

  
CLERK OF THE COURT

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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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DATED this \_\_\_\_\_ day of February, 2009.

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

## STATEMENT OF FACTS

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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.

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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.  
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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.

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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 (9<sup>th</sup> 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:  
28

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  
4 identical to the events charged, so long as they are closely related to the  
5 offense and tend to rebut the defense of mistake.

6 Id. at 769.

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

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

#### 19 **D. Balancing Test.**

20 After a court finds that evidence of other crimes fits within NRS 48.045(2), it must  
21 then review the evidence in regard to NRS 48.035.<sup>1</sup> This statute requires a weighing of  
22 probative value against prejudicial effect. As stated above, it is anticipated that the defense  
23 will argue that the proffered evidence is more prejudicial than probative. In United States v.  
24 Parker, 549 F.2d 1217 (9<sup>th</sup> Cir. 1977), cert. denied, 430 U.S. 971, 97 S.Ct. 1659 (1977), the

25 <sup>1</sup> 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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1 CONCLUSION

2 Based upon the foregoing, the State requests the Court grant the State's Motion to  
3 Admit Evidence of Other Crimes.  
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5 DATED this \_\_\_\_\_ day of February, 2009.  
6

7 DAVID ROGER  
8 DISTRICT ATTORNEY  
9 Nevada Bar #002781

10 BY /s/ PHILLIP N. SMITH, JR.  
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12 PHILLIP N. SMITH, JR.  
13 Deputy District Attorney  
14 Nevada Bar #010233  
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28

1                                    **CERTIFICATE OF FACSIMILE TRANSMISSION**

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

4  
5                                    PATRICIA PALM, ESQ.  
6                                    FAX # 455-6265

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

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28    ts/dvu

  
CLERK OF THE COURT

1 **NOTC**  
2 **DAVID ROGER**  
3 Clark County District Attorney  
4 Nevada Bar #002781  
5 **PHILLIP N. SMITH, JR.**  
6 Deputy District Attorney  
7 Nevada Bar #0010233  
8 200 Lewis Avenue  
9 Las Vegas, Nevada 89155-2212  
10 (702) 671-2500  
11 Attorney for Plaintiff

7 DISTRICT COURT  
8 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,  
10 Plaintiff,  
11 -vs-  
12 BRIAN KERRY O'KEEFE,  
13 #1447732  
14 Defendant.

CASE NO: C250630  
DEPT NO: XVII

15 **NOTICE OF WITNESSES AND/OR EXPERT WITNESSES**  
16 [NRS 174.234(1)(a)]

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

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

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

21 <u>NAME</u>	22 <u>ADDRESS</u>
23 BENJAMIN, JACQUELINE DR.	24 CLARK COUNTY CORONER
	25 This witness is expected to testify regarding
	26 the nature of the victim's injuries.
27 STALLINGS, JOHN	28 ME #0031
29 DUHN, ROBBIE	LVMPD #5947

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

BY David Roger  
DAVID ROGER  
DISTRICT ATTORNEY  
Nevada Bar #002781

# CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of NOTICE OF WITNESSESS AND/OR EXPERT WITNESSES, was made this 3rd day of February, 2009, by facsimile transmission to:

PATRICIA PALM ESQ  
FAX #(702) 455-6273

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

ORIGINAL

1 ROC  
2 DAVID M. SCHIECK  
3 SPECIAL PUBLIC DEFENDER  
4 Nevada Bar No. 0824  
5 Randall H. Pike  
6 Assistant Special Public Defender  
7 Nevada Bar No. 1940  
8 Patricia Palm  
9 Deputy Special Public Defender  
10 Nevada Bar No. 6009  
11 330 South Third Street, Suite 800  
12 Las Vegas, NV 89155-2316  
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

FILED

FEB 6 10 34 AM '09

*Ed. [Signature]*  
CLERK OF THE COURT

11 DISTRICT COURT  
12 CLARK COUNTY, NEVADA

13 THE STATE OF NEVADA,  
14 Plaintiff,  
15 vs.  
16 BRIAN O'KEEFE #1447732  
17 Defendant

CASE NO. C250630  
DEPT. NO. XVII

19 RECEIPT OF COPY

20 RECEIPT of a copy of the Opposition to State's Motion to Admit Evidence of Other  
21 Bad Acts is hereby acknowledged this 6 day of February, 2009.

