 call? Specifically in regards to your living
9 arrangements?

10 A. He just called, said he wanted to come home
11 and he was going to bring Victoria.

12 Q. Victoria Whitmarsh?

13 A. Yes.

14 Q. Were you amenable to that relationship?

15 A. No.

16 Q. Because of that, what did you do?

17 A. I moved out that night.

18 Q. And approximately when was this?

19 A. I think it was a Saturday or Sunday of that
20 weekend, the weekend of the 6th of September.

21 Q. Now, after September 6, 2008, did you ever
22 reside with Mr. Okeefe again?

23 A. No.

24 Q. Do you know whether or not Miss Whitmarsh
25 moved in to the 5001 El Parque, Number 35?

1 A. Yes.

2 Q. How did you become aware of that?

3 A. I still had the key to the apartment and I
4 had kept contact with the owner and told him I was not
5 going to return the key until a brand new lease was
6 made up and my name taken off of the lease.

7 Q. Do you know how long Mr. Okeefe knew Mrs.
8 Whitmarsh?

9 A. Since 2001.

10 Q. How did you become aware of that?

11 A. Mr. Okeefe told me.

12 Q. Do you recall at any point coming into
13 contact with police detectives doing an investigation
14 in to the death of Miss Whitmarsh?

15 A. Only contact I actually had is when I was
16 called in to make a statement.

17 Q. And did you give a statement to a Detective
18 Bunn and/or Detective Wildermann?

19 A. Yes.

20 Q. That statement take place at the homicide
21 section of the Las Vegas Metropolitan Police
22 Department?

23 A. Yes, on Oakey.

24 Q. Would that have been November 20, 2008 ?

25 A. Yes.

1 Q. Now, do you recall the police officers asking
2 you questions about statements the defendant made in
3 regards to how he could kill somebody?

4 A. Yes.

5 Q. Did the defendant ever make any statements
6 like that to you?

7 A. Yes.

8 MR. PIKE: Objection, Your Honor, hearsay.

9 MR. SMITH: I would submit it's not
10 hearsay if it's the defendant's own statement. I'm
11 proffering it to establish motive.

12 THE COURT: Overruled.

13 MR. SMITH:

14 Q. What did Mr. Okeefe say about his ability to
15 kill somebody?

16 A. He actually said that he could do that
17 because that was part of what he had to do in Grenada
18 in special ops.

19 Q. Let me ask you specifically, did he ever make
20 any statements about his ability to kill somebody with
21 a knife?

22 A. Just the fact that that's how he would have
23 to survive.

24 Q. Did he ever demonstrate to you how he could
25 kill somebody with a knife?

1 A. Yes.

2 Q. Explain that, please?

3 A. He would stand in front of me and he would
4 show me, he would hold me onto one shoulder and say he
5 could take the knife and shove it right into my mid
6 section and just sort of pull up. And that's how you
7 would kill someone.

8 Q. Into your rib cage area?

9 A. Yes.

10 Q. Did Mr. Okeefe ever make any statements to
11 you regarding what he would do to you if he found out
12 that you were cheating on him?

13 A. On occasions he would say he would kill me if
14 he found out I was cheating.

15 Q. Finally, do you ever recall having a
16 conversation with Mr. Okeefe where he expressed
17 displeasure with Victoria Whitmarsh because of
18 something she may have done to him?

19 A. Yes.

20 Q. Can you explain that?

21 MR. PIKE: Request ongoing objection.

22 THE COURT: Objection noted and overruled.
23 You can answer that.

24 THE WITNESS: He would stay up nights and
25 we would talk, reminisce. When it got to the point he

1 couldn't take too much he would actually just say he
2 would -- he would actually -- he hated Victoria.

3 Q. Did he say why he hated Victoria?

4 A. In his own words he said because Victoria put
5 him in jail, took three years of his life, that he
6 wanted to kill the bitch.

7 Q. Just so the record's clear -- incidently, can
8 you give me a time frame of when these conversations
9 would have taken place?

10 A. They took place throughout the time I was
11 with him.

12 Q. Did he make these statements on more than one
13 occasion?

14 A. Yes.

15 Q. And for the record, it was he was upset with
16 her for sending him to prison?

17 A. Yes.

18 Q. And he wanted to kill her because of that?

19 A. Yes.

20 MR. SMITH: Pass the witness.

21

22 CROSS EXAMINATION

23

24 MR. PIKE:

25 Q. Miss Morris, good morning.

1 In relationship to the time frame that you
2 and Mr. Okeefe were involved with each other, you had
3 actually lived together -- you spent some evenings,
4 you said, spent some nights together. And based upon
5 answering the questions from the State, I take it that
6 the apartment that you were in had a joint lease or
7 was with Mr. Okeefe or was it in your name?

8 A. It was supposed to be in our name, both of
9 our names.

10 Q. In relationship to that the two of you also
11 bought a vehicle together?

12 A. Correct.

13 Q. In fact, Mr. Okeefe had used your credit to
14 buy a car, so you were still obligated under the note
15 on that car at the time this happened?

16 A. Correct.

17 Q. You kept a key to the apartment complex or
18 the apartment that you and he shared. Did you ever go
19 back into that apartment prior to the death of
20 Victoria?

21 A. Yes.

22 Q. What did you go back there for?

23 A. To go pick up the rest of my things, what was
24 left there. I couldn't pick up the two large boxes
25 that were left there, so he actually took them and

1 dropped them off at a friend's house.

2 Q. Whether you say he?

3 A. I'm sorry, Bryan.

4 Q. During the course of that time, did you ever
5 have an opportunity to meet Victoria Whitmarsh?

6 A. Victoria requested that I meet with her. I
7 thought about it and I declined.

8 Q. When she requested that she meet with you,
9 did you talk with her on the phone?

10 A. Yes, several times.

11 Q. What was the general content of that
12 conversation?

13 A. The general content of that conversation was
14 why she was still seeing Bryan, why I was still seeing
15 Bryan. Also, the fact that if I made him upset, if I
16 got him mad, that he would and could hurt me. Because
17 she said he had done that to her.

18 Q. During the time that you were with Mr.
19 Okeefe, he didn't hurt you physically, did he?

20 MR. SMITH: Objection, relevance.

21 THE COURT: The relevance?

22 MR. PIKE: In response to the observations
23 of whether he was intoxicated. Let me rephrase the
24 question.

25 Q. During the time that you resided with Mr.

1 Okeefe, you had an opportunity to see him both when he
2 was sober and both when he was intoxicated, is that
3 correct?

4 A. Yes.

5 Q. And up to the time close to the time when you
6 left, was he drinking more or less than he usually
7 did?

8 A. I would say that he was drinking a little bit
9 more.

10 Q. What was he drinking usually?

11 A. Beer. But on occasions he would drink vodka
12 and pretend as though I wouldn't know.

13 Q. When he was drinking or when you saw him
14 drink alcoholic beverages, did his general attitude
15 change?

16 A. When he was drinking beer he was okay, he
17 never really got violent. When it was hard liquor,
18 that was a different story. With vodka I had
19 experienced that situation with him.

20 Q. When you say you experienced that, you saw
21 that his demeanor changed?

22 A. Yes.

23 Q. Did he become more or less violent?

24 A. More violent.

25 Q. During the time that you were residing with

1 him or, excuse me, when you made the decision to move
2 out and when you talked with Victoria, did she
3 indicate to you in the conversation that she had with
4 you that she was frightened of Mr. Okeefe in any way?

5 A. No.

6 Q. And approximately how long prior to the time
7 that you became aware that she had passed away did
8 this conversation occur?

9 A. There were several conversations with her
10 throughout, from June through, I think it was August.

11 Q. Were all of these over the telephone?

12 A. Yes.

13 Q. Did any of these relate to the ongoing
14 relationship between her and Mr. Okeefe or you and Mr.
15 Okeefe?

16 A. I don't understand.

17 Q. It was a poor question, I'm sorry.

18 What basically were the conversations
19 about?

20 A. There was a time when he had spent the whole
21 week with her and he had actually come back to me
22 saying he no longer wanted to be with her, that he
23 wanted to be with me, she was poison, I was the good
24 person, or the good girl, is what he would say. And
25 that he did not want to have anything to do with her.

1 But there were occasions in between June through the
2 time that we had broke up that he had actually gone to
3 see her and he wouldn't come home for a couple of
4 days.

5 Q. During that time, your conversation with Mrs.
6 Whitmarsh, did she indicate to you that she would
7 often initiate going back with Mr. Okeefe?

8 MR. SMITH: Objection to relevance, Judge.
9 Either that or it's hearsay, under no exception.

10 MR. PIKE: Certainly it is hearsay. The
11 exception is the State has brought forth hearsay
12 evidence to indicate their belief or their theory as
13 to premeditation, deliberation or mental intent at the
14 time that this occurred. If there was any sort of
15 planning or question about planning, then this is in
16 direct response to that. It's reliable, there is a
17 general exception to the hearsay rule when the
18 evidence is inherently reliable. And it may involve
19 the mental state of Mrs. Whitmarsh at the time they
20 were getting back together.

21 MR. SMITH: My reply would be her mental
22 state, whether or not she was going to get back with
23 him has nothing to do with the admissions that I've
24 elicited on direct testimony regarding premeditation
25 or deliberation or planning.

1 THE COURT: The objection is overruled.

2 Ask the question again. You can answer

3 MR. PIKE:

4 Q. During the conversation did she ever talk
5 with you about her initiating, reconnecting with Mr.
6 Okeefe?

7 A. One of the lengthier conversations she said
8 she did not want to have anything to do with him, that
9 she could not take care of him, that he was a grown
10 man and he could take care of himself. I asked why
11 she wanted to be with him and if whether or not she
12 loved him or not. And her reply to me, and I never
13 told Mr. Okeefe this, but her reply to me was "I just
14 keep him around because somebody has to love
15 somebody."

16 MR. SMITH: I'm just going to continue my
17 objection, for the record

18 MR. PIKE:

19 Q. Since the arrest of Mr. Okeefe, have you had
20 any contact with Mr. Okeefe?

21 A. Yes, I did.

22 Q. And what was that?

23 A. That was, I believe, two weeks ago I went to
24 visit him because a friend of mine had called and had
25 informed me that Bryan had sent a letter to his sister

1 stating that the district attorney had given him some
2 information and said things that I did not say. And I
3 went to Bryan and I asked him about it, and that was
4 pretty much the conversation.

5 Q. Since this has occurred, were you able to go
6 back in to the apartment after the police had cleared
7 it to get the rest of your personal items out of the
8 apartment?

9 A. The items that I took -- yes, I did. I was
10 able to go back there. I do not remember when. But
11 I was able to go ahead and retrieve the key for the
12 car. The other key is missing, we don't know where
13 that's at, and some paperwork for the car and the car
14 itself.

15 Q. It doesn't indicate, according to the
16 records, that it was impounded?

17 A. No. I just had to take it back. I had to
18 turn it in because the car payments were behind.

19 Q. During the course of this have you had a
20 opportunity to talk with any of the other neighbors
21 that were there at that time?

22 A. Just what we saw outside when we all gathered
23 out there.

24 Q. At that point in time you shared what you
25 knew about the case and they shared what they knew

1 about the case?

2 A. They spoke about their feelings and why they
3 were here.

4 Q. Without saying what they said, you guys just
5 kind of talked about what you knew, what you felt
6 about the case?

7 A. Yes.

8 Q. During the course of your conversations with
9 Mrs. Whitmarsh, did she talk to you about the two of
10 them drinking together?

11 A. Yes.

12 Q. What did she say about that ?

13 MR. SMITH: Again, judge, I'd renew my
14 objection, hearsay, and I'd also add relevance.

15 THE COURT: Relevance?

16 MR. PIKE: Relevance would have to be with
17 whether or not mutual drinking, if both of them were
18 drinking together, if that precipitated any sort of
19 violence or if she felt threatened by his drinking?

20 MR. SMITH: It's not really tailored to
21 the night in question, it's more propensity than
22 anything, which is specifically precluded by statute.
23 It's no different than us asking is a person a
24 habitual drug user.

25 MR. PIKE: I'll withdraw the question.

1 Q. During the time -- during your observations
2 when Mr. Okeefe was drinking, he became a little bit
3 louder, a little bit -- I guess meaner, would that be
4 a good term? Or how would you describe it?

5 A. That would only be when he was drinking hard
6 liquor. When he was drinking beer, he was pretty
7 mellow person.

8 Q. And you never -- during the time he was
9 intoxicated, although he may have said he was angry
10 about things, he was never physically violent with
11 you?

12 A. He hit me a couple times, once in the arm,
13 and pinned me up against a wall.

14 MR. PIKE: I have no further questions.

15 MR. SMITH: Briefly.

16

17 REDIRECT EXAMINATION

18

19 MR. SMITH:

20 Q. Ma'am, you said something on
21 cross-examination, I just want to make sure it's
22 clear. Do you recall telling Mr. Pike that Miss
23 Whitmarsh had said something to you about I better be
24 careful because when he gets mad he hurt me?

25 A. Correct.

1 Q. She stated to you that she had better be
2 careful or else Mr. Okeefe would hurt her or . . .

3 A. No, she stated that I would need to be
4 careful because if I got Mr. Okeefe upset, that Mr.
5 Okeefe would hurt me.

6 Q. So she did not say to you that she had better
7 be careful or Mr. Okeefe would hurt her?

8 A. No.

9 Q. And one final question. 5001 El Parque, is
10 that in Las Vegas, Clark County, Nevada?

11 A. Yes, it is.

12 MR. SMITH: No further questions.

13

14 RECROSS EXAMINATION

15

16 MR. PIKE:

17 Q. When you were demonstrating the physical act
18 and you said in the rib cage, would that be in the
19 sternum, or front part of your chest?

20 A. Right here.

21 Q. For the record, you're pointing directly?

22 A. Off to one side, closer to the heart.

23 Q. But in the front?

24 A. Correct.

25 MR. PIKE: Thank you. That's all.

Exhibit 3

ORIGINAL

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

ORIGINAL

THE STATE OF NEVADA,

Plaintiff,

vs.

BRIAN KERRY O'KEEFE,

Defendant.
.....

CASE NO. C-250630

DEPT. NO. 17

TRANSCRIPT OF
PROCEEDINGS

FILED

JUL 10 2009

CLERK
CLERK OF COURT

BEFORE THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE

TUESDAY, MARCH 17, 2009

ROUGH DRAFT TRANSCRIPT OF
JURY TRIAL - DAY 2

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:

VERBATIM DIGITAL REPORTING, LLC
Littleton, CO 80120
(303) 798-0890

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JUL 10 2009

CLERK OF THE COURT

1 he made some statements.
2 I submit that that clearly satisfies the statute.
3 And Judge, it's the State's position that the reason for the
4 excited utterance exception is that it is presumed that a
5 person will make truthful statements while under the stress of
6 an event because presumably they have no motive to fabricate or
7 to lie. So the only thing that the State has to show is that a
8 startling event happened, and that the person was still under
9 the stress of that startling event while they made those
10 statements, and that's exactly what we have here.
11 THE COURT: All right. I don't think he needs to see
12 the actual stabbing when he's -- like counsel had mentioned,
13 this lady that perhaps didn't know if she was dead, blood all
14 over the place. I think he said the sheets or rags were soaked
15 in blood.
16 MR. SMITH: Yes, sir.
17 THE COURT: The defendant he testified was shaken to
18 wake up or something like that. So that's why I overruled the
19 objection. Anything else?
20 MS. GRAHAM: Nope.
21 THE COURT: Call the jury in.
22 THE MARSHAL: Officers and members of the court,
23 Department 17 jurors.
24 (In the presence of the jury)
25 THE CLERK: Roll call. Justin Dettre. Jody

Page 6

ROUGH DRAFT TRANSCRIPT

1 turned off, please. All phones are off.
2 THE COURT: Ladies and gentlemen, just so you know,
3 Juror No. 12 was involved in an extreme emergency situation,
4 and so he is no longer part of the jury panel, and that's why
5 it's important that we have alternates. As I said before, the
6 alternates have been randomly selected, so it's not necessarily
7 seats 13 or 14. So I'm sure everyone will pay attention
8 throughout the trial. State, please call your next witness.
9 MR. SMITH: Thank you, Judge. Judge, the State calls
10 Cheryl Morris to the stand.
11 THE COURT: Also, I don't believe either party's
12 invoked the exclusionary rule. Does either party wish to
13 invoke that?
14 MS. GRAHAM: We do, your Honor.
15 THE COURT: All right. If there are any witnesses
16 that are going to be called in this case, they're instructed to
17 remain outside until called in by the marshal.
18 UNIDENTIFIED SPEAKER: Your Honor, the head phones
19 aren't working.
20 THE COURT: We'll have the marshal check -- or
21 Michelle, do you have time to --
22 THE MARSHAL: Ms. Morris, if you'll remain standing,
23 please. Raise your right hand. Face the clerk.
24 CHERYL MORRIS, PLAINTIFF'S WITNESS, SWORN
25 THE WITNESS: Yes.

Page 8

ROUGH DRAFT TRANSCRIPT

1 Montonya.
2 JUROR NO. 2: Here.
3 THE CLERK: James Eral.
4 JUROR NO. 3: Here.
5 THE CLERK: Judy Chelini.
6 JUROR NO. 4: Here.
7 THE CLERK: Nancy Mirolock.
8 JUROR NO. 5: Here.
9 THE CLERK: Kirk Livernash.
10 JUROR NO. 6: Here.
11 THE CLERK: Dawn Fraley.
12 JUROR NO. 7: Here.
13 THE CLERK: Araceli Murrieta.
14 JUROR NO. 8: Here.
15 THE CLERK: James McCaldin.
16 JUROR NO. 9: Here.
17 THE CLERK: Marie Pinillos.
18 JUROR NO. 10: Here.
19 THE CLERK: Jose Vasquez.
20 JUROR NO. 11: Here.
21 THE CLERK: Robert Clark.
22 JUROR NO. 13: Here.
23 THE CLERK: And Martin Villascnor.
24 JUROR NO. 14: Here.
25 THE MARSHAL: Let's make sure all cell phones are

Page 7

ROUGH DRAFT TRANSCRIPT

1 THE CLERK: Please be seated. State your name and
2 spell it for the record.
3 THE WITNESS: Cheryl Morris, C-h-e-r-y-l. Morris,
4 M-o-r-r-i-s.
5 THE COURT: Go ahead, Counsel.
6 MR. SMITH: Thank you, Judge.
7 DIRECT EXAMINATION
8 BY MR. SMITH::
9 Q Good morning, Ms. Morris.
10 A Good morning.
11 Q Ms. Morris, do you know a person by the name of Brian
12 O'Keefe?
13 A Yes, I do.
14 Q Do you see Mr. O'Keefe present in court today?
15 A Yes, I do.
16 Q Can you point to him for us and identify what he's
17 wearing.
18 A He's the gentleman sitting there with his counsel,
19 and he's wearing a dark suit.
20 Q What color tie?
21 A Brown/black tie, dark tie.
22 MR. SMITH: Judge, can the record reflect the witness
23 has identified the defendant?
24 THE COURT: Yes it will.
25 MR. SMITH: Thank you, Judge.

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ROUGH DRAFT TRANSCRIPT

1 BY MR. SMITH:
2 Q And Ms. Morris, how do you know Mr. O'Keefe?
3 A I was dating Mr. O'Keefe.
4 Q When would that relationship start?
5 A January 7th of 2008.
6 Q When did that relationship end?
7 A September 6th of 2008.
8 Q Okay. Now, when that relationship ended, where were
9 you residing?
10 A I was residing with a friend.
11 Q Okay. Throughout the course of the relationship that
12 you had with Mr. O'Keefe, did you two ever reside together?
13 A Briefly, which was last part of August of this year
14 or excuse me, of last year and September, actually. We moved
15 into an apartment, but I was only there for four days.
16 Q Okay. Where was that apartment located?
17 A 5001 El Parque Avenue, Apartment 35 --
18 Q Is that --
19 A -- in Las Vegas.
20 Q And was that in Clark County, Nevada?
21 A Yes.
22 Q Now, you just said that you only lived there for four
23 days.
24 A Correct.
25 Q Why did you only stay there for that short period of

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ROUGH DRAFT TRANSCRIPT

1 Q And were you not okay with that?
2 A No.
3 Q Okay. And why not?
4 A Didn't think it was right. Several days prior to him
5 calling me, we had agreed that we weren't going to bring anyone
6 over to the apartment until I was able to move out. We broke
7 up two days before.
8 Q So we being you and Mr. O'Keefe?
9 A Yes.
10 Q Okay. So, is it correct to say that when you guys
11 were living in the El Parque address, you guys being you and
12 Mr. O'Keefe, that you weren't actually in a relationship at
13 that time?
14 A No.
15 Q Okay. And what was the lease agreement?
16 A I'm sorry?
17 Q Whose name was on the lease?
18 A Both of ours.
19 Q Okay. Now, when you moved out of the apartment, did
20 your name remain on the lease?
21 A Yes, but I did not -- I called the apartment owner,
22 and I requested that he take that lease and have Mr. O'Keefe
23 and Ms. Witmarsh sign a brand new lease. I actually kept the
24 apartment keys and the only mailbox key to the apartment so
25 that it would be taken care of.

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ROUGH DRAFT TRANSCRIPT

1 time?
2 A I received a phone call from Mr. O'Keefe stating that
3 he wanted to come home, and he wanted to bring Victoria home
4 with him.
5 Q Victoria who?
6 A Victoria Witmarsh (phonetic).
7 Q Do you know who Victoria Witmarsh is?
8 A Yes.
9 Q And who is Victoria Witmarsh?
10 A A former girlfriend of his.
11 Q How do you know Victoria Witmarsh was a former
12 girlfriend of Mr. O'Keefe's?
13 A Mr. O'Keefe let me know.
14 Q Okay. Had you ever personally met Victoria Witmarsh?
15 A No.
16 Q Now, when you moved into the El Parque address in
17 August 2008, to your knowledge, was the defendant still in a
18 relationship with Ms. Witmarsh?
19 A He had seen her on occasions, yes. But he'd come
20 back and let me know that he was actually more interested in me
21 rather than being with her.
22 Q Okay. Now, you've already testified that you moved
23 out of the El Parque address because the defendant said that he
24 was going to bring Ms. Witmarsh to that address.
25 A Correct.

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ROUGH DRAFT TRANSCRIPT

1 Q Okay. Now, let me ask you this. You've already
2 testified that you moved out of the apartment because Mr.
3 O'Keefe wanted to bring home another woman as it were.
4 A Yes.
5 Q Did you have any ill will towards Mrs. Witmarsh?
6 A No, not at all.
7 Q Did you have any ill will towards Mr. O'Keefe?
8 A I was -- I was upset at the way he had done it.
9 Q Okay.
10 A At the way -- as of the way he approached the
11 situation because I actually informed him that if he wanted to
12 be with her, it was okay. Just let me know, and I'd move out
13 of the way.
14 Q Okay. And did you, in fact, move out of the way?
15 A Yes.
16 Q Okay. Now, you testified that your relationship
17 lasted for several months.
18 A Correct.
19 Q You said it started in January and it ended when?
20 A It ended September.
21 Q Okay. Throughout the course of that relationship did
22 the defendant ever talk to you about his relationship with Mrs.
23 O'Keefe -- excuse me, Mrs. Witmarsh?
24 A Yes.
25 Q Okay. And how often would he speak to you about her?

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ROUGH DRAFT TRANSCRIPT

1 A Almost all the time. He usually would be more or
2 less on a daily basis. I'd say about three, four weeks a day
3 --
4 Q Okay.
5 A -- or a time.
6 Q What types of things would he tell you about the
7 relationship?
8 MR. PIKE: Objection, your Honor. Hearsay.
9 THE COURT: Sustained.
10 MR. SMITH: Judge, it's a statement of a party
11 opponent offered against that person.
12 THE COURT: Counsel approach.
13 (Bench conference).
14 THE COURT: I'm going to overrule the objection.
15 MR. SMITH: Thank you, your Honor.
16 MR. PIKE: I'd ask for that continuing objection to
17 be placed.
18 THE COURT: All right.
19 BY MR. SMITH:--
20 Q Ms. Morris, you can answer the question.
21 A Could you repeat the question, please.
22 Q The question was what types of things would the
23 defendant tell you with regards to his relationship with
24 Victoria Witmarsh?
25 A On occasions he'd actually say that he was upset

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ROUGH DRAFT TRANSCRIPT

1 Q Do you recall giving a statement to the police back
2 on November 20th, 2008?
3 A Yes.
4 Q Do you recall him recording that statement?
5 A Yes, I do.
6 Q If I showed you a copy of that statement, would it
7 refresh your recollection as to whether defendant ever made any
8 statements to you regarding whether he liked Victoria because
9 she was a submissive woman?
10 A Yes.
11 MR. SMITH: May approach the witness --
12 THE COURT: Yes.
13 MR. SMITH: -- Judge?
14 BY MR. SMITH:--
15 Q And for the record, Ma'am, I'm showing you Page 18 of
16 a recorded transcript -- of a transcript of a recorded
17 voluntary statement that you gave to you police. I'd ask you
18 to just -- read this portion to yourself, and then let me know
19 when you're done.
20 A Yes.
21 Q Now do you recall whether or not the defendant ever
22 made a statement to you that he liked Victoria Witmarsh because
23 he was submissive?
24 A Yes.
25 Q Did he, in fact, say that?

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ROUGH DRAFT TRANSCRIPT

1 because she put him in prison.
2 Q Okay. What else would he say?
3 A He'd say things like he wanted to kill the bitch.
4 Q So just so the record's clear, Mr. O'Keefe would make
5 statements to you saying he wanted to kill Mrs. Witmarsh
6 because she put him in prison?
7 A Yes.
8 Q And when you say that because he put her in prison,
9 did he indicate that she had actually testified against him?
10 A Yes.
11 Q At a jury trial?
12 A Yes.
13 Q Okay. Did he make any statements as to what kind of
14 person Victoria Witmarsh was?
15 A He would state that Victoria was somewhat a very --
16 she wasn't a strong person.
17 Q Okay.
18 A She -- if you yelled at her, basically, she would
19 cower. So she would be portrayed as a very meek person.
20 Q So the defendant described Mrs. Witmarsh to you as a
21 submissive woman?
22 A Correct.
23 Q Okay. Did he indicate that he liked her because of
24 that?
25 A No, he didn't make any sort of indication.

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ROUGH DRAFT TRANSCRIPT

1 A Yes, he did.
2 Q Now, Ms. Morris, again, throughout your time with Mr.
3 O'Keefe, did he ever make any statements to you indicating his
4 proficiency with weapons?
5 A Yes.
6 Q Specifically what kind of a weapon?
7 A A knife.
8 Q What types of things would he tell you?
9 A That he was capable of killing anyone.
10 Q With a knife?
11 A With a knife, yes.
12 Q Did he ever demonstrate to you how he could kill
13 someone with a knife?
14 A Yes, he did.
15 Q Can you show us.
16 A I'd have to stand up.
17 Q Yes, ma'am.
18 A Mr. O'Keefe would hold me on one shoulder and have a
19 pretend sort of weapon in his hand, and he would stand there
20 and hold me as length's -- arm's length and say he would come
21 at me or could come at a person and shove it through the cage
22 -- rib cage area and then just pull up pretty much --
23 Q And for the --
24 A -- slicing someone open.
25 MR. SMITH: And for the record, the witness is

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ROUGH DRAFT TRANSCRIPT

1 pointing to her mid section.
2 THE COURT: All right.
3 MR. PIKE: More particularly the sternum area.
4 MR. SMITH: The sternum area.
5 MR. PIKE: Thank you.
6 THE COURT: Okay.
7 BY MR. SMITH:
8 Q Now, while you two were living in the El Parque
9 address for those four days, did you sleep in the same bed?
10 A No.
11 Q What were the sleeping arrangements?
12 A After Mr. And O'Keefe and I had decided that we were
13 no longer going to be with each other, I slept in the room in
14 my bed behind locked door, and he slept on the couch.
15 Q And was that, to your knowledge, consistent with the
16 agreement you two had to be merely platonic?
17 A Correct.
18 Q Did you ever reside with Brian O'Keefe again after
19 you moved out?
20 A No.
21 Q Do you know how long Mr. O'Keefe has known Victoria
22 Witmarsh?
23 A Since 2001.
24 Q And how do you know that?
25 A Mr. O'Keefe has stated that to me.

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ROUGH DRAFT TRANSCRIPT

1 while he was in the Clark County Detention Center a month after
2 this incident had happened, did you ask him what happened?
3 A Yes, I did.
4 Q And what did he tell you?
5 A He said that he and Victoria had come home from
6 somewhere -- I cannot remember the place where he had mentioned
7 --
8 Q Okay.
9 A -- but he and Victoria came home. He was tired. He
10 went into the room, and he proceeded to go to sleep in the
11 darkroom and the next thing he knew he said that he felt a
12 prick or a stabbing on his hand, and he saw Victoria standing
13 over him with a knife.
14 Q Okay.
15 A And then he stated that the next thing he knew was
16 that he was holding her hand, and it went limp, and the knife
17 was at -- in her side.
18 Q Okay. Did he offer anything to explain the gap
19 between the alleged prick and the knife being inside of Mrs.
20 Witmarsh?
21 A He said that they struggled.
22 Q Okay. What was his demeanor while he was telling you
23 this?
24 A Somber.
25 Q Okay. Did he ever -- excuse me, strike that. Did he

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ROUGH DRAFT TRANSCRIPT

1 Q Did Mr. O'Keefe ever make any statements to you
2 regarding any training that he has had in the special forces?
3 A Yes, he said he had training in the Grenada.
4 Q Okay. Now, after you moved out of that apartment in
5 2008, did you ever have an occasion to see Mr. O'Keefe again?
6 A Yes, I did. I'm not exactly sure what date it was.
7 Q Could it have been December 6th, 2008?
8 A Yes.
9 Q So would that have been approximately a month after
10 the incident in question?
11 A Correct.
12 MR. SMITH: Your Honor, we're -- actually, can we
13 approach? Can we --
14 THE COURT: All right.
15 MR. SMITH: -- approach, Judge?
16 THE COURT: (Bench conference).
17 MR. SMITH: May I proceed, Judge?
18 THE COURT: Yes.
19 MR. SMITH: Thank you.
20 BY MR. SMITH:
21 Q Now, Ms. Morris, under what circumstances did you
22 next come into contact with Brian O'Keefe in December of 2008?
23 A It was just that moment when I went to go and visit
24 him at the county jail.
25 Q Okay. Now, when you went to go visit Mr. O'Keefe

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ROUGH DRAFT TRANSCRIPT

1 indicate to you that Mrs. Witmarsh ever struck him during this
2 alleged struggle?
3 A No.
4 Q Going back to the conversations that you had with Mr.
5 O'Keefe regarding his disdain of Mrs. Witmarsh for sending him
6 to prison, did he ever make any statements to you as to the
7 length of time?
8 A In regards to how many times that she'd go and visit?
9 Q No, in regards to her testifying against him and
10 ultimately being incarcerated?
11 A She would go and visit him quite often. I'm sorry --
12 Q Okay.
13 A -- I don't understand.
14 Q My question is, okay, do you recall whether or not
15 the defendant made a statement to you that Ms. Witmarsh took
16 away three years of his life?
17 A Yes, he did. He had mentioned that quite often, and
18 that was in conclusion with, you know, the bitch, I hate her,
19 she's poison, she took three year of my life, I want to kill
20 her.
21 MR. SMITH: Pass the witness, Judge.
22 THE COURT: Cross-examination.
23 CROSS-EXAMINATION
24 BY MR. PIKE:
25 Q Moming --

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ROUGH DRAFT TRANSCRIPT

1 A Good morning.
2 Q -- Ms. Morris. How are you today?
3 A Fine, thank you.
4 Q Now, how did you and Brian meet?
5 A I was at a casino called Arizona Charlie's with a
6 friend, and I happen to go into the Sour Dough Cafe (phonetic)
7 and sit down and eat, and he and another friend had come in and
8 sat down beside me.
9 Q Okay. And that was -- you indicated that was in
10 January of last year.
11 A No, actually that happened in December, and I had
12 left to go to San Diego and I did not return until January.
13 Q Okay. And when you came back in January, did -- was
14 it you that initiated the contact with Brian to say I'm back in
15 town or did mutual friends tell you? What -- how did that work
16 out?
17 A Mr. O'Keefe and I had talked while I was in San
18 Diego. As a matter of fact, he made this comment that he ran
19 up a bill of \$300. We had talked on the phone almost all --
20 several nights, and he asked if he would be able to come and
21 pick me up from the Greyhound Station when I got into town, and
22 that was the arrangement.
23 Q Okay. And he did pick you up?
24 A Yes.
25 Q All right. And so during that period of time while

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ROUGH DRAFT TRANSCRIPT

1 THE WITNESS: No more than he usually did. On
2 occasions he would have a little more, yes.
3 BY MR. PIKE::
4 Q Did you believe during that period of time that Brian
5 had a problem with alcohol?
6 A Yes.
7 Q Did he consume too much alcohol?
8 A Depends on what you call or consider too much.
9 Q Too much -- let me ask the question this way. Did he
10 appear to become intoxicated or drink to the point where he
11 would not -- he would behave differently?
12 A With beer, no.
13 Q With other alcohol beverages, yes?
14 A Correct.
15 Q And you indicated just previously that the
16 questioning that it was Victoria that reinitiated contact with
17 Mr. O'Keefe, correct?
18 A Yes.
19 Q And you talked to Victoria about that.
20 A Yes.
21 Q And you told her -- you told Victoria that it was
22 inappropriate for her to try and get back with him.
23 A I don't recall making that statement.
24 Q Okay. When you talked with Victoria, did you ask her
25 why she wanted to get back with Brian?

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ROUGH DRAFT TRANSCRIPT

1 you're talking on the telephone and you were developing a
2 relationship with each other, you were developing an
3 attraction; would that be an appropriate term to use?
4 A Yes.
5 Q And it became a couple type relationship where it --
6 you could talk with him about intimate details of your life and
7 he could talk to you about intimate details --
8 A Yes.
9 Q -- of his life.
10 A Yes.
11 Q And between the two of you, that relationship where
12 you were talking to each other was a safe relationship where
13 you could share dreams, hopes, aspirations, concerns, past
14 horrors of your life and things like that.
15 A Correct.
16 Q And that went on for a period of time.
17 A Yes.
18 Q During that early part of the relationship, that was
19 before Victoria came back into the -- into Mr. O'Keefe's life,
20 correct?
21 A Correct.
22 Q Did you a marked change when Victoria reinitiated
23 contact? Let me rephrase it. Did Brian start to drink more?
24 MR. SMITH: Objection. Goes to relevance.
25 THE COURT: Overruled.

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ROUGH DRAFT TRANSCRIPT

1 A Yes, I did.
2 Q And what did she tell you?
3 MR. SMITH: Objection, Judge. Calls for hearsay.
4 THE COURT: Sustained.
5 BY MR. PIKE::
6 Q During the time that you talked with Victoria, did
7 you tell her that she wasn't good for Brian?
8 A No.
9 Q Did you tell her that she didn't get back in his
10 life?
11 A No.
12 Q Did you tell him (sic) that she should leave well
13 enough alone and just go on with her life?
14 A No.
15 Q Was Victoria persistent in calling you in and talking
16 with you?
17 A Several times, yes.
18 Q In fact, when she got on the phone with you and she
19 was talking with you, would she yell at you?
20 A She did that one occasion which was the day that Mr.
21 O'Keefe called and said he was bringing Victoria home.
22 Q And how did you get the phone to talk to Victoria
23 during at that period of time?
24 A He handed her the phone.
25 Q And you talked with her, and she was insistent about

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ROUGH DRAFT TRANSCRIPT

1 coming to your apartment?
2 A Yes, because her statement was he lived there, he
3 paid the rent, why wasn't he able to come back.
4 Q And you took it from that conversation, the other
5 conversations that you had with her that she was coming back
6 into that apartment whether you liked it or not.
7 A No, I took it that they both needed a place to stay
8 that night for one reason or another, and that's where they
9 were going to be.
10 Q During that period of time you became aware that
11 during the conversations that Victoria was no longer welcome at
12 her home with her husband.
13 A That is what she told me.
14 Q And from everything that you had observed during that
15 period of time, you didn't think it was going to be a good idea
16 for Victoria to be back in that house.
17 A In whose house?
18 Q In living back with Brian, Mr. O'Keefe.
19 A No, that's not true. What I actually was stating was
20 that as soon as I moved out, they could be together.
21 Q And so it was your impression during that period of
22 time that both of them wanted to be back together.
23 A Correct.
24 Q And during conversations with Brian about Victoria,
25 Mr. O'Keefe told you that she went to visit him while he was in

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ROUGH DRAFT TRANSCRIPT

1 MR. PIKE: All right, thank you.
2 BY MR. PIKE::
3 Q The fact that you had established a relationship with
4 Mr. O'Keefe for about a nine month period, you had lived with
5 him off and on during that period?
6 A I stayed with him in the trailer.
7 Q And that was located here in Las Vegas, Nevada?
8 A Yes, we -- it was mostly during the night because he
9 was working during the day. I had my school during the day. I
10 did other things, went to appointments.
11 Q And there was a decision that you would become a
12 couple. And in fact, you started to make plans together. You
13 rented an apartment.
14 A Yes.
15 Q You purchased a car together.
16 A Yes.
17 Q He put you on a bank account. You had a joint
18 account together --
19 A Correct.
20 Q -- for awhile.
21 MR. SMITH: Judge, at this point I'm going to object
22 to the relevance of their relationship.
23 THE COURT: I think it can go to bias so --
24 MR. PIKE: Yeah.
25 THE COURT: -- going to overrule the objection.

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ROUGH DRAFT TRANSCRIPT

1 custody over her testimony, didn't he?
2 A Yes.
3 Q And that she would put money on his books.
4 A Yes.
5 Q And do you understand what that means?
6 A Yes.
7 Q That means? Okay, would you describe it for the
8 jury.
9 A It means when you go to the court house or anywhere
10 else, you're allowed to go ahead and put -- the inmate has an
11 expense account where you're able to deposit money so the
12 inmate is allowed to buy things while they are incarcerated.
13 Q And, in fact, at the time of the trial in this
14 matter, she testified on behalf of Mr. O'Keefe.
15 A No, she testified against Mr. O'Keefe.
16 Q Remember him saying that she recanted her testimony?
17 MR. SMITH: Objection, Judge. It calls for hearsay.
18 THE COURT: Sustained.
19 MR. PIKE: It's a complete story, your Honor.
20 They've brought in the hearsay as to what he said. If she
21 recanted that testimony.
22 THE COURT: Well --
23 MR. SMITH: Well, Judge --
24 THE COURT: -- there wasn't any objection at the time
25 so I'm sustain the objection.

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ROUGH DRAFT TRANSCRIPT

1 MR. PIKE: Thank you, your Honor.
2 BY MR. PIKE::
3 Q And you had done all of this, and then Victoria comes
4 out of the blue, somebody that you thought would never come
5 back; is that correct?
6 A No. Victoria was always there. He -- Mr. O'Keefe
7 told me about her the very moment that we'd met. So she was
8 always there in conversation throughout the entire time.
9 Q And then physically she showed up.
10 A She called him in June on Father's Day where Mr.
11 O'Keefe proceeded to first lie to me about it, and then said I
12 can't lie to you, it was Victoria.
13 Q And it appeared that Victoria was reinitiating the
14 relationship, as you've indicated, and then Mr. O'Keefe started
15 to spend more time with Victoria.
16 A Mr. O'Keefe, after that conversation, that following
17 Monday he had left for an entire week without any notice,
18 friends or myself, and stayed with Victoria for that week.
19 Q And that obviously would upset you.
20 A I was more hurt because I had seen in Mr. O'Keefe
21 something different. Something that when we had spoken before
22 that if it ever arose that he would be courteous enough to let
23 me know that that was his intentions.
24 Q Because you and -- you had made plans with him.
25 You'd bought a car with him. You had an account with him. And

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ROUGH DRAFT TRANSCRIPT

1 that all started to change, yes or no? Yes, it started to
2 change.
3 A It did start to change, yes.
4 Q In fact, you were taken off of the account.
5 A No, I took myself off the account.
6 Q Okay. And you wanted to take yourself off of the
7 car.
8 A Correct.
9 Q And you wanted to take yourself off of the apartment.
10 A Correct.
11 Q At that point in time you wanted to dissociate
12 yourself completely with Mr. O'Keefe because he was involved
13 with Victoria.
14 A He was involved with Victoria --
15 Q And you wanted to go through and because that car had
16 been purchased jointly with you and Mr. O'Keefe, that car was
17 -- the loan was in your name, and you still had a financial
18 responsibility for that.
19 A It was in both Mr. O'Keefe's name and my name.
20 Q And after -- and you maintained a key to the
21 apartment. After you heard about what happened that night, did
22 you go back into that apartment?
23 A It was not until the police cleared us to be able to
24 go back into the apartment.
25 Q And who did you go back in the apartment with?

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1 able to get money to him and put them on his books and anything
2 else that needed to be taken care of.
3 Q And in fact, you kept that set of keys you kept, and
4 then you were able to resolve the issues with the car, correct?
5 A I voluntarily gave it back, yes.
6 Q In going through that, during this period of time the
7 police actually didn't contact you. You went and contacted the
8 detectives.
9 A Yes, I did, and the reason why I did that was because
10 I have a friend in Metro, and I spoke with this retired
11 officer, and I asked him what I should do.
12 Q You went in and gave a statement, and then you went
13 over and talked with Mr. O'Keefe at the Clark County Detention
14 Center, and that was done over a monitor; is that correct?
15 A Yes.
16 Q During the time that you had the conversations with
17 him, did you believe that those conversations were being
18 recorded?
19 A He said they were --
20 Q Did you --
21 A -- recorded.
22 Q Did you have a -- did you believe they were being
23 recorded?
24 A Yes, I did.
25 Q Okay. And during that period of time, during that

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ROUGH DRAFT TRANSCRIPT

1 A My son and Victoria's husband David and Victoria's
2 daughter.
3 Q During the time that you went through that apartment
4 did you have Mr. O'Keefe's glasses? Did you pick those up?
5 A Yes, I did.
6 Q And for what purpose?
7 A Mr. O'Keefe had called me some time when he ended up
8 in jail and requested that I -- through his lawyer -- through
9 you as a matter of fact requested that I bring that to you.
10 Q And you and I had some conversations in trying to
11 arrange the exchange of those glasses --
12 A Correct.
13 Q -- and you brought them to the preliminary hearing --
14 A Yes.
15 Q -- in fact, so that he could have those glasses.
16 A Yes.
17 Q In addition to that, you wanted to have a power of
18 attorney to close out the account, try and resolve the issues
19 with the car, and try and resolve the financial issues that you
20 had been encumbered with during your relationship with Mr.
21 O'Keefe.
22 A In regards to that, it was only because of the fact
23 that Mr. O'Keefe, when I did have an account with him and I
24 voluntarily took my name off the account, he would state to me if
25 anything happened to him, I would be able to have access to be

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ROUGH DRAFT TRANSCRIPT

1 jail conversation, your purpose for that visit was to get his
2 side of the story, was it to get a report from him, what was
3 your purpose in going and visiting him?
4 A My purpose was I went to visit Mr. O'Keefe because a
5 mutual friend contacted me stating that Mr. O'Keefe sent a
6 letter to his sister --
7 Q Well, okay, now let me just ask you, did you go there
8 with a specific purpose in mind, yes or no?
9 A Yes, and it was because --
10 Q Did --
11 A -- I needed --
12 Q Let me -- I'll get there. I'll get there, I promise.
13 We're developing a short -- in short segments here. And prior
14 to going over to talk with him at the jail, you had met with
15 the police and you'd given a statement.
16 A Yes.
17 Q You -- at that point in time the police had told you
18 that you were going to testify at a preliminary hearing; is that
19 correct?
20 A They said it was a possibility, yes.
21 Q And did any police officer talk with you about going
22 in and having conversations or talking with Mr. O'Keefe and
23 then coming back to them and telling them what he had said?
24 A No.
25 Q Okay. No detective told you not to talk with him?

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1 MR. SMITH: Objection, Judge. Asked and answered.
2 THE COURT: I think it's -- I'm going to allow it.
3 Overruled.
4 THE WITNESS: When I made the statement it was said
5 -- I don't recall them telling me anything about that I wasn't
6 supposed to go and see him. They may have suggested that it
7 was a good idea not to see him or not to have any conversations
8 with him.
9 BY MR. PIKE::
10 Q And regardless of that, then you went in and had that
11 conversation, which you believe to be recorded during that
12 period of time. During the time that you and Mr. O'Keefe were
13 together, did he ever take you to the union to work with him?
14 A To go to work, you mean?
15 Q To go to work with him or to --
16 A No.
17 Q -- go to any social events at the union?
18 A No.
19 Q Did he ever take you to any sort of alcohol
20 counseling or drug counseling?
21 A No.
22 Q Did he ever take you to go over and meet his two
23 minor daughters?
24 A Yes.
25 Q And hoped that that was part of establishing a

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ROUGH DRAFT TRANSCRIPT

1 with emphasis.
2 Q Well, in your --
3 MR. PIKE: May I approach the witness?
4 THE COURT: Yes.
5 BY MR. PIKE::
6 Q Ms. Morris, this is the same statement that you
7 previously looked at.
8 A Um-h'm.
9 Q And if you just kind of look at that area.
10 A Um-h'm.
11 Q Okay.
12 A Right.
13 Q Having looked at your statement and having refresh
14 your recollection with that, you advised the police that when
15 she got on the phone, she did start yelling at you.
16 A Yes.
17 Q And yelling is a loud aggressive type of a voice.
18 A It wouldn't be like something I'd have to hold the
19 phone at here, but here, you know, and she said it a little bit
20 louder than usual, yes.
21 Q It seemed to you during that period of time that she
22 was intent upon or inserting herself into Mr. O'Keefe's life
23 and kicking you out of it.
24 A I didn't think of that.
25 Q You just knew that you were leaving.

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ROUGH DRAFT TRANSCRIPT

1 relationship was to get to meet his daughters?
2 A No.
3 Q You just -- what did you take that as?
4 MR. SMITH: Objection, Judge. Relevance.
5 THE COURT: I'm going to nvmule it.
6 BY MR. PIKE::
7 Q If anything.
8 A Just the fact that he was showing me how proud he was
9 of his daughters.
10 Q And how many times did you meet his daughters?
11 A I think maybe once, twice. A couple of times.
12 Q And in going through this relationship you felt that
13 your agreements with Mr. O'Keefe had been violated by him.
14 A Yes.
15 Q You felt that it was inappropriate for him to be back
16 be Victoria.
17 A No, it was inappropriate for him to cheat.
18 Q Did you think, based upon your conversations with
19 Victoria when she was yelling at you, that that was somehow
20 different than this submissive voice that somehow the State
21 indicates that she had? She certainly didn't seem -- let me
22 rephrase the question. It was a bad question.
23 When she was on the phone yelling at you, that didn't
24 sound submissive.
25 A It wasn't really yelling. It was more of a statement

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ROUGH DRAFT TRANSCRIPT

1 A Well, he and I had broken up two days before so it
2 didn't matter what she was doing.
3 Q Well, that's kind of a short period of time to be
4 replaced by somebody coming in two days.
5 A No, because I had understood that during the time
6 that Mr. O'Keefe and I were together, he had feelings for her,
7 and we talked a lot about it. I did a lot of listening. Mr.
8 O'Keefe did a lot of talking, and he had told me that, you
9 know, that he did care about her because she was dying, and he
10 wanted to be with her.
11 And I told him if that's what he wanted, if that's
12 what made him happy, I understood.
13 Q She was dying because of what?
14 A She had Hepatitis.
15 Q Do you recall her having cirrhosis of the liver also?
16 A Cirrhosis of the liver and Hepatitis C, yes.
17 Q She ever talk with -- and didn't you suggest to Mr.
18 O'Keefe that being with her may expose him to health risks?
19 A Yes.
20 Q Did at that seem to concern him?
21 A On an occasion, several occasions, yes, he talked to
22 me about it.
23 Q And he called her poison.
24 A Yes, he did.
25 Q And you wouldn't disagree with that.

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ROUGH DRAFT TRANSCRIPT

1 A I let him talk.
2 MR. SMITH: Objection, Judge. That's -- to
3 relevance.
4 THE COURT: Sustained.
5 MR. PIKE: I have no further questions.
6 THE COURT: Any further direct?
7 MR. SMITH: Yes, Judge.
8 REDIRECT EXAMINATION
9 BY MR. SMITH:
10 Q Ms. Morris, going back to some of the things that you
11 kind of ended your cross-examination with, specifically about
12 conversations that Mr. O'Keefe had with you indicating that he
13 still had feelings for Mrs. Witmarsh.
14 A Yes.
15 Q But is it still your testimony that there were also
16 occasions where he stated that he hated Mrs. Witmarsh for
17 testifying against him at that trial?
18 A Yes.
19 Q And that she testified against him as a victim.
20 A Yes.
21 Q Now, one over the questions that Mr. Pike asked you
22 about Mr. O'Keefe's propensities when drinking alcohol, I
23 think, based on -- in answering a question that he asked you,
24 you said that his mood didn't change when he drank beer but
25 with other alcohol it did.

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ROUGH DRAFT TRANSCRIPT

1 MR. PIKE: Thank you.
2 BY MR. SMITH:
3 Q Mrs. Morris, are you a jilted ex-girlfriend?
4 A No.
5 Q Do you have any biases towards Mr. O'Keefe as you sit
6 here today?
7 A No, I do not.
8 Q Do you have any biases towards Victoria Witmarsh as
9 you sit here today?
10 A No, I do not.
11 Q Now, Mr. Pike also asked you a question in regards to
12 the conversation that you had with Mrs. Witmarsh with she
13 yelled at you --
14 A Yes.
15 Q -- do you recall that?
16 A Yes.
17 Q And Mr. Pike asked you basically was she being
18 submissive under those circumstances; is that correct?
19 A Correct.
20 Q Okay. Going back to Mr. O'Keefe's statements to you
21 about Mrs. Witmarsh's personality and her being submissive, did
22 he indicate if she was submissive to everyone or submissive to
23 him?
24 A She was submissive to everyone.
25 Q Now, another question that I'm sure is on everyone's

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ROUGH DRAFT TRANSCRIPT

1 A Correct.
2 Q Can you elaborate on that?
3 A He would drink vodka, and when he drank vodka, he
4 would become violent.
5 Q Okay. Now, you've also testified already that you
6 moved out of your own accord.
7 A Correct.
8 Q Did you have any hard feelings upon moving out?
9 A No, I did not.
10 Q And you've also testified on cross-examination that
11 you did several things to dissociate yourself with Mr. O'Keefe;
12 is that correct?
13 A Correct, yes.
14 Q Okay. Then, Ma'am, why are you here today?
15 A Because I was subpoenaed.
16 Q Okay. And are you here today to tell the truth?
17 A Correct.
18 Q Pursuant to the oath you just took?
19 A Yes.
20 MR. PIKE: Objection, your Honor. It's leading. It
21 goes beyond the scope. It's --
22 THE COURT: I'll sustain the objection.
23 MR. PIKE: -- vouching for a witness. I have a
24 motion at the appropriate time.
25 THE COURT: Sustain the objection.

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ROUGH DRAFT TRANSCRIPT

1 mind, Ms. Morris, is why did you go visit Mr. O'Keefe in
2 December of 2008?
3 A Because of a letter he wrote to his sister. His
4 sister contacted a mutual friend, and I wanted to set the
5 record straight with him.
6 Q Have you been back to see him since then?
7 A No.
8 Q Have you spoken with him since then?
9 A No.
10 Q And you've already testified that pursuant to a
11 request by the defense attorney, you in fact, brought Mr.
12 O'Keefe his glasses; is that correct?
13 A Yes, I did.
14 Q Would you have done that if you were biased against
15 him?
16 MR. PIKE: Objection, your Honor. Impermissible.
17 There's nothing to rehabilitate.
18 THE COURT: I'm going to sustain it as it relates to
19 the form of the question.
20 BY MR. SMITH:
21 Q Why did you bring his glasses?
22 A Because he also asked me when I went to go and see
23 him if I could bring his glasses because he needed it, and I
24 said I would do that.
25 MR. SMITH: Court's indulgence.

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ROUGH DRAFT TRANSCRIPT

1 THE COURT: All right.
2 BY MR. SMITH::
3 Q Ms. Morris, how many conversations would you say you
4 had with Victoria Witmarsh?
5 A I would say probably about five.
6 Q And how many times out of those conversations did she
7 yell at you?
8 A Just that one day.
9 Q Just that one time?
10 A Correct.
11 MR. SMITH: No further questions.
12 THE COURT: Any recross?
13 RECCROSS-EXAMINATION
14 BY MR. PIKE::
15 Q In relation to the conversations about Mr. O'Keefe
16 (indiscernible) military, did he tell you about his experiences
17 during the Grenada war?
18 A Yes, he did.
19 Q And those had upset him?
20 A Yes.
21 Q And in relationship to what you demonstrated about
22 the knife or said -- testified about the knife, that was what
23 had been -- he'd been trained with in the Army?
24 A Correct.
25 Q And did he tell you anything about what had happened

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ROUGH DRAFT TRANSCRIPT

1 THE COURT: For the record, we received three
2 questions from the jurors, and under the rules of evidence
3 we're not able to ask these questions. All right, thank you,
4 Ma'am, for your testimony. You are instructed not to discuss
5 your testimony with any other witness involved in this case
6 until this matter is finally resolved. Thank you for your
7 time, Ma'am.
8 THE WITNESS: Thank you.
9 THE COURT: State, please call your next witness.
10 MS. GRAHAM: That would be Officer Brian Santarossa.
11 THE MARSHAL: Officer Santarossa, if you'll remain
12 standing, please. Raise your right hand and face the clerk.
13 OFFICER BRIAN SANTAROSA
14 THE CLERK: Please be seated. Will you please state
15 your name and spell it for the record.
16 THE WITNESS: Brian Santarossn, B-r-i-a-n,
17 S-a-n-t-a-r-o-s-s-a.
18 DIRECT EXAMINATION
19 BY MR. GRAHAM::
20 Q Good morning, Officer.
21 A Good morning.
22 MR. PIKE: Your Honor during this testimony and
23 during the testimony of the trial there is a diagram of an area
24 that's been prepared. We've been provided a copy of that and
25 stipulated to its admission at this point in time.

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ROUGH DRAFT TRANSCRIPT

1 in Grenada?
2 MR. SMITH: Objection, Judge. Calls for hearsay.
3 MR. PIKE: Okay, let me rephrase the question.
4 BY MR. PIKE::
5 Q During the course of that time the -- in the
6 conversations that you had with him, you were able to form an
7 opinion that that training and that portion of it was
8 distasteful to him.
9 A Yes.
10 Q And that, in fact, it was those experiences that
11 caused him to start on his road to drinking.
12 A I don't know. No.
13 Q And he was drinking pretty much everyday at the end
14 of the relationship, wasn't he?
15 A Yes.
16 MR. SMITH: Judge, I'd renew my objection to
17 relevant.
18 THE COURT: Overruled.
19 MR. PIKE: Thank you. Nothing further.
20 THE COURT: Anything further, Mr. Smith?
21 MR. SMITH: No, Judge.
22 THE COURT: All right, thank you, Ma'am. Or any
23 questions from the jurors? Yes, we do. Counsel approach,
24 please.
25 (Bench conference).

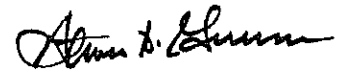
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ROUGH DRAFT TRANSCRIPT

1 THE COURT: Thank you, Mr. Pike. What number is
2 that?
3 MS. GRAHAM: State's Exhibit I.
4 THE COURT: I will be admitted.
5 MS. GRAHAM: Thank you, Judge.
6 MR. SMITH: Is it okay if I just stand up with my
7 co-counsel?
8 THE COURT: Yes.
9 BY MS. GRAHAM::
10 Q Officer Santarossa, how are you employed?
11 A Police officer with the Las Vegas Metropolitan Police
12 Department.
13 Q And how long have you been employed with Metro?
14 A About one and a half years.
15 Q And were you working in your capacity as an officer
16 on November 5th, 2008, this past year?
17 A Yes, I was.
18 Q Approximately 10:00 p.m.ish?
19 A Yes, ma'am.
20 Q Did you respond to a call at a location of 5001 El
21 Parque, Apartment 35 that evening?
22 A Yes, ma'am.
23 Q And what were the details of that call?
24 A The only details we initially got was that there was
25 a female lying in a bedroom and that there was blood every

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ROUGH DRAFT TRANSCRIPT


CLERK OF THE COURT

1 **NOTC**
2 DAVID ROGER
3 Clark County District Attorney
4 Nevada Bar #002781
5 CHRISTOPHER J. LALLI
6 Chief Deputy District Attorney
7 Nevada Bar #005398
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

9	THE STATE OF NEVADA,)	
10	Plaintiff,)	CASE NO: 08C250630
11	-vs-)	DEPT NO: XVII
12	BRIAN KERRY O'KEEFE,)	
13	#1447732)	
14	Defendant.)	

SUPPLEMENTAL NOTICE OF WITNESSES
[NRS 174.234(1)(a)]

16 TO: BRIAN KERRY O'KEEFE, Defendant; and

17 TO: PATRICIA PALM, ESQ., Counsel of Record:


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

20	<u>NAME</u>	<u>ADDRESS</u>
21	ARMBRUSTER, TODD	6344 BURGUNDY ST., LVN
22	BALLEJOS, J.	LVMPD P#8406
23	BAS, JENNIFER	LVMPD P#9944
24	BESSE, TOBIAS	1254 N. TORREY PINES #1154, LVN
25	BUNN, CHRISTOPHER	LVMPD P#4407
26	COLLINS, CHELSEA	LVMPD P#9255
27	CONN, TODD	LVMPD P#8101
28	CONNOR, MICHAEL	801 BINBROOK DR., HENDERSON, NV

1	DAHN, ROBBIE	LVMPD P#5947
2	DUNCAN, J.	LVMPD P#7157
3	DUTRA, DR. TIMOTHY	CCME, 1704 PINTO LN., LVN
4	EBBERT, LINDA	SANE/UMC
5	EGGLESTON, LINDA	3864 ALGONQUIN #2, LVN
6	FONABUENA, R.	LVMPD P#6834
7	FORD, DANIEL	LVMPD P#4244
8	GUENTHER, ED	LVMPD P#5891
9	HATHCOX, JIMMY	3955 CHINCHILLA AVE., LVN
10	HODSON, R.	LVMPD P#3711
11	HORN, D.	LVMPD P#1928
12	HUTCHERSON, C.	LVMPD P#12996
13	KELLY, S.	LVMPD P#6836
14	KOLACZ, ROBIN	MGR./CASA SALVATORE APTS.,
15	KYGER, TERESA	LVMPD P#4191
16	MALDONADO, J.	LVMPD P#6920
17	MONIOT, T.	LVMPD P#4664
18	MORGENSTERN, K.	LVMPD P#4665
19	MORRIS, CHERYL	C/O DAWN BARLOW/CCDA'S OFFICE
20	MOTT, HONEY	1500 STARDUST RD. #A-2016, LVN
21	MURPHY, KATE	LVMPD P#9756
22	NEWBERRY, DANIEL	LVMPD P#4956
23	OELAND, A.	LVMPD P#6942
24	PAZOS, E.	LVMPD P#6817
25	PENNY, B.	LVMPD P#6042
26	POINTON, C.	LVMPD P#7160
27	PRICE, RICHARD	LVMPD P#5626
28	RADMANOVICH, S.	LVMPD P#6420

1 RAMIREZ, V. LVMPD P#4916
2 RUMERY, S. LVMPD P#6734
3 SANTAROSA, B. LVMPD P#6930
4 STALLINGS, JOHN CCME, 1704 PINTO LN., LVN
5 STEIBER, R. LVMPD P#3542
6 TAYLOR, SEAN LVMPD P#8718
7 TINIO, NORMA 2992 ORCHARD MESA, HENDERSON, NV
8 TOLIVER, CHARLES 1013 N. JONES #101, LVN
9 TOLIVER, JOYCE 2218 DISK LANE, NLVN
10 WHITMARSH, ALEXANDRA 7648 CELESTIAL FLOW, LVN
11 WHITMARSH, DAVID 7648 CELESTIAL GLOW, LVN
12 WILDEMANN, MARTIN LVMPD P#3516
13 WONG, T. LVMPD P#6812

14 These witnesses are in addition to those witnesses endorsed on the Information and
15 any other witness for which a separate Notice has been filed.

16
17
18 BY 
19 DAVID ROGER
20 DISTRICT ATTORNEY
21 Nevada Bar #002781

22 CERTIFICATE OF FACSIMILE TRANSMISSION

23 I hereby certify that service of the above and foregoing, was made this 14th day of
24 January, 2011, by facsimile transmission to:

25 PATRICIA PALM, ESQ.
26 FAX: 386-9114

27 /s/Deana Daniels
28 Secretary for the District Attorney's
Office

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5 DISTRICT COURT
6 CLARK COUNTY, NEVADA
7

8 THE STATE OF NEVADA,)

9)
10 Plaintiff,)

11 vs.)

12 BRIAN KERRY O'KEEFE,)

13 Defendant.)
14)

CASE NO. C250630

DEPT. XVII

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

16 THURSDAY, JANUARY 13, 2011

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

18 **NOTICE OF MOTION AND MOTION BY DEFENDANT O'KEEFE TO**
19 **PRECLUDE THE STATE FROM INTRODUCING AT TRIAL IMPROPER**
20 **EVIDENCE AND ARGUMENT**

21 **APPEARANCES:**

22 For the State:

CHRISTOPHER LALLI, ESQ.,
Chief Deputy District Attorney

23
24 For the Defendant:

PATRICIA PALM, ESQ.,

25 RECORDED BY: MICHELLE L. RAMSEY, COURT RECORDER

1 LAS VEGAS, NEVADA; THURSDAY, JANUARY 13, 2011

2 [Proceeding commenced at 9:07 a.m.]

3
4 THE COURT: 250630, Brian O'Keefe. Mr. O'Keefe is present in
5 custody. Ms. Palm. Mr. Lalli coming up.

6 MS. PALM: Good morning, Your Honor.

7 THE COURT: Defendant's motion to preclude the State from
8 introducing at trial improper evidence and argument.

9 MS. PALM: Your Honor, would you like us to take this one at
10 a time? There's five different arguments or how would you -- how
11 would you like to do it?

12 THE COURT: No. Just hit your points and --

13 MS. PALM: Okay.

14 THE COURT: -- I've reviewed the motions.

15 MS. PALM: Okay. With respect to the first argument that the
16 State should be precluded from introducing evidence or argument to
17 show that Victoria Whitmarsh testified against O'Keefe in the prior
18 felony case. It's one thing, Your Honor, to say that she was the
19 named victim in that case, that he was convicted of the offense
20 against her. It's another thing when the prosecutor argues that
21 she testified against him for battering her previously; that she
22 stood right here in the courtroom like this when she testified
23 against him which is simply not true. It's presenting a false
24 light on the evidence when her testimony was actually recanting.

25 And you know we're not challenging that judgment of

1 conviction, but again the jury should not be given a false
2 impression of what her testimony actually was. And I think that,
3 you know, for us to say that she recanted to impeach Cheryl Morris
4 'cause Cheryl Morris says that's a whole motive of -- for O'Keefe
5 to be mad at her. He's mad at her because she testified against
6 him and so he wants to kill her; that's Cheryl Morris' testimony.

7 We should be able to impeach that without opening the
8 door to anything else and even with a limited instruction saying
9 you know that the fact she recanted can only be used to impeach
10 Cheryl Morris and not to challenge the judgment of conviction;
11 that's fine.

12 The State also should not be allowed to present
13 evidence that she testified against him and characterized it as --
14 in that manner because that's just false.

15 THE COURT: But at the -- in his first conviction, not
16 relating to this case.

17 MS. PALM: Right.

18 THE COURT: She recanted in trial, but did she testify
19 differently at a preliminary hearing or before the grand jury?

20 MS. PALM: That I don't know. I only know her trial
21 testimony.

22 THE COURT: So at trial she said he did nothing to me, but
23 bring me flowers and candy; is that --

24 MS. PALM: She --

25 MR. LALLI: No, that's not what she said.

1 THE COURT: Okay.

2 MR. LALLI: The transcripts attached. She -- she's the one
3 who called the police. She minimized. And, you know, we can get
4 into this little semantics game. She did testify. She didn't.

5 The fact of the matter is the Defendant knows that she
6 testified against him because she told -- he told Cheryl Morris I'm
7 going to kill that bitch for taking three years of my life. So
8 however they want to paint it today, years after the fact, he knew
9 the import of this woman testifying against him at the trial.

10 THE COURT: I remember that now.

11 Okay. Next item, Ms. Palm.

12 MS. PALM: The next item is Cheryl Morris' expanded testimony
13 that was actually introducing bad acts. We want to preclude all
14 that. Cheryl Morris testified at the preliminary hearing. She
15 testified at the prior trial and she gave a statement.

16 For the first time at the last trial she testified that
17 O'Keefe actually killed people. She didn't previously state --
18 state that in any of her testimony. She said that he showed her
19 how to could kill people and Mr. Smith, when he was arguing that
20 the State should be able to use that evidence, argued that it was
21 relevant to show his skill because he was trained by the military.
22 Not that he had killed people. Having killed people is incredibly
23 prejudicial. It's an obvious bad act and the State should not be
24 allowed to go there.

25 If the Court's going to allow them still to use Cheryl

1 Morris' testimony at all, I think she -- she turned out to be very
2 incredible at the last trial. I don't know if the Court remembers
3 that, but she actually is the one that testified that she had a
4 casual relationship with O'Keefe and that she admits on Cross that
5 she bought a car with him, she shared a bank account with him and
6 she actually went to his work crying when he left her.

7 So, she -- she turned out to be very incredible in her
8 testimony, but also going back to her expanding her testimony at
9 the last trial, she also testified that O'Keefe was kicked out of a
10 trailer which is just bad acts conduct; it's not relevant to
11 anything. It tends to show he's a bad character; that he yelled at
12 Cheryl Morris or that he stated he yelled at Cheryl Morris; that's
13 a bad act. We didn't have any notice of that and that's not
14 relevant.

15 That she -- that she slept behind a locked door when
16 the two of them split up. Mr. Lalli did point out in his
17 opposition that she did testify to that at the prior trial. I
18 didn't -- I did not recall that, but I still think it should be
19 excluded. I think it tends to show that she thought O'Keefe was
20 dangerous which is just not relevant to this case and it's overly
21 prejudicial.

22 She testified at the last trial for the first time that
23 a week before the incident, he was calling her asking her to meet
24 with him which indicates that he was going to cheat on Victoria
25 Whitmarsh. Again, it's speculative and incredible. She never

1 mentioned it before even though she's given, you know, one
2 statement, two prior testimonies.

3 And then she testified that at the last trial that he
4 demonstrated a different way of killing people which is slicing
5 them across the neck. She never said that in her statement to
6 police. She didn't state it at the preliminary hearing. She
7 didn't say that at the prior trial. You know, again that's
8 incredible. She keeps expanding her testimony every time she
9 testifies and the State shouldn't be allowed to keep adding to what
10 she's got to say given that none of it could be proved beyond clear
11 and -- proved by clear and convincing evidence since it's ever
12 changing.

13 MR. LALLI: Your Honor, the problem is with -- with retrials,
14 every time a witness hits the stand there are going to be minor
15 inconsistencies. Every time that a witness gives a statement to
16 the police, there are going to be inconsistencies. The witness
17 will remember things. The Court may recall the six-week trial that
18 we were all in on a capital case where a particular witness and I
19 know Ms. Palm might not be privy to this, but it's -- you had a
20 witness who had given multiple statements to the police. Had
21 testified in multiple hearings and Mr. Sgro did a cross-examination
22 that lasted most of the day; that's just the very nature of someone
23 giving multiple statements to the police.

24 There's going to be inconsistencies; that's a matter of
25 cross-examination. That's not a matter of exclusion. This is the

1 third time now that the defense has tried to exclude this evidence,
2 the third time. And as I've done in my motion, as I've indicated
3 just every single time that Cheryl Morris has testified to these
4 things.

5 We've never suggested that Mr. O'Keefe is a murderer or
6 that he has murdered someone before. Every single reference to his
7 killing including in the last trial was in the context of his
8 military service; every single one of them. So to try to now
9 reattack this as being my goodness, overly prejudicial is just
10 ludicrous.

11 The fact that somebody yelled is not a bad act; that's
12 just life. The fact that -- that a door was locked incidentally
13 Cheryl Morris had testified to that multiple times. So, there's
14 nothing in her -- and there is a reference to Ms. Palm says that
15 while she testified about a phone call that the Defendant made to
16 her just before Victoria was murdered, there's actually a reference
17 to that in her voluntary statement. The first voluntary statement
18 that she gave to the police, it was never really clarified, but
19 through pretrial conferences with her we were able to clarify that
20 and then ultimately elicited at the trial, so the Court has rule on
21 this.

22 In fact, in the last -- in the last -- before the last
23 trial, there was an attempt to try to exclude this evidence which
24 the Court denied. So, nothing is really changed. I think that the
25 same ruling should apply.

1 THE COURT: Mr. Lalli, let me get a better understanding on
2 the issue of the relevancy of the fact that Ms. Morris slept behind
3 a closed door. She had to lock herself in a bedroom.

4 MR. LALLI: The relevance of that?

5 THE COURT: Right.

6 MR. LALLI: Well, the relevance is -- is how this man treats
7 women. The -- it's relevant to intent. It's relevant to motive.
8 What you'll find is and we even argued how he treated Theresa
9 Keiger [phonetic] during the -- the interview. Theresa Keiger
10 [phonetic] was the homicide detective. How he kept referring to
11 her as young lady, young lady; things of that nature.

12 It's -- it's -- it's relevant for his motive, his
13 intent, how he perceives women in general. And she's testified to
14 this numerous times; that she slept behind a closed door. It's
15 also relevant because at the time of the murder, it's pretty clear
16 this Defendant and Victoria Whitmarsh, were although living under
17 the same roof, living separately.

18 The Court may recall that the -- there was a couch that
19 was made up as a bed in the living room, so they're sleeping apart
20 at -- at the same time. And the police had to come in and allow --
21 well, that might be a different case.

22 THE COURT: You have too many cases?

23 MR. LALLI: Well, possible.

24 THE COURT: And the issue that he was kicked out of the
25 trailer; can you address that again?

1 MR. LALLI: It's -- it's not a point of consequence in
2 explaining something Cheryl Morris mentioned that. It's -- it's
3 not a point -- it's simply not a point of -- of contentions.

4 THE COURT: Well, Ms. Palm was saying that this just puts him
5 in a bad light and that's her objection. I think -- I think that's
6 her objection.

7 MR. LALLI: That he was kicked out of the trailer and he was
8 charged with a murder case, I don't see how those --

9 THE COURT: Well --

10 MR. LALLI: -- things are -- I don't see how something like
11 that enters the guilt equation quite honestly. It's not something
12 that we intend to elicit. If the Court doesn't want us to elicit
13 it, we'll do our best not too, but -- but I just don't see it as --
14 as a matter of consequence in the case.

15 THE COURT: Well, you know, on relevant testimony is that the
16 testimony tends to prove the truth of the charges and the fact that
17 he was kicked out for whatever reason I don't -- separate trailers,
18 relevance -- I'm reconsidering my previous ruling. The issue of
19 kicked out of the trailer, I'm going to direct the State to
20 admonish Ms. Morris that she's not to provide that testimony.

21 And also, Mr. Lalli, for further consideration the
22 issue that she slept behind closed doors. If it was Ms. Whitmire
23 [phonetic] who slept behind closed doors on a regular basis because
24 she had a fear could be a different story. So those two items
25 slept behind closed doors and that he was kicked out of the trailer

1 will be excluded at the -- at the third trial. The State is
2 directed to admonish Ms. Morris not to discuss those items and
3 perhaps we'll do it before she testifies, so it's outside of the
4 presence of the jury panel.

5 MS. PALM: Thank you, Your Honor.

6 THE COURT: On all of the other issues, Ms. Palm, if she's
7 given numerous statements and expanded on the statements, those are
8 areas of impeachment on your part.

9 MS. PALM: Okay. Did the Court want to address the first --
10 go back and address the first issue or do you want to wait until
11 the end?

12 THE COURT: Well, on that issue there regarding the prior
13 testimony, I'm going to deny your motion on that issue.

14 And the issue of that the State referred to your
15 expert, he was paid thousands and thousands of dollars, I think
16 that's permissible argument. And I know there's a Nevada Supreme
17 Court case where you can't -- I mean, it was a doctor from
18 California and an attorney referred to him as someone from the hot
19 tub capital in Supreme Court.

20 MR. LALLI: Hired gun from hot tub country.

21 THE COURT: Something like that and the Supreme Court found
22 that inappropriate, but to merely state he was paid ten thousand
23 dollars for his testimony is proper impeachment and so --

24 MS. PALM: And that's not my only argument with -- with
25 respect to that though, Your Honor. He did argue last time that

1 Schiro was the Defendant's highest paid expert from Louisiana and
2 that Dr. Grey came all the way from Utah to tell us that he could
3 not rule out suicide. Those are appealing to regionalism. They're
4 appealing to biases against outsiders. They're inappropriate.
5 They're like the hot tub county argument. And he's talking about
6 the high paid expert again; that's inappropriate argument and I'm
7 seeking to preclude them from doing that.

8 And also part of the argument was that it's not fair
9 for them to refer to the cumulative cost here because last time --

10 THE COURT: I'm sorry, the cumulative --

11 MS. PALM: -- the cumulative cost --

12 THE COURT: I just didn't hear you that's all. Okay.

13 MS. PALM: -- for these experts because last time he argued,
14 you know, Schiro was paid over ten thousand dollars to come in here
15 and say this to you, but that's the fault of having three trials
16 now. It's going to probably be fifteen, sixteen thousand dollars.
17 And that's not fair to Mr. O'Keefe because with the amount of money
18 going up, it sounds like we're paying this guy an awful lot of
19 money and then Mr. Lalli wants to argue that he's saying what he's
20 saying because he's getting paid so much money. It's not Mr.
21 O'Keefe's fault that were on the third trial right now.

22 So it's not fair for the cost to keep raising and him
23 to be able to make that argument based on the cumulative cost of
24 retaining his expert. He should be able to ask about the cost for
25 this trial period.

1 MR. LALLI: Well, it -- all of that could be cured on cross-
2 examination; all of it. How much money -- it's interesting because
3 it -- it almost weighs in my favor the fact that here we go yet
4 another trial, we're using the same expert. It creates even more -
5 - my argument was it's a business venture for this expert because
6 all of his businesses through the Special Public Defender's Office
7 which is true.

8 This case originated in the Special Public Defender --
9 Defender's Office. Ms. Palm worked in the Special Public
10 Defender's Office at the time, so all of that could be cured with
11 through cross-examination. Well, you testified previously and your
12 testimony was the same then. It's the same now. It continues to
13 be the same. They can fix that.

14 This argument with respect to regionalism, that's a new
15 one. I've never heard that. And, in fact, if that were true we
16 call Dr. Benjamin to testify. He was actually a resident of
17 California. So, gosh, you know, that really doesn't work either.

18 We're allowed to impeach the credibility of witnesses.
19 If they're some suggestion that Mr. Schiro who comes in with, in my
20 opinion, ridiculous theories that maybe there might be some
21 financial motivation for him not to perjure himself. And I've
22 never called him a perjurer or a liar in Court. I've never imputed
23 him personally, but I'm certainly allowed to argue the bias
24 associated with his testimony. And there's absolutely nothing
25 wrong in the manner in which those arguments were made.

1 THE COURT: How's the State going to argue or present to the
2 doctors that you have now been paid let's say thirty thousand
3 dollars 'cause basically ten thousand per trip here, without the
4 trip -- they might question why are you testifying three separate
5 times.

6 MR. LALLI: Previous hearings associated with the case; that
7 happens all the time.

8 THE COURT: Ms. Palm, anything further?

9 MS. PALM: Well, he -- he did argue last time that it
10 impugned his credibility. Like he said he was paid ten thousand
11 dollars to walk in this courtroom and say what he did. His total
12 bill was over ten thousand dollars and when someone is getting that
13 kind of money, do you think they might extend themselves a little
14 bit? That's his argument and that's why we're biased by them being
15 able to refer to the cumulative cost when it's not Mr. O'Keefe's
16 fault.

17 And we're not telling the jury that there's been prior
18 trials, so they're going to think he's been paid that much money
19 for this one case.

20 MR. LALLI: There's prior hearings. I'm sure like I did with
21 the last trial, I'm sure I will attack his credibility based upon
22 inconsistencies in his testimony like I did last time, so they're
23 going to know there's prior hearings.

24 THE COURT: I'm going to allow the testimony. Just make sure
25 he refers to his prior hearings and as a total of prior hearings

1 you've been paid twenty thousand dollars or whatever the amount. I
2 think its appropriate impeachment.

3 Next issue, Ms. Palm.

4 MS. PALM: The next issue --

5 THE COURT: And I don't see any regionalism that someone came
6 from Louisiana or Utah. Mr. Lalli is not attacking someone well we
7 have this expert from the Bayou or something like that; that would
8 be inappropriate the same as hot tub capital.

9 MS. PALM: The next issue was to preclude them from arguing
10 and introducing evidence relating to domestic violence syndromes,
11 effects or the dynamics of domestic violence in general or trying
12 to kind of get the jury in finding the cause of domestic violence.
13 They did some of that questioning about domestic violence during
14 jury selection last time and the Court ruled that they couldn't
15 talk about syndromes or defining that term. They couldn't talk
16 about, you know, the whole community problem and because that's
17 improper.

18 And then in closing argument, they made several
19 references to domestic violence. Kind of theories and what
20 domestic violence is about. And there's not evidence admissible
21 here for the -- to show that Mr. O'Keefe had the character trait of
22 an abuser. The prior felony was only admitted and it's supposed to
23 be with limiting instruction to show that there was intent in this
24 case or malice in this case because this is now a second degree.
25 And so to argue about domestic violence in general is improper.

1 And we also, I'm sure the Court's probably aware, we
2 have motions set for next -- for the 20th which is two days after
3 calendar call on the whole domestic violence issue.

4 THE COURT: I'm not --

5 MS. PALM: Okay.

6 THE COURT: -- I'm not aware of it until a couple of days --

7 MS. PALM: Well, they noticed --

8 THE COURT: -- right.

9 MS. PALM: -- a domestic violence expert who is allegedly
10 going to come in and testify about syndromes or battered woman
11 syndrome. I filed a motion to preclude their expert and then I
12 filed a motion based to dismiss this case based on double jeopardy.

13 They filed a motion to admit other bad acts and those
14 are all going to be heard on the 20th, so I'm not sure if the Court
15 wants to deal with this now.

16 THE COURT: On the issue of domestic violence, I'll defer
17 that until we have the hearing on the other motion.

18 I would like the -- the ability, Ms. Palm, to review
19 motions four weeks in advanced. Some of our caseload of two
20 thousand cases doesn't allow me to do that.

21 MS. PALM: Okay. So we'll move that one to the 20th and then
22 number -- number 5 was the prior convictions for non-support and
23 State and I are in agreement those are inadmissible.

24 THE COURT: State's not going to seek?

25 MR. LALLI: That's correct. I mean, they -- it doesn't

1 appear that even though they're felonies in Ohio, they probably
2 don't need the statute here.

3 THE COURT: Okay, so that's excluded.

4 All right, we'll see you back next week.

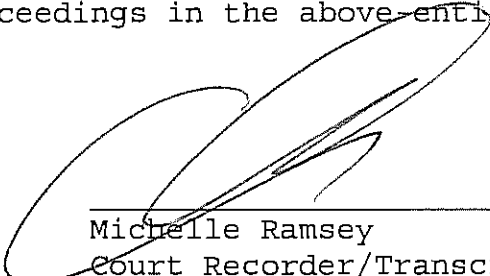
5 MR. LALLI: Thank you, Your Honor.

6 THE COURT: All right. Thank you.

7 [Proceeding concluded at 9:26 a.m.]
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20 ATTEST: I hereby certify that I have truly and correctly
21 transcribed the audio/video proceedings in the above-entitled case
22 to the best of my ability.
23
24
25



Michelle Ramsey
Court Recorder/Transcriber

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FILED

JAN 18 1 45 PM '11

Ann L. Johnson
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

BRIAN K. O'KEEFE,

Defendant.

CASE NO: C250630

DEPT. NO: XVII

DATE: 1/20/11

TIME: 8:15a.

**DEFENDANT O'KEEFE'S OPPOSITION TO MOTION IN LIMINE TO
ADMIT EVIDENCE OF OTHER BAD ACTS PURSUANT TO NRS 48.045
AND EVIDENCE OF DOMESTIC VIOLENCE PURSUANT TO 48.061**

COMES NOW the Defendant, Brian O'Keefe, by and through his attorney,
Patricia Palm of Palm Law Firm, Ltd., and hereby opposes the State's Motion to
Admit Evidence of Other Bad Acts, above-named, which was filed on served on
Defendant's counsel on January 7, 2011.¹

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¹The State's Certificate of Facsimile Service certifies that the document was served
on January 6, 2011. That date is incorrect, as the document was actually served by
facsimile in the late afternoon of January 7, 2011.

1 This Opposition is made and based upon all papers and pleadings on file with
2 this Court, the United States and Nevada Constitutions, the attached Points and
3 Authorities, and any argument as may be had at the time of hearing.

4 Dated this 18th day of January, 2011.

5 PALM LAW FIRM, LTD.

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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

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

6 After remand to this Court, O'Keefe continued to assert his rights to a speedy
7 trial, and the case was retried beginning August 23, 2010. During that trial, the
8 State introduced new bad act evidence and arguments never before noticed and/or
9 ruled upon. O'Keefe moved for a mistrial during that case, based upon
10 prosecutorial misconduct during closing argument. That motion was denied.
11 8/31/10 TT 163-65, 168-69. The retrial ended with a hung jury. Again, O'Keefe
12 invoked his speedy trial rights and the case was set to begin a third trial on
13 January 24, 2011.

14 On January 2, 2011, O'Keefe filed a Motion to Preclude the State from
15 Introducing at Trial Improper Evidence and Argument, including matters related to
16 Victoria Whitmarsh's prior testimony in Case C207835 (felony domestic battery
17 case), Cheryl Morris's allegations that O'Keefe had committed "other bad acts"
18 including killing people and yelling at Whitmarsh, expert witness disparagement
19 and improper impeachment, evidence relating to domestic violence syndromes,
20 causes, etc., and evidence relating to O'Keefe's failure to pay child support
21 convictions.

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

1 On January 7, 2011, O'Keefe filed and Served a Motion to Dismiss on
2 Grounds of Double Jeopardy Bar and Speedy Trial Violation and, alternatively, to
3 Preclude State's New Expert Witness, Evidence and Argument Relating to The
4 Dynamics or Effects of Domestic Violence and Abuse. The same date, the State
5 served on O'Keefe its pending Motion in Limine to Admit Evidence of Other Bad
6 Acts Pursuant to NRS 48.045 and Evidence of Domestic Violence Pursuant to NRS
7 48.061. Both of these motions were set for argument before this Honorable Court
8 on January 20, 2011.

9 On January 13, the Court heard partial argument O'Keefe filed a Motion to
10 Preclude the State from Introducing at Trial Improper Evidence and Argument.
11 The Court denied O'Keefe's request to preclude the State from introducing
12 evidence/argument to show that Whitmarsh testified "against him" in a prior Felony
13 Domestic Battery Conviction in C207835, when in fact, she had recanted during her
14 testimony and denied abuse. The Court denied O'Keefe's requests to prevent
15 witness Cheryl Morris from testifying that O'Keefe had killed people during
16 military service, that O'Keefe had demonstrated how he would kill a person with a
17 knife, that O'Keefe had yelled at Whitmarsh, and the Court granted O'Keefe's
18 request to preclude evidence that Morris locked her bedroom door and that O'Keefe
19 had been kicked out of his trailer. The Court also denied O'Keefe's request to
20 prevent certain questioning and argument related to his expert witnesses, and the
21 Court granted O'Keefe's request to preclude the use of his prior convictions for
22 failure to pay child support. The Court continued argument on the final issue
23 raised by O'Keefe: That the State should be precluded from arguing or introducing
24 evidence related to domestic violence syndromes, effects or dynamics or the general
25 cause of fighting against domestic violence. That argument is set to be heard at the
26 same time as the other motions set for January 20, 2011.

27 The original calendar call of January 18, 2011, has been continued to
28 January 20, 2011, because whether O'Keefe's will or can go forward depends on the
outcome of the Court's ruling on the pending motions.

RELEVANT FACTS

1
2 Preceding the August 2010 retrial, O'Keefe sought to introduce expert
3 testimony and evidence regarding Whitmarsh's diagnosed psychological conditions
4 and mental health history. See August 19, 2010 Motions Hearing Transcript 28-36;
5 8/23/11 TT 1-11; see also Motion By Defendant O'Keefe to Admit Evidence
6 Pertaining to the Alleged Victim's Mental Health Condition and History, filed
7 7/21/10; and Court's Exhibit B admitted during the March 2009 trial. In opposition
8 to the defense request for admission of Whitmarsh's various diagnoses, which
9 included bipolar disorder, borderline personality traits, panic attacks with
10 agoraphobia, and anxiety disorder, the prosecutor argued, "*I mean, now what we're*
11 *going to do is we're going to have a - a shrink come in, I guess, and analyze someone*
12 *who's dead after the fact.*" The Court responded, "*Well, we're not having it at this*
13 *point.*" 8/19/10 Motions Hearing Transcript at 35. The defense argued, in part, that
14 Whitmarsh's mental health history and conduct shown in the medical records was
15 relevant to show alternative reasons why the knife might have been brought into
16 the bedroom and why the neighbors might have heard noises when Whitmarsh was
17 alone in the apartment, and to show a possible non-criminal cause of death and
18 balance the prejudice from the evidence of O'Keefe's prior conviction and Morris's
19 accusations being admitted to show intent/motive. The Court ruled that the parties
20 should attempt to determine to which evidence from the medical records they might
21 stipulate. The parties disagreed on a stipulation, and the Court granted in part, the
22 defense's request to present certain facts. However, the Court denied the defense's
23 request to present evidence of Whitmarsh's diagnoses or expert testimony related to
24 these diagnoses. 8/23/10 TT 8-10; 8/24/10 TT 2-11.

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

27 To briefly summarize the basic evidence presented at trial, O'Keefe and
28 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

1 prison. 8/26/10 TT 27; 8/30/10 TT 169. He was released from prison in April, 2007,
2 and in January, 2008, he began dating Cheryl Morris. Later, in June, 2008, he also
3 resumed a relationship with Whitmarsh. 8/26/10 TT 27. By September, 2008,
4 O'Keefe had left Morris in favor of Whitmarsh, and he and Whitmarsh began living
5 together. Id. at 35.

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

18 During the first trial, all parties operated under the assumption that O'Keefe
19 could introduce evidence of the loving and forward looking relationship of O'Keefe
20 and Whitmarsh during the period after he was released from prison. 3/16/09
21 Transcript at 12; see, e.g., 3/16/09 TT 259 (Jimmy Hathcox's testimony that during
22 period of time Whitmarsh and O'Keefe lived at El Parque they appeared to be an
23 open and loving couple); 3/19/09 TT 19-21 (testimony of Louis DeSalvio that
24 Whitmarsh and O'Keefe seemed very upbeat in the fall of 2008). During the retrial
25 in August, 2010, the State sought to limit the evidence that O'Keefe could introduce
26 as rebuttal to the evidence from Cheryl Morris regarding O'Keefe's alleged hatred of
27 Whitmarsh. 8/26/10 TT 11-21. The Court limited the defense to asking what the
28 witnesses saw during the relevant time period (versus opinion on the couple's

1 interaction), so as to not open the door to cross-examination on other prior bad acts.
2 Id. at 21; 8/25/10 TT 114.

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

11 Specifically, Morris testified that O'Keefe would become angry over being
12 sent to prison based upon a trial involving Whitmarsh. 8/26/10 TT 29-30. He would
13 say he hated the bitch and wanted to kill her. He did this multiple times. Id. at 30.
14 During the same conversations, he would tell her about his experience in the
15 military killing people. Id. He would talk about it and say it was either kill or be
16 killed and he would talk about the kind of weapon he would use. Id. He said the
17 military trained him to kill. Id. He was very equipped for hand to hand combat,
18 basically using a knife. He would describe killing someone by taking a knife and
19 shoving it upwards toward their sternum and pulling up. Or perhaps coming up
20 from behind and taking the knife from the left side of the neck to the right side. Id.
21 at 31. (The alleged victim was killed by a puncture type stab wound under her
22 armpit that went directionally from front to back and downward.) See 3/18/09 TT
23 103, 118 (description of wound).

24 Morris also testified for the first time that O'Keefe got "kicked out" of the
25 trailer he was living in. 8/26/10 TT 28. Morris further testified at the retrial that
26 O'Keefe was attracted to Whitmarsh because she was submissive. If he yelled at
27 her, she'd do whatever he asked. Id. at 32.

28 Other evidence at the retrial showed that on November 5, 2008, beginning
shortly after 9:00 p.m., downstairs neighbors began hearing noise coming from

1 O'Keefe and Whitmarsh's upstairs apartment. 8/26/10 TT 85. There had never
2 been noise up there before; the couple was very quiet. Id. at 85, 91. The only voice
3 heard sounded like a female. Id. at 98. Charles Toliver went upstairs and found
4 O'Keefe and Whitmarsh in their bedroom; O'Keefe was holding Whitmarsh and
5 talking to her, and she appeared to be unconscious. Id. at 135-38, 152. Charles ran
6 out of the apartment and started hollering for help. Id. at 140. Jimmy Hathcox,
7 who lived next door to O'Keefe and Whitmarsh, had also heard a little ruckus going
8 on, but the walls are paper thin and it did not seem out of the ordinary. Id. at 250-
9 51. Hathcox never heard yelling, and the noises he heard from the apartment could
10 have been someone banging things around in a temper fit. Hathcox heard a bang
11 on the rail outside, looked out and saw O'Keefe entering his apartment. Id. at 253-
12 54. About 15 minutes after Hathcox saw O'Keefe enter the apartment, he heard
13 Toliver yelling for help. Id. at 253.

14 Police responded but O'Keefe did not obey their commands that he leave
15 Whitmarsh's body. While lying next to Whitmarsh, he was twice tased then
16 arrested. 8/27/10 TT 84-85, 169. It was possible that Whitmarsh was bumped
17 during the arrest process, and O'Keefe went on top of her body during the tazing. It
18 was apparent that O'Keefe was extremely intoxicated. Id. at 133. He was
19 interviewed, and the redacted interview, was played for the jury. 8/30 TT 180.

20 Law enforcement found no disarray in O'Keefe's apartment, except for in the
21 bedroom where O'Keefe and Whitmarsh were found. There was a large knife on the
22 bed, and analysis of it showed both Whitmarsh's and O'Keefe's blood. 8/27/10 TT
23 220; 8/30/10 TT 151-55.

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

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

3 The State's medical examiner, Dr. Benjamin, ruled the cause of death was
4 homicide, but neither she, nor the defense expert medical examiner, Dr. Grey, could
5 rule out accident or suicide based on the physical evidence. 8/25/10 TT 104, 106;
6 8/26/10 TT 170-71. Whitmarsh had both healing and acute bruising, but few of the
7 bruises were determined to be acute, and the bruising could have been consistent
8 with bumping into things or being bumped into, and also would have been likely
9 been exacerbated by Whitmarsh's advanced liver cirrhosis and use of alcohol. Her
10 blood alcohol level at the time of death was .24. 8/25/10 TT 78; 8/26/10 TT 161-223.

11
12 **The new other bad act evidence which the State seeks to admit:**

13 **1. Event No. 030107-0129 (Obstructing misdemeanor conviction**
14 **stemming from January 7, 2003 incident).**

15 O'Keefe has been provided in discovery only a three page incident report by
16 Officer Pointon. That report references the existence of a "domestic violence
17 report," and a "voluntary statement" by Victoria Whitmarsh. Neither of those
18 documents has been provided to the defense. Nor have any other reports,
19 photographs or other evidence. O'Keefe pleaded guilty to obstructing an officer and
20 not a domestic battery offense.

21
22 **2. Event No. 030804-2025 (never charged, August 4, 2003 incident)**

23 The defense has only been provided with a three page incident report by
24 Officer Oeland, which references a voluntary statement by Victoria Whitmarsh.
25 The incident report states the allegation full, "Victoria declares that Brian grabbed
26 her ponytail and was going to pull her hair, but she said, "Don't," so he didn't."
27 There is no reference to any carrying Victoria, or dropping her, or pouring water on
28 her mentioned in the State's motion. The defense had not been provided with the

1 voluntary statement by Whitmarsh, any other reports, photographs or other
2 evidence. No charges were even filed in this case.

3
4 **3. Event Number 031114-0539 (November 14, 2003 incident, 1st misd.**
5 **BDV conviction)**

6 The defense was given only a three page incident report by Officer Wong,
7 which report refers to voluntary statements by Victoria Whitmarsh and Michelle
8 Mott. Neither of those documents has been provided to the defense. Nor have any
9 other reports, photographs or other evidence. O'Keefe was charged with
10 misdemeanor battery, and pled guilty to a first offense.

11 **4. Event Number 031126-0903 (November 26, 2003 incident,**
12 **dismissed)**

13 The defense has been provided only a two page incident report, which refers
14 to a voluntary statement of Whitmarsh, and another from Michael Connor. Neither
15 of these documents has been provided to the defense. Nor have any other reports,
16 photographs or other evidence. Moreover, this case was dismissed and did not
17 result in a conviction.

18 **5. Event Number 040402-3158 (April 2, 2003 incident, BDV 3rd**
19 **conviction - felony case C207835)**

20 The State has provided the defense with only a three page incident report.
21 That report refers to a voluntary statement by Victoria Whitmarsh: that document
22 has never been provided. This offense is the 3rd BDV conviction for felony for which
23 O'Keefe was sentenced to prison. The Court has already ruled that the fact of this
24 felony conviction is admissible in the State's case in chief, but only the fact of the
25 conviction, the jurisdiction, the date, and the fact that Whitmarsh testified in the
26 State's case against O'Keefe.

27 ///

28 ///

1 reviews and even moved for discovery on August 2, 2010. O'Keefe also conducted
2 two file reviews prior to the August 2010 retrial. Despite the fact that voluminous
3 evidence is obviously in the State's possession, the State has never provided the
4 defense with any more than simple incident reports. Indeed, O'Keefe is unaware of
5 upon which evidence the State relies for its motion's statement of the prior
6 incidents, since most of the State's allegations have never been shown in any
7 document provided to defense counsel. O'Keefe has proactively litigated every
8 aspect of this case, and the State has affirmatively indicated that it did not intend
9 to introduce the evidence which it now seeks to admit. Thus, O'Keefe had no cause
10 to waste defense resources to prepare for mini-trials on the prior allegations.

11 Pursuant to NRS 174.235, the defense is entitled to discovery to include the
12 statements of any witness the prosecuting attorney intends to call in the case in
13 chief of the State, results or reports of any examination or testing made in
14 connection with a particular case, and books, papers, documents, and tangible
15 objects which the State intends to introduce in its case in chief. Moreover, pursuant
16 to constitutional due process under the State and Federal Constitutions, O'Keefe is
17 entitled to evidence, "if it provides grounds for the defense to attack reliability,
18 thoroughness, and good faith of the police investigation, to impeach credibility of
19 the state's witnesses, or to bolster the defense case against prosecutorial attacks[,]
20 and this obligation is not limited to evidence that will be admissible at trial.
21 Mazzan v. Warden, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000); U.S. Const., amend. V,
22 XIV; Nev. Const. art. 1, sec. 8. The State's failure to provide adequate discovery in
23 a timely manner should prevent it from introducing such evidence, which the
24 defendant has had no opportunity to adequately investigate or prepare to meet.
25

26
27 **B. The evidence is neither relevant nor admissible pursuant to NRS**
28 **48.045.**

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

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

- 15 1. Although relevant, evidence is not admissible if its probative value
16 is substantially outweighed by the danger of unfair prejudice, of
17 confusion of the issues or of misleading the jury.
- 18 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. . . .

19 Additionally, "[a]bsent certain exceptions, evidence of a person's character or
20 a trait of his character is not admissible for the purpose of proving that he acted in
21 conformity therewith on a particular occasion. This includes evidence of other
22 crimes, wrongs or acts, which is not admissible to prove the character of a person in
23 order to show that he acted in conformity therewith." Taylor v. State, 109 Nev. 849,
24 853, 858 P.2d 843, 846 (1993). Prior to admitting such other act evidence, the State
25 must first bring a "Petrocelli" motion and request a hearing to determine if "(1) the
26 incident is relevant to the crime charged; (2) the act is proven by clear and
27 convincing evidence; and (3) the probative value of the evidence is not substantially
28 outweighed by the danger of unfair prejudice." Roever v. State, 114 Nev. 867, 872,

1 963 P.2d 503, 505-06 (1998) (citing Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d
2 1061, 1064-65 (1997); (Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985)).
3 However, even if the other-act evidence is relevant to a permissible purpose and
4 proven by clear and convincing evidence, a court should still exclude it if its
5 probative value is substantially outweighed by the danger of unfair prejudice. Id. at
6 872, 963 P.2d at 505-06 (citing Tinch, 113 Nev. at 1176, 946 P.2d at 1064-65.

7 The Nevada Supreme Court recognizes that the use of character evidence to
8 convict a defendant is extremely disfavored in our criminal justice system. Such
9 evidence is likely to be prejudicial and irrelevant and forces the accused to defend
10 against vague and unsubstantiated charges. It may improperly influence the jury
11 and result in the accused's conviction because the jury believes he is a bad person.
12 The use of such evidence to show a propensity to commit the crime charged is
13 clearly prohibited by the law of this state and is commonly regarded as sufficient
14 ground for reversal on appeal. See Taylor, 109 Nev. at 854, 858 P.2d at 847.

15 The State has failed to demonstrate how it will prove any of the alleged prior
16 offenses by clear and convincing evidence. That is, the State does not indicate in its
17 motion how any of the evidence in support of the priors might be admissible.
18 Because the defense does not have full discovery pertaining to these prior offenses,
19 despite multiple file reviews and a discovery motion, it is impossible to determine
20 how to defend against the State's assertions.

21 The State already has permission to admit the fact of conviction for felony
22 domestic battery. Incidents numbered 1, 2 and 4 above did not result in domestic
23 violence convictions. Number 1, was a conviction for obstructing. Number 2 was
24 not charged because of insufficient evidence. Number 4 was dismissed. As for
25 number 7 above, O'Keefe was acquitted of the sexual assault charges though they
26 are described at length in the State's motion. It does not appear from the meager
27 evidence provided to the defense that any witness actually saw any abuse by
28 O'Keefe.

1 Because there were not independent witnesses to any battery, each of the
2 proposed incidents rely on hearsay accusations of Ms. Whitmarsh as to what
3 happened. To the extent that the State intends to rely on prior statements of
4 Whitmarsh, this would violate O'Keefe's Sixth Amendment rights as set forth in
5 Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004), Melendez-Diaz v.
6 Massachusetts, 557 U.S. ___, 129 S. Ct. 2527 (2009), and Polk v. State, 126 Nev.
7 ___, 233 P.3d 357 (2010).

8 Moreover, even though Whitmarsh may have actually testified, at least with
9 respect to the felony BDV conviction already admissible, she recanted in that
10 testimony. Also, the State has not timely noticed its intent to admit *any* prior
11 testimony. If the State desired to admit any of Whitmarsh's prior testimony, it
12 would be required to make a timely motion, at least 15 days before trial. EDCR
13 3.20, 3.28, and NRS 174.125. The State would be required to show good cause to
14 support the untimely motion. Hernandez v. State, 124 Nev. ___, 188 P.3d 1126
15 (2008). Here, the State appears to be sidestepping the requirements of the rules by
16 filing a motion to admit bad acts. However, that document contains no reference to
17 prior testimony, and there has been no motion to admit prior testimony.
18 Considering that the State had since November, 2008, when O'Keefe was first
19 arrested, to move to admit prior testimony of Whitmarsh, there is no good cause to
20 allow a late request. In addition, Whitmarsh was not subjected to adequate cross-
21 examination in the context of this case, as we now know her substantial mental
22 health history, which is detailed more fully in connection with O'Keefe's Motion to
23 Dismiss. Given the host of psychiatric disorders which Whitmarsh suffered from,
24 and her conduct following the allegations which imprisoned him, O'Keefe should
25 have been able to cross-examine Whitmarsh on her mental health issues, including
26 bipolar disorder II, depressed versus recurrent major depressive disorder, and
27 borderline personality traits, past auditory hallucinations, her history of impulse
28 control and anger problems, and her prior reports of abuse against her husband.

1 Therefore, the admission of her prior testimony would violate his confrontation
2 rights.

3 Furthermore, this Court has already conducted the balancing determination
4 necessary under Petrocelli, and it determined that the prior felony domestic battery
5 conviction would be admissible to show motive/intent. The State grossly misstates
6 the strength of its case in arguing that a different balance should now apply. Not
7 only has our Supreme Court stated there is not overwhelming evidence of a second
8 degree murder, the jury hung at the last trial, even with the improper introduction
9 of other bad acts evidence and improper argument by the State.

10 In addition, the State has never alleged a theory of second degree murder
11 based upon an unlawful act; however, the State by its motion seeks to show that
12 Whitmarsh's death was a result of a domestic battery, and this must be so because
13 of O'Keefe's propensity to batter. Allowing the State to proceed with such an
14 unnoticed theory would violate O'Keefe's due process rights, as previously
15 determined by the Supreme Court had already happened in this case. "[T]he State's
16 charging document did not allege that O'Keefe killed the victim while he was
17 committing an unlawful act and the evidence presented at trial did not support this
18 theory of second-degree murder." O'Keefe v. State, NSC Docket No. 53859, Order of
19 Reversal and Remand (April 7, 2010). The Court further stated, "The district
20 court's error in giving this instruction was not harmless because it is not clear
21 beyond a reasonable doubt that a rational juror would have found O'Keefe guilty of
22 second-degree murder absent the error." Id. at 2. See also Jennings v. State, 116
23 Nev. 488, 998 P.2d 557 (2000).

24 In addition, introduction of such evidence at trial would cause unfair
25 prejudice and confuse the issues and mislead the jury. NRS 48.035(1) (Although
26 relevant, evidence is not admissible if its probative value is substantially
27 outweighed by the danger of unfair prejudice, of confusion of the issues or of
28 misleading the jury.) O'Keefe has never claimed that he killed Whitmarsh

1 purposely in self-defense. His defense theory has been that she either stabbed
2 herself, or, she must have been accidentally stabled during the struggle when he
3 sought to ward off her knife attack. Here, the evidence of prior batteries is not
4 sufficiently probative of an intent to kill. None of the prior incidents involved the
5 use of a knife or an attempt to kill. Thus, even under the cases upon which the
6 State relies, the evidence would not be admissible. See, e.g., People v. Johnson, 185
7 Cal. App. 4th 520 (2010) (incidents not involving use of weapons were not admitted
8 in case where defendant was alleged to have shot his ex-girlfriend in the back). In
9 addition, as noted in the various other motions to this court, and most specifically,
10 the recent Motion to Dismiss, Whitmarsh suffered from a host of psychological
11 disorders which may have affected her conduct and reporting of conduct. She also
12 made similar allegations about her former husband. O'Keefe was twice married
13 and there have been no such allegations against him.

14 The evidence is overly prejudicial, as it tends to show that O'Keefe acted with
15 a character trait of being an abuser. See Longoria v. State, 99 Nev. 754, 670 P.2d
16 939 (1983) (evidence of prior stabbing improperly admitted to show intent to kill
17 another person a month later by stabbing); Roever, 114 Nev. 867, 963 P.2d 803
18 (improper to admit evidence of various threats and violent conduct, which served to
19 inflame jury). Moreover, this is not a strong case for the State. None of the experts
20 could rule out suicide or accident based on the physical evidence. There was no
21 evidence that any sort of domestic dispute had occurred between these two people in
22 the days and weeks before the incident. Indeed, the neighbors and friends have
23 testified to the contrary, i.e., that they were a loving, forward looking couple, who
24 were quiet neighbors. It is apparent why the State needs this testimony: to bolster
25 its weak case. However, in defending against the evidence, which greatly increases
26 the likelihood of conviction based on the improper use of character evidence, the
27 trial would be sidelined by mini-trials on the alleged prior offenses.

1 Finally, the State's citation to the unpublished order in Holcomb v. State, is
2 in direct violation of SCR 123, which provides in relevant part, "An unpublished
3 opinion or order of the Nevada Supreme Court shall not be regarded as precedent
4 and shall not be cited as legal authority" Therefore, this Court should refuse to
5 consider the State's prohibited argument based on Holcomb.

6
7 **C. NRS 48.061 does not create an exception to the presumption against**
8 **prior act evidence to show propensity.**

9 Contrary to the State's assertion, there is no exception in Nevada to allow the
10 evidence in question despite the presumption against admitting such evidence
11 under NRS 48.045. Specifically, the State relies on the 2001 amendments to NRS
12 48.061, which both allowed the State to introduce evidence of domestic violence and
13 its effects, and at the same time made clear that the State could not use expert
14 testimony to prove the basis of a charge against a criminal defendant. That statute
15 provides, in full:

16 (1) Except as otherwise provided in subsection 2, evidence of domestic
17 violence and expert testimony concerning the effect of domestic
18 violence, including, without limitation, the effect of physical, emotional
19 or mental abuse, on the beliefs, behavior and perception of the alleged
20 victim of the domestic violence that is offered by the prosecution or
21 defense is admissible in a criminal proceeding for any relevant
22 purpose, including, without limitation, when determining:

23 (a) Whether a defendant is excepted from criminal liability pursuant
24 to subsection 7 of NRS 194.010, to show the state of mind of the
25 defendant.

26 (b) Whether a defendant in accordance with NRS 200.200 has killed
27 another in self-defense, toward the establishment of the legal defense.

28 (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.*

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

3
4 (Emphasis added.)

5 Also, contrary to the State's suggestion, the clear legislative intent in
6 enacting the amendment to NRS 48.061, allowing the prosecution to introduce
7 evidence relating to domestic violence, was to remedy the problem of testifying but
8 recanting victim, versus create an exception to the normal rules of evidence
9 disfavoring bad act evidence. As the minutes reflect, a proponent of this change,
10 Gemma Waldron, Legislative Representative, Washoe County District Attorney's
11 Office and Nevada District Attorney's Association,

12 explained to the committee that under current law, a defendant who
13 was charged with a violent crime could bring in expert testimony and
14 evidence to make the claim of self-defense by showing that the crime
15 committed by the defendant was a result of being abused over many
16 years. However, the state was not allowed under current law to bring
17 in experts to discuss the cycle of violence in order to explain the
18 testimony given by a victim who had been battered by the defendant
19 and testified in a manner that assisted the defense rather than the
20 state, by minimizing the actions of the defendant. Ms. Waldron stated
21 most jurors were not aware of the consequences of the cycle of violence
22 and could not understand how the state could bring a case against a
23 defendant despite testimony by the victim that minimized the behavior
24 of the defendant. Ms. Waldron indicated without any mechanism to
25 explain the victim's testimony, it was difficult to convict the defendant.
26 A.B. 417 would allow the state to bring in an expert witness to explain
27 why a victim of violence would minimize a batterer's behavior.

28 Minutes of the Assembly Committee on the Judiciary, April 5, 2001. Prior to
29 passage of AB 417, the Senate amended the proposed bill to make clear that an
30 expert could not testify in order to prove the underlying offense against a defendant.
31 The Minutes of the Senate Committee on the Judiciary, May 16, 2001, reflect as
32 follows:

33 Ms. Waldron noted an attempt is not being made to change current
34 law, just add something to it. Answering a question, Ms. Waldron said

1 they want to bring in expert testimony to explain the cycle of violence.
2 She stressed the expert would not be asked to give an opinion on the
3 ultimate issue of the case. She said that is why the language is in the
4 bill. Senator James inquired, "What other purpose would it be used
5 for?" Ms. Waldron answered, "To explain why she is testifying the way
6 she is."

7 Id. Thus, the history is clear that our legislature sought to make clear the evidence
8 of prior offenses would be admissible when the prosecution had to impeach a
9 recanting victim. At the same time, the legislature, by adding subsection 2,
10 intended to assure that expert testimony would not be admissible to prove the
11 charge against a defendant.

12 Additionally, the State relies on out-of-state authorities, which have no
13 persuasive effect in interpreting Nevada's statutes. The other states in question
14 enacted laws creating an exception in cases of domestic violence to the general
15 presumption against the admissibility of other bad act evidence to show propensity.
16 Such an exception was also proposed in Nevada in 2001, as Assembly Bill 436. The
17 relevant language of the bill stated, "Chapter 48 of NRS is hereby amended by
18 adding thereto a new section to read as follows: 1. Except as otherwise provided in
19 subsection 2, evidence that a defendant who is charged with a crime which
20 constitutes domestic violence previously has committed an act that constitutes
21 domestic violence is admissible in a criminal proceeding." *However, that bill met*
22 *opposition, and it died in committee and was not passed.* See Minutes of the
23 Assembly Committee on Judiciary, April 2, 2001.

24 In sum, contrary to the State's lengthy dissertation on other state's
25 inapposite laws, in Nevada the general presumption against the admissibility of
26 this evidence to show propensity stands.

27 ///

28 ///

///

1 **D. To allow the State to improve its case after a hung jury, following**
2 **its own misconduct, is inconsistent with double jeopardy protection**

3 As argued by way of the Defense Motion to Dismiss, to allow the State to
4 improve its case following two trials in which it committed misconduct, is
5 inconsistent with Double Jeopardy protections.

6 The Double Jeopardy Clauses of the United States and Nevada Constitutions,
7 mandate that no person shall "be subject . . . to be twice put in jeopardy" for the
8 same offense. U.S. Const. amend. V; Nev. Const. art. 1, § 8. Jeopardy attaches
9 when a jury is sworn, and the guarantee against double jeopardy may entitle a
10 defendant who is put to trial to go free if the trial fails to end in a final judgment.
11 See Glover v. District Court, 125 Nev. ___, ___, 220 P.3d 684, 692 (2009). The public
12 has an interest in seeing that verdicts in criminal cases are the result of "honest
13 deliberation by individuals who are of a mind free from bias and prejudice." Glover,
14 125 Nev. at ___, 220 P.3d at 692 (quoting Merritt v. District Court, 67 Nev. 604,
15 607, 222 P.2d 410, 411 (1950)).

16 The Double Jeopardy Clause protects, in part, "the 'deeply ingrained'
17 principle that 'the State with all its resources and power should not be allowed to
18 make repeated attempts to convict an individual for an alleged offense, thereby
19 subjecting him to embarrassment, expense and ordeal and compelling him to live in
20 a continuing state of anxiety and insecurity, as well as enhancing the possibility
21 that even though innocent he may be found guilty.'" Yeager v. United States, ___,
22 U.S. ___, 129 S. Ct. 2360, 2365-66 (2009) (quoting Green v. United States, 355 U.S.
23 184, 187-188, 78 S. Ct. 221 (1957)) (other citations omitted). See also United States
24 v. Jorn, 400 U.S. 470, 479, 91 S. Ct. 547, 554 (1971). This interest is "implicated
25 whenever the State seeks a second trial after its first attempt to obtain a conviction
26 results in a mistrial because the jury has failed to reach a verdict." Yeager, 129 S.
27 Ct. at 2366.

1 It is unacceptable for the prosecution to seek tactical advantage by using an
2 aborted proceeding as a trial run for the next. In Arizona v. Washington, 434 U.S.
3 497, 98 S. Ct. 824 (1978), the Supreme Court stated:

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

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

18 Normally, the double jeopardy bar does not prevent retrial following a hung
19 jury. See Washington, 434 U.S. 514, 98 S. Ct. 824. However, an exception to this
20 rule is recognized where the prosecutorial misconduct results in a hung jury, and
21 the prosecutor intended to commit such misconduct for the purpose of a tactical
22 advantage upon retrial. See Ohio v. Betts, 2007 Ohio 5533, Ohio App. Lexis 4873,
23 p.23 (2007). In Betts, the same rare factual scenario as the instant case was
24 present, i.e., "the somewhat unusual backdrop of potential double jeopardy
25 implications following the *denial* of the motion for mistrial and the case is then
26 retried following a hung jury." Ohio App. Lexis 4873, at 10. The court relied on the
27 decision in another procedurally similar case, United States v. Gollamudi, E.D.N.Y.
28 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.

To be brief, the instances of prosecutorial misconduct are more thoroughly discussed in the Defense Motion to Dismiss. However, it is apparent from the prosecution's conduct during the most recent trial, that the prosecution was willing to risk a mistrial so that it could improve its strategy in this case. For instance, 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 original trial, Hathcox testified that

1 they appeared to be a loving couple. Additionally, the evidence at trial clearly
2 showed an innocent explanation might exist for Whitmarsh's bruising, i.e. her
3 physical condition combined with alcohol use and accidental bumping during the
4 rescue or arrest process.

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

15 In closing argument, the prosecutor stated, "*An anonymous domestic violence*
16 *survivor once made this observation. If you can't be thankful for what you have, be*
17 *thankful for what you have escaped.*" 8/31/10 TT 32. In rebuttal closing argument,
18 the prosecutor argued, "*It was Ralph Waldo Emerson who said all violence, all that*
19 *is dreary, all that repels is not power. It is the absence of power. In battering*
20 *Victoria in the hours leading up or the minutes leading up to her ultimate death, the*
21 *defendant didn't show us what kind of power he has. He showed us how weak he is.*
22 *Men who beat women.*" 8/31/10 TT 132. The prosecutor further argued, "*Mary*
23 *Gianocos who is the director of Voices against violence once said. . . everything we*
24 *know. . .*" A defense objection to this argument was sustained. The prosecutor
25 continued, "*Everything we know about domestic violence is that it is about power*
26 *and controlling people.*" 8/31/10 TT 161. The defense made a motion for mistrial
27 based on this improper argument, *id.* at TT 165, but that motion was denied. *Id.* at
28 169.

1 Counsel should not intentionally refer to or argue on the basis of facts outside
2 the record, as doing so can involve the risk of serious prejudice, with a mistrial as a
3 possible remedy. Glover, 125 Nev. at ___, 220 P.3d at 696. Here, it was misconduct
4 for the State to rely on psychological syndromes, effects or dynamics of abuse or
5 domestic violence because there is no evidence which was admissible for the
6 purpose of showing that O'Keefe had the character traits of an abuser or that
7 Whitmarsh had the character traits of a victim. Reliance on the dynamics of
8 abusive relationships to prove this case was improper. Additionally, it was
9 misconduct for a prosecutor to appeal to the conscience of the community or societal
10 concerns because the jurors' only proper focus should be on whether the State has
11 proved its charge. See Atkins v. State, 112 Nev. 1122, 1138-39, 923 P.2d 1119
12 (1996) (Rose, J., concurring), overruled on other grounds by Berjano v. State, 122
13 Nev. 1066, 1076, 146 P.3d 265 (2006).

14 The prosecutor's conduct, whether misconduct or inexcusable negligence,
15 preceding a mistrial must be subjected to the strictest scrutiny because "the *Double*
16 *Jeopardy Clause* . . . protect[s] a defendant against governmental actions intended
17 to provoke mistrial requests . . . [or] bad faith conduct . . . [that] threatens the
18 [h]arassment of an accused." Glover, 125 Nev. at ___, 220 P.3d at 684 (quoting
19 Washington, 434 U.S. at 508). Such misconduct tends to frustrate the public
20 interest in having a just judgment reached by an impartial tribunal and creates the
21 risk that the panel will be tainted. Washington, 434 U.S. at 512-13, 98 S. Ct. at
22 834.

24 It is now abundantly clear from the newly methods of the prosecution, that
25 the prosecutors introduced the above challenged evidence and argument with the
26 purpose of goading the defense into seeking a mistrial or tainting the jurors'
27 consideration of the legal evidence. The prosecution's bad motive is demonstrated
28 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 any of the new bad acts evidence pursuant to Petrocelli.

1 nor an expert in domestic violence, though it wished to present evidence pertaining
2 to domestic violence and repeatedly introduced such improper character evidence.
3 However, "[t]he prohibition against double jeopardy unquestionably "forbids the
4 prosecutor to use the first proceeding as a trial run of his case." Washington, 434
5 U.S. at 508, 98 S. Ct. at 831-32 (citing Note, Twice in Jeopardy, 75 Yale L.J. 262,
6 287-288 (1965)).

7 Even if this Court rules that Double Jeopardy does not prevent the retrial,
8 the very basis for such a ruling lies in the fact that the retrial from a hung jury may
9 be deemed a continuation of the initial jeopardy that attached when the last jury
10 was empaneled on August 23, 2010. Yeager, 129 S. Ct. at 2365-66 ("the inability to
11 reach a decision "is the kind of 'manifest necessity' that permits the declaration of a
12 mistrial and the *continuation of the initial jeopardy that commenced when the jury*
13 *was first impaneled*"). Thus, if O'Keefe is not entitled to bar the entire prosecution
14 based on double jeopardy, he must be entitled to preclude the State from starting
15 anew with its witness and evidence notice periods. The retrial is merely a
16 continuation of the former trial, and the ability of the State to seek to admit new
17 other bad acts evidence ended with the motion deadline prior to the last trial.

18 It would be unfair and inconsistent with the Due Process Clauses of the
19 United States and Nevada Constitutions to allow the State the opportunity to
20 correct prior strategies and bolster its case with additional evidence or witnesses
21 when no good cause is shown for their failure to timely notice this evidence prior to
22 the aborted trial. The due process interest at issue here is analogous to the
23 situation presented in Bennett v. District Court, 121 Nev. ___, 121 P.3d 605 (2005).
24 There, the Nevada Supreme Court ruled that lower court erred in allowing the
25 State to allege new aggravators in support of a death sentence following a change in
26 law which invalidated aggravators found by the jury, where the State had chosen to
27 forego the proposed new aggravators during the notice period proscribed by SCR
28 250. The Court explained that the required notice-period was designed to protect a

1 capital defendant's due process rights to fair and adequate notice of aggravating
2 circumstances, safeguard against any abuse of the system, and insert some
3 predictability and timeliness into the process. Id. at ___, 131 P.3d at 610. See also
4 Browning v. State, 124 Nev. ___, 188 P.3d 60, 74 (2008) (assuming without deciding
5 that the State might be prevented from presenting new penalty hearing evidence at
6 a second penalty trial, but concluding that minimal additional evidence was
7 actually introduced); cf. State v. Hennessy, 29 Nev. 320, 341, 90 P. 221 (1907)
8 (recognizing that where a judgment of conviction is reversed on appeal, without
9 addressing all assignments of error, it is proper to give the defense an opportunity
10 to address them and the court an opportunity to correct them prior to a retrial).

11 The same due process type of considerations apply here. A retrial after a
12 mistrial for a hung jury, to be consistent with due process and not barred by double
13 jeopardy, must be considered a continuation of the previous trial. What it cannot be
14 is a chance for the State to start over with new witnesses and evidence not noticed
15 or tested during prior trials. This would encourage prosecutors, who had not met
16 witness deadlines for whatever reason, to engage in misconduct to attempt to cause
17 a mistrial. Here, the prosecutor certainly did attempt to introduce inadmissible
18 evidence at the last trial. Because that conduct likely tainted the jury's
19 consideration of the evidence and caused the jury to hang versus acquit, the
20 prosecutors cannot be permitted to take advantage of the result to correct the
21 perceived weaknesses in their case. See also McMillian v. Weeks Marine, Inc., 2008
22 U.S. Dist. LEXIS 76973, pp. 5-6 (D.C. Del., Sept. 30, 2008) (granting award of a new
23 civil trial on damages, but recognizing that an exception to the general rule
24 prohibiting new evidence upon retrial is where a court perceives a manifest
25 injustice in limiting evidence at retrial); Yong ex rel. Yong v. The Nemours
26 Foundation, 432 F. Supp. 2d 439, 441 (D. Del. 2006) ("[A]s a general rule, a retrial
27 should not involve the addition of new issues, evidence, or witnesses."). As the
28 State has failed to comply with the notice and discovery requirements, Double

1 Jeopardy concerns should at the very least prohibit it from introducing the new
2 evidence in question.

3 **E. Allowing the State to introduce evidence, which it had never sought**
4 **to introduce before, and which would have been precluded by previous**
5 **rulings of this Court, would cause a delay in violation of O'Keefe's**
6 **constitutional and statutory speedy trial rights.**

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

12 NRS 178.556(1) provides in relevant part, "If a defendant whose trial has not
13 been postponed upon the defendant's application is not brought to trial within 60
14 days after the arraignment on the indictment or information, the district court may
15 dismiss the indictment or information." This statutory speedy trial right applies to
16 the resetting of a trial following a mistrial. Rodriguez v. State, 91 Nev. 782, 542
17 P.2d 1065 (1975). Dismissal if the defendant is not brought to trial within 60 days
18 is mandatory if there is not good cause shown for the delay. Anderson v. State, 86
19 Nev. 829, 477 P.2d 595 (1970); Huebner v. State, 103 Nev. 29, 731 P.2d 1330 (1987).
20 The state has the burden of showing good cause for delay of the trial. Huebner, id.
21 An accused is not required to show that he was prejudiced by the failure to bring
22 him to trial within 60 days after the finding of an indictment. State v. Craig, 87
23 Nev. 199, 484 P.2d 719 (1971).

24 O'Keefe has at all times asserted his right to a speedy trial, and even
25 assuming the Court's calendar constitutes good cause for the January 24, 2011 trial
26 setting, a delay of 145 days from the date the mistrial was declared on September 1,
27 2010, by its conduct affecting the last trial (and possibly now O'Keefe's ability to go
28

1 forward with the current setting), the State has caused unexcused delay and further
2 prejudice to O'Keefe.

3 When the State last presented this case, it was not prepared to present the
4 evidence it now seeks to admit. It had never sought permission pursuant to the
5 dictates of Petrocelli. It had not and has not provided the defense with all relevant
6 discovery related to the new bad act evidence. It has not noticed any intent to
7 present prior testimony. A "trial judge must recognize that lack of preparedness by
8 the Government to continue the trial directly implicates policies underpinning both
9 the double jeopardy provision *and the speedy trial guarantee*." Jorn, 400 U.S. at
10 485, 91 S. Ct. at 557-58.

11 Despite the multiple opportunities the State had in which it could have
12 sought to introduce this evidence, since the fall of 2008, and despite its prior
13 agreement that it should be limited to the one prior felony conviction, now that the
14 State has twice failed to secure the conviction it seeks, it seeks to change course.
15 Allowing this late-noticed evidence would cause even further delay. O'Keefe would
16 need to further investigate each of the allegations upon which the State now
17 intends to rely in order to mount a defense at trial – an investigation that cannot
18 proceed without adequate discovery. The defense would need to interview any
19 witnesses, seek to find impeachment evidence, seek to secure the testimony of good
20 character witnesses, and would have likely prepared its case differently. There is
21 no good cause to allow such further delay for the State to present evidence which it
22 could not have presented at the last trial, and which is inadmissible as irrelevant
23 and overly prejudicial. To grant the State's motion would cause further delay in
24 violation of O'Keefe's speedy trial rights.

25
26 ///

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28 ///

1 CONCLUSION

2 For all of the foregoing reasons, Defendant Brian O'Keefe respectfully
3 requests that this Court deny in total the State's Motion in Limine to Admit
4 Evidence of Other Bad Acts.

5 DATED this 18th day of January, 2011.

6 PALM LAW FIRM, LTD.

7
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9 Email: Patricia.palm@law.com
10 Attorney for Brian O'Keefe

FILED

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Alana L. Johnson
CLERK OF DISTRICT COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

10 THE STATE OF NEVADA,
11
12 Plaintiff,

13 vs.

14 BRIAN K. O'KEEFE,
15 Defendant.

CASE NO. C250630

DEPT. NO. XVII

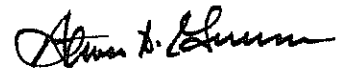
RECEIPT OF COPY

18 RECEIPT of a copy of DEFENDANT O'KEEFE'S OPPOSITION TO MOTION IN
19 LIMINE TO ADMIT EVIDENCE OF OTHER BAD ACTS PURSUANT TO NRS 48.045 AND
20 EVIDENCE OF DOMESTIC VIOLENCE PURSUANT TO 48.061 is hereby acknowledged.

DISTRICT ATTORNEY OFFICE

23
24 *Eri McCarty*
25 200 Lewis Ave. 3rd Floor
26 Las Vegas, NV 89155

27 Dated: 1-18-11
28



CLERK OF THE COURT

OPPS

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
CHRISTOPHER J. LALLI
Chief Deputy District Attorney
Nevada Bar #005398
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Las Vegas, Nevada 89155-2212
(702) 671-2830
christopher.lalli@ccdanv.com
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

BRIAN K. O'KEEFE

Defendants.

Case No: 08-C-250630

Dept. No: XVII

Date: January 20, 2011

Time: 8:15 a.m.

**STATE'S OPPOSITION TO MOTION TO DISMISS AND,
ALTERNATIVELY, TO PRECLUDE EXPERT AND
ARGUMENT REGARDING DOMESTIC VIOLENCE**

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through CHRISTOPHER J. LALLI, Chief Deputy District Attorney, and hereby opposes the Defendant's Motion to Dismiss and, alternatively, to Preclude Expert and Evidence regarding Domestic Violence. This Opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

DATED this 18 day of January, 2011.

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY /s/ Christopher J. Lalli

CHRISTOPHER J. LALLI
Chief Deputy District Attorney
Nevada Bar #005398

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 On January 3, 2011, Brian K. O'Keefe (hereinafter "the Defendant") filed a Motion to
3 Preclude the State from Introducing at Trial Improper Evidence and Argument. On January
4 7, 2011, the Defendant filed the instant motion, almost identical to the motion filed on
5 January 3, 2011, now requesting that the case be dismissed. Many of the issues raised by the
6 Defendant were rejected by the Court on January 13, 2011. The few, remaining issues will
7 be addressed herein.

8 **ARGUMENT**

9 **A. Retrial is Not Double-Jeopardy Barred**

10 The Defendant argues that the doctrine of double jeopardy bars a retrial of the instant
11 case. He makes unsupported claims against the prosecution, arguing, as examples, that the
12 State "committed intentional misconduct for the purpose of improving its case upon retrial"
13 (Def.'s Mot. at 8) and that "[i]t is apparent in this case that the prosecution introduced ...
14 evidence and argument with the purpose of goading the defense into seeking a mistrial or
15 tainting the jurors' consideration of legal evidence." Def.'s Mot. at 17. These are,
16 obviously, untrue and unsupported by the record.

17 In truth, a mistrial in this case resulted from a hung jury. The Nevada Supreme Court
18 has consistently held that retrial after a hung jury does not constitute double jeopardy.
19 *Glover v. District Court*, 125 Nev. —, —, 220 P.3d 684, 692 (2009); *Peck v. State*, 116 Nev.
20 840, 847-48 (2000), *overruled on other grounds by Rosas v. State*, 122 Nev. 1258 (2006);
21 *Sheriff v. Robertson*, 90 Nev. 365, 366 (1974); *Adams v. State*, 86 Nev. 358, 359 (1970);
22 *Wheeler v. District Court*, 82 Nev. 225, 229 (1996); *State v. Eisentrager*, 76 Nev. 437, 441
23 (1960).

24 **B. The State's Notice of Expert Witness Was Timely Filed**

25 The State filed a Supplemental Notice of Expert Witnesses on January 3, 2011,
26 placing the Defendant on notice that Andrea Sandburg would be testifying regarding battered
27 women's syndrome, power and control dynamics and the cycle of abuse, generally. The trial
28 in this matter is presently scheduled for January 24, 2011. Therefore, the notice was filed

precisely 21 days before trial as is required by NRS 174.234(2). It is timely.

The Defendant argues that the notice is untimely because it was not filed 21 days prior to the original trial in this case. *See* Def.'s Mot. at 18. There certainly is no case that stands for the proposition that the State cannot endorse different or additional experts in advance of a retrial. The Defendant, himself, has done this. For example, the Defendant filed a Supplemental Notice of Defendant's Expert Witnesses on July 29, 2010. (This Notice is attached hereto as Exhibit 1.) That notice included Doctor Todd Gray as a potential expert. Doctor Gray actually testified in the retrial of this matter. However, in the Notice of Defendant's Expert Witness filed on February 20, 2009, prior to the original trial, Doctor Gray was not listed as an expert witness. (This Notice is attached hereto as Exhibit 2.) Following the Defendant's logic, Doctor Gray should have been precluded from testifying at the second and any subsequent trial of this matter. Obviously, this is not the law.

The Defendant also argues that the State should be altogether precluded from calling an expert in domestic violence based upon NRS 48.061. *See* Def.'s Mot. at 18-25. The Defendant misconstrues this statutory provision. NRS 48.061 and the legislative intent behind this statute are addressed in the State's 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 filed on January 6, 2011. The State should be permitted to call an expert witness on this subject.

C. The Defendant's Speedy Trial Rights Have Not Been Violated

The Defendant argues that his case should be dismissed because his speedy trial rights have been violated. *See* Def.'s Mot. at 25-26. However, there has been no such violation. After a jury was unable to reach a verdict in the previous trial, the Court was inclined to reset the trial the very next day. *See* Transcript of Proceedings of September 2, 2010, at 5. However, counsel for the Defendant instead requested that the matter be passed for a time before the trial be reset. The State joined in this request. *Id.* Thereafter, the trial was set for January 24, 2011, due to the Court's schedule and the schedules of the parties.

The Court has always sought to accommodate the Defendant's speedy trial request.

1 In fact, the Court set this case on a day knowing it had other matters with priority settings,
2 hoping that the calendar would clear up to accommodate the Defendant's trial. As things
3 turned out, the Court is available to hear this trial on the date set.

4 The mere fact that a trial is scheduled beyond 60 days from arraignment does not
5 necessarily result in a violation of a defendant's right to speedy trial. The Nevada Supreme
6 Court has multiple times held that the setting of a trial outside of the 60-day window does
7 not result in a speedy trial violation if the trial date is due to the congestion of the court's
8 trial calendar or the calendar of the parties. *See, e.g., Manley v. State*, 115 Nev. 114, 126
9 (1999) (delays caused, in part, by legitimate conflicts with the State's and the court's
10 schedules); *Bailey v. State*, 94 Nev. 323, 324 (1978) (224-day delay was not inordinate due
11 to the congestion of the trial calendar). Moreover, the constitutional deprivation of right to
12 speedy trial requires proof of prejudice attributable to delay. *Anderson v. State*, 86 Nev. 829,
13 833 (1970). The Defendant cannot demonstrate how he has been prejudiced by any minimal
14 delay in this case.

15 CONCLUSION

16 Based upon all of the foregoing, the Defendant's Motion to Dismiss on Grounds of
17 Double Jeopardy Bar and Speedy Trial Violation and, Alternatively, to Preclude State's New
18 Expert Witness, Evidence and Argument Relating to the Dynamics or Effects of Domestic
19 Violence and Abuse should be denied.

20 DATED this 18 day of January, 2011.

21 DAVID ROGER
22 Clark County District Attorney
23 Nevada Bar #002781

24 BY /s/ Christopher J. Lalli
25 CHRISTOPHER J. LALLI
26 Chief Deputy District Attorney
27 Nevada Bar #005398
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CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of the above and foregoing, was made this 18th day of January, 2011, by facsimile transmission to:

PATRICIA PALM, ESQ.
FAX: 386-9114

/s/Deana Daniels
Secretary for the District Attorney's
Office

Exhibit 1

ORIGINAL

FILED

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Ann M. Quinn
CLERK OF THE COURT

NOTC
PALM LAW FIRM, LTD.
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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

08C250630
noew
Notice of Expert Witnesses
872896



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

DATE:

TIME:

TO: THE STATE OF NEVADA, PLAINTIFF, and

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

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

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

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CLERK OF THE COURT

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

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

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

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

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

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

4 (CV and report previously provided).

5 Dated this 29th day of July, 2010.

6
7 PALM LAW FIRM, LTD.

8 


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

13 RECEIPT OF COPY

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

16 DATED: July 29, 2010.

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18 DISTRICT ATTORNEY'S OFFICE

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21 Las Vegas, NV 89155
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HOME PAGE

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

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

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

University of Central Florida, Orlando, FL.

Bachelor of Science, Microbiology

Including three hours of credit in Genetics

Louisiana State University, Baton Rouge, La.

PROFESSIONAL CERTIFICATION

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

PROFESSIONAL TRAINING ATTENDED

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

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

La. State Police Training Academy, Baton Rouge, LA

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

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

PROFESSIONAL EXPERIENCE

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

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

1988 - 2001 Louisiana State Police Crime Lab - Baton Rouge, LA
An ASCLD-LAB accredited laboratory

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

1984 - 1988 Jefferson Parish Sheriff's Office Crime Lab - Metairie, LA

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

PROFESSIONAL PAPERS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARTICLES PUBLISHED

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

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

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

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

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

TRAINING CONDUCTED

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

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

PROFESSIONAL ORGANIZATIONS

International Society for Forensic Genetics

International Association of Bloodstain Pattern Analysts (Full Member)

AAFS (Fellow)

American Board of Criminalistics (Molecular Biology Fellow)

American Society for Testing and Materials Committee E-30 on Forensic Sciences

AFDAA (Chairperson 2004-2005, Fellow)

Association for Crime Scene Reconstruction

SAFS

LAFS (Editor of *Nanogram*, the official publication of LAFS - July 1994 to May 1998, President - 1990, Vice President - 1989)

LASCI

OTHER ACCOMPLISHMENTS

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

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

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

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

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

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

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

Featured on the "Knock, Knock, You're Dead" episode of Forensic Factor that first aired on the Discovery Channel Canada, April 16, 2009.

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

Formerly a columnist for *Southern Lawman Magazine*.

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

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

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

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

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

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July 27, 2010

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

Case No.: FSR 3-09

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

Client Case No.: C250630, Brian O'Keefe

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

Case Documentation Received and Examined By: George Schiro

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

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

Specimens Examined: Case documentation, photographs, and a DVD

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

Results:

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

CONCLUSIONS:

1. Toxicology

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

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

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system. The presence or absence of drugs or alcohol in a person's body and the issue of whether the subject was under the influence of a drug is important in the legal defense of diminished capacity cases.² In addition to alcohol quantification, Mr. O'Keefe's blood and urine could have also been tested for the presence of any hallucinogens or other mind altering substances. One of the specific objectives of the applied science of forensic toxicology as stated by the Society of Forensic Toxicologists, Inc. is interpreting, when experience allows, the results of an analysis in terms of the effect of the substance(s) found on the behavior and state of health of an individual.³ Without toxicology analysis and results, factors which may have affected Mr. O'Keefe's state of mind and behavior at the time of Ms. Whitmarsh's death will never be known.

2. Improper Evidence Collection

The penile swabs collected from Mr. O'Keefe were collected improperly. This improper collection technique could have directly impacted the DNA results of the penile swabs through cross contamination of samples. Cross contamination is defined as the unwanted transfer of material between two or more sources of physical evidence.⁴ When the swabs were collected, Mr. O'Keefe was handed the swabs by a Crime Scene Analyst (CSA) who was wearing gloves. Mr. O'Keefe was not wearing any gloves, his right hand was bleeding, and he also had blood, most likely belonging to Ms. Whitmarsh, on his hands. Mr. O'Keefe then swabbed his own penis using both hands. The swabs were then collected by the CSA. The proper technique would have been for the CSA to collect the swabs while wearing gloves. This would have prevented the possible transfer of blood and Ms. Whitmarsh's DNA from Mr. O'Keefe's hands to the penile swabs.

An alternate method of collection would have been for Mr. O'Keefe to clean his hands and wounds after they had been documented and any potential evidence had been collected from his hands. His wounds should have then been bandaged. He could have then been provided with gloves and at this point he could have swabbed himself under supervision. Contamination control is essential to maintaining the integrity of evidence.⁵ The policy of contamination control requires all personnel to follow procedures to ensure evidence integrity.⁶ Contamination control procedures require that personal protective equipment, such as gloves, are used to prevent contamination of personnel.⁷

The LVMPD Forensic Laboratory Report of Examination Biology/DNA Detail states that Mr. O'Keefe's penile swabs were negative for semen, but positive for blood. Because of the improper collection technique, it is unknown if this blood was present on his penis prior to the swabbing or if the blood on the penile swabs was introduced during the swabbing. The LVMPD Forensic Laboratory Report of Examination Biology/DNA Detail also states that a

² *Ibid.*, pp.323-324.

³ <http://www.soft-tox.org/Content/Introduction/figure1.htm>

⁴ *Crime Scene Investigation: A Guide for Law Enforcement*, Technical Working Group on Crime Scene Investigation, U.S Dept. of Justice, Office of Justice Programs, National Institute of Justice, Rockville, MD., p. 42.

⁵ *Ibid.* p. 24.

⁶ *Ibid.*

⁷ *Ibid.*

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mixture of DNA was obtained from the penile swabs and Mr. O'Keefe and Ms. Whitmarsh cannot be excluded as contributors to this mixture. Because of the improper collection technique, it is unknown if Ms. Whitmarsh's DNA was present on his penis prior to the swabbing or if Ms. Whitmarsh's DNA was introduced to the penile swabs during the swabbing. Evidence contamination is misleading to an investigation and it results in an inability on the part of the crime laboratory to evaluate the true meaning of forensic results.⁸

3. Mr. O'Keefe's wounds

Based on the photographs examined, Mr. O'Keefe appeared to have two injuries on his right hand. It appears as though he has a cut on the top joint of his right thumb and a cut between the first and second joints of the right index finger. The exact mechanism by which he received these injuries is unknown; however, given the presence of his blood on the light switch in the bedroom, his blood on one side of the knife blade and on the handle of the knife, and his blood on the pants found in the bathroom, then it is most likely that he received these injuries around the same time that Ms. Whitmarsh received her injury. He could have received his injuries just prior to her injury, at the same time as her injury, or shortly after her injury.

One possibility is that these injuries were obtained after her injury. Other than being self-inflicted or accidental, there appears to be no other mechanism as to how he would have received these injuries if they occurred after she received her injury.

Another possibility is that he received his injuries at the same time Ms. Whitmarsh received her injury. This scenario is less likely than the other two scenarios given the location of Mr. O'Keefe's injuries, the angle of Ms. Whitmarsh's wound, the lack of blood that would have been on the knife prior to her injury, and the fact that, according to the autopsy report, no bones were struck. Injuries received by an assailant while stabbing someone can be caused by a sudden cessation of motion due to unexpectedly hitting a bone or other hard surface causing the hand to slide down on the blade and be cut.⁹ Injury to the assailant's hand can also occur if the hand or handle of the knife becomes bloody and the hand slides down the knife blade.¹⁰ Finally, the assailant could inadvertently stab himself while stabbing the victim.¹¹ If Mr. O'Keefe received his injuries at the same time that Ms. Whitmarsh received her injury, then it would require that the knife have an unusual position in his hand. Based on this scenario, then the injuries to both parties could have been the result of an accident.

Another possibility is that Mr. O'Keefe received his injuries prior to Ms. Whitmarsh receiving her injury. Defense wounds are wounds of the extremities incurred when an individual attempts to ward-off a pointed or sharp-edged weapon.¹² Defense wounds are

⁸ Moreau, Dale M., "Concepts of Physical Evidence in Sexual Assault Investigations," in *Practical Aspects of Rape Investigation: A Multidisciplinary Approach*, Robert R. Hazelwood and Ann Wolbert Burgess, eds., CRC Press, Boca Raton, FL, 1993, p. 73.

⁹ James, Stuart H., Kish, Paul E., and Sutton, T. Paulette, *Principles of Bloodstain Pattern Analysis*, CRC Taylor & Francis, Boca Raton, FL, 2005, p.344.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² DiMaio, Vincent J. and Dominick, *Forensic Pathology*, CRC Press, Boca Raton, FL, 2001, p. 215

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commonly found on the palms of the hands, due to attempts to grasp or ward-off the knife.¹³ Mr. O'Keefe could have received his injuries as a result of trying to grasp or ward-off the knife prior to when Ms. Whitmarsh received her injury. He could have received these injuries while defending himself from a knife attack. This scenario is more likely than the scenario in which he received his injuries at the same time that Ms. Whitmarsh received her injury.

4. Other notes of interest

The photographs do not indicate that Mr. O'Keefe was dripping blood around the crime scene outside of the immediate area of the bed despite the fact that he had actively bleeding cuts on his hand. He may have used something to slow down or temporarily stop the bleeding.

The following events cannot be sequenced. They all happened at some point, but not necessarily in the order listed.

The pillowcase was removed, possibly held together or bunched up, and then came in contact with Ms. Whitmarsh's blood.

Ms. Whitmarsh received her injury, Mr. O'Keefe's blood next came in contact with one side of the knife blade, and then the pillowcase was placed or landed on the knife.

Ms. Whitmarsh's pants were removed after they were saturated with blood and then placed in bathroom.

Shoeprints were deposited after stepping in blood.

5. The possibility of an accidental stabbing

The possibility of an accidental stabbing cannot be ruled out. One scenario that supports an accidental stabbing is outlined in the third paragraph of "3. Mr. O'Keefe's wounds." Other evidence supporting an accidental stabbing is the lack of defense wounds on Ms. Whitmarsh's extremities and the presence of a single stab wound.

These results and conclusions are subject to alteration if any new or previously undisclosed information is provided.



George Schiro, MS, F-ABC
Forensic Scientist

¹³ *Ibid.*

Todd Cameron Grey, M.D.

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Salt Lake City, Ut. 84108

Pre-medical Education:

§ Yale University - B.A. 1976 Anthropology

Medical Education:

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

Hospital Training:

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

Past Employment:

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

Current Employment:

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

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

Certification:

Updated July 9, 2010

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

Licensure:

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

Honors and Awards:

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

Professional Society Memberships:

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

Committees and Consultantships:

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

Updated July 9, 2010

- § Electronic Death Registration Advisory Committee
Provide advice and expertise for the development of a web based electronic death registration system November 2004 to August 2006
- § National Violent Death Registration System Advisory Committee
Provide advice and expertise in the process of data collection and analysis of violent deaths in Utah July 2005 to present

Presentations:

- § Grey, T.C. AKearns Mid-Air Collision-The Role of the Medical Examiner in Aircraft Disasters@ Aircraft Disaster Seminar, Jackson Hole, WY., October 1987
- § Grey, T.C. APreserving the Scene@ and AMechanisms of Injury@
Eighth Annual Life Flight Conference, SLC, UT., March 1989
- § Penny, J.A., Grey, T.C., and Sweeney, E.S. ACause of Death: Venomous Snake Bite, Manner of Death: Homicide@ Presented by Grey, T.C. at the 40th Annual Meeting of American Academy of Forensic Sciences, Philadelphia, Pa., February 1988
- § Grey, T.C. and Schnittker, S.I. AA Fowl Deed at the Aviary@
National Association of Medical Examiners 1989 Annual Meeting, Sanibel Island, Fl., October 1989
- § Grey, T.C. AEquivocal Deaths: >What=s the Manner With You?=@
5th Annual National Conference on Serial Murders, Unidentified Bodies and Missing Persons, Nashville, Tn., March 1993
- § Grey, T.C. AMechanisms of Injury and Their Medicolegal Significance@
1993 Clinical Care Conference: Transport and Care of the Critically Injured, Snowbird, Ut., May 1993
- X Grey, T.C. AHighway Accident Deaths: The Role of the Medical Examiner and a Plea to Change Utah Law@
Northwest Association of Forensic Sciences-Fall Meeting, SLC, Ut., October 1996
- X Grey, T.C., ASudden Infant Death Syndrome@
Family Practice Grand Rounds, Salt Lake Regional Medical Center, SLC, Ut., June 1997
Pediatric Grand Rounds, Primary Children=s Medical Center, SLC, Ut., September 1997
- § Grey, T.C. AThe Pediatric Autopsy: Role of the Medical Examiner@
Panel Discussion-Pediatric Grand Rounds, Primary Children=s Medical Center,

Updated July 9, 2010

SLC, UT., October 1997

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

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

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

Publications:

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

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

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

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

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

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

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

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

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

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

Updated July 9, 2010

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

Seminars and other training activities:

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

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- \$ ADeath Investigation@ Eight hour course for law enforcement professionals on investigative techniques and pathologic findings.
Cedar City, Utah, April 5, 1991.
St. George, Utah, April 10, 1992.
Vernal, Utah, June 5, 1992.
- \$ APathological Techniques for Discovering Non-Accidental Causes of Death in Children@. Prosecution Council Training Seminar on Child Sexual Abuse and Child Fatalities, Snowbird, Utah, June 18, 1991.
- \$ AShaken Baby Syndrome-The Role of the Medical Examiner@. Child Abuse Prevention Council of Ogden, Weber State University, Ogden, Utah, August 6, 1992.
- \$ AMechanism, Cause and Manner of Death: The Proper Completion of the Death Certificate@ Pediatric Grand Rounds, University of Utah Medical Center, Salt Lake City, Utah, February 22, 1993.
- \$ AS.I.D.S. and The Office of the Medical Examiner@ Utah Department of Health Symposium on S.I.D.S. for Public Health Nurses, Salt Lake City, Utah, March 30, 1993.
- \$ APatterns of Injury: Investigative Challenges@ Federal Bureau of Investigation-College of American Pathologists Course AMedicolegal Investigation of Death & Injury in Child Abuse and S.I.D.S.@ Salt Lake City, Utah. August 14, 1995.
- \$ AFire Related Deaths@ Salt Lake City Fire Department, September 12, 1995.
Also presented to Idaho Chapter, International Arson Investigators, November 7, 1996.
- \$ AForensic Medicine: The Vital Link in Organ/Tissue Donation@ Intermountain Organ Recovery Systems Educational Symposium, Salt Lake City, Utah, May 6, 1997.
- \$ AWhat Your Pathologist Can and Can't Do For You@@
Utah Prosecution Council Prosecutor Training Course. Layton, UT, September 18, 2003
- \$ AProsecutors and the Office of the Medical Examiner@ Utah Prosecution Council Homicide Conference. St. George, UT, November, 2008.

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Other Activities:

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

Updated July 9, 2010

LOUIS F. MORTILLARO, PH.D.

501 South Rancho Drive, Suite F-37
Las Vegas, Nevada 89106
(702) 388-9403 FAX (702) 388-9643
E-Mail: mortpsych501@AOL.COM

LICENSURE:

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

AREAS OF SPECIALIZATION:

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

PROFESSIONAL CREDENTIALS & CERTIFICATIONS:

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

PROFESSIONAL CREDENTIALS:

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

EDUCATIONAL HISTORY:

Post Graduate Certificate of Specialization in Clinical Neuropsychology

The Fielding Institute, Santa Barbara, California

Dates Attended: February, 1996 - January, 1998

Major: Clinical Neuropsychology

Course Work: 40 semester units

2000 hour practicum

200 hours of clinical case supervision

Date Certificate Conferred: January 24, 1998

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

Major: Professional Psychology

Minor: Clinical Psychodiagnostics

Dates Attended: 1976 - 1978

Date Degree Conferred: June 11, 1978

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

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

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

INTERNSHIPS:

Predoctoral Internship (2500 hours)

1976 - 1978

• Clark County Juvenile Court
Las Vegas, Nevada

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

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

• CareUnit Program
Lake Mead Hospital
North Las Vegas, Nevada

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

Postdoctoral Internship (2500 hours)

1978 - 1980

• Jean Hanna Clark Rehabilitation Center
Las Vegas, Nevada

Supervisor: Verdun Trione, Ed.D.

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

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

School Psychology Internship (700 hours)

1971

• Pasadena Unified School District
Pasadena, California

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

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

1972

• Clark County Juvenile Court
Las Vegas, Nevada

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

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

PROFESSIONAL EXPERIENCE:

1989 - Present

Private Psychology Practice

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

Clinical Assessments:

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

Forensic Assessments:

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

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Clinical Treatment:

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

Clinical Consultation/Conferencing With:

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

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

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

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

1995 - 2002

Psychology Director

NovaCare Pain and Rehabilitation Center

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

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

1995 - present

Post Job Offer Psychological Evaluator

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

Served the following police departments:

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

1990 - 1995

Co-Owner/Psychology Director

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

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

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

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

1985 - 1994

Owner/Consultant

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

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

1978 - 1989

Chief Psychologist

Jean Hanna Clark Rehabilitation Center
Las Vegas, Nevada

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

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

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

1971 - 1978

Chief Psychologist

Clark County Juvenile Court
Las Vegas, Nevada

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

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

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

1969 - 1971

Adult Education Instructor

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

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

1968 - 1969

Employment Counselor

Department of Employment
East Los Angeles, California

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

1967 - 1968

High School Teacher/Coach

Black-Foxe School, Los Angeles, California

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

SUPPLEMENTARY EMPLOYMENT HISTORY:

Media Consulting:

2002 - Present

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

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Part-Time College Teaching:

1976 - 1984

Park College School for Community Education:
Parkville, Missouri

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

1978 - 1989

Nova University
Las Vegas, Nevada

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

1973 - 1976

Clark County Community College
Las Vegas, Nevada

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

1978 - 1979

New College/Stoner Chiropractic Foundation
Las Vegas, Nevada

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

1977

College of Great Falls, Montana
Great Falls, Montana

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

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1972 - 1986

University of Nevada, Las Vegas
Las Vegas, Nevada

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

1986 - 1990

Golden Gate University
San Francisco, California

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

Training and Consultation Services:

Provided educational seminars and organizational consulting for the following clients:

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

PROFESSIONAL MEMBERSHIPS/ACTIVITIES:

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

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

PUBLICATIONS:

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

MEMBERSHIP ON COMMUNITY BOARDS (Past and Present):

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

STATE BOARD OF PSYCHOLOGICAL EXAMINERS APPOINTMENT:

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

MEDIA APPEARANCES:

Interviews for local television newscasts
Interviews on local radio shows

HONORS AND AWARDS:

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

PRESENTATIONS:

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

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

Exhibit 2

ORIGINAL

FILED

FEB 20 3 46 PM '09

E. J. Smith
CLERK OF THE COURT

1 **NOTC**
2 DAVID M. SCHIECK
3 SPECIAL PUBLIC DEFENDER
4 State Bar No. 0824
5 RANDALL H. PIKE
6 Assistant Special Public Defender
7 Nevada Bar No. 1940
8 Patricia A. Palm
9 Deputy Special Public Defender
10 State Bar No. 6009
11 330 South Third Street, 8th Floor
12 Las Vegas, NV 89155
13 (702) 455-6265
14 (702) 455-6273 fax
15 rpike@co.clark.nv.us
16 palmpa@co.clark.nv.us
17 Attorneys for O'KEEFE

10 **DISTRICT COURT**
11 **CLARK COUNTY, NEVADA**

13 STATE OF NEVADA,

14 Plaintiff,

15 vs.

16 BRIAN O'KEEFE #1447732,

17 Defendant.

CASE NO. C 250630
DEPT. NO. XVII

19 **NOTICE OF DEFENDANT'S EXPERT WITNESS**
20 **[NRS 174.089(2)]**

DATE:
TIME:

23 TO: THE STATE OF NEVADA, Plaintiff, and

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

25 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that Defendant, BRIAN
26 O'KEEFE, by and through his attorneys, DAVID M. SCHIECK, Special Public Defender,
27 RANDALL H. PIKE, Assistant Special Public Defender, and PATRICIA A. PALM, Deputy
28 Special Public Defender, intends to call an expert witness in her case in chief as follows:

RECEIVED

FEB 20 2009

CLERK OF THE COURT

SPECIAL PUBLIC
DEFENDER

CLARK COUNTY
NEVADA

002523

1 1. GEORGE SCHIRO, 5004 W. Admiral Doyle Dr., New Iberia, LA 70560, an expert
2 in forensic science. Should this witness testify, he will testify in the area of crime scene
3 analysis, crime scene investigation, processing of crime scenes, collection and preservation
4 of evidence, latent print comparison, footwear examination, and DNA evaluations and will give
5 opinions related thereto.

6 2. DR. JOHN HIATT, 8180 Placid St., Las Vegas, NV 89123, a Consulting
7 Toxicologist in effects of Alcohol, effects of Spironolactone, Traxopone, Venlafaxine, and
8 combinations of the above in an individual.


9 3. BARRY BATES, 2022 Pinion Spring Dr., Henderson, NV 89074, a
10 biomechanical engineer.

11 A copy of the expert witnesses' curriculum vitae is attached hereto.

12 DATED this 20th day of February, 2009.

14 SPECIAL PUBLIC DEFENDER

15 DAVID M. SCHIECK


16 
17 RANDALL H. PIKE
18 PATRICIA A. PALM
19 330 South Third Street, Ste 800
20 Las Vegas, NV 89155-2316
21 (702) 455-6265
22 Attorneys for O'Keefe

23 RECEIPT OF COPY

24 RECEIPT of a copy of the Notice of Expert Witnesses is hereby acknowledged.

25 DATED: Feb 20, 2009.

26 DISTRICT ATTORNEY'S OFFICE

27 
28 200 Lewis Ave., 3rd Floor
 Las Vegas NV 89155

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

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

EDUCATION

Master of Science, Industrial Chemistry - Forensic Science

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

Bachelor of Science, Microbiology

Including three hours of credit in Genetics
Louisiana State University, Baton Rouge, La.

PROFESSIONAL CERTIFICATION

Molecular Biology Fellow of the American Board of Criminalistics

PROFESSIONAL TRAINING ATTENDED

October 2007	"Integrity, Character, and Ethics in Forensic Science" – Instructor: Dan B. Gunnell, Louisiana Association of Forensic Scientists (LAFS) Fall 2007 Meeting, Baton Rouge, LA
February 2007	"Anatomy of a Wrongful Conviction: A Multidisciplinary Examination of the Ray Krone Case" – Co-chairmen: George Schiro and Thomas Streed, American Academy of Forensic Sciences Meeting, San Antonio, TX
February 2006	"Solving the South Louisiana Serial Killer Case – New Approaches Blended With Older Trusted Techniques" Co-chairmen: George Schiro and Ray Wickenheiser, American Academy of Forensic Sciences (AAFS) Meeting, Seattle, WA

December 2004	"National Forensic Science Technology Center (NFSTC) Auditor Workshop" – Instructors: Mark Nelson, John Wegel, Richard A. Guerreri, and Heather Subert
June 2003	"CODIS v5.6 Software Training" – Instructor: Carla Heron, Baton Rouge, LA
May 2003	"DNA Auditor Training" - Instructors: Richard A. Guerreri and Anja Einseln, Austin, TX
April 2003	"Statistical Analysis of Forensic DNA Evidence" - Instructor: Dr. George Carmody, Harvey, LA
January 2002	"Association of Forensic DNA Analysts and Administrators (AFDAA) Workshops" - Instructors: S. Cribari, Dr. T. Wang, and R. Wickenheiser, Austin, TX
March 2001	"Basic Forensic DNA Analysis" - Instructor: Dr. Pat Wojtkiewicz, Baton Rouge, LA
February 2000	DNA Workshop AAFS Meeting, Reno, NV
November 1999	"Advanced AmpFestSTR™ & ABI Prism™ 310 Genetic Analyzer Training" - Instructor: Catherine Caballero, PE Biosystems, Baton Rouge, LA
March 1998	"DNA Typing with STRs - Silver Stain Detection Workshop" - Instructors: Dr. Brent Spoth and Kimberly Huston, Promega Corp., Madison, WI
November 1997	"Laboratory Auditing" - Instructors: Dr. William Tilstone, Richard Lester, and Tony Longhetti, NFSTC Workshop, Baton Rouge, LA
October 1997	"Forensic Microscopy" - Instructor: Gary Laughlin, McCrone Research Institute, La. State Police Training Academy, Baton Rouge, LA
September 1997	"Presenting DNA Statistics in Court" - Instructors: Dr. Bruce Weir and Dr. George Carmody, Promega Symposium, Scottsdale, AZ
August 1997	"Forensic DNA Analysis" - Instructors: Pat Wojtkiewicz and Michelle Gaines, North La. Crime Lab, Shreveport, LA
February 1997	DNA Workshop AAFS Meeting, New York, NY

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

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

PROFESSIONAL EXPERIENCE

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

Employed as a Forensic Chemist - DNA Technical Leader. Duties include incorporating the DNA Advisory Board (DAB) standards, accountability for the technical operations of the lab's biology section, conducting DNA analysis using the 13 STR core loci in casework, DNA research, forensic science training, and crime scene investigation. Qualified as an expert over 130 times in 28 Louisiana parish courts, one Florida county court, one Mississippi county court, one Missouri county court, one Nevada county court, federal court, and two Louisiana city courts. Has qualified as an expert in the following areas: latent fingerprint development; serology; crime scene investigation; forensic science; trajectory reconstruction; shoeprint identification; crime scene reconstruction; bloodstain pattern analysis; DNA analysis; fracture match analysis; and hair comparison. Has also consulted on cases in 17 states and the United Kingdom. Worked over 2600 cases. Independently contracted DNA technical auditor with NFSTC and Forensic Quality Services. Contracted DNA Technical Leader to the Southwest La. Crime Lab in Lake Charles, LA. Is also a member of the La. Foundation Against Sexual Assault (LAFASA) Training Team.

1988 - 2001

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

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

1984 - 1988

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

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

PROFESSIONAL PAPERS

"Criminalistics Errors, Omissions, Problems, and Ethical Issues" presented as part of the "Anatomy of a Wrongful Conviction: A Multidisciplinary Examination of the Ray Krone Case" workshop at the 2007 AAFS Meeting in San Antonio, TX and as part of the LAFS Fall 2007 Meeting in Baton Rouge, LA.

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

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

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

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

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

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

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

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

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

Assault/La. District Attorneys Association sponsored conference, "Collaborating to STOP Violence Against Women Conference," March 12, 2003, Lafayette, LA.

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

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

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

ARTICLES PUBLISHED

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

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

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

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

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

TRAINING CONDUCTED

Have conducted training at the following seminars and have trained the following organizations and agencies in crime scene investigation, forensic science, and/or the collection and preservation of evidence: Fourth and Seventh International Conferences of Legal Medicine held in Panama City, Panama; U.S. State Department's Anti-Terrorism Assistance Program Police Executive Seminar; AAFS; American Chemical Society; AFDAA; Forensic Science Education Conference; SAFS; Southern Institute of Forensic Science; University of Nevada Las Vegas Biotechnology Center; Professional Private Investigators Association of Colorado; Indiana Coroner's Training Board; DNA Security, Inc. Open House; Palm Bay Police Dept., Palm Bay, Florida; CGEN 5200, Expert Testimony in Forensic Science, University of North Texas Health Science Center, Ft. Worth, TX; Tennessee Association of Investigators; Mississippi Society for Medical Technology; La. State Coroners' Association; Jefferson Parish Coroner's Office Eighth Annual

Death Investigation Conference; Southern University Law Center; La. State University Chemistry Department Seminar; Chemistry 105, Southeastern Louisiana University; University of Louisiana at Lafayette Biology Club; Louisiana Division of the International Association for Identification; U.S. Department of Justice La. Middle District Law Enforcement Coordinating Committee Crime Scene Investigation Workshop; La. State University's Law Enforcement Training Program Scientific Crime Investigator's Institute; La. State University's Continuing Law Enforcement Education School; La. State Police Training Academy's Advanced Forensic Investigation School; La. District Attorneys Association; La. Southeast Chiefs of Police Association; Acadiana Law Enforcement Training Academy; Caddo Parish Sheriff's Office; Mystery Writers of America - Florida Chapter; NALI Continuing Education Seminars; TALI; Lafayette Parish Sheriff's Office; Iberia Parish Sheriff's Office; Jefferson Parish Sheriff's Office Training Academy; Kenner Police Dept.; St. Charles Parish Sheriff's Office; Terrebonne Parish Sheriff's Office; East Feliciana Parish Sheriff's Office; East Baton Rouge Parish Sheriff's Office; Vermilion Parish Sheriff's Office; West Baton Rouge Parish Sheriff's Office; Washington Parish Rape Crisis Center Volunteers; Mississippi Professional Investigators Association; East Baton Rouge Stop Rape Crisis Center Volunteer Physicians; Stuller Place Sexual Assault Response Center Volunteers; Evangeline and St. Landry Parish Rape Crisis Volunteers; Tri-Parish Rape Crisis Volunteer Escorts; LPIA; La. Foundation Against Sexual Assault; Louisiana Society for Medical Technology; Baton Rouge Society for Medical Technology; Baton Rouge Police Dept. Sex Crimes Unit, Crime Scene Unit, and Traffic Homicide Unit; Violence Against Women Conference; Family Focus Regional Conference; Our Lady of the Lake Hospital Emergency Room Personnel; St. Martinville Chamber of Commerce; New Iberia Optimist Club; Sexual Assault: Effective Law Enforcement Response Seminar; La. State Police Training Academy; La. Association of Scientific Crime Investigators (LASCI); LAFS; and the Basic Police Academy (La. Probation and Parole, La. Dept. of Public Safety, La. Motor Vehicle Police, and La. Dept of Wildlife and Fisheries).

PROFESSIONAL ORGANIZATIONS

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

OTHER ACCOMPLISHMENTS

Analyzed evidence and issued a report in the 1991 La. State Police investigation of the September 8, 1935 assassination of U. S. Senator Huey P. Long.

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

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

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

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

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

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

Formerly a columnist for *Southern Lawman Magazine*.

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

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

Featured in the books *The Bone Lady: Life as a Forensic Anthropologist* by Mary Manhein, *Rope Burns* by Robert Scott, *Smilin Acres: The Angry Victim* by Chester Pritchett, *An Invisible Man* by Stephanie A. Stanley, and *Soft Targets, A Woman's Guide to Survival* by Detective Michael L. Varnado.

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

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

CURRICULUM VITAE

JOHN E. HIATT, PH.D.

EDUCATION

Occidental College, Los Angeles, California 1959-1963
A. B. Degree with honors in chemistry.

Yale University Graduate School, New Haven, Connecticut 1963-1968
Ph.D. in organic chemistry.

POSTDOCTORAL TRAINING

Department of Chemistry, Stanford University
Stanford, California 94304 1968-1970
Position: Postdoctoral Research Fellow in
Organic Chemistry

Clinical Laboratory, University of California
Medical Center, San Francisco, California 94122 1971-1973
Position: Postdoctoral trainee in Clinical Chemistry

EMPLOYMENT

Quest Diagnostics, formerly known as Associated
Pathologists Laboratories and American Medical
Laboratories, 4230 So. Burnham Ave., Suite 250,
Las Vegas, NV 89119. 1976 - Present
Position: Forensic Chemist: Responsible for Analytical
Protocols, Data Review, Client Consultation and
Expert Testimony. Solution of technical problems in
all areas of the laboratory.

Valley Clinical Laboratories, 74-040 El Paseo,
Palm Desert, CA 92260. 1973-1976
Position: Clinical Chemist and Assistant Laboratory
Director - Responsible for methods, instrumentation
and quality control.

OTHER

Qualified as an expert witness in the District Courts of
Clark, Douglas, Elko, Lyon, Nye and Washoe Counties
of the State of Nevada on the subject of analyses of drugs
and alcohol in Biological fluids and interpretation of same.

QUEST DIAGNOSTICS INCORPORATED

FORENSIC LABORATORY STATEMENT OF QUALIFICATIONS

Date: 04/17/06

Name: John E. Hiatt, Ph.D.

Title: Forensic Chemist

EXPERIENCE IN THE FOLLOWING DISCIPLINES			
Controlled Substances	XXX	Blood Alcohol	XXX
Toolmarks		Breath Alcohol	
Trace Evidence		Argon Analysis	
Toxicology	XXX	Firearms	
Latent Prints		Crime Scene Investigation	
Serology		Clandestine Laboratory Response Team	
Document Examination	XXX	DNA Analysis	

EDUCATION			
Institution	Dates Attended	Major	Degree Completed
Occidental College, Los Angeles, CA.	1963	Chemistry	AB
Yale University Graduate School, Connecticut	1968	Organic Chemistry	Ph.D.

ADDITIONAL TRAINING / SEMINARS			
Course / Seminar			
	Location	Dates	
Postdoctoral Research Fellow in Organic Chemistry	Department of Chemistry, Stanford University	1968-1970	
Postdoctoral trainee in Clinical Chemistry	Clinical Laboratory, University of California Medical Center	1971-1973	

COURTROOM EXPERIENCE		
Court	Discipline	Number of Times
District Court, Douglas, Elko, Lyon, Nye, Washoe counties, Nevada.	Expert Witness to testify regarding the analysis and interpretation of alcohol and controlled substances in biological samples	Several
Las Vegas Municipal Court, Nevada.	Expert witness concerning analysis of alcohol and drugs of abuse.	Several

EMPLOYMENT HISTORY	
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Employer	Job Title	Date
Quest Diagnostics Incorporated, Las Vegas, NV.	Technical Director	08/76 to 04/02
	Forensic Chemist	04/02 to Present
Valley Clinical Laboratories, Palm Desert, CA	Clinical Chemist and Assistant Laboratory Director	02/73 to 06/76

PROFESSIONAL AFFILIATIONS	
Organization	Date

PUBLICATIONS / PRESENTATIONS

OTHER QUALIFICATIONS

PROFESSIONAL VITA BARRY T. BATES

PRESIDENT

Human Performance & Wellness, Inc.
3265 Chambers Street, Suite 200
Eugene, Oregon 97405-6004
(541) 683-1935; (702) 450-4838

PROFESSOR EMERITUS

University of Oregon
Eugene, Oregon 97403-1240
e-mail: hpw@mail.com
www.hpwbiomechanics.com

EDUCATION

Princeton University; Princeton, NJ; 1960; B.S.E.
East Stroudsburg State College; East Stroudsburg, PA; 1970; M.Ed.
Indiana University; Bloomington, IN; 1973; Ph.D.

- *Undergraduate Major Area: Engineering
- *Graduate Major Area: Human Performance: Biomechanics/Kinesiology
- *Graduate Minor Area: Motor Learning, Computer Science, Statistics and Design

PROFESSIONAL EXPERIENCE

2000-	Adjunct Professor: University of Nevada-Las Vegas; Las Vegas, NV
1997-	Professor Emeritus: University of Oregon; Eugene, OR
1996-	President: Human Performance & Wellness, Inc.; Eugene, OR
1985-1996	Professor: University of Oregon; Director: Biomechanics Laboratory; Eugene, OR
1991-1996	Head: Dept. of Exercise and Movement Science; University of Oregon; Eugene, OR
1984-	President: BioDynamics Foundation; Eugene, OR
1984-90	Vice President: Bio-Dynamics Corporation; Eugene, OR
1982-84	Founder, President: Bio-Dynamics Corporation; Senior Scientist; Eugene, OR
1979-85	Associate Professor: University of Oregon; Director: Biomechanics Lab; Eugene, OR
1974-79	Assistant Professor: University of Oregon; Director: Biomechanics Lab; Eugene, OR
1973-74	Assistant Professor: University of Massachusetts; Amherst, MA
1970-73	Graduate Student: Indiana University; Bloomington, IN
1968-70	Director of Athletics: Blair Academy; Blairstown, NJ
1964-70	Teacher of Mathematics: Blair Academy, Head Coach, Football; Blairstown, NJ
1963-64	Teacher of Mathematics: Randor High School, Assistant Coach; Wayne, PA
1960-63	Officer: U.S. Navy

PROFESSIONAL ORGANIZATIONS

American Academy of Kinesiology and Physical Education
American Alliance for Health, Physical Education, Recreation and Dance
American Board of Forensic Examiners
American College of Sports Medicine
American Society for Testing and Materials
American Society of Biomechanics
Human Factors and Ergonomics Society
International Society of Biomechanics
International Society for Biomechanics in Sports
Society of Automotive Engineers

B.T. Bates, B.S.E., Ph.D.

SELECTED HONORS AND PROFESSIONAL RECOGNITION

Visiting Professor, Swiss Federal Institute of Technology, Zurich, Switzerland, September, 1979.
Member, American College of Sports Medicine Committee on International Relations Delegation to the Soviet Union, Moscow, U.S.S.R., October, 1979.
Invited Lecturer, Division of Sports Medicine, American Academy of Orthopedic Surgeons, "Biomechanics of Running: New Concepts", San Francisco, CA, 1979.
Invited Lecturer, American Orthopedic Foot Society, Inc., Twelfth Annual Meeting, Biomechanics of the Foot and Shoe Selection", New Orleans, LA, 1982.
Keynote Address, International Symposium of Biomechanics Aspects of Sports Protective Equipment, "Testing and Evaluation of Running Shoes", Waterloo, Ontario, Canada, 1983.
Recipient, Runner's World "Sportsmedicine All-Star Team", One of 25 international sports medicine experts named by peers for "contributions to the physical and emotional health of elite athletes and recreational runners, and to rapidly advancing sports medicine and knowledge", 1984.
Invited Participant, NASA Glove Workshop, Sponsor: NASA Tech. Applications Team, Houston, TX, 1985.
Elected Member, American Academy of Kinesiology and Physical Education, 1986.
Visiting Professor, Beijing Institute of Physical Education, Beijing, People's Republic of China, July, 1988.
Lifetime Member, President's Associates, University of Oregon, 1992.
Keynote Speaker, International Society of Biomechanics in Sports, "Individual Accommodation Strategies to Running and Landing Impact Forces", Amherst, MA, 1993.
Invited Lecturer, Biomechanics Academy Symposium, "Lower Extremity Function: Injury and Performance Factors", Portland, OR, 1995.
Invited Speaker, International Conference on Women, "Lower Extremity Function During Running and Landing" and "Landing Models: Evaluation of Elite Volleyball Players", Alexandria, Egypt, 1995.
Invited Speaker, American College of Sports Medicine, "Biomechanics of Running", Cincinnati, OH, 1996.
Invited Speaker, American College of Sports Medicine, "The Value of the Individual in the Research Paradigm: Single Subject Methodology", Cincinnati, OH, 1996.
Invited Speaker, Eighth National Measurement and Evaluation Symposium, "Experimental and Statistical Design Issues in Human Movement Research", Corvallis, OR, 1996.
Selected as member of ASICS International Sport Science and Sports Medicine Forum, 1996.
Certified, Fellow of the American Board of Forensic Examiners, 1997.
Recipient, *Ruth B. Glasgow Award*, Contributions in Applied Biomechanics, Biomechanics Academy, 1999.
Keynote Speaker, Australasian Podiatry Conference, Methven, New Zealand, 1999.
Invited Participant, Oregon State Bar Convention, "Using Expert Witnesses to Win", Seaside, OR, 1999.
Scholar Lecturer, Texas Tech Univ, "The *How's* and *Why's* of Lower Extremity Injury", Lubbock, TX, 2001.
Scholar Lecturer, University of Nevada Las Vegas, "Individual Accommodation to Running Injury", Las Vegas, NV, 2002.
Hall of Fame Inductee, Muhlenberg High School, Reading, PA, 2002.

RESEARCH, PUBLICATIONS, PRESENTATIONS

Actively involved in research in the areas of human performance (biomechanics and human factors) for 25 years, resulting in more than 120 academic publications and 200 presentations.

Developed the Biomechanics Laboratory and co-developed the Biomechanics/Sports Medicine Laboratory. Organized an interdisciplinary research team and was primary administrator for laboratory grants in excess of one million dollars. For a comprehensive listing, please see <http://darkwing.uoregon.edu/~btbates/vita.htm>

B.T. Bates, B.S.E., Ph.D.

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CLERK OF COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

BRIAN KERRY O'KEEFE,

Defendant.

CASE NO. C250630

DEPT. XVII

BEFORE THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE

TUESDAY, JANUARY 18, 2011

RECORDER'S TRANSCRIPT OF HEARING RE:

CALENDAR CALL

APPEARANCES:

For the State:

CHRISTOPHER LALLI, ESQ.,
Chief Deputy District Attorney
ELIZABETH A. MERCER, ESQ.,
Deputy District Attorney

For the Defendant:

PATRICIA PALM, ESQ.,

RECORDED BY: MICHELLE L. RAMSEY, COURT RECORDER

1 LAS VEGAS, NEVADA; TUESDAY, JANUARY 18, 2011

2 [Proceeding commenced at 8:38 a.m.]

3
4 THE COURT: Brian O'Keefe. Mr. O'Keefe is present in custody.
5 Ms. Palm. Mr. Lalli.

6 MS. PALM: Morning.

7 THE COURT: Morning. Time set for Calendar Call.

8 MR. LALLI: We're ready, Your Honor.

9 MS. PALM: Your Honor, we don't know whether we can be ready
10 or not because our readiness depends on the outcome of the motions
11 that are set for Thursday.

12 THE COURT: Okay. Well, are you announcing ready assuming --

13 MS. PALM: No. I'm saying that depending on how the Court
14 rules on Thursday, we may be seeking a Writ to the Nevada Supreme
15 Court, so I can't announce ready at this time because I don't know
16 if we're going to be able to go forward or not.

17 THE COURT: I don't know if you can get a stay in time to
18 stop the trial for Monday if you didn't -- if you attempted to get
19 a Writ. I know there's a motion for new trial, motion to dismiss,
20 violation of double jeopardy. I think a motion for --

21 MR. LALLI: Bad acts.

22 THE COURT: -- bad acts. I have -- I mean, I just glanced at
23 them because they're on for Thursday that's why --

24 MR. LALLI: I can't see the Supreme Court interposing a stay
25 for any of those -- any ruling that the Court might offer so I

1 don't see that as a reason as not setting this to go.

2 THE COURT: Well, if -- if I rule against you on the motions,
3 like I said I have not reviewed them more than a cursory glance, if
4 I rule -- if I deny the motions are you saying you would be -- you
5 would not be ready to go to trial?

6 MS. PALM: That's correct. We'll be seeking a stay and we
7 will be petitioning --

8 THE COURT: But besides the stay --

9 MS. PALM: -- for a Writ.

10 THE COURT: -- besides the stay, would you be ready? No,
11 'cause I'm not going -- more than likely I will not grant the stay.
12 Okay.

13 MS. PALM: Your Honor, I'm telling you that I don't know if I
14 can be ready because what witnesses we're going to need, what
15 investigation we might need to do depends on the outcome of your
16 other rulings.

17 THE COURT: My question is if I rule against you, okay, so I
18 deny your motions --

19 MS. PALM: Yes.

20 THE COURT: -- are you ready to go to trial on Monday? I
21 understand you're going to file a Writ. Okay, and that's your
22 right and I respect that. Okay.

23 MS. PALM: Okay.

24 THE COURT: But are you ready to go?

25 MS. PALM: If you ruled against us on all the motions, we

1 would not be ready because we would need to do further
2 investigation that we at this point have had no reason to do. So
3 that's why I'm saying I can't announce ready.

4 THE COURT: Right. Well, then --

5 MS. PALM: If you rule in our favor, we will be.

6 THE COURT: I understand. Well, that's going to affect one
7 of your -- part of your motions saying for delay of getting him to
8 trial. You're telling me that if I rule against you, you will not
9 be ready to go and this trial will have go be bumped.

10 MS. PALM: Well, Your Honor, the delay would have been caused
11 by the State, so it affects it in a way that it is even further
12 reason to bring our motion to dismiss for speedy trial violation.

13 THE COURT: Well, I don't grant motions for judicial economy.
14 Well, I'm just going to trail this calendar call and if in another
15 case is -- if I have to set another case and that's going to
16 prevent this case from going next week.

17 MR. LALLI: Well, Your Honor, because there is a speedy trial
18 invocation in this case -- well, I guess it would be the defense
19 who's moving -- would be moving to continue, so that -- that would
20 kind of settle that issue.

21 THE COURT: Is that correct, Ms. Palm? So if I deny the
22 motions, you are moving to continue the trial?

23 MS. PALM: If you deny the motion, we will be -- if you deny
24 all of our motions, we will be requesting a stay.

25 THE COURT: I'm not -- I got that, but --

1 MS. PALM: Right.

2 THE COURT: -- you have to go up to the Supreme Court and
3 they have to grant the stay within 'cause your motions are on
4 Thursday. You have to get something out Thursday afternoon.
5 Assuming they rule on Friday which I can't envision that, but on
6 Thursday if I deny your motions just so I know you'll be moving to
7 stay?

8 MS. PALM: Yes.

9 THE COURT: I mean, moving to continue?

10 MS. PALM: Well --

11 THE COURT: I understand you want the Writ. I understand you
12 want the motion to be granted. I'm not saying they won't be. If I
13 deny the motions, Thursday you're going to move to continue the
14 trial?

15 MS. PALM: I would say that it's a State caused continuance,
16 but yes I would be telling the Court I would not be ready to go and
17 we would have to reset it.

18 THE COURT: I understand. You're choosing your words
19 carefully and I understand where you're coming from. I just want
20 to make sure.

21 All right, we'll just pass this calendar call to
22 Thursday and just go from there.

23 MS. PALM: Thank you.

24 THE COURT: All right.

25 MR. LALLI: Thank you.


1 THE COURT: Thank you.

2 THE CLERK: January 20, 8:15.

3 [Proceeding concluded at 8:43 a.m.]
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20 ATTEST: I hereby certify that I have truly and correctly
21 transcribed the audio/video proceedings in the above-entitled case
22 to the best of my ability.
23
24
25


Michelle Ramsey
Court Recorder/Transcriber

1 TRAN

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CLERK OF DISTRICT COURT

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5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

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8 THE STATE OF NEVADA,

9
10 Plaintiff,

11 vs.

12 BRIAN KERRY O'KEEFE,

13 Defendant.
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) CASE NO. C250630
)
)

) DEPT. XVII
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15 BEFORE THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE

16 THURSDAY, JANUARY 20, 2011

17 RECORDER'S TRANSCRIPT OF HEARING RE:

18 ALL PENDING MOTIONS AND CALENDAR CALL

19 APPEARANCES:

20 For the State:

CHRISTOPHER LALLI, ESQ.,
Chief Deputy District Attorney
ELIZABETH A. MERCER, ESQ.,
Deputy District Attorney

21
22
23 For the Defendant:

PATRICIA PALM, ESQ.,

24
25 RECORDED BY: MICHELLE L. RAMSEY, COURT RECORDER

1 LAS VEGAS, NEVADA; THURSDAY, JANUARY 20, 2011

2 [Proceeding commenced at 9:47 a.m.]

3
4 THE COURT: All right. Which -- Mr. Lalli, you said you're
5 handling -- we have the trial issue of double jeopardy, the State's
6 notice of expert witness and speedy trial. Now you said Ms.
7 Mercer's going to handle one of those or two of those issues?

8 MR. LALLI: Well, the -- our bad acts motion and the
9 expertise she is going to handle.

10 THE COURT: Okay. So we can handle the other matters --

11 MR. LALLI: Yes.

12 THE COURT: -- while we're waiting for her?

13 MR. LALLI: Yes.

14 MS. PALM: And, Your Honor, I want to be forthright with the
15 Court before we get started because I realize it may affect your
16 decisions in some of this, but at this point just the way this case
17 has progressed, Mr. Keefe -- O'Keefe continues -- we're asking for
18 a continuance for the purpose of preparing a Writ.

19 And the reason for that is the whole double jeopardy
20 issue, you know, if that goes against us, but also some of the
21 other issues that came up in trial last time with jury instructions
22 and then the most recent ruling by this Court on January 13th.

23 I think that Mr. O'Keefe's been tried twice. He
24 doesn't feel like he's had a fair trial either time. And versus
25 risking going through another one where he might come back for a

1 fourth, he would like me to pursue a Writ to the Supreme Court and
2 get some of these things settled by the Court.

3 We still would like a rulings on the other things and I
4 realize that that might affect some of our arguments with respect
5 to the late timing of discovery and all that before this Court, but
6 I wanted the Court to know that we are asking for that a short a
7 continuance for purposes of doing a Writ.

8 THE COURT: Okay. You had requested that last Court
9 appearance and I had denied that request.

10 MS. PALM: I didn't actually request it.

11 MR. LALLI: I think the request was for a stay technically so
12 that she could file a Writ --

13 THE COURT: Right.

14 MR. LALLI: -- Your Honor.

15 With respect to the continuance, I can just --

16 THE COURT: No. I'm not going to grant a continuance for the
17 sole purpose of filing a Writ with the Supreme Court.

18 MR. LALLI: Right. That would be our position as well. I
19 understand that if -- if the Court is inclined to grant some of the
20 bad act or all of the bad acts we're requesting, I think that is a
21 different situation with respect to the discovery issue that
22 apparently has evolved, so I think that's --

23 MS. PALM: And --

24 MR. LALLI: -- that's a different -- different situation.

25 MS. PALM: -- and I would just like to make a little bit

1 better record on that. I wasn't technically asking for a stay the
2 other day. I wasn't sure, you know, how it was going to go, but
3 the reason that I was not able to do a Writ earlier was because we
4 didn't even have the transcripts in this case until late November.

5 And just because of my trial schedule and calendar, it
6 took me, you know, December to get through reading the transcripts
7 and then I didn't really see a very strong basis that we should
8 proceed with the Writ with the Supreme Court versus get ready for
9 trial and I can't do both. And then I didn't know until the 3rd
10 that they were going to be asking for their new expert. And I
11 didn't know until the 7th that they were going to be asking for
12 these other bad acts. And I didn't know until the 13th that they
13 were going to be able to introduce some of the bad act evidence
14 that they introduced last time. So, I just did not have time to
15 prepare a Writ earlier and that's why I'm asking for a continuance.

16 THE COURT: All right. And I had the motions here and I have
17 to tell you the -- the issues I have reviewed -- researched on this
18 matter dealt with the retrial, double jeopardy, expert and speedy
19 trial right violation. And for whatever confusion on my part, I
20 did not for whatever reason review the motions to admit evidence of
21 other bad acts. I can review that and we can further argue that at
22 perhaps 1:30 this afternoon.

23 All right. So let's deal with the -- we'll start --
24 first issue, Ms. Palm, was retrial as it violates double jeopardy.

25 MS. PALM: Court's indulgence.

1 Okay. I think, Your Honor, the last trial the State
2 introduced not only other bad acts that hadn't been noticed before,
3 but it also repeatedly tried to introduce this evidence of domestic
4 violence and the cause of domestic violence and made an argument
5 about domestic violence; and the Court had ruled that they should
6 not do that and they did it any way, but they were limited on their
7 felony that was admissible for motive and intent, but they kept
8 trying to rely in propensity by their argument and it was improper
9 argument and it became clear after the fact when they've now -- now
10 they're seeking to remedy what they couldn't do before.

11 Last time they couldn't have called an expert. They
12 didn't notice one. They couldn't have introduced bad acts. They
13 didn't notice it. So, by their -- by their now recent trying to do
14 all this stuff, it's very evident that they were risking a mistrial
15 and a hung jury. They didn't have -- they weren't prepared to do
16 what they were supposed to do.

17 The case laws very clear on that they don't get to have
18 a -- a free ride trial risking a mistrial. They go to me into
19 asking for a mistrial; that was denied, but there is case law on it
20 that when I move for a mistrial and it's denied and there's still a
21 hung jury, when they did that conduct, it's still a basis to
22 preclude a new trial for double jeopardy.

23 And we're not doing expert -- we're not talking about
24 their expert notice now. Just the double jeopardy aspect of it?

25 THE COURT: No. One at a time --

1 MS. PALM: Okay.

2 THE COURT: -- that was your --

3 MS. PALM: Okay.

4 THE COURT: -- first item. And I just want to hear your
5 argument, then I'll hear the States, then I'll make the ruling on
6 that item.

7 MS. PALM: Okay. Well, so my argument is that the Supreme
8 Court has been very clear on the State has not allowed to put on a
9 trial as a practice run. They're not allowed to use a -- a trial
10 to improve their case.

11 And with every single case, every single time this case
12 is tried, the evidence comes out a little stronger, but gives Mr.
13 O'Keefe and that's what happens when you have multiple trials. The
14 testimony has subtle changes in it. I save the case law for that
15 if they're talking about that; that's what happens each time it
16 gets a little stronger.

17 Now, here they want to make it way stronger, but it was
18 evident that they were -- they were purposely causing misconduct in
19 that trial. We move for a mistrial and they should not be able to
20 try this case again and remedy the defects in the last trial.

21 THE COURT: Thank you. Who's handling that for the State?

22 MR. LALLI: I am, Your Honor.

23 The -- a mistrial resulted in the previous trial
24 because of a hung jury. Not because of any misconduct. There was
25 no misconduct on the part of the State and I think -- you know,

1 it's when there are personal attacks, you know, levied against you
2 there's always that -- that inclination to kind of jump down in --
3 into that realm and go tit for tat. I'm just not going to do it.

4 There was no misconduct. The record will bare that
5 out. Hopefully the Court's memory and recollection will bare that
6 out.

7 What keeps being cited by the defense are the use of
8 quotations that I recited in my closing argument and in my opening
9 statement. All of which are proper and I cited -- I cited
10 treatises that stand for the proposition. It's good -- good and
11 appropriate to do that. It is being an effective advocate. I
12 cited to a Supreme Court case from another jurisdiction that said
13 that's argument from the Court's own experience. I know the Court;
14 it has been a practitioner in this jurisdiction for many years.

15 When you look at the great trial lawyers of Clark
16 County, when you look at people like Nell Harmon or Bill Coot
17 [phonetic] or David Schwartz or Dan Seaton; they were masters in
18 this art. And certainly as -- as much as was hurled at them in the
19 Supreme Court, the Supreme Court has never said you cannot be an
20 effective advocate in the courtroom which is what I did.

21 The other issue with respect to double jeopardy is that
22 some how to -- to adopt what the defense is saying some how we the
23 State tried a case that we knew would result in a hung jury so that
24 we could have this third opportunity to -- to try Mr. O'Keefe which
25 doesn't even pass the straight face test. I mean, nothing could be

1 further than the truth.

2 And so what you're left with is there was a hung jury
3 here. Can a person be retried or does double jeopardy bar a
4 retrial under the circumstances? I've cited a plethora of Nevada
5 Supreme Court cases that obviously stand for the proposition that a
6 person can be retried after a hung jury.

7 THE COURT: I don't -- I don't agree, Ms. Palm, that there
8 was any misconduct in this case. And if there was misconduct, I
9 rarely don't see that it was intentional with the go-in mind to
10 create a mistrial, so the State can have a do over and perhaps
11 strengthen their case.

12 And so, I'm not granting the motion based upon double
13 jeopardy argument. I don't find intentional misconduct on behalf
14 of the State. And there isn't any persuasive case law that says if
15 there's a hung jury and I believe it was ten/two for guilt that
16 that precludes the State from retrying a particular Defendant, so
17 on that issue I'm going to deny the Defendant's motion.

18 The issue of the State filing the notice of the expert
19 timely for the third trial did not file a notice of expert for the
20 first or second trial. I think that was your second issue, Ms.
21 Palm. Go ahead.

22 MS. PALM: It was, Your Honor. Thank you.

23 Because of the same double jeopardy concerns, the State
24 should not be allowed now to correct what they didn't do right the
25 last time what they clearly wanted to do by their arguments. The

1 double jeopardy, the reason that a hung jury would not prevent a
2 retrial in this case is because it's considered a continuation of
3 the trial from the last jury that was impaneled. It's a
4 continuation from that, so their notice period ended twenty-one
5 days before the last retrial.

6 Now, I know that they've said we have changed, you
7 know, what we're doing notice wise, but that was after a reversal
8 and it came back for different charges and there's case law and I
9 cited in my brief that the Defendant can change courses to remedy
10 things that weren't remedied with an order of reversal.

11 We raised several issues in the first appeal. The
12 Supreme Court chose not to address those because it was sending it
13 back; that's our opportunity to address them with this Court which
14 we did. I have litigated everything and that was appropriate.
15 It's appropriate for us to attempt to change the things that we
16 thought were erroneous the first time.

17 Now, if the State had changed course, I'm not saying
18 that they could have, but if they did their opportunity to change
19 course ended with twenty-one days before the last trial. The
20 retrials a continuation of that. And so we didn't have a timely
21 notice on the expert.

22 THE COURT: It was timely for the third trial. It's not
23 timely if we start the clock at the second trial.

24 MS. PALM: That's correct.

25 And also their expert is prohibited by NRS 48.061

1 subsection 2 of that statute says expert testimony concerning the
2 effect of domestic violence may not be offered against the
3 Defendant pursuant to subsection 1 to prove the occurrence of an
4 act which forms the basis of the criminal charge against the
5 Defendant. And we addressed this also in our bad acts motion, but
6 the legislative intent which is more comprehensively addressed from
7 the subsequent motion is clear that this sort of evidence was not
8 to be used against a criminal Defendant.

9 So, the expert in this case is inappropriate; that the
10 intent of that subsection that adding language to that subsection
11 to allow the State to bring in experts on the issue of domestic
12 violence was for when they had this situation of a recanting victim
13 and that's quoted at length in my other -- in my other opposition.
14 That's not the situation here. They want to use it as evidence of
15 guilty. They want to use it as propensity. There's no reason to
16 have an expert in here otherwise. And it's inappropriate under the
17 statute. It's not allowed.

18 And aside from that, the last time we were not allowed
19 to have an expert testify about Ms. Whitmarsh's diagnosis. And I
20 quoted in my -- in my brief the little discussion on that and it
21 was Mr. Lalli saying so now that after the fact we're supposed to
22 come in here and, you know, examine this dead woman and the Court
23 said not at this time you're not. So we were precluded from doing
24 a similar thing. What they want to do now after a hung jury which,
25 you know, that's just completely unfair they're allowed to do that,

1 if they're allowed to bring in expert now.

2 Plus, this expert never diagnosed Ms. Whitmarsh. She
3 never talked to Ms. Whitmarsh and Ms. Whitmarsh had a whole host of
4 psychiatric disorders which, you know, we submitted the exhibit to
5 the motion which was under seal; that just confused the heck out of
6 what would have been going on with this woman when it comes to
7 domestic batteries or violence syndrome or battered woman syndrome.

8 She had all kinds of problems. She was bipolar. She
9 had panic disorder. Major depressive episodes. Multiple suicide
10 attempts. Impulse control. Anger problems. She also reported
11 long term abuse by her own husband, eighteen years of abuse. So to
12 have this woman come in here and say now this is what was going on
13 in this case or talk about the syndrome at all is extremely
14 prejudicial to Mr. O'Keefe. Entirely inappropriate under the
15 statute and so we would ask to preclude their expert. Also their
16 late notice expert.

17 THE COURT: Mr. Lalli?

18 MR. LALLI: Your Honor, counsel said a couple of times
19 mention the words changing course. And I just wanted to be very
20 clear, we're not changing course. Our theories of guilt haven't
21 changed. The theories of what was happening in this relationship
22 haven't changed. It's all the same.

23 I think I would not be a good lawyer and I would not be
24 fulfilling my obligations to this community if when I got a case
25 every time I worked on that case, I didn't do something to make it

1 better. I think that is my responsibility and my obligation as an
2 attorney. And I think it is ludicrous to suggest that if the case
3 is going to be retried, everybody's hands are tied and we're just
4 stuck by what happened before. I mean, we could call amount of
5 lawyers into a courtroom and simply read a prior transcript and
6 give it back to the jury if that were the case.

7 And I illustrated one example. There are many others
8 of how the defense is not lived by this theory with respect to
9 their experts. The Court may recall on the second trial they
10 relitigated a number of issues. The bad act issues. The Defendant
11 statement was substantially redacted from the first trial, and good
12 for them.

13 I mean, Ms. Palm's doing her very best to be a good and
14 effective advocate as she should. While we're certainly going to
15 do the same thing on the State's end.

16 With respect to this -- some how we're bound to notice
17 an expert from the very beginning or we're forever damned if you
18 will throughout the life of the case. There's just absolutely no
19 legal support for that premise. There's no -- there's no support
20 for whatsoever. If we choose to call an expert witness; that is
21 our right subject to the Court telling us that we can't.

22 The statute is very clear and Ms. Mercer's really an
23 expert in this area, but the statute on domestic violence, we have
24 a statute on it. And we're not allowed. I would agree with Ms.
25 Palm, we're not allowed to bring in an expert in and to talk about

1 propensity that that man is a wife beater and a woman beater and so
2 he beat this woman too.

3 If the Court will recall the defense theory here is
4 that, and I don't want to -- I don't want to speak for what their
5 theory is going to be in the case, but I think a reasonable
6 observer would take their position to be that things were just fine
7 in their relationship. Sure, they had their issues in the past,
8 but those had kind of resolved themselves and sure enough Victoria
9 Whitmarsh was back with him because she loved him. And that's just
10 not the case. That is just not the case.

11 And we're entitled subject to the Court limiting us.
12 Subject to the Court reeling us in. If the Court believes we're
13 getting too far field, then I'm going to submit to the Court we're
14 not going too far field, but we have the right to explain why is
15 that she might have stuck around with this guy or come back to him.

16 And specifically with regard to the statute 48.061,
17 we've cited the Court with the legislative history of that. And if
18 you read it and even if you look at the history cited by Ms. Palm,
19 and I apologize, Your Honor, it's just occurring to me, you didn't
20 read our -- you haven't read our motion -- our bad act motion and
21 that's the motion that kind of deals with this in Ms. Palm's
22 opposition to it.

23 But both of us cite to you legislative history on that
24 -- on that and perhaps maybe -- if the Court get's beyond the
25 procedural issue and then wants to kind of jump into the substance

1 of it, maybe addressing that a later time is appropriate, but I can
2 tell the Court why it was that this section was enacted. And it's
3 borne out in both of the legislative history cited by the defense
4 and by the State.

5 The Nevada District Attorney's Association went to the
6 Legislature and said hey, Defendants are able to come in and
7 they're able to call experts as to why they do the things that they
8 do. We don't have the similar opportunity to do that with respect
9 to our victims and why they do the things that they do. Why it is
10 that they recant when they testify; and it's certainly is Ms.
11 Palm's position that Victoria Whitmarsh had recanted in her
12 allegations against the Defendant in the past. She cited
13 transcripts and argued up and down that, in fact, was the case.

14 We're certainly able to -- well, so the Nevada District
15 Attorney's Association went to the Legislature and specifically
16 asked them to change this statute to allow for the State to do what
17 we are doing in this very case; that's what the history of the
18 statute says. And so it is appropriate. We're entitled as good
19 lawyers to make our cases as good as we can within the bounds of --
20 of ethics. And certainly our notice was timely filed in this case.

21 THE COURT: Anything further, Ms. Palm?

22 MS. PALM: Well, in response to that. We've never been able
23 to put on evidence that Victoria Whitmarsh recanted. So the fact
24 that we may talk about that whether things are admissible or not
25 admissible, we've never put on evidence about that. Last time we

1 took our lumps, he's got a felony conviction for domestic battery.
2 The Court did the balancing already on that and we weren't allowed
3 to come forward with -- but yeah, she recanted in that case.

4 And we're not asking to now, so there's no reason to
5 bring on this expert who's going to talk about her state of mind
6 which is entirely ambiguous given her mental health history. And
7 it's not timely.

8 THE COURT: Well, he's not going to -- the expert's not going
9 to say her -- her particular state of mind is generally this is
10 what the dynamics of this -- of a domestic violence relationship
11 entails. So he can't -- is not going to be allowed to say this is
12 what she was thinking in this case.

13 MS. PALM: Well, then I'm not sure how it's relevant.

14 THE COURT: Well, we're going to deal with that at 1:30
15 'cause that's part and parcel of the motion for 1:30. But the
16 issue of the timeliness that there's absolutely no case law,
17 statutory law, that provides that on a second trial, third trial,
18 fourth trial that the State can't -- State or defense can't notice
19 new witnesses, can't notice new experts as long as they're noticed
20 timely.

21 So on item 2 as far as the timeliness of the notice I
22 find that it was timely and we'll deal with the issue of substant
23 area of that at 1:30.

24 The last item of the first part of the motion, Ms.
25 Palm, is that your client's speedy trial rights have been violated.

1 MS. PALM: That's correct, Your Honor. Mr. O'Keefe has at
2 all times prior to this asserted his speedy trial rights. The last
3 time the case presented -- this case was presented, the State
4 wasn't prepared to present this evidence. They didn't give notice
5 for this evidence. It's lack of preparedness directly implicates
6 his speedy trial right. Again it's a whole double jeopardy speedy
7 trial kind of mix as their remedying what they didn't do last time
8 although we think that they're responsible for the hung jury last
9 time.

10 So -- and also allowing this late notice expert is
11 going to cause even further delay because we haven't had the
12 opportunity to go get a battered woman's expert to talk about. I
13 don't know what their expert's going to say either. We haven't had
14 -- at this point, not only was there notice just for this person,
15 we don't have a report. We don't know what they're going to talk
16 about. I can't go get somebody to tell me how to counter what the
17 evidence is when they haven't given me notice of what the evidence
18 is. There's no report. This is going to cause further delay
19 because I'm going to have to look into battered woman syndrome and
20 whether their opinions are accurate. I don't know what the
21 opinions are.

22 THE COURT: I haven't seem to notice, but I'm assuming the
23 notice identifies a brief statement as to the area they're going to
24 testify too and their CV needed to be attached to the notice. I'm
25 assuming that was done in this case?

1 MR. LALLI: Yes, Your Honor. It was.

2 THE COURT: And it has a list of publications and other cases
3 they testified in?

4 MR. LALLI: It's a -- it's a curriculum vitae, Your Honor. I
5 guess here's what I can tell the Court on this. With respect to --
6 let's just -- without trying to morph everything back into one big
7 issue. With respect to the speedy trial issue, I understand that
8 the Defendant has been invoking his right to speedy trial and he
9 has that right. We're not suggesting he doesn't after a retrial.

10 But I do want to point out that the Court has really
11 bent over backwards to accommodate his speedy trial right. The
12 Court may recall that initially after the verdict or the -- the non
13 verdict in this case, the Court wanted to put this case on the very
14 next day to set it for retrial. The very next day. And it was at
15 Ms. Palm's request and the State's acquiescence. I don't want to
16 suggest that we didn't join in the request or agree to the request,
17 but in -- in opposition to this -- to the Court's desire to set it
18 the very next day, it was asked to be passed for a time. A short
19 period of time, but it was asked to be passed for a time, so that
20 the -- the parties could explore whatever they were going to
21 explore.

22 And then the Court certainly that has a lot of trials
23 on it's calendar and does a lot of trials, set this really almost
24 out of desperation for the date that we're now set because the
25 Court may recall there was a -- a very lengthy case involving UMC,

1 a fraud case, that had previously started and couldn't finish, just
2 a monster of a case and as I recall there's also a capital case
3 that was at this area of time, but the Court was so determined to
4 give and to honor Mr. O'Keefe's right to speedy trial that it set
5 this trial now.

6 And as things would have it, the storm clouds have
7 cleared if you will and the Court now does have an opportunity to -
8 - to hear the trial now. It was a time that worked for my schedule
9 and it was a time that worked for Ms. Palm's schedule.

10 When you look at the cases that we've cited, the Manley
11 case that talks about delays by conflicts. In the Court's
12 schedule, that does not in and of itself amount to a speedy trial
13 violation. A crowded docket or crowded calendar as we we're
14 experiencing in the Eighth Judicial District Court does not result
15 in a speedy trial violation and that's under Bailey versus State,
16 the 1978 case that we cited, B-A-I-L-E-Y.

17 So with respect to just mere timing issues, there is no
18 issue here. There's none whatsoever. With respect to the notice,
19 the Legislature and the Supreme Court has adopted this idea of
20 twenty-one days whether I agree that that's sufficient time or not
21 is really irrelevant, but that's what our Legislature has said is
22 sufficient time to notice the defense of an expert so that they can
23 call the expert if they want too. They can reach out to the
24 expert. We've never said hey you can't talk to this person. They
25 can do their investigation. They could have sought immediately to

1 retain an expert upon receiving our notice. Or start exploring
2 that opportunity. Or reaching out to the office of appointed
3 counsel for that purpose.

4 So these -- if there is a delay that Ms. Palm believes
5 she needs based upon our right and our willingness to endorse and
6 call an expert in domestic violence, that's not our issue. That's
7 not our fault. That's not something that can be blamed upon the
8 State because we have complied with our -- our statutory duty. If
9 she needs more time to prepare because of that, that's a separate
10 issue, but that's not something that you can say the State did or
11 the Court did to infringe upon that man's speedy trial rights.

12 THE COURT: Frankly, I don't recall stating that we could
13 start the trial the next day or the next week, but it seems like
14 Ms. Palm isn't objecting to that --

15 MS. PALM: No.

16 THE COURT: -- so apparently I did say that.

17 MR. LALLI: It's in the record. I cited the --

18 THE COURT: Okay.

19 MR. LALLI: -- transcripts where that occurred in the --

20 THE COURT: But no. The point is --

21 MS. PALM: Well, you --

22 THE COURT: -- Ms. Palm, that --

23 MS. PALM: -- well --

24 THE COURT: -- this Court attempted to give you the earliest
25 trial date possible after the hung jury or the mistrial was

1 declared and assuming the transcript is accurate that I was willing
2 to give you a trial the next week or the next day. Also I tried to
3 squeeze this case in as best I could. As for the record, I have a
4 split calendar which gives me five weeks of civil trials and five
5 weeks of criminal trials.

6 So, I did what I could to fit this case in as soon as
7 possible. And I recall now that at the time the trial was set for
8 January which was done in 2010 that I had I believe twelve to
9 fourteen murder trials set for 2011. And each one of those -- I
10 think there was eight death penalty cases out of those and as we
11 know it takes two to three weeks. So, this was the earliest case I
12 can give and, in fact, it was trailing and two other cases or
13 another death penalty case I think it was Schneider I think we
14 talked about and also Lacy Thomas case.

15 So, I don't find any violation of speedy trial rights
16 in this case, so I'm denying your motion in that regard.

17 If counsel can come back at 1:30 we could resolve the -
18 - the other motion.

19 MS. PALM: Your Honor, I would just like to clear up the
20 record a little bit. When we ended the trial last time, part of
21 the reason is we had to find out who was going to be new counsel.
22 Whether the -- whether I was going to be reappointed counsel or
23 not, so I think that that was the hesitation about whether -- what
24 we had to take care of because I was removed from the case after
25 the trial and then Drew had to reappoint me, so --

1 MR. LALLI: Your Honor, that's -- and I don't mean to quivel
2 about this; that's simply not my recollection and if the Court were
3 to look at the -- at the transcript --

4 MS. PALM: What date is that?

5 MR. LALLI: It's September 2, 2010 at page 5.

6 MS. PALM: And I will tell you the Court minutes of the
7 September 16th reflect that I was just being appointed as his new
8 counsel, so --

9 MR. LALLI: And that could very well have been. I think the
10 point of it is and it's very clear from the transcript, the Court
11 wanted to put it on the very next day to reset the trial. And it
12 was Ms. Palm who requested additional time from that. I'm not
13 saying that waives the Defendant's speedy trial rights. I'm not
14 suggesting that her saying hey I need a week or two weeks or
15 whatever it was to look at some things, but I just -- I just -- I
16 want to point out the Court's willingness to accommodate this
17 Defendant because certainly that has been the case.

18 THE COURT: I think the record will bare that out as far as
19 what I attempted to do to schedule this again with my split
20 calendar.

21 So I'm going to deny that portion of your motion on
22 violation of Defendant's speedy trial rights.

23 And if you can come back at 1:30. Again, I apologize
24 to counsel. There's a confusion. I will have those motions
25 reviewed and we can argue them at 1:30 this afternoon.

1 MS. PALM: And, Your Honor, just so that the Court remembers,
2 we had left an issue number four in my previous motion from the 13th
3 to deal with today too. It's all the same domestic violence
4 matters, but the Court will need to make a ruling on that still
5 when we come back.

6 THE COURT: All right. See you back at 1:30.

7 MR. LALLI: Your Honor, I -- I don't want to be fly in the
8 ointment here, but I've got a preliminary hearing tomorrow and I've
9 got a witness, an important one, who's going to be here at 1:30.
10 Is it possible to do this at 1?

11 THE COURT: That'll be fine. Are you available, Ms. Palm?

12 MS. PALM: Yes.

13 THE COURT: All right.

14 MR. LALLI: Thank you.

15 [Matter trailed]

16 [Matter recalled at 1:07 p.m.]

17 THE COURT: The first item -- this is our -- this is the
18 State's motion in limine to admit evidence of other bad acts
19 pursuant to 48.045. The first item, Mr. Lalli or Ms. -- who's
20 handling this? Do you have it, Ms. Mercer?

21 MS. MERCER: It's mostly me, Your Honor.

22 THE COURT: Which is the January 7th '03 incident?

23 MS. MERCER: Yes.

24 THE COURT: He was -- the Defendant pled guilty to
25 obstructing a police officer, not a domestic violence and Ms. Palm

1 said she did not get -- did not receive the full packet of reports
2 that may relate to this incident.

3 MS. MERCER: Judge, I think Mr. Lalli's going to be
4 addressing the discovery issues.

5 MR. LALLI: Yes.

6 MS. MERCER: So --

7 MR. LALLI: If I can just address --

8 THE COURT: Sure.

9 MR. LALLI: -- the discovery -- just the overall discovery
10 issue. I can tell the Court I had presumed that Ms. Palm had all
11 of the discovery for all of these events and I'll tell the Court
12 why.

13 I came in last minute before the last trial. And based
14 upon the -- the condition of my file and file reviews, Ms. Palm had
15 done a file review prior to that. I certainly believed that she
16 had everything that I had at certainly at that time, but I believe
17 she had more for a couple of reasons.

18 One, during -- during the trial I was -- I had
19 requested discovery from her things that I certainly should have
20 had, but I didn't have and an example would have been all of the
21 victims psychiatric records. So I believe that that was missing,
22 but Ms. Palm was good enough to give it to me. I presumed that we
23 had provided that to her at some point.

24 Another example is in our most recent round of motions,
25 she had actually attached some trial testimony to one of our

1 motions that I've never seen before and it is from one of these
2 cases in question. And I do know from her file review that at
3 least on a limited basis, she had reviewed my file and it had some
4 of the discovery on these events that I did.

5 Another example is prior to Mr. O'Keefe testifying in
6 the first trial, he was warned about opening the door to the priors
7 that he had had if he said something that would open the door to
8 something that would be fair game. So, I realize that I was
9 lacking some of the discovery and resubpoenaed, rerequested all of
10 the discovery for all of the event numbers.

11 Now, I think that somewhat there is maybe some
12 positioning going on by the defense. Our motion was filed on
13 January 6th of 2011. It was filed on January 6th of this year. In
14 the opposition that we received, there's this indication well I
15 have this report which makes reference to other reports. And so,
16 first when that -- if there is no discovery and I don't doubt it.
17 Ms. Palm said she didn't have discovery I believe she doesn't have
18 the discovery, but why if -- if this discovery references other
19 reports which I know that she's had because she reviewed it in a
20 previous file review, why wasn't there a request for it at that
21 point. Why after we filed our motion wasn't there a request back
22 on January 6th or 7th or 8th?

23 We had a calendar call and Ms. Palm did not mention
24 anything about not having discovery. It wasn't until the moment
25 that I received that motion and as soon as I got the motion, I

1 picked up the phone and I called her and I said didn't realize you
2 did not have these things. I've recopied everything. Scanned it
3 on a disc. I have it for you. Here you go.

4 So, I -- she said she doesn't have it. I'm not going
5 to question that. However, I don't know why I'm learning that for
6 the first time in an opposition that's filed after -- after our
7 calendar call was held.

8 THE COURT: Okay.

9 MR. LALLI: And it very well might be that she doesn't have
10 it, so that is the discovery piece, Your Honor. Ms. Mercer's going
11 to talk about the actual merits of these things.

12 MS. PALM: Would you like me to address the discovery, Your
13 Honor, or respond to that?

14 THE COURT: Just very briefly because we're going to get into
15 each one.

16 MS. PALM: On the discovery, we had done file reviews the
17 first trial. There was an exchange of discovery. The only thing
18 we ever got were incident reports and we didn't think ever that
19 this would be coming in because we had an agreement with the D.A.
20 who was very upfront. I'm not going to bring any of this into my
21 case in chief. There's no reason to do a whole bunch of
22 investigations. Mr. O'Keefe had invoked. We had to get ready for
23 trial. We were not going to open the door to this and we made it
24 very clear that we were not going to open the door and we discussed
25 it with the Court what would open the door, what would not open the

1 door.

2 So, there was no reason to go investigate all of these.
3 We did get some things like Ms. Whitmarsh's testimony, but we
4 didn't -- we don't have everything. We never did. We never got
5 more than an incident reports from the D.A.'s office.

6 Then I did the file reviews. I did two file reviews.
7 One with Ms. Graham and one with Mr. Lalli. I got what they had
8 which was just incident reports and then I remember the day it went
9 during trial, he gave me a folder, here's some additional discovery
10 and in that it was more copies of the same incident reports. So,
11 he was trying to give me what he had, but that's all he had that
12 I'm aware of that's all I've ever had from the D.A.'s Office.

13 I did do a discovery motion before this Court which
14 asked for discovery of everything that they intended to introduce
15 in their case in chief. I've done everything I could to get this
16 discovery. Why didn't I jump up and down, am I going to get
17 discovery when I finally get their notice that they're intending to
18 put this in on January 7th; that's not going to give me enough time
19 to do anything any way. We're already well into trial preparation
20 and -- and exchanging motions and as you know I've been litigating
21 the heck out of this case and filing every motion that I could and
22 responding to every motion that they did.

23 So, giving me discovery, you know, two weeks out would
24 not have helped me. And the fact is that I did get three hundred
25 pages of discovery yesterday afternoon from Mr. Lalli on a disc and

1 some of them on paper and most of it I have never seen before. So
2 that's the discovery.

3 THE COURT: All right, Ms. Mercer, let's talk about the first
4 incident of January 7th '03.

5 MS. MERCER: Uh-huh. What specifically do you want to talk
6 about, Judge?

7 THE COURT: So the reports that you have provided identify
8 that on or about January 7th Defendant had -- they were drinking I
9 guess. Defendant slapped her and she had a nose bleed.

10 MS. MERCER: Correct. And that when the police arrived they
11 saw that she was -- that her nose was still bleeding.

12 THE COURT: Then she pled -- he pled to obstructing a police
13 officer?

14 MS. MERCER: Correct, Your Honor.

15 THE COURT: Was he charged with battery domestic violence, do
16 you know?

17 MS. MERCER: Yes.

18 THE COURT: On the -- the merits of that first item, Ms.
19 Palm, what's your objection 'cause I've read your opposition and
20 the main part of that at least on this one was your I only have
21 three pages. I don't have photos. I don't have, you know, all of
22 the documentation.

23 MS. PALM: Okay.

24 THE COURT: I don't know if the Court has all the
25 documentation, but --

1 MS. PALM: Well, if the Court would allow me to I can have a
2 general objection to all of them and I can go through it on the
3 first one because all of it will apply to all of them.

4 But first of all there's -- there is unfairness in
5 letting this in because we weren't allowed -- maybe I'll save some
6 of this for the expert's testimony or did you just want to hear it
7 now 'cause it kind of all goes together?

8 THE COURT: Is sort of does. Go ahead.

9 MS. PALM: Okay. As far as allowing evidence of other
10 evidence domestic violence and the expert diagnosis, we were
11 precluded from introducing evidence of her actual diagnosis during
12 the last trial and I believe the quote was we're not going to do
13 that now at this time. We were too close to trial.

14 It also has -- Mr. Lalli said this evidence is relevant
15 because it shows why she went back to him. We're not challenging
16 anything about her going back to him. We're not challenging her
17 recanting testimony. There's not reason to -- to show why she
18 would go back to him. It doesn't have any relevance to any
19 material fact.

20 The only fact and issue is that there's malice and
21 intent to cause her death. The felony battery that you let in
22 already weighs heavily towards that along with Ms. Morris'
23 statements; that balance was already made by this Court. So this
24 is just tipping the scales further prejudicially. What's in is
25 already extremely prejudicial to him.

1 We were also denied the opinion testimony about a
2 loving relationship without opening the door to other bad acts.
3 The last trial we had a big discussion. Mr. Lalli didn't want us
4 to be able to say they had a loving relationship even though we had
5 neighbors and friends and other people who would say that at the
6 time that they had reestablished their relationship out of prison.
7 And the discussion was we went there, we were going to open the
8 door to this stuff, so we didn't go there.

9 So, it's not fair to do it now. I think it's going to
10 be a due process problem.

11 THE COURT: Well, if I recall I allowed the witnesses in your
12 examination to include what did you observe --

13 MS. PALM: That's correct.

14 THE COURT: -- if they were kissing, etcetera, but as far as
15 reputation, well then if they're coming in -- if they -- their
16 reputation merit they were very loving couple, that he was very
17 peaceful with her or loving with her, then the State could come in
18 and say well will your opinion change for --

19 MS. PALM: Right.

20 THE COURT: -- various reasons, so --

21 MS. PALM: But here what --

22 THE COURT: Well you were not precluded from saying they were
23 holding hands, doing kissy face, whatever else, so you weren't
24 precluded.

25 MS. PALM: Right. And I'm not saying that we were. I'm just

1 saying that they want to do the reverse now. They want to have
2 this hole that they, you know, this is a domestic violence
3 relationship and it's not fair at this point in the game I don't
4 think.

5 There's a due process problem with notice. This case
6 came back after the reversal because they hadn't notice an unlawful
7 act theory. I think trying to do this through showing battered
8 woman syndrome and the repeat domestic violence incidents is just
9 trying to prove the case through it occurred during an unlawful act
10 being a battery which they haven't noticed. And it's
11 inappropriate. The notice is just for a second degree murder. Not
12 a domestic violence battery murder. So I think it creates some due
13 process issues.

14 As far as NRS 48.045, I think that showing any more
15 than the felony battery which encompasses three of the acts that
16 are in there, is just tipping the scale way too far. It's
17 overwhelmingly prejudicial. The State has grossly misstated the
18 strength of their case in their motion. One of the things they
19 were saying this should be in because this is a good case for us
20 any ways, so it's not going to do us any harm; that is just not
21 true.

22 The Supreme Court says there's not overwhelming
23 evidence of a second degree murder. The jury hung the last time.
24 The experts who testified can't rule out accident or suicide based
25 on the body. Their AME testified there was -- they were all

1 injuries that she identified as acute and everybody said they
2 couldn't -- those injuries were not inconsistent with an accident.
3 They were not inconsistent with happening during the arrest or
4 rescue. I mean, we had -- not that the expert testified about it
5 exactly, but the evidence I think we had good evidence that
6 supported those theories.

7 The older injuries could have been caused by innocent
8 accidental means, bumping into things with her cirrhosis and her
9 alcohol abuse. We had innocent explanations for those. The
10 neighbors heard no yelling and no screaming during this incident.
11 The neighbor testified that they were very quiet. They never heard
12 any noise coming from there until this incident.

13 So, this whole ongoing abuse theory that's happening at
14 the time that's not -- there's no evidence to support it. Mr.
15 O'Keefe had defensive cuts. His next door neighbor saw him enter
16 an apartment just fifteen minutes before this happened supported
17 that she would have been alone in there.

18 We were allowed to let in a limited amount of her
19 history just so innocent reasons for the noises the neighbors heard
20 the reason for the knife in the bedroom a potential innocent cause
21 of death being suicide or accident. We didn't get to put in all of
22 her suicide attempts. We didn't get to put in her drug problems.
23 We didn't get to put in a lot of evidence that we otherwise would
24 have wanted to put in.

25 But the Court struck the balance and we think that's

1 where it should stay. And aside from that Mr. O'Keefe was
2 extremely intoxicated, so they just don't have a strong case by any
3 -- by any measure.

4 The whole late discovery thing, they've always
5 indicated it was never their intent to introduce any of this other
6 evidence. We've built our case theory. Our entire case theory is
7 built around this is the evidence that we're dealing with. This is
8 how we're going to go with our investigation. Letting anything
9 else in at this point would cause me to have to go out and
10 investigate all of this.

11 I would have to go look for impeachment evidence. I
12 probably have to subpoena her other counseling that she had. I
13 probably have to subpoena the safe house that she was living in
14 'cause I think she was in when Mr. O'Keefe was incarcerated. I
15 have to interview the witnesses and character witnesses. Good
16 character witnesses for Mr. O'Keefe potentially out of state
17 because he grew up in Ohio and that's where his family is. And
18 that's where his ex-wife is.

19 And it's three hundred pages of new discovery for me to
20 have to deal with. It's not a simple thing to deal with right
21 before trial.

22 It's also not permitted by the statute, NRS 48.061 they
23 want to say that there's a different standard to NRS 48.045 when it
24 comes to this kind of propensity evidence that our Legislature has
25 determined that it's no -- it's not to be treated as propensity

1 evidence somehow. And that's just not the case.

2 Under our case law, bad acts are disfavored. They're
3 disfavored. They're supposed to be, you know, scrutinizing and
4 carefully let in because of there -- there's a realization they're
5 so prejudicial. The legislative history of NRS 48.061 shows that
6 our Legislature had a law in front of it that would have done that.
7 It didn't get out of committee, so we did not become like those
8 other States that wanted -- let in this kind of evidence to show
9 the entire context of the relationship; that's not Nevada. Nevada
10 disfavors bad acts. These are bad acts subject to the regular
11 Nevada test for it. This Court has struck that balance and it
12 shouldn't change now.

13 And then I don't know how the heck they're going to
14 prove any of these because I want a Petrocelli hearing on every
15 single one of them. If they're saying they can prove them because
16 they're all based on Ms. Whitmarsh's statements and they're all
17 hearsay. It's a violation of the confrontation clause. I don't
18 know how they are going to prove any of these beyond clear and
19 convincing evidence without going to hearsay and violating his
20 confrontation rights.

21 And they have not noticed that they want to use any
22 prior testimony. They haven't timely noticed it. They shouldn't
23 be able to do it. And if this Court grants their -- their request
24 to admit these it should be from today and they shouldn't get to
25 cure that because then we would have to have time to investigate

1 'cause it's a problem they caused. So, they should be excluded
2 from using her -- her transcripts for anything.

3 And even under the case law, none of these are
4 relevant. There was no knife involved in them. They cite a case
5 for, you know, the Johnson case where they let in attempt killing
6 or whatever it was involving a weapon 'cause it was just like the
7 one they had. None of these prior incidents involve a knife at
8 all.

9 And as far as this first obstructing this one, I don't,
10 you know, I don't know what else to say about it. I haven't had
11 any more on it until yesterday and I don't think still I have
12 everything. I would have to go get the Court records and, you
13 know, to be able to challenge it I just don't know, but I don't
14 think, you know, an obstructing is relevant. It's not a domestic
15 violence offense. Other than that I don't know anything about it.

16 THE COURT: On the November 14th '03, I don't know if IT'S a
17 typo. Was is it supposed to be '04, '03? One of the statements
18 says a few months later, it looked like -- maybe I misread it, but
19 it said the last four numbers of the event number is 0539 which I
20 think is the third item brought up in the State's motion. Didn't
21 your client plead guilty to battery domestic violence and by that
22 plea of guilty doesn't it establish by clear and convincing
23 evidence?

24 MS. PALM: He pled guilty to a first offense, but if the
25 Court's going to say you can tell the jury he pled guilty to a

1 first offense that's one thing. If you're going to say he can put
2 it -- they can put in hearsay evidence relating to that that's
3 another thing. I think that violates his confrontation rights plus
4 I haven't had a chance to look at how to challenge it.

5 THE COURT: And then the felony conviction, he went to trial
6 and he was guilty of battery DVA third.

7 MS. PALM: Which one are you talking about, Your Honor?

8 THE COURT: This is April 2nd '04. One he had a felony and
9 went to prison.

10 MS. PALM: Oh, okay.

11 THE COURT: And then on was it April 3rd, which is the very
12 incident, he pled guilty to battery DV.

13 MS. PALM: Yes.

14 THE COURT: So we have at least two guilty pleas and one jury
15 verdict of guilt.

16 MS. PALM: And, Your Honor, what those are the three domestic
17 batteries that resulted in a felony. And we're not saying that he
18 is not guilty of those, but what they can put into prove those up
19 is another question and -- and if they're just saying they want to
20 put in the fact that he was convicted of those three incidents like
21 we did last time with their putting in the facts he was convicted
22 of a felony domestic battery. And then they -- to say they're
23 supported by these three incidents, they could probably prove that,
24 but the underlying facts of it, the other things that they haven't
25 properly noticed that I haven't been given before, you know, I

1 think that it's just too late in the day to start noticing a whole
2 bunch of other things. And they haven't yet said how they're
3 proving anything.

4 THE COURT: Just so I'm clear from the second trial, it
5 appeared to the Court that there was some argument or perhaps part
6 of your client's statement to the police officers that there was
7 self defense, perhaps some attempt suicide, perhaps an accident,
8 they were wrestling around and she got stabbed with a knife. So
9 aren't some of these incidents relevant to the issue of lack of
10 mistake, intent or motive?

11 MS. PALM: Well, Your Honor --

12 THE COURT: Those are your three defenses it sounds like if I
13 recall from the trial.

14 MS. PALM: -- our defenses are that she either stabbed
15 herself or in the struggle over the knife, she was accidentally
16 stabbed. Those are defenses and I would say that there's a
17 question of relevance, yes. Some of those things are relevant.
18 The Court considered that when you said the felony domestic
19 violence conviction is going to come in.

20 But when you start talking about what's coming in to
21 actually show this again beyond the fact of conviction, that's when
22 we're getting into the real prejudice. And I don't know how
23 they're going to do that. And I haven't, you know, I don't have a
24 full discovery on this, so I don't know how to challenge it at this
25 point.

1 THE COURT: 'Cause typically I see a lot of these with, you
2 know, where someone's a serial burglar. I had one in particular
3 where they go on the roof of the business and break a hole in; sort
4 of like the hole in the wall game, but I think they're hitting some
5 fast food stores. So they can go into the facts saying that -- I
6 think it was like a Burger King they broke a hole in the roof at
7 the Burger King; and they went to a McDonald's and they went to a
8 Wendy's and under this they just don't bring in that they were
9 charged with these crimes. Can't they bring in the facts of
10 breaking in the roofs, jimmying the cash register?

11 MS. PALM: Who are they going to bring in to testify to that?

12 THE COURT: Well, if we have a guilty plea or a conviction
13 and isn't the allegation is to prove -- prove -- proved by clear
14 and convincing evidence?

15 MS. PALM: The conviction itself would be clear and
16 convincing evidence, but what's admissible is another question.

17 THE COURT: Ms. Mercer, on that issue.

18 MS. MERCER: Judge, as to a number of these events there were
19 other witnesses involved. People that she ran to for help such as
20 security guards, apartment managers. A neighbor in one of them
21 pulled her out of the apartment. There's 9-1-1 calls. I
22 understand that her position is that Crawford bars us from
23 introducing all hearsay evidence. It hasn't been subjected to
24 prior cross-examination, but it applies to testimonial hearsay and
25 it's the State's opinion that we will be able to present sufficient

1 non-testimonial hearsay to support many of these allegations,
2 Judge.

3 MS. PALM: Well, then I guess we would need a Petrocelli
4 hearing.

5 MS. MERCER: And we agree with that Judge.

6 THE COURT: All right.

7 MS. PALM: And also, you know, I'm going to need some time to
8 look at impeachment.

9 THE COURT: At least at this point from what I have and
10 obviously I need to hear more and I want Ms. Palm to have an
11 opportunity to review all the -- there's always an arrest report,
12 incident report, affidavit. There's like four or five reports
13 generated from each situation, but it does seem here at least with
14 the two guilty pleas and the jury verdict that those items would be
15 coming in.

16 MS. MERCER: Judge, I'm sorry I meant to bring it to your
17 attention. There also actually was another jury verdict of guilt
18 as to the --

19 THE COURT: That was the last one --

20 MS. MERCER: Correct.

21 THE COURT: -- where he was charged with sexual assault,
22 attempt sexual assault, burglary.

23 MS. MERCER: And he was convicted of battery and burglary.

24 THE COURT: Was the battery DV or just --

25 MS. MERCER: I can't recall off the top of my head --

1 MS. PALM: I'm not sure --

2 MS. MERCER: -- Judge. I'll have to look at them again.

3 MS. PALM: -- I'm not sure if there was a conviction of
4 battery. I think the burglary was just based on a battery.

5 MS. MERCER: He was given credit for time served on the
6 battery charge. I do recall that, Judge.

7 [Colloquy between Plaintiff's counsel]

8 MR. LALLI: I believe it was a battery domestic violence
9 conviction --

10 THE COURT: Okay.

11 MR. LALLI: -- 'cause I remember reading the transcript and I
12 believe it was Judge Loehrer who sentenced him --

13 MS. MERCER: Yes.

14 MR. LALLI: -- if I'm not mistaken.

15 MS. MERCER: It was.

16 THE COURT: 'Cause I don't have that information in front of
17 me for -- for me to make a decision on that, but I think we need to
18 get a little bit more factual basis for these, but, you know, I
19 feel the State would meet the burden of clear and convincing
20 evidence on the two misdemeanor battery DV's, the felony battery DV
21 where he went to trial.

22 I'm not sure on the last item which was with the sexual
23 assault, attempt sexual assault when the jury came back with
24 burglary, battery, assuming misdemeanor. I don't know if there's
25 battery DV or not.

1 The -- the first two items where he was charged with
2 obstructing a police officer, you know, the State's going to be
3 able to establish that situation of a -- of a battery and show some
4 further relevance to the Court, I'll entertain that, but I think
5 right now we need to have more evidence than what's been presented.
6 And Ms. Palm needs -- has some challenging opportunity to see all
7 the reports.

8 And so, at this point I'm inclined to grant some of
9 these assuming they pan out, but I think the felony battery DV went
10 to trial and the two guilty pleas would probably be allowed in this
11 case, but I want Ms. Palm to have an opportunity to look at all the
12 reports for those at least those misdemeanor battery DV's as well
13 as the other ones.

14 The other ones I'm not inclined to say -- to say
15 anything one or the other, but at least with the guilty pleas the
16 State will meet their burden of clear and convincing.

17 MS. PALM: And -- and the Court's not ruling that they're
18 admissible because they're clear and convincing at this point; is
19 that correct because we still have --

20 THE COURT: I just need to have more information --

21 MS. PALM: -- the prejudice versus relevance issue?

22 THE COURT: Well, you know, I think they are relevant. I
23 mean, assuming it pans out as set forth, I think they're relevant
24 to motive, lack of mistake in this particular case.

25 MS. MERCER: Correct, Judge.

1 MS. PALM: Well --

2 MR. LALLI: Your Honor, my understanding what the Court's
3 inclined to do at this point, you're -- you're -- you're tending to
4 grant our motion on those items that you suggested. You want to
5 see a Petrocelli hearing or you want to see witness testimony or at
6 least a proffer on each one of those as to what we would prove.

7 THE COURT: Correct.

8 MR. LALLI: Okay.

9 THE COURT: And make sure that Ms. Palm has all the reports
10 relating to those situations.

11 MR. LALLI: She has -- she has everything that I have with
12 respect to reports on a disc that I gave her.

13 MS. PALM: What I got last --

14 MR. LALLI: And I welcome her to come over to my office.

15 MS. PALM: -- what I got last night and their reports will be
16 helpful. I just don't know if there's any impeachment out there
17 because we're on the eve of trial and now how am I supposed to go
18 out and find impeachment evidence.

19 THE COURT: I understand what you're saying. Okay. And so
20 we need to have this hearing and the trial set for Monday and I
21 think by almost default, Ms. Palm, you would be getting your
22 continuance. I think your main concern was to file a Writ which is
23 your right and I respect that, but we do need to hash out some of
24 these factual scenarios before I make a definitive ruling on these.
25 Some of the other ones I'm concerned about.

1 So, you're not going to be ready to go to trial on
2 Monday, correct? Even if the State got you all these -- assuming
3 they gave you everything yesterday, I'm assuming you're not going
4 to go to trial?

5 MS. PALM: No, I would not be ready if these bad acts are
6 admissible.

7 THE COURT: Okay. And so we're going to vacate the trial
8 date and I don't know if -- I know you're busy, Ms. Palm, and so is
9 Ms. Mercer and Mr. Lalli. I have cases with him. It seems like I
10 have to set trials 2013 for him, but does everyone have their
11 calendar with them?

12 MS. MERCER: Yes, Your Honor.

13 MR. LALLI: I do, Your Honor.

14 MS. PALM: I do.

15 THE COURT: You have yours, Ms. Palm?

16 MS. PALM: I do.

17 THE COURT: All right. Actually, it probably might be easier
18 just to come up and look at Carol's calendar and my calendar
19 instead of us throwing all kinds of dates out and Carol can point
20 to you and show you what where we have some openings.

21 [Matter recalled at 1:42 a.m.]

22 THE COURT: Carol, 'cause Michelle's got the recorder going
23 on now; would you put on the record the trial date, calendar call
24 date and Petrocelli -- Petrocelli hearing date.

25 THE CLERK: Okay. Petrocelli hearing May 12th, 10 o'clock.

1 Calendar Call May 30 -- I'm sorry, April -- April 12th at 10 o'clock
2 for the Petrocelli hearing. May 31st Calendar Call, 8:15. Jury
3 Trial June 6th, 1 o'clock.

4 THE COURT: All right. We're good.

5 MS. PALM: Thank you.


6 MS. MERCER: Thank you.

7 MR. LALLI: Thank you, Your Honor.

8 [Proceeding concluded at 1:43 a.m.]
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20 ATTEST: I hereby certify that I have truly and correctly
21 transcribed the audio/video proceedings in the above-entitled case
22 to the best of my ability.
23
24
25



Michelle Ramsey
Court Recorder/Transcriber



LEXSEE

STATE OF OHIO, PLAINTIFF-APPELLEE vs. JASON K. BETTS, DEFENDANT-APPELLANT

No. 88607

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY

2007 Ohio 5533; 2007 Ohio App. LEXIS 4873

October 18, 2007, Released

SUBSEQUENT HISTORY: Discretionary appeal not allowed by *State v. Betts*, 117 Ohio St. 3d 1441, 2008 Ohio 1279, 883 N.E.2d 458, 2008 Ohio LEXIS 777 (2008)

Post-conviction relief denied at *State v. Betts*, 2010 Ohio 438, 2010 Ohio App. LEXIS 356 (Ohio Ct. App., Cuyahoga County, Feb. 11, 2010)

PRIOR HISTORY: [**1]

Criminal Appeal from the Cuyahoga County Court of Common Pleas. Case No. CR-451845.

DISPOSITION: AFFIRMED.

COUNSEL: FOR APPELLANT: Robert L. Tobik, Esq., Cuyahoga County Public Defender, Cullen Sweeney, Esq., Asst. Public Defender, Cleveland, Ohio.

FOR APPELLEE: William D. Mason, Esq., Cuyahoga County Prosecutor, Mark J. Mahoney, Esq., Pinkey S. Carr, Esq., Asst. County Prosecutor, Cleveland, Ohio.

JUDGES: BEFORE: Dyke, J., Calabrese, P.J., Kilbane, J. ANTHONY O. CALABRESE, JR., P.J., and MARY EILEEN KILBANE, J., CONCUR.

OPINION BY: ANN DYKE**OPINION**

JOURNAL ENTRY AND OPINION

ANN DYKE, J.:

[*P1] Defendant Jason Betts appeals from his conviction for aggravated murder alleging felony murder, two counts of aggravated robbery, and firearm specifications. For the reasons set forth below, we affirm.

[*P2] On May 14, 2004, defendant was indicted for two counts of aggravated murder with felony murder and three-year firearm specification, and two counts of aggravated robbery with one and three-year firearm specifications, in connection with the shooting death of David Reyes. Defendant pled not guilty and the matter proceeded to a jury trial on September 14, 2005. In his opening statement, the prosecuting attorney told the jury that the state's evidence would [**2] show that defendant's girlfriend, Jessica Randleman, made an oral statement to police in which she indicated that defendant got rid of a gun during a pursuit for breaking and entering and that he hoped that the gun was not recovered "because it could tie him to a lot of stuff." (Tr. 1213-1214). Defense counsel moved for a mistrial, citing this statement and the prosecuting attorney's failure to disclose it prior to trial. At the hearing on this issue, Randleman denied making the oral statement and testified that she told the prosecuting attorney that the statement was not true. The trial court denied the motion for a mistrial.

[*P3] Defense counsel also moved for a mistrial after all of the evidence had been presented, and complained that in his opening statement, the prosecuting attorney informed the jury that Norman Pomaes would testify, but Pomaes was never called as a witness. (Tr. 2503). The trial court denied this second motion for a mistrial and the matter was submitted to the jury for de-

liberations. The jury was ultimately unable to reach a verdict and was discharged.

[*P4] A second trial to a death-qualified jury commenced on June 12, 2006. The state's evidence demonstrated that in [**3] the weeks preceding his death, the decedent drove a gold Buick Riviera with distinctive specialty "20 inch Polo" rims. At this time, he was also helping his friend Jeffrey Williams remodel Williams' mother's house.

[*P5] On October 8, 2002, Reyes left his vehicle on Cantor Avenue and went with Williams to meet friends at a bar. Later that night, Reyes was driven back to his car. Trisha Smith and Tina Maynard spoke to Reyes. After a few minutes, Tina observed someone walking in a nearby alley. Reyes said, "Oh shit," and fled. The individual chased Reyes. Reyes slipped and fell and the other man caught Reyes by the back of the shirt, took out a gun and shot Reyes, killing him. Maynard then observed a man drive away in Reyes' car.

[*P6] Smith described the assailant as a dark complexioned African-American male, approximately 5'6" or 5'5", with dread locks or braids. Police recovered a 9 mm shell casing from the scene. A few hours later, police recovered Reyes' car while responded to a call that an automobile was being stripped on Parkview Avenue. The vehicle was missing both passenger side tires and the wheels on the driver's side appeared to be replacement wheels. The distinctive Polo rims had been [**4] removed. Police obtained fingerprints from the right front fender, three exterior windows and a CD case inside the car.

[*P7] Smith believed that she saw the man again at Reyes' wake. In the ensuing weeks, she looked at approximately twenty photographs for police but could not identify the assailant.

[*P8] On October 16, 2002, Jeffrey Williams received a telephone call from Norman Pomaes. Following this phone call, Williams contacted investigators and investigators in turn identified a green Pontiac automobile owned by Randleman.

[*P9] By April 2003, police linked two of the fingerprints recovered from the right front fender of Reyes' car to defendant. The next month, Trisha Smith was shown a six-person photo array and indicated that defendant looked like the person but she could not be sure. Following a second photo array in April 2004, Smith identified defendant. That same month, Maynard identified defendant from a different six-person photo array but she stated that she could not be sure. At trial, Smith also identified defendant as the assailant.

[*P10] In March 2003, Houston Foster turned over to police a 9 mm weapon he had found in the out-

door grill at his home located at 1371 East 185<th> Street. Police [**5] later determined that defendant had been arrested at 1371 East 185<th> Street in March 2003. In May 2004, police determined that a Browning 9 mm weapon found in the grill at Foster's home fired the 9 mm casing found at the crime scene and that a live round found within the Browning 9 mm was the same make and manufacture of the casing found at the crime scene.

[*P11] Police located defendant hiding in a closet at his parents' home. He denied ever seeing Reyes or Reyes' car. Defendant stated that Randleman is his girlfriend.

[*P12] Defendant presented the testimony of Solomon Fulero, Ph.D. who testified that eye witness memories can be tainted by post-event information, that memories fade over time, that brief eye witness observations are less accurate than observations involving longer exposure times, and that various factors including the presence of weapons and other stressful factors tend to render eye witness observations less accurate. In addition, identifications of individuals from a different race tend to be less accurate as same-race identifications. Finally, Fulero opined that the presentation of a six-person photo array yields less reliable identifications than a sequential presentation [**6] of photos.

[*P13] The defense also presented the testimony of Officer Edward Csoltko who arrested defendant at 1371 East 185<th> Street. According to Officer Csoltko, he reported to his dispatcher that the subject he was chasing was "possibly armed," and the report does not mention a gun but he believed that he did observe defendant to be armed during the pursuit. He conceded, however, that it was possible that a second individual involved in this incident could have been the person he observed with a weapon.

[*P14] Defendant was subsequently convicted of the felony murder charge, both aggravated robbery charges, and the firearm specifications. Following the penalty phase of the trial, defendant was sentenced to life imprisonment without the possibility of parole, plus a concurrent term of ten years for the aggravated robbery charges, and a single three-year term for the firearm specifications. Defendant now appeals and assigns twelve errors for our review.

[*P15] For his first assignment of error, defendant asserts that the trial court erred in denying his motion for a mistrial made in the first trial, which challenged the prosecuting attorney's reference to Randleman's oral statement and Pomaes' statement. [**7] Defendant further asserts that "[b]ecause of the severity of the prosecutorial misconduct which occurred during the first trial, the *Double Jeopardy Clause* bars his retrial" pursuant to *Oregon v. Kennedy* (1982), 456 U.S. 667, 102 S.

Ct. 2083, 72 L. Ed. 2d 416, and he asks us to reverse and remand for a hearing as to this issue.

[*P16] With regard to our standard of review, we note that the granting or denial of a motion for mistrial rests in the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Treesh*, 90 Ohio St.3d 460, 2001 Ohio 4, 739 N.E.2d 749; *State v. Iacona*, 93 Ohio St. 3d 83, 2001 Ohio 1292, 752 N.E.2d 937. The granting of a mistrial is only necessary when the ends of justice so require and a fair trial is no longer possible. *State v. Franklin* (1991), 62 Ohio St.3d 118, 127, 580 N.E.2d 1, citing *Illinois v. Somerville* (1973), 410 U.S. 458, 462-463, 93 S.Ct. 1066, 35 L.Ed.2d 425.

[*P17] The denial of an evidentiary hearing is also reviewed for an evidentiary abuse of discretion. Cf. *Abdus-Samad v. Bell* (C.A. 6 2005), 420 F.3d 614, 626.

[*P18] In this instance we find no abuse of discretion. The prosecuting attorney's comments were made in opening statement and [**8] closing argument and the jury was instructed that these were not evidence. Further, in light of the actual evidence linking defendant to the home at 1371 East 185th Street and linking the murder weapon to this address, this court cannot say that the brief reference to Randleman's alleged statement rendered a fair trial impossible. Similarly, we cannot say that the brief reference to Pomales' out-of-court statement rendered a fair trial impossible.

[*P19] Moreover, we note that the state did not dispute the essence of the defendant's claims and asserted instead, that it thought Randleman's statement could come in as a prior inconsistent statement and Pomales's statement could come in as nonhearsay offered not for the truth of the matter asserted but to explain subsequent conduct, we are unable to conclude that the trial court erred in failing to hold an evidentiary hearing.

[*P20] As to whether plain error occurred in holding the second trial, we note that we conduct de novo review of a denial of a motion to dismiss an indictment on the grounds of double jeopardy. *In re Ford* (6th Cir. 1992), 987 F.2d 334, 339.

[*P21] The *Fifth Amendment to the U.S. Constitution* provides that no person shall "be subject [**9] for the same offense to be twice put in jeopardy of life or limb."

[*P22] In *Oregon v. Kennedy*, *supra*, the Supreme Court noted that the *Double Jeopardy Clause* affords a criminal defendant a valued right to have his trial completed by a particular tribunal, but does not offer a guarantee to the defendant that the State will vindicate its societal interest in the enforcement of the criminal laws in one proceeding.

[*P23] As an initial matter, this court notes that the first trial ended with a mistrial because the jury could not reach a verdict. Under *R.C. 2945.36*, this did not terminate the original jeopardy. Accord *Oregon v. Kennedy*, *supra*, (noting that the *Double Jeopardy Clause* has been held not to bar a retrial where there is a "manifest necessity" for declaring a mistrial and that a "hung jury remains the prototypical example" of manifest necessity).

[*P24] In some instances, prosecutorial misconduct may prevent a retrial. Typically mistrials for prosecutorial misconduct present possible double jeopardy implications where the defendant moves for a mistrial, the motion is granted and the double jeopardy implications of retrial must then be addressed. See, e.g., *Oregon v. Kennedy*, *supra*. Here, however, [**10] this matter presents 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. This exact scenario was addressed in *United States v. Gollamudi* (Jan. 29, 1993), E.D.N.Y. No. CR-91-518, 1993 U.S. Dist. LEXIS 1402.

[*P25] The *Gollamudi* court considered the issue of the standard to be applied where the request for a mistrial was denied, the matter was tried to a hung jury and a double jeopardy claim was then raised. The court considered the standard set forth in *Oregon v. Kennedy*, *supra*, i.e., that retrial is barred only if the prosecutorial misconduct was intended to subvert the double jeopardy protections, that is where the government intended to "goad" the defendant into moving for a mistrial. The court also considered the standard set forth in *United States v. Wallach* (C.A.2 1992), 979 F.2d 912, in which the court held that where a defendant had suffered "no impairment" of his valued right to have his trial completed by a single tribunal retrial is barred only where the misconduct of the prosecutor is undertaken to prevent an acquittal that the prosecutor believed was likely to occur in the absence of such [**11] misconduct. Ultimately, the court concluded that a prosecutor's misconduct, no matter how egregious, will not bar a subsequent retrial as long as the prosecutor did not act with the specific intent either to inspire a motion for a mistrial, or to obtain a conviction where an acquittal was likely.

[*P26] Accord *State v. Loza*, 71 Ohio St.3d 61, 70, 1994 Ohio 409, 641 N.E.2d 1082. "Only where the prosecutorial conduct in question is intended to 'goad' the defendant into moving for a mistrial may defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." Mere negligence will not suffice to show intent to provoke a mistrial. *State v. Girts* (1997), 121 Ohio App.3d 539, 553, 700 N.E.2d 395.

[*P27] The trial court's finding regarding whether the prosecuting attorney intended to cause a mistrial is a finding of fact which is accorded great deference. *Oregon v. Kennedy*, 456 U.S. at 675. A reviewing court may consider the following factors in determining whether the required intent to provoke a mistrial existed: (1) whether there was a sequence of overreaching prior to the single prejudicial incident; (2) whether the prosecutor resisted or [**12] was surprised by the defendant's motion for a mistrial; and (3) the findings of the trial and appellate courts concerning the intent of the prosecutor. *State v. Girts*, *supra*.

[*P28] A hearing is necessary only if there existed a genuine issue in the mind of the trial court concerning the prosecutor's intent. *United States v. Wentz* (C.A. 4 1986), 800 F.2d 1325.

[*P29] After reviewing the record, we find no plain error in proceeding to the second trial. The record reveals that the prosecuting attorney believed that Randleman had made the oral statement about defendant's fears of discovery of the gun to investigating officers, and that he believed that he could impeach Randleman with the prior statement under *Evid.R. 607*. Moreover, there is absolutely no indication of an intent to goad the defense into moving for a mistrial, no evidence of a sequence of overreaching prior to this incident, and the prosecutor resisted or was surprised by the defendant's motion for a mistrial. Likewise, the record reveals that the prosecuting attorney believed that Pomales' out-of-court statement was not hearsay, and offered it to show the subsequent conduct of officers in relation to Randleman and her car. There is [**13] absolutely no indication of an intent to goad the defense into moving for a mistrial, no evidence of a sequence of overreaching prior to this incident, and the prosecutor resisted or was surprised by the defendant's motion for a mistrial. The prosecutor's actions did not operate to bar the retrial as the prosecutor did not act with the specific intent either to inspire a motion for a mistrial, or to obtain a conviction where an acquittal was likely.

[*P30] The first assignment of error is without merit.

[*P31] For his second assignment of error, defendant asserts that the trial court erred in refusing to suppress the eyewitness testimony of Trisha Smith because, he claims, the identification was the result of unnecessarily suggestive pretrial identification procedures. Specifically, defendant complains that Smith was shown a photo array which featured a photo of defendant with a darker complexion than the other subjects.

[*P32] When a witness has been confronted with a suspect before trial, due process requires a court to suppress an identification of the suspect if the confronta-

tion was unnecessarily suggestive of the suspect's guilt and the identification was unreliable under all the circumstances. *State v. Waddy* (1992), 63 Ohio St.3d 424, 438, 588 N.E.2d 819, [**14] citing *Manson v. Brathwaite* (1977), 432 U.S. 98, 116, 97 S.Ct. 2243, 2254, 53 L.Ed.2d 140, 155, and *Neil v. Biggers* (1972), 409 U.S. 188, 196-198, 93 S.Ct. 375, 381-382, 34 L.Ed.2d 401, 410-411.

[*P33] The defendant bears the initial burden of establishing that the photographic identification procedure was unnecessarily suggestive. If the defendant meets this burden, the court must consider whether the procedure was so unduly suggestive as to give rise to irreparable mistaken identification. *State v. Wills* (1997), 120 Ohio App.3d 320, 324-325, 697 N.E.2d 1072, citing *Manson v. Brathwaite*, *supra*.

[*P34] The court must determine whether the photographic identification procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States* (1968) 390 U.S. 377, 384, 19 L.Ed.2d 1247, 88 S.Ct. 967.

[*P35] However, no due process violation will be found where an identification is instead the result of observations at the time of the crime and does not stem from an impermissibly suggestive confrontation. *Coleman v. Alabama* (1970), 399 U.S. 1, 5-6, 90 S.Ct. 1999, 2001, 26 L.Ed.2d 387, 394.

[*P36] A court must consider the following factors [**15] with regard to potential misidentification: "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation ***." *Neil v. Biggers*, *supra*. (1972), 409 U.S. 188, 199-200, 34 L.Ed.2d 401, 93 S.Ct. 375. The court must review these factors under the totality of the circumstances. *Id.* Even if the "identification procedure may have contained notable flaws, this factor does not, per se, preclude the admissibility of the identification." *State v. Merrill* (1984), 22 Ohio App.3d 119, 121, 22 Ohio B. 320, 489 N.E.2d 1057; *State v. Moody* (1978) 55 Ohio St.2d 64, 67, 377 N.E.2d 1008.

[*P37] In this matter, we cannot conclude that the trial court erred in denying the motion to suppress. The evidence demonstrated that immediately following the shooting, Smith described the assailant as a dark complexioned African-American male, approximately 5'6" or 5'5", with dread locks or braids. Smith believed that she saw the man again at Reyes' wake. In the ensuing weeks, she looked at [**16] approximately twenty photographs for police but could not identify the assailant. In

May 2003, she was shown a six-person photo array and indicated that defendant looked like the person but she could not be sure. All of the foregoing strongly suggests that Smith's identification is instead the result of observations at the time of the crime. Moreover, there is nothing to indicate that the identification procedure was unnecessarily suggestive. A six-person black and white photo array was presented. The men have comparable facial hair, and hair styles. We cannot accept defendant's claim that his complexion is darker than the others so as to isolate his identity and we also reject defendant's contention that his photo is the only one consistent with Smith's description. The photo array was well-constituted and not impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

[*P38] This assignment of error is without merit.

[*P39] For his third assignment of error defendant asserts that the trial court violated his rights under the *Confrontation clause* by determining that she was unavailable under *Evid.R. 804*, and permitting the state to introduce Randleman's [**17] testimony at the first trial.

[*P40] A testimonial statement from a witness who does not appear at trial is inadmissible against the accused unless the witness is unavailable to testify and the defendant had a prior opportunity to cross-examine the witness. *Crawford v. Washington* (2004), 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed. 2d 177. *Evid.R. 804(A)(5)* defines the initial requirement of unavailability in the following manner:

[*P41] "'Unavailability as a witness' includes situations in which the declarant:

[*P42] "(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (13)(2), (3), or (4), his attendance or testimony) by process or other reasonable means. * * *"

[*P43] A witness is not considered unavailable unless the prosecution has made reasonable efforts in good faith to secure his presence at trial. *State v. Keairns* (1984), 9 Ohio St.3d 228, 230, 9 Ohio B. 569, 460 N.E.2d 245. "A showing of unavailability under *Evid.R. 804* must be based on testimony of witnesses rather than hearsay not under oath unless unavailability is conceded by the party against whom the statement is being offered." *Id.* at 232.

[*P44] In this matter, [**18] Randleman was under subpoena and a bench warrant was issued for her appearance at trial but she was absent from the proceedings. The prosecuting attorney was unable to procure her appearance and he played a voice mail message from Randleman for the trial court in chambers in which

Randleman indicated that she had received her subpoena and was aware of the court date but expressed notice, transportation and other issues. In another phone call to the attorney's personal cell phone, she indicated that she would be available on Tuesday and needed a ride. The prosecutor then related that the Elyria Police and Sheriff's Deputies had gone to her home on numerous times to locate her, and spoke to a woman taking care of Randleman's children who stated that she did not know when Randleman would return. The record supports the trial court's finding that the state did make a reasonable good-faith effort, including numerous attempts by law enforcement, to secure her appearance. *Cf. State v. Smith* (1990), 49 Ohio St.3d 137, 551 N.E.2d 190. Although the state's evidence was not under oath, defense counsel does not appear to have objected to the informal in chambers proceeding.

[*P45] In any event, we conclude [**19] that admission of this evidence was harmless beyond a reasonable doubt in light of the actual evidence linking defendant to the home at 1371 East 185th Street and linking the murder weapon to this address, the evidence of defendant's fingerprints on Reyes' car, and the identification evidence. *Cf. State v. Coma* (August 14, 2000), *Columbiana App. No. 99 CO 8*, 2000 Ohio App. LEXIS 3683.

[*P46] This assignment of error is overruled.

[*P47] For his fourth assignment of error, defendant complains that his convictions are not supported by sufficient evidence.

[*P48] When reviewing the sufficiency of the evidence, an appellate court's function is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 1997 Ohio 52, 678 N. E.2d 541. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Id.*

[*P49] The essential elements of felony murder are set forth in *R.C. 2903.01(B)* as follows:

[*P50] "(B) No person shall purposely cause the [**20] death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, terrorism, or escape."

[*P51] The elements of aggravated robbery are set forth in *R.C. 2911.01* as follows:

[*P52] "(A) No person, in attempting or committing a theft offense * * * shall do any of the following: * * * (3) Inflict or attempt to inflict, serious physical harm on another."

[*P53] The Supreme Court has repeatedly rejected the argument that there is no aggravated robbery when the victim's property is taken after he is murdered. The court has stated:

[*P54] "[T]he victim of a robbery, killed just prior to the robber's carrying off [his] property, is nonetheless the victim of an aggravated robbery. The victim need not be alive at the time of asportation. A robber cannot avoid the effect of the felony-murder rule by first killing a victim, watching [him] die, and then stealing [his] property after the death."

[*P55] *State v. Smith* (1991), 61 Ohio St.3d 284, 290, 574 N.E.2d 510. Accord *State v. Rojas*, 64 Ohio St.3d 131, 139, 1992 Ohio 110, 592 N.E.2d 1376.

[*P56] [*21] In this matter, the state's evidence demonstrated that defendant chased Reyes down and shot and killed him then fled in Reyes' car. The car was stripped of its rims and defendant's fingerprints were found on the fender, despite defendant's statement to police that he did not know Reyes and had never seen his car. In a prior arrest, defendant was also linked to 1371 East 185<th> Street, the location from which the murder weapon was recovered. In light of the foregoing, we conclude that this evidence, if believed, would convince the average mind of defendant's guilt of the offenses beyond a reasonable doubt. Cf. *State v. Scott*, 101 Ohio St.3d 31, 2004 Ohio 10, 800 N.E.2d 1133.

[*P57] This assignment of error is without merit.

[*P58] For his fifth assignment of error defendant complains that his convictions are against the manifest weight of the evidence.

[*P59] In evaluating a challenge to the verdict based on manifest weight of the evidence, the court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of [*22] justice that the conviction must be reversed and a new trial ordered. *State v. Thompkins*, *supra*. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *Id.* at 387.

[*P60] As explained by the Ohio Supreme Court:

[*P61] "Weight of the evidence concerns 'the inclination of the greater amount of credible evidence offered in a trial, to support one side of the issue rather

than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief.'" *Id.*

[*P62] The evidence in this matter indicated that defendant was arrested at 1371 East 185<th> Street subsequent to the instant offense, and the owner of this home found the weapon used to kill Reyes hidden in his grill. The evidence also indicated that defendant was identified as the assailant, that his fingerprints were found on Reyes' car, and that the car was stripped [*23] of its specialty rims. From the foregoing, we cannot say that the jury lost its way in convicting defendant of the offenses. This claim is without merit

[*P63] For his sixth assignment of error, defendant asserts that the State of Ohio violated his constitutional rights to equal protection by using its preemptory challenges to strike African-American jurors.

[*P64] In *Batson v. Kentucky* (1986) 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69, the United States Supreme Court held that the *Equal Protection Clause of the Fourteenth Amendment* prohibits the use of preemptory challenges in a discriminatory manner to exclude potential jurors solely on account of their race. *Batson* created a three-part test for determining whether a prosecutor's use of a preemptory challenge is racially motivated. First, a defendant must make a prima facie showing of intentional discrimination by demonstrating that the state has used preemptory challenges to exclude potential jurors on the basis of race. *Id.* at P31. The defendant must point to facts and relevant circumstances which raise an inference that the prosecutor used the preemptory challenges to exclude jurors on account of their race. *Id.*; see, also, *State v. Jordan*, 167 Ohio App.3d 157, 2006 Ohio 2759, 854 N.E.2d 520, [*24] citing *Batson*.

[*P65] Once a defendant makes a prima facie case of discrimination, the burden shifts to the state to provide a race-neutral explanation for the preemptory challenge. *Id.*, citing *Hernandez v. New York* (1991), 500 U.S. 352, 111 S.Ct. 1859, 114 L. Ed. 2d 395. "The state's explanation need not rise to the level of a 'for cause' challenge; rather, it need only be based on a juror characteristic other than race and not be pretextual." *Id.* The issue is the facial validity of the prosecutor's explanation; unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral. See *Purkett v. Elem* (1995), 514 U.S. 765, 767-768, 115 S. Ct. 1769, 1771, 131 L.Ed.2d 834, quoting *Hernandez v. New York*, *supra*.

[*P66] The court's finding that the state had no discriminatory intent in excluding the juror will not be reversed unless it is clearly erroneous. *State v. Hernandez* (1992), 63 Ohio St. 3d 577, 582, 589 N.E.2d 1310, 1313.

[*P67] In this matter, the state used a preemptory to strike Juror Jeffries, an African-American. The state explained that she stated that she did not want to be there, (see Tr. 3433, 3438), and she had a problem putting people [**25] in jail. This was a race-neutral explanation, and there was no showing of pretext. Another African-American remained on the panel. We find no error in connection with this preemptory challenge.

[*P68] For his seventh assignment of error defendant asserts that the trial court erred in failing to conduct an in-camera review of Det. Beamon's report pursuant to *Crim.R. 16(B)(1)(g)*.

[*P69] Those portions of police reports recording the officer's personal observations and recollections of the events are subject to scrutiny under *Crim.R. 16(B)(1)(g)*; *State v. Jenkins* (1984), 15 Ohio St.3d 164, 15 Ohio B. 311, 473 N.E.2d 264. Those portions which recite matters beyond the witness' personal observations, such as notes regarding another witness' statement or the officer's investigative decisions, interpretations and interpolations, are privileged and excluded from discovery under *Crim.R. 16(B)(2)*. Id.

[*P70] Before a writing can be considered a witness's "statement," it must be demonstrated that the witness prepared, signed, or adopted the statement or that it is a continuous narrative made by the witness. *State v. Cummings* (1985), 23 Ohio App. 3d 40, 23 Ohio B. 84, 491 N.E.2d 354. Reports or notes taken by a police officer during an interview [**26] with a victim or witness in a case are not considered a statement for the purposes of *Crim.R. 16(B)(1)(g)* and are not subject to an in camera inspection within the meaning of *Crim.R. 16(B)(1)(g)*. *State v. Washington* (1978), 56 Ohio App. 2d 129, 381 N.E.2d 1142; *State v. Watts* (June 4, 1998), *Cuyahoga App.No. 72863*, 1998 Ohio App. LEXIS 2410; *State v. Spraggins*, *Cuyahoga App. No. 87256*, 2006 Ohio 5739. The *Washington* Court noted that "*** the word 'written' in this context does not refer to notes made by a detective talking to a witness during an investigation. The word 'written' refers to a writing made by a witness or by somebody else at the witness' direction." 56 Ohio App.2d at 132-133. See, also, *State v. Henry* (1987), 37 Ohio App. 3d 3, 523 N.E.2d 877.

[*P71] In this matter, there is no indication that the documents at issue constitute "statements" within the contemplation of *Crim.R. 16*. Det. Beamon was not present at the scene of the shooting, and the documents at issue were not his statement or narrative. There is abso-

lutely no indication that the officer was present for any of the defendant's conduct or that he made any observations pertaining to the actual commission of the offense. Rather, the officer became [**27] involved with this matter after commission of the offenses and in the months following the shooting, he spoke to witnesses regarding the witnesses' observations. The documents are investigative reports and not witness statements.

[*P72] Defendant herein relies upon *Spraggins*, *supra* for support herein. In that case, the officer whose statement was at issue was a member of the unit that participated in the "buy/bust" of the defendant, was present for the transaction at issue and made personal observations of the defendant's conduct. *Spraggins* is therefore completely distinguishable from this matter.

[*P73] Insofar as the defense sought to review the statement because the detective used it to refresh his recollection, the trial court was vested with discretion in making this ruling, *Evid.R. 612*, and we find no abuse of discretion as the trial court determined that those portions were turned over to the defense. (Tr. 4200).

This claim lacks merit.

[*P74] For his eighth assignment of error, defendant claims that the trial court erroneously instructed the jury as to the offense of aggravated robbery. Specifically, he challenges that portion which indicate that the violent act "must occur as part of the sequence [**28] of acts leading up to, occurring during or immediately subsequent to armed robbery and that the death was associated with the armed robbery."

[*P75] As an initial matter, we note that this portion of the instruction pertained to the charge of attempted aggravated robbery. We further note that no error was recognized in connection with this instruction in *State v. Andrews* (May 4, 1995), *Cuyahoga App. No. 67370*, 1995 Ohio App. LEXIS 1859.

[*P76] We reject this claimed error.

[*P77] Within his ninth assignment of error, defendant asserts that his trial counsel was ineffective for failing to object to the aggravated robbery instruction. As we have rejected the underlying challenge to the jury instruction, the claim of error premised thereon must likewise fail. *State v. Henderson* (1988), 39 Ohio St.3d 24, 33, 528 N.E.2d 1237.

[*P78] For his tenth assignment of error, defendant maintains that the trial was tainted by prosecutorial misconduct.

[*P79] The test for prosecutorial misconduct is whether the prosecutor's conduct at trial was improper and prejudicially affected the substantial rights of the defendant. *State v. Lott* (1990), 51 Ohio St.3d 160, 165,

555 N.E.2d 293. A prosecutor's conduct during trial cannot be grounds for error unless the conduct [**29] deprives the defendant of a fair trial. *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 24, 514 N. E.2d 394. To determine if the alleged misconduct resulted in prejudice, an appellate court should consider the following factors: "(1) the nature of the remarks, (2) whether an objection was made by counsel, (3) whether corrective instructions were given by the court, and (4) the strength of the evidence against the defendant." *State v. Braxton* (1995), 102 Ohio App.3d 28, 41, 656 N.E.2d 970. Additionally, the appellate court should consider whether the alleged misconduct was "an isolated incident in an otherwise properly tried case." *Id.*

[*P80] Defendant complains that the prosecuting attorney noted that he was unemployed, that he breaks into houses, that the jurors should use their common sense in evaluating eyewitness identification, and that he misrepresented the evidence of record.

[*P81] The reference to a defendant's unemployed status was determined not to amount to prejudicial prosecutorial misconduct in *State v. Siler, Ashland App. No. 02 COA 028, 2003 Ohio 5749*; vacated on other grounds *Siler v. Ohio* (2004), 543 U.S. 1019, 125 S.Ct. 671, 160 L.Ed.2d 494.

[*P82] The comment that defendant breaks into [**30] houses had only a loose association to the evidence as the state demonstrated that defendant was arrested following a report of a break-in. We cannot conclude that this isolated comment prejudicially affected defendant's substantial rights, as the jury was repeatedly informed that the comments were not evidence.

[*P83] The reference to jurors using their common sense has been determined to be neither prosecutorial misconduct nor plain error. See *Toledo v. Moore, Lucas App. No. L-02-1288, 2003 Ohio 2362*.

[*P84] As to the claims that the prosecutor committed misconduct by distorting evidence of record, we note that Dabney's fingerprints were evaluated (Tr. 4231), the similarity of the rims taken from Reyes and later put on Randleman's car was established, both Smith and Maynard did identify defendant as the assailant. We therefore are unable to conclude that the prosecuting attorney caused prejudicial error in connection with these remarks. Cf. *State v. Daoud, Montgomery App. No. 19213, 2003 Ohio 676*.

[*P85] We reject this assignment of error.

[*P86] For his eleventh assignment of error, defendant asserts that the trial court erred in failing to permit his trial counsel to argue the existence of residual doubt [**31] in the penalty phase of the trial.

[*P87] In *Franklin v. Lynaugh* (1988), 487 U.S. 164, 188, 108 S.Ct. 2320, 2335, 101 L.Ed.2d 155, 175, the Court held that states are not required to allow a defendant the opportunity to argue residual doubt as a mitigating circumstance. The court stated that residual doubt did not have to be considered as a mitigating factor because it was not relevant to the defendant's character, record, or any circumstances of the offense. Accord *State v. McGuire, 80 Ohio St.3d 390, 1997 Ohio 335, 686 N.E.2d 1112*.

[*P88] For his final assignment of error, defendant asserts that the trial court violated his right to remain silent when it noted in the sentencing hearing that defendant had not accepted responsibility for his conduct. He further complains that the trial court should have considered lesser sentencing alternatives before fashioning the sentence in this matter.

[*P89] A defendant's silence may not be used against him in fashioning a sentence. *Mitchell v. United States* (1999), 526 U.S. 314, 119 S.Ct. 1307, 143 L.Ed.2d 424.

[*P90] In this matter, however, defendant did not exercise his *Fifth Amendment* right to remain silent at the sentencing hearing. Instead, he voluntarily responded [**32] when the judge gave him the opportunity to speak prior to sentencing. Moreover, the record clearly reflects that the court's determination that defendant did not accept responsibility was a reference to this pre-sentence statement.

[*P91] As to defendant's claim that the trial court did not consider lesser options before imposing the sentence herein, we note that in *State v. Foster, 109 Ohio St.3d 1, 2006 Ohio 856, 845 N.E.2d 470*, the court specifically held that "after the severance, judicial fact-finding is not required before a prison term may be imposed within the basic ranges of R.C. 2929.14(A) based upon a jury verdict or admission of the defendant." As a result, "trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings and give reasons for imposing maximum, consecutive or more than the minimum sentence." *Id.* at paragraph seven of the syllabus, and *State v. Mathis, 109 Ohio St.3d 54, 2006 Ohio 855, 846 N.E.2d 1*, paragraph three of the syllabus.

[*P92] By application of all of the foregoing, this assignment of error is

overruled. Affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court [**33] finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*.

ANN DYKE, JUDGE

ANTHONY O. CALABRESE, JR., P.J., and

MARY EILEEN KILBANE, J., CONCUR