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JUN 25 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT

LEAV

Brian Kerry O'Keefe
P.O. Box 650 [H.D.S.P.]
Indian Springs, NV, 89407-0650
PRO SE - [90244]

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

BRIAN KERRY O'KEEFE, Supreme Court Case No.: 61631.

Appellant,

) District Court Case No.: C-250630.

v.

THE STATE OF NEVADA,

) NOTICE OF AND LEAVE TO

Respondents.

) APPEAR AND FILE MOTIONS

FILED

JUN 28 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. M. M. M.
DEPUTY CLERK

COMES NOW, humbly for fair play and substantial justice, Brian Kerry O'Keefe (hereinafter, "Mr. O'Keefe"), Appellant, pro se and canvassed pursuant to Earetha v. Ca., 422 U.S. 806 (1975), countenanced under Haines v. Kerner, 404 U.S. 519 (1972), backed into a Judicial Corner by Bellon & Maningo, LTD, and hereby moves this Honorable Court leave to appear propria persona per N.R.A.P. 46(b) so as to file a Motion For Reconsideration En Banc, attached hereto, and Judicial Notice, forthcoming the following Wednesday as of this writing, due squarely and precisely to the irretrievable breakdown in communication with court-appointed counsel.

Further, Mr. O'Keefe requests an enlargement of page limitation for Judicial Notice and Reconsideration thereof because of the importance of the Jury Instructions ("J.I.") and inadequate briefing heretofore.

This request for Leave is made and based upon the supporting Points And Authorities appended hereunder, N.R.A.P. 24 and 40A, U.S.D.C. F.R. Civ. P. Rule 8, Nev. Const. Amend. V, VI, XIV, as well as all papers, pleadings, and

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JUN 24 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

1 - Leave

12-18717

1 documentation on file herein, Exhibits in appurtenance to Judicial Notice hereafter
2 and incorporates hereto all Exhibits annexed to Fast Track Statement and Reply therein
3 in addition to Supplemental Appendix thereto.

4 5 POINTS AND AUTHORITIES

6
7 Compounded thereunto by the lack of law library access, the short timeframe to
8 file aforesaid motions, and not being in receipt of the denial of rehearing order, Mr.
9 O'Keefe is forced to handwrite these simple motions because of the gravity and
10 seriousness of the charge. Mr. Maningo's office hasn't been available to Mr. O'Keefe
11 during his several phone calls in the interim of the rehearing denial as prison phone
12 records will attest. The Rehearing itself wasn't brought up properly by failing to attach
13 JI's repeatedly with stand-by Counsel only asking if this Court received the
14 propounded Instruction. Yet, by not supplying the full set necessary for the
15 Comparison Test that this Court specifically cited in the Affirmance Order,
16 Mr. Maningo has foreclosed any possible and meaningful review based on, once
17 again, an incomplete record that is required, namely, having the JI's.

18 The petitions forthcoming are merely a treatment and not meant to be an all-
19 inclusive cure. Armed with only the cases in his boxes, Mr. O'Keefe is attempting
20 an emergency motion to compel current Counsel or newly appointed Counsel to
21 facilitate an impetus for full briefing and/or oral argument.

22
23 WHEREFORE, all premises considered, Mr. O'Keefe respectfully prays
24 for Leave to Appear and be allowed to file Motion For Reconsideration En
25 Banc herewith and Judicial Notice thereafter with an enlargement of page
26 limitation in the furtherance of Justice.

27 DATED: JUNE 20, 2013

By: Brian K. O'Keefe
BRIAN K. O'KEEFE
PRO SE #90244

1 RECON

2 Brian Kerry O'Keefe

3 P.O. Box 650 [H.D.S.P.]

4 Indian Springs, NV. 89070-0650

5 PRO SE - [90244]

6 IN THE SUPREME COURT OF THE STATE OF NEVADA

7 * * * * *

8 BRIAN KERRY O'KEEFE,) Supreme Court Case No.: 69631.

9 Appellant,

10) District Court Case No.: C-250630.

11 v.