22 DISTRICT ATTORNEY'S OFFICE

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

27 RECEIVED

28 FEB 06 2009

CLERK OF THE COURT

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ORIGINAL

FILED

FEB 6 10 31 AM '09

*Erin D. Smith*  
CLERK OF THE COURT

1 **ORDR**  
2 **DAVID M. SCHIECK**  
3 **SPECIAL PUBLIC DEFENDER**  
4 **Nevada Bar No. 0824**  
5 **Randall H. Pike**  
6 **Assistant Special Public Defender**  
7 **Nevada Bar No. 1940**  
8 **Patricia Palm**  
9 **Deputy Special Public Defender**  
10 **Nevada Bar No. 6009**  
11 **330 South Third Street, Suite 800**  
12 **Las Vegas, NV 89155-2316**  
13 **(702) 455-6265**  
14 **(702) 455-6273 fax**  
15 **rpik@co.clark.nv.us**  
16 **palmpa@co.clark.nv.us**  
17 **Attorneys for O'Keefe**

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

13 **THE STATE OF NEVADA,**  
14 **Plaintiff,**  
15 **vs.**  
16 **BRIAN O'KEEFE #1447732**  
17 **Defendant**

**CASE NO. C250630**  
**DEPT. NO. XVII**

19 **OPPOSITION TO STATE'S MOTION TO ADMIT EVIDENCE OF OTHER BAD ACTS**

20 **Date of Hearing: 2-10-09**  
21 **Time of Hearing: 8:00am**

22 **COMES NOW** the Defendant herein, **BRIAN O'KEEFE**, by and through his  
23 **attorneys, DAVID M. SCHIECK, Special Public Defender, RANDALL PIKE, Assistant**  
24 **Special Public Defender, and PATRICIA PALM, Deputy Special Public Defender, and**  
25 **hereby offer the following in opposition to the State's Motion to introduce evidence of other**  
26 **bad acts in the above-entitled matter.**

27 **As the State limits its requested evidence that it requests to the conviction and facts**  
28 **RECEIVED 7835, this response will respond solely to that request.**

**FEB 6 2009**  
**CLERK OF THE COURT**

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1 As a general proposition, evidence of prior crimes and other bad acts of a criminal  
2 defendant is inadmissible character evidence unless it falls within certain specific  
3 exceptions. See, NRS 48.045.

4 As the State notes in it's Motion to admit, NRS 48.045(2) and Tinch v. State, 113  
5 Nev. 1170 (1997) offer some guidelines regarding the appropriate admission of this  
6 extremely prejudicial evidence. The seriousness of an improper admission of such  
7 evidence, or, an in trial reference to a prior criminal history of a defendant is reversible  
8 error. Witherow v. State, 104 Nev. 721, 765 P.2d 1153 (1988). The test for determining  
9 whether a reference to criminal history occurred is whether "a juror could reasonably infer  
10 from the facts presented that the accused had engaged in prior criminal activity." Manning  
11 v. Warden, 99 Nev. 82, 659 P.2d 847 (1983), citing Commonwealth v. Allen, 292 A.2d 373,  
12 375 (Pa 1972).

13 This court in Manning, supra, detailed a number of different cases where indirect  
14 references to prior acts were found to be references to criminal history. See e.g. Gehrke v.  
15 State, 96 Nev. 581, 613 P.2d 1028 (1980); Reese v. State, 95 Nev. 419, 596 P.2d 212  
16 (1979); Geary v. State, 91 Nev. 784, 544 P.2d 417 (1975); Founts v. State, 87 Nev. 165,  
17 483 P.2d 654 (1971). Most interestingly, the State in Manning, supra, conceded that in a  
18 majority of jurisdiction, an improper reference to criminal history is a violation of due  
19 process since it affects the presumption of innocence. Id at 87.

20 The Nevada Supreme Court summarized the position of Defendant O'KEEFE as  
21 follows:

22 The danger of allowing prejudicious remarks and testimony during a trial is  
23 not confined to their momentary effect upon the juror. Trial tactics are  
24 influenced immeasurably. Counsel is forced to object and argue repeatedly.  
25 Defendant may be compelled to testify when it is his right not to do so. Ibsen  
26 v. State, 83 Nev. 42, 422 P.2d 543 (1967)

27 This reversal for a new trial is a hard burden to bear because Walker is a  
28 confirmed criminal. But it is a proud tradition of our system that every man,  
no matter who he may be, is guaranteed a fair trial. As stated by Chief  
Justice Traynor in People v. Cahan, 282 P.2d 905 at 912 (Cal. 1955) 'Thus,  
no matter how guilty a defendant might be or how outrageous his crime, he  
must not be deprived of a fair trial, and any action, official or otherwise, that  
would have that effect would not be tolerated.'

1 The requisites of a trial free of prejudicial atmosphere are too deeply  
2 implanted to require repetition; for when the death penalty is executed, its  
3 consequences are irretrievable. A fair trial therefore is a very minimal  
4 standard to require before its imposition."

5 Walker v. Fogliani, 83 Nev. 154, 157, 425 P.2d 794 (1983)

6 If the State desires to introduce evidence of other bad acts or criminal activity it is  
7 necessary for the Court to hold a hearing wherein it is the burden of the State to establish  
8 that: (1) the incident is relevant to the crime charged; (2) the act is proven by clear and  
9 convincing evidence; and (3) the probative value of the evidence is not substantially  
10 outweighed by the danger of unfair prejudice. Tinch v. State, 113 Nev. 1170, 946 P.2d  
11 1061 (1997). As the State has properly announced its desire to introduce such evidence,  
12 it is requested that a hearing be held outside the presence of the jury to determine if the  
13 evidence is properly admissible.

14 Although a prior felony conviction may be admitted for impeachment, a court should  
15 exclude such evidence if its probative value is substantially outweighed by danger of unfair  
16 prejudice, confusion of the issues, or misleading the jury. Edwards v. State, 90 Nev. 255,  
17 524 P.2d 328 (1974); Anderson v. State, 92 Nev. 21, 544 P.2d 1200 (1976); NRS 48.035.  
18 Only through an evidentiary hearing before the trial can the Court conduct the necessary  
19 weighing to determine what, if any, evidence may be admissible and if admissible, for what  
20 limited purpose.

21 Finally, the Court will then have to determine the appropriate limiting instruction to  
22 be given to the jury.

### 23 CONCLUSION

24 It is respectfully requested that the Court enter its order precluding the State from  
25  
26  
27  
28

1 introducing any of the above evidence along with any other prior bad acts, character  
2 evidence or unrelated criminal activity at the trial herein

3 DATED this 6<sup>th</sup> day of February 2009.

5 Respectfully Submitted:  
6 DAVID M. SCHIECK  
7 SPECIAL PUBLIC DEFENDER

8 

9 Randall H. Pike  
10 Patricia Palm  
11 330 S. Third St. #800  
12 Las Vegas, NV 89155  
13 Attorneys for O'Keefe  
14  
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ORIGINAL

1 ORDR  
2 DAVID M. SCHIECK  
3 SPECIAL PUBLIC DEFENDER  
4 Nevada Bar No. 0824  
5 Randall H. Pike  
6 Assistant Special Public Defender  
7 Nevada Bar No. 1940  
8 Patricia Palm  
9 Deputy Special Public Defender  
10 Nevada Bar No. 6009  
11 330 South Third Street, Suite 800  
12 Las Vegas, NV 89155-2316  
13 (702) 455-6265  
14 (702) 455-6273 fax  
15 rpike@co.clark.nv.us  
16 palmpa@co.clark.nv.us  
17 Attorney for O'Keefe

FILED  
FEB 10 12 09 PM '09  
E. J. Smith  
CLERK OF THE COURT

10 DISTRICT COURT  
11 CLARK COUNTY, NEVADA

12 THE STATE OF NEVADA,

13 Plaintiff,

14 vs.

15 BRIAN O'KEEFE

16 Defendant

CASE NO. C250630  
DEPT. NO. XVII

Date of Hearing: n/a  
Time of Hearing: n/a

16 STIPULATION AND ORDER

17 COMES NOW the Defendant herein, BRIAN O'KEEFE, by and through  
18 his attorneys, DAVID M. SCHIECK, Special Public Defender, RANDALL PIKE,  
19 and PATRICIA PALM, Deputy Special Public Defenders, and the State of  
20 Nevada, by and through its Deputy District Attorney, PHILLIP SMITH, hereby  
21 stipulate that the Court may Order release of the Medical Records of VICTORIA  
22 WHITMARSH to the office of the Clark County Special Public Defender's Office  
23 upon presentation of the Order attached hereto in compliance with the subpoena  
24 issued in this case.

25 THE PARTIES FURTHER STIPULATE that upon receipt of the records,  
that Counsel for the Defendant shall provide a complete copy of the same to the

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FEB 10 2009  
CLERK OF THE COURT

SPECIAL PUBLIC  
DEFENDER

CLARK COUNTY  
NEVADA

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1 office of the Clark County District Attorney, and that prior to introducing any  
2 evidence derived as a result of this Order, including attempts at introducing the  
3 contents or any expert opinions that are based in whole or in part upon the  
4 contents of the records, that Counsel for the Defense shall present a pre-trial  
5 proffer. This proffer shall be made prior to the Calendar call in this matter.

6 DATED this \_\_\_\_ day of February, 2009.

7  
8   
9 Randall H. Pike  
Assistant Special Public Defender

  
Phillip Smith  
Deputy District Attorney

10 **ORDER**

11  
12 **THE COURT BEING FULLY APPRISED** as the contents of the enclosed  
13 stipulation and the law appurtenant thereto, it is therefore,  
14 **ORDERED, AJUDGED AND DECREED** that copies of the Medical records of  
15 **VICTORIA WHITMARSH**, shall be released to the Clark County Special  
16 **Public Defender's Office** subject to the use restrictions contained herein.

17 Dated this 10 day of February, 2009

18  
19  
20   
21 \_\_\_\_\_  
22 Honorable District Court Judge  
Hon. Michael P. Villani

ORIGINAL

1 AINF  
2 DAVID ROGER  
3 Clark County District Attorney  
4 Nevada Bar #002781  
5 PHILLIP N. SMITH, JR.  
6 Deputy District Attorney  
7 Nevada Bar #010233  
8 200 South Third Street  
9 Las Vegas, Nevada 89155-2211  
10 (702) 671-2500  
11 Attorney for Plaintiff

FILED IN OPEN COURT

FEB 10 2009

EDWARD A. FRIEDLAND  
CLERK OF THE COURT

BY

*Kristen Brown*  
KRISTEN BROWN DEPUTY

DISTRICT COURT  
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,  
10 Plaintiff,

11 -vs-

12 BRIAN KERRY O'KEEFE,  
13 #1447732

14 Defendant.

Case No. C250630  
Dept No. V

AMENDED  
INFORMATION

16 STATE OF NEVADA }  
17 COUNTY OF CLARK } ss:

18 DAVID ROGER, District Attorney within and for the County of Clark, State of  
19 Nevada, in the name and by the authority of the State of Nevada, informs the Court:

20 That BRIAN KERRY O'KEEFE, the Defendant(s) above named, having committed  
21 the crime of **MURDER WITH USE OF A DEADLY WEAPON (OPEN MURDER)**  
22 **(Felony - NRS 200.010, 200.030, 193.165)**, on or about the 5th day of November, 2008,  
23 within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes  
24 in such cases made and provided, and against the peace and dignity of the State of Nevada,  
25 did then and there wilfully, feloniously, without authority of law, and with premeditation and  
26 deliberation, and with malice aforethought, kill VICTORIA WHITMARSH, a human being,  
27 by stabbing the said VICTORIA WHITMARSH with a deadly weapon, to-wit: a knife.

28 ///

1  
2 DAVID ROGER  
DISTRICT ATTORNEY  
3 Nevada Bar #002781  
4

5 BY   
6 PHILLIP N. SMITH, JR.  
7 Deputy District Attorney  
8 Nevada Bar #010233

9 Names of witnesses known to the District Attorney's Office at the time of filing this  
10 Information are as follows:

11	<u>NAME</u>	<u>ADDRESS</u>
12	ARMBRUSTER, TODD	5001 OBANNON DR #34 LVNV
13	BALLEJOS, JEREMIAH	LVMPD #8406
14	BENJAMIN, JACQUELINE DR	ME 0081
15	BLASKO, KEITH	LVMPD #2995
16	BUNN, CHRISTOPHER	LVMPD #4407
17	COLLINS, CHELSEA	LVMPD #9255
18	CONN, TODD	LVMPD #8101
19	CUSTODIAN OF RECORDS	CDC
20	CUSTODIAN OF RECORDS	LVMPD COMMUNICATIONS
21	CUSTODIAN OF RECORDS	LVMPD RECORDS
22	FORD, DANIEL	LVMPD #4244
23	FONBUENA, RICHARD	LVMPD #6834
24	HATHCOX, JIMMY	5001 EL PARQUE AVE #C-36 LVNV
25	HUTCHERSON, CHRISTOPHER	LVMPD #12996
26	IVIE, TRAVIS	LVMPD #6405
27	KYGER, TERESA	LVMPD #4191
28	KOLACZ, ROBIN	5001 EL PARQUE AVE #38 LVNV

1	LOWREY-KNEPP, ELAINE	DISTRICT ATTORNEY INVESTAGATOR
2	MALDONADO, JOCELYN	LVMPD #6920
3	MORRIS, CHERYL	UNKNOWN
4	MURPHY, KATE	LVMPD #9756
5	NEWBERRY, DANIEL	LVMPD #4956
6	PAZOS, EDUARDO	LVMPD #6817
7	RAETZ, DEAN	LVMPD #4234
8	SANTAROSSA, BRIAN	LVMPD #6930
9	SHOEMAKER, RUSSELL	LVMPD #2096
10	TAYLOR, SEAN	LVMPD #8718
11	TINIO, NORMA	2992 ORCHARD MESA HENDERSONNV
12	TOLIVER, CHARLES	5001 EL PARQUE #29 LVNV
13	TOLIVER, JOYCE	5001 EL PARQUE #C-29 LVNV
14	WHITMARSH, ALEXANDRA	7648 CELESTIAL GLOW LVNV
15	WHITMARSH, DAVID	7648 CELESTIAL GLOW LVNV
16	WILDEMANN, MARTIN	LVMPD #3516

26 DA#08F23348X/ts  
 27 LVMPD EV#0811053918  
 28 (TK9)

  
CLERK OF THE COURT

1 **NOTC**  
2 **DAVID ROGER**  
3 Clark County District Attorney  
4 Nevada Bar #002781  
5 **PHILLIP N. SMITH, JR.**  
6 Deputy District Attorney  
7 Nevada Bar #0010233  
8 200 Lewis Avenue  
9 Las Vegas, Nevada 89155-2212  
10 (702) 671-2500  
11 Attorney for Plaintiff

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

9 **THE STATE OF NEVADA,**  
10 Plaintiff,

11 -vs-

12 **BRIAN O'KEEFE, aka,**  
13 **Brian Kerry O'Keefe, #1447732**  
14 Defendant.

CASE NO: C250630

DEPT NO: V

15 **NOTICE OF WITNESSES AND/OR EXPERT WITNESS**  
16 [NRS 174.234(1)(a)]

17 TO: BRIAN O'KEEFE, aka, Brian Kerry O'Keefe, Defendant; and

18 TO: PATRICIA PALM Deputy Special Public Defender, Counsel of Record:

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

21 <u>NAME</u>	22 <u>ADDRESS</u>
23 BAS, JENNIFER	24 FORENSIC SCIENTIST LVMPD #9944
	25 Will testify as to the DNA collection and
	26 analysis.

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

BY

DAVID ROGER  
DISTRICT ATTORNEY  
Nevada Bar #002781

# CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of NOTICE OF WITNESSES AND/OR EXPERT WITNESS, was made this 17th day of February, 2009, by facsimile transmission to:

**PATRICIA PALM**  
Deputy Special Public Defender  
FAX # (702) 455-6273

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

ORIGINAL

FILED

FEB 20 3 40 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 rpik@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:

21 TO: THE STATE OF NEVADA, Plaintiff, and

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

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

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FEB 20 2009

CLERK OF THE COURT

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 20<sup>th</sup> day of February, 2009.

13  
14 SPECIAL PUBLIC DEFENDER

15 DAVID M. SCHIECK

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

24 RECEIPT OF COPY

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

26 DATED: Feb 20, 2009.

27 DISTRICT ATTORNEY'S OFFICE

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. Guerrieri, and Heather Subert
June 2003	"CODIS v5.6 Software Training" - Instructor: Carla Heron, Baton Rouge, LA
May 2003	"DNA Auditor Training" - Instructors: Richard A. Guerrieri 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 AmpF <sub>STR</sub> <sup>TM</sup> & ABI Prism <sup>TM</sup> 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 7<sup>th</sup> 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; 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; TALL; 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; Vermillion 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. Rantaia 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.

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# QUEST DIAGNOSTICS INCORPORATED

## FORENSIC LABORATORY STATEMENT OF QUALIFICATIONS

Date: 04/17/08

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		Arson 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	06/76 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
<b>PROFESSIONAL AFFILIATIONS</b>		
Organization		Date
<b>PUBLICATIONS / PRESENTATIONS</b>		
<b>OTHER QUALIFICATIONS</b>		



## 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.

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## 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/~bhbates/vita.htm>

ORIGINAL

FILED

MAR 4 2 35 PM '09

*Earl D. ...*  
CLERK OF THE COURT

MTN

DAVID M. SCHIECK  
SPECIAL PUBLIC DEFENDER  
Nevada Bar No. 0824  
Randall H. Pike  
Assistant Special Public Defender  
Nevada Bar No. 1940  
Patricia Palm  
Deputy Special Public Defender  
Nevada Bar No. 6009  
330 South Third Street, Suite 800  
Las Vegas, NV 89155-2316  
(702) 455-6265  
(702) 455-6273 fax  
rpik@co.clark.nv.us  
palmpa@co.clark.nv.us  
Attorneys for O'Keefe

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

BRIAN O'KEEFE #1447732

Defendant

CASE NO. C250630  
DEPT. NO. XVII

DEFENDANT'S MOTION TO REQUIRE THE COURT TO ADVISE THE  
PROSPECTIVE JURORS AS TO THE MANDATORY SENTENCES REQUIRED  
IF THE DEFENDANT IS CONVICTED OF SECOND DEGREE MURDER.

Date of Hearing: 3-10-09  
Time of Hearing: 8:00am

*cd*

COMES NOW the Defendant herein, BRIAN O'KEEFE, by and through his  
attorneys, DAVID M. SCHIECK, Special Public Defender, RANDALL PIKE,  
Assistant Special Public Defender, and PATRICIA PALM, Deputy Special Public  
Defender, and hereby offer the following motion to require the trial Court to

9

CHC

CLERK OF THE COURT

MAR 4 2009

RECEIVED

SPECIAL PUBLIC  
DEFENDER

CLARK COUNTY  
NEVADA

1 advise the jury as to the mandatory sentences required if the Defendant is  
2 convicted of second degree Murder with use of a deadly weapon.

3  
4 **NOTICE OF MOTION**

5 TO: STATE OF NEVADA, Plaintiff; and

6 TO: PHILLIP SMITH, ESQ. Deputy District Attorney, Attorney for Plaintiff

7 YOU WILL PLEASE TAKE NOTICE that the undersigned will bring on the  
8 above and foregoing **MOTION** on for hearing on the 10 day of March, 2009 at  
9 the hour of 8:00 a.m., in Department No. XVII of the above-entitled Court, or as  
10 soon thereafter as counsel may be heard.

11 **POINTS AND AUTHORITIES**

12 **STATEMENT OF FACTS**

13 Brian O'Keefe and Victoria Whitmarsh ("Victoria"), the alleged victim in this  
14 matter, enjoyed a fairly long, but tumultuous relationship together. They dated  
15 and cohabitated on and off since 2001, after meeting in a treatment facility.  
16 During the relationship, in 2004, Brian was ultimately convicted of burglary (entry  
17 into the couple's joint dwelling with intent to commit a crime against Victoria). He  
18 was given a sentence of probation for that crime, but he was later convicted of a  
19 third offense domestic battery against Victoria. He went to prison in March 2005.  
20 When he was released from prison in March 2007, he initiated a relationship with  
21 a woman named Cheryl Morris. (PHT 63) He separated with Ms. Morris several  
22 months before the incident so that Victoria could move into his apartment with  
23 him. Ms. Morris testified at the time of the preliminary hearing that Victoria  
24 voluntarily reentered into a relationship with Brian and began cohabitating with  
25 him in his apartment. (PHT 74) Victoria had called Ms. Morris several times and  
26 discussed her decision to return to Brian. (PHT 66). At the time of the incident in  
27 November 2008, he was 45 years old. Victoria was 54.

1 She died of one stab wound to her side. (PHT 4) Armbruster tried to go  
2 towards Brian, who took a swing at Armbruster. Brian then returned to attend to  
3 Victoria. Armbruster described Brian as appearing to be intoxicated and  
4 disoriented. (PHT 60) He was stumbling and not very steady on his feet. (PHT  
5 61-62) Neighbors called 911 at 11:00 p.m. (PHT 52) The police responded and  
6 found Brian lying on the floor next to Victoria's dead body, cradling and stroking  
7 her head. (PHT 26-27, 43-44) Although he was unarmed, his behavior was  
8 erratic, and at times he was incoherent. PHT 24

9 Victoria and Brian were drinking partners and were often seen drinking  
10 together on the patio of the residence where the incident occurred. (PHT 60)  
11 They had both been drinking on the date of the incident, and at the time of her  
12 death, Victoria's blood alcohol content was .24. (PHT 6) At the homicide offices  
13 subsequent to his arrest, Brian gave a rambling statement indicating that he was  
14 not aware of Victoria's death or its cause. In the interview, which began at 1:20  
15 a.m., he was emotional, crying, raising his voice, talking to himself, slurring,  
16 belligerent, ridiculous, and detectives noted that he might be a "nut." (PHT 83-  
17 85, 93) Detective Wildemann agreed that during the interview, Brian smelled  
18 heavily of alcohol, and during photographs taken subsequent to the interview, at  
19 about 3:55 a.m., officers held him upright to steady him. (PHT 91-93) Detective  
20 Wildemann agreed that it was "pretty obvious" that Brian had been drinking.  
21 (PHT 94)

#### 22 POINTS AND AUTHORITIES

23 It is not uncommon for the members of a jury to misunderstand jury  
24 instructions or to carry improper beliefs as to the impact of sentencing into the  
25 Court. The Capital Jury Project, a national research endeavor funded by the  
26 National Science Foundation, interviewed people who had served on death  
27



1 penalty juries from 15 states around the country. They found that approximately  
2 50% of jurors interviewed decided what the penalty should be before the  
3 sentencing phase of the trial. This is before they have heard mitigating evidence  
4 from the defense or received instructions from the judge about how to make the  
5 punishment decision. The Capital Jury Project found that most jurors grossly  
6 underestimated the amount of time a defendant would serve in prison if not  
7 sentenced to death, and the sooner that jurors believed a defendant would return  
8 to society if not given the death penalty, the more likely they were to vote for  
9 death. Recognizing this, it becomes clearer and clearer that juries should be  
10 made aware of the "harsh mandatory minimum" sentencing rules in certain  
11 cases—particularly homicides. The jury's required role in finding facts necessary  
12 to support a criminal conviction and a basis for sentencing enhancement is  
13 prescribed by the Fifth and Sixth Amendments. The Sixth Amendment provides  
14 that in criminal proceedings, "the accused shall enjoy the right to a speedy and  
15 public trial, by an impartial jury of the State and district wherein the crime shall  
16 have been committed." U.S. Const, amend. VI. The Fifth Amendment guarantees  
17 that no one will be deprived of "life, liberty, or property without due process of  
18 law." U.S. Const, amend. V. Together these Amendments require "criminal  
19 convictions to rest upon a jury determination that the defendant is guilty of every  
20 element of the crime with which he is charged, beyond a reasonable doubt."  
21 *United States v. Gaudin*, 515 U.S. 506, 510, 115 S. Ct. 2310, 132 L. Ed. 2d 444  
22 (1995) (citing *Sullivan v. Louisiana*, 508 U.S. 275, 277-78, 113 S. Ct. 2078, 124  
23 L. Ed. 2d 182 (1993)).



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.

1 THE COURT: Thank you for your time this  
2 morning. You're excused.

3 MR. SMITH: Judge, at this point the  
4 State's going to rest. I do understand they want to  
5 call the detective. I have agreed, even though they  
6 are calling him as their witness I will permit them to  
7 lead.

8 THE COURT: State's rested. Any  
9 witnesses?

10 MS. PALM: We are calling Detective  
11 Wildemann.

12  
13 (Whereupon, the witness was duly sworn.)  
14

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

17 THE WITNESS: Detective Martin Wildemann,  
18 W i-l-d-e-m-a-n-n.  
19

20 DIRECT EXAMINATION  
21

22 MS. PALM:

23 Q. Good morning, detective?

24 A. Good morning.

25 Q. You were working on the morning of November

1 6, 2008?

2 A. Yes.

3 Q. And at that time, that morning, did you have  
4 an opportunity to interview my client, Mr. Okeefe?

5 A. Yes, I did.

6 Q. And that was with Detective Keiger?

7 A. Yes.

8 Q. I'm not going to ask you questions about the  
9 content of the interview as far as what he stated, I'm  
10 just interested in the conditions of the interview?

11 A. Okay.

12 Q. And his condition.

13 Have you reviewed the video tape of the  
14 interview?

15 A. I haven't recently, no, ma'am.

16 Q. If the time stamp on it reflects it starts in  
17 the interview room at 1:20 in the morning, would that  
18 be accurate?

19 A. That would be accurate.

20 Q. Do you know if he was there for a while  
21 before the tape started rolling?

22 A. I don't believe so. I think as he was being  
23 placed in there I was trying to get the equipment  
24 situated and working.

25 Q. And if the time stamp shows, the official

1 interview shows at the time you came in and started  
2 recording and give Miranda was about 1:45, does that  
3 sound accurate?

4 A. That's what I recall, yes.

5 Q. During the interview Mr. Okeefe is shackled?

6 A. I believe he had one handcuff to a bar, yes,  
7 ma'am.

8 Q. And he's drinking coffee?

9 A. Yes.

10 Q. About three cups during the course of the  
11 interview be right?

12 A. I don't know. He definitely had more than  
13 one, I can remember that.

14 Q. In watching that video, would you agree that  
15 he's sort of talking to himself or to nobody in  
16 particular prior to the recording of the interview?

17 A. Yes, there's times when he's talking alone in  
18 the room.

19 Q. And during the course of the interview with  
20 you he's also emotional?

21 A. Yes.

22 Q. At times he cries?

23 A. Yes.

24 Q. Other times he raises his voice?

25 A. Yes.

1 Q. And would you agree that he's slurring his  
2 words?

3 A. At times.

4 Q. And at the beginning of the interview you had  
5 told him that she was unconscious, is that correct?

6 A. Can you refer to it for me? That would be  
7 great. Like I said, I have not looked at the  
8 interview recently.

9 Q. Would you agree you hadn't told him she's  
10 dead.

11 A. That I hadn't? I don't believe I told him  
12 right away that she had passed away, no, ma'am.

13 Q. Do you recall that he was kind of talking  
14 about her in the first person without saying what he  
15 said?

16 A. Without saying what?

17 Q. I'm not asking you what he said, but he was  
18 referring to her in the first person, as if she's  
19 still present?

20 A. Yes.

21 Q. At times during the interview he was  
22 belligerent with you?

23 A. Yes.

24 Q. And he's not really answering your questions,  
25 is he?



1 A. No.

2 Q. And you even make a note hey, you go off on  
3 tangents easily?

4 A. Yes.

5 Q. And it's hard to get any information from  
6 him?

7 A. Yes.

8 Q. And you actually threaten to walk out a  
9 couple times because he's not being interviewed well?

10 A. Right, yes, ma'am.

11 Q. Do you recall telling him he's being utterly  
12 ridiculous a couple times?

13 A. Yes.

14 Q. When the interview terminated, it terminated  
15 by you actually walking out; is that correct?

16 A. I'm not positive on that.

17 Q. I can show you the end of the transcript if  
18 that will help you refresh?

19 A. Just tell me the page number, I have mine  
20 with me.

21 Q. Page 34?

22 A. Did I just get up and walk out?

23 Q. Kind of looks like it, you and Detective  
24 Keiger?

25 A. Okay.

1 Q. Is that accurate?

2 A. It looks like, I don't make a formal  
3 statement, but it looks like I pretty much terminated  
4 it.

5 Q. You got frustrated and walked out?

6 A. Yes.

7 Q. Do you recall telling Detective Keiger, "You  
8 might want to leave the door open because he might be  
9 a fucking nut"?

10 A. I believe I said that to the officers  
11 outside.

12 Q. And that's based on his erratic interview  
13 during the entire interview?

14 A. Yes, his aggressive behavior.

15 Q. He wasn't being physically aggressive,  
16 correct?

17 A. He got up and made very, you know, aggressive  
18 gestures with his arms and things like that. I recall  
19 telling him what you're doing right now, that's not  
20 smart.

21 Q. He didn't come at you, did he?

22 A. No, he