12 THE STATE OF NEVADA,) MOTION FOR RECONSIDERATION

13 Respondents.

14 EN BANC

15 COMES NOW, Appellant, Brian Kerry O'Keefe (hereinafter Appellant
16 or "Mr. O'Keefe"), prose and Faretta canvassed, and hereby moves this Honorable
17 Court, En Banc, to please reconsider the Fast Track due to Court appointed counsel's
18 ineptitude and, if necessary, to comport with notions of fundamental fairness,
19 order full briefing and/or oral argument per Lockett v. State, 541 P.2d
20 910 (1975), in the above-entitled Reconsideration action.

21 This Motion is made and based pursuant to the Points And Authorities
22 hereunder, N.R.A.P. 24 and 40A, the denial of Rehearing (which, to date, Mr.
23 O'Keefe has yet to receive) order, U.S.D.C. F.R. Civ.P. Rule 8, Nev. Const. Art. 1
24 §8, U.S. Const. Amend. V, VI, XIV, as well as all papers, pleadings, and documentation
25 on file herein, Exhibits attached hereof, and Judicial Notice to be mailed by
06-26-13 for filing hitherward due to once-a-week law library access.

/// RECEIVED

JUN 24 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

1 - Reconsideration

POINTS AND AUTHORITIES

I. Statement Of Relevant Facts.

Mr. O'Keefe herewith incorporates the entirety of procedural history fully expounded in Judicial Notice thereat which will be filed hereafter, at next scheduled law library appointment on 06-26-13, as if specifically alleged herein.

II. Full Court Reconsideration Is Necessary To Secure And Maintain Uniformity Of This Court's Decisions.

A. There was no alternative theory to or cited in the Affirmance Order because there were no Jury Instructions ("JI") submitted with record for review (instructions filed/hidden under deliberate erroneous case number).

The Order affirming the conviction for the abovementioned case merely propositions that the State may recharge Mr. O'Keefe with an alternate theory yet no such "theory" was cited to. Neither the original charging document nor any of the Amended versions and not any of the Instructions list any other "theory." There is none.

Mr. O'Keefe was charged with Battery Constituting Domestic Violence ("D.V.") merged with homicide by a deadly weapon, to-wit: a knife. Nothing else.

If the supposed "alternate theory" was specified in the original charging document, then it underwent Jeopardy and ended with the Reversal and Remand Order in the Supreme Court of Nevada ("SCN") No. 53859. To re-try Mr. O'Keefe would, thus, violate Double Jeopardy, upend every decision made by this Court, and rent asunder every principle of a fair and impartial Jury system in this Great Silver State.

1 B. The Ruling In Mr. O'Keefe's Case Is Contrary To Established Precedent.

2
3 The Affirmance and subsequent denial of Rehearing Orders are at odds with every
4 decision of this Court on the matter going as far back as 1895. Perhaps this is the
5 answer to the curiously cited Eighth Circuit case...

6 In *State v. Rose*, 255 P.3d 291 (2011), citing *Ramirez v. State*, 235 P.3d 619
7 (2010), the felony murder II is mandated to be conjoined with the involuntary
8 manslaughter. If this is so, then involuntary manslaughter was in jeopardy and
9 recharging Mr. O'Keefe based upon N.R.S. 200.070 is nothing short of Double
10 Jeopardy again. See also *Rose*, id. at 294 n.1 (note the missing "or" between the
11 first two paragraphs of Rose's Instruction No. 17 and contrast the No. 18 of Mr.
12 O'Keefe's First Trial II to be filed henceforth). The ~~illegible~~ bisection of No. 18
13 does not an "alternate theory" make.

14 The Reversal Order of No. 53859 specifically declared that the evidence didn't
15 support the unlawful act. While Rose's error was instructional, an abuse of discretion
16 constitutes insufficient evidence and is therefore tantamount in nature. This act was the
17 Battery D.V. stabbing. Pursuant to *State v. Mangana*, 33 Nev. 511, 518, 112 P. 693, 696 (1910),
18 battery is inherent to murder by stabbing and, therefore, is not apart of the enumerated
19 felonies. So, if there was no evidence to support this unlawful act, and the Rule of
20 Lenity construes any and all ambiguities in favor of Appellant, then any other murder
21 - 2nd Degree or otherwise - would be an impossibility without the res gestae. See
22 *Mangana*, 33 Nev. at 519, 112 P. at 697. In addition, Jeopardy attached and ended to
23 Battery as well.

24 The Court in *Labastida v. State*, 986 P.2d 443, 115 Nev. 298 (1999), held that the
25 unlawful act, malice, and felony murder didn't hold water. Aside from the specifically
26 delineated act of child abuse in *Labastida*, this case is on point with Mr. O'Keefe
27 because the only available "theory" ostensibly left was malice murder. But if this

GROUND II.B CONTINUED

1 were true, then this culpability undertook Jeopardy too when the 1st Amended Info.
2 listed every mental element conjoined by "and" altogether. See id., 115 Nev. at 305-
3 06, 986 P.2d at 447-48 (citing Sheriff v. Morris, 99 Nev. 109, 118, 659 P.2d 852, 859
4 (1983) (mirroring Rose)).

5 While it may or may not be true that one who's had an Acquittal of 1st Degree
6 murder with a reversal on 2nd may be re-tried under 2nd, the trial court cannot
7 recharge 2nd Degree murder after it's been reversed prior to based on insufficient
8 evidence. See K-Mart v. Washington, 109 Nev. 1180, 866 P.2d 274 (1993); West v. State,
9 119 Nev. 410, 420, 75 P.3d 808, 814 (2003); Morse, 231 P.2d 478, 480 (1951);
10 Wilson v. Bellegue, 554 F.3d 816, 820 (9th Cir. 2009); Schad v. Ariz., 501 U.S. 624
11 629, 640 (1991). The mode of commission does not matter per the Sullivan Rule. See
12 Schad, id. at 649-50 (Scalia, J., concurring) (citing People v. Sullivan, 173 N.Y. 122, 65 N.E.
13 489 (1903)). Accordingly, this Court may not reverse one "theory" of 2nd Degree murder if
14 the evidence presented at trial would have supported the other phantom "theory." By doing
15 such, the evidence, then, must not have supported any "theory" of 2nd Degree at all.

16 Assuming, arguendo, that it did, this conflicts with other case law. Evidencing the commission
17 of an unlawful act to sustain malice implied with knowledge and extreme recklessness is done
18 by proving the intent. Key v. State, 766 P.2d 270, 272 (1988). Malice is defined in Collman v.
19 State, 116 Nev. 687, 713-20, 7 P.3d 426, 443-47 (2000), and Springer's dissent in Labastida v.
20 State, 112 Nev. 1502, 1515-32, 931 P.2d 1324, 1343-54 (1996) (Springer, J., dissenting). Besides
21 the lack of any instruction whatsoever giving all the elements and requisite judicial inter-
22 pretation of the Abandoned and Malignant heart mens rea per People v. Sarun, 203 P.3d 425,
23 434 (2009), self-defense (even on a reasonable amount) negates malice. Kelso v. State,
24 95 Nev. 37, 588 P.2d 1035 (1979); Vaughan v. State, 22 Nev. 285, 39 P. 733 (1895). Superstating
25 that liability counts as a "theory" (if culpability doesn't), there's no other disjunctive
26 allegation in the charging document. Cf., Jennings v. State, 116 Nev. 488, 490-91, 998
27 P.2d 557, 559 (2000) (discussing Noonan v. State, 115 Nev. 184, 188-89, 980 P.2d 637, 639.

GROUND II. B CONTINUED

1 (1999); Alford v. State, 11 Nev. 1409, 1415, 906 P.2d 714, 717 (1995); Sheriff v. Levinson, 95 Nev.
2 436, 437, 596 P.2d 232, 233 (1979) citing "established principles" in Simpson v. Dist. Ct., 88
3 Nev. 654, 659, 503 P.2d 1225, 1229 (1972), and Earlywine v. Sheriff, 94 Nev. 100, 575 P.2d 599
4 (1978) (conversely, if the T.I. was couched solely in conclusory, ^{statutory} language, then it must be
5 insufficient). The information was quite clear and rather straightforward: one theory unlike
6 West. See id. 119 Nev. at 919, 75 P.3d at 814 nn. 25-31.
7 Concludingly, when the Court in SCN No. 53859 established the law of the case, Byford
8 v. State, 994 P.2d 700, 711-12 (2000), Stare Decisis prohibits any deviation thereof. legal
9 acquittals based on insufficient evidence are nonappealable, U.S. v. Scott, 437 U.S. 83, 91 (1978),
10 and not retriable under Green v. Marney, 437 U.S. 19, 24-25 (1978), and U.S. v. Bibbero, 749 F.2d
11 581, 586 (9th Cir. 1984). This was just affirmed in the U.S. Supreme Court in Evans v. Mich.
12 133 S. Ct. 1069, 185 L. Ed. 2d 124, 133-35 (2013). Even if in correct, the State is still bound
13 by the decision. U.S. v. Martin Linen Supply, 430 U.S. 564, 571 (1977). And when the Order
14 adjudged and decreed that the evidence didn't support one "theory" of 2nd Degree,
15 that constructively meant Mr. O'Keefe was not guilty of any other surmised "theory"
16 therein. Cf. Fogliani, 79 Nev. 146, 150, 379 P.2d 945, 947 (1963). Accord Saylor v. Cornelius,
17 845 F.2d 1401, 1403-04 (6th Cir. 1988). Heedlessly, the D.A. disregarded the weight of these
18 decisions and instigated three (3) trials based on malice murder. See Emerson v.
19 State, 98 Nev. 158, 164 (1982) (quoting Burger v. U.S., 295 U.S. 78, 88 (1935)); s.p. Thompson
20 v. Calderon, 120 F.3d 1045, 1057-58 (9th Cir. 1997).

21

22 III. This Petition Is Based On Substantial Grounds.

23

24 A. Precedential issues.

25

26 As thoroughly briefed ante, the State is attempting to cut a broad swath of new
27 law painting precisely to nowhere and diametrically opposed to longstanding bedrock.

28

GROUND III.A CONTINUED

1 fundamentals of Double Jeopardy and 6th Amendment Trial Rights such as JI's (which will
2 be filed forthwith).

3 Hypothetically, a D.A. could have an endless number trials for falsely obtaining
4 money starting with Robbery and working their way down the totem pole of Burglary,
5 thievery, all the shades of larceny, embezzlement, fraud, defalcation, stealing, pick-
6 pocketing, etc., etc. There's no end. The state is only free to re prosecute on different
7 statutory provisions. V.S. v. Poll, 538 F.2d 845, 847 (9th Cir. 1976). Here, Mr. O'Keefe
8 was convicted of N.R.S. 200.010 and 200.030 at both the First and Third Trial.

9
10 B. Constitutional issues.

11
12 Practically the entire U.S. 6th Amendment and virtually all of §8 of Art. I,
13 Nev. Const. is vitiated and rendered nugatory by the D.A.'s immoral actions to retry Mr.
14 O'Keefe, et al., ~~thru~~ endlessly until a conviction sticks.

15 The law of Double Jeopardy is perfectly concise, as spelled out above. Res
16 Judicata is the son of the 5th U.S. Amend. when the issue was definitively decided,
17 collateral estoppel prohibits the State from relitigating in the same issue. When the
18 D.A. obviates Stare Decisis, every trial protection is towed in and nullified by
19 unceasing trials and unyielding prosecutorial misconduct.

20
21 C. Public policy issues.

22
23 An impartial jury trial protects both the public and the accused. See
24 Powers v. Ohio, 499 U.S. 400, 407 (1990).

25 Every concept of a fair trial is thrown out the proverbial window when
26 the State is allowed a mulligan for any acquittal or mistrial. As T. Stark, Evidence
27 756 (1824), once said, "The maxim of law is... that it is better that ninety nine...

GROUND III.C CONTINUED

1 offenders should escape than one innocent man should be condemned." This axiom has
2 been echoed in numerous U.S. Supreme Court cases hitherto. Public confidence in elected
3 D.A.s is lost when their citizens are illegally confined with everlasting trials and the
4 stress, anxiety, irritation, worry, etc., that comes with Double Jeopardy — not to
5 mention the cost of trials levied onto the taxpayers. That is the quintessential
6 definition of vexatiousness and is a crime under the laws of Barratry. There can be no
7 faith in a Justice system that is willfully blind to the laws of this State and Country
8 and hellbent on unlawfully detaining the very civilians they're meant to protect under the
9 U.S. 14th Amendment.

10
11 IV. Prayer For Relief.

12
13 Mr. O'Keefe is requesting answers to several key questions:

- 14 1) What is the alternate theory and where is it located?
15 2) Does not Jeopardy attach to this illusive theory?
16 3) If not, isn't the state precluded from retrying the accused
17 based on insufficient evidence?

18 4) How is the State, standby counsel, and this Court not permitted to
19 produce the law of the case when every case challenging JI's has required a
20 Comparison Test? Where are they?

21 5) Why wasn't a Transmission of Records not sent to the lower court
22 to send for the JI's? Can this Court even rule without the JI's once the burden
23 of proof has been established for an error in the laws of the case?

24
25 Ultimately, where does it end? How many iterations must the defendants suffer
26 through? Simply put, Mr. O'Keefe was legally acquitted of the elements necessary to
27 uphold 2nd Degree — notwithstanding the fact that 2nd Degree has already been overruled

GROUND IV. CONTINUED

1 in case no. 53859, This embodies every variation of prosecutorial misconduct based
2 by the U.S. 5th, 6th, and 14th Amendments: malicious prosecution, vindictive prosecution,
3 selective enforcement, selective prosecution, prosecutorial intransigence, etc. etc. etc.
4 This absolutely cannot stand and, as such, Mr. O'Keefe's conviction is infirm.

5
6 WHEREFORE, all premises considered, Mr. O'Keefe respectfully prays for this
7 Honorable Court, En Banc, to grant an ORDER to Reconsider the denial of his
8 Fast Track Direct appeal to comply with the pursuit of Justice and demand for
9 equality to all.

10
11 DATED: this 20th day of June, 2013.

12
13 BY: Brian Kerry O'Keefe

14 Brian Kerry O'Keefe #90244

15 Appellant / In Propria Persona

16 ///

17 ///

18 ///

19 ///

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding _____

MOTION FOR RECONSIDERATION EN BANC

(Title of Document)

S.C.N.
filed in ~~District Court~~ Case number 61631

☒ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

(State specific law)

-or-

B. For the administration of a public program or for an application
for a federal or state grant.

Ben KOKOP
Signature

JUNE 20, 2012
Date

Brian K. O'Keefe
Print Name

PRO SE - APPELLANT
Title

CERTIFICATE OF SERVICE BY MAILING

I, Brian Kerry O'Keefe, hereby certify, pursuant to NRCP 5(b), that on this 20
day of JUNE, 2013, I mailed a true and correct copy of the foregoing, "NOTICE OF
AND LEAVE TO APPEAR AND FILE MOTIONS; NOTICE OF AND MOTION TO"
by depositing it in the High Desert State Prison, Legal Library, First-Class Postage, fully prepaid,
addressed as follows: WITHDRAW AND SUBSTITUTE COUNSEL;
MOTION FOR RECONSIDERATION EN BANC.

SUPREME COURT OF NEVADA
OFFICE OF THE CLERK
201 S. Carson Street, Suite 201
Carson City, Nevada 89701

NOTE: REQUEST CLERK TO UTILIZE CM/ECF
FOR PARTICIPANTS IN THE CASE WHO ARE
REGISTERED, TO SERVE ALL (3) MOTIONS UPON.
CC:FILE

DATED: this 20 day of JUNE, 2013.

Brian K. O'Keefe
BRIAN KERRY O'KEEFE

90244

/In Propria Personam

Post Office box 650 [HDSP]
Indian Springs, Nevada 89018
IN FORMA PAUPERIS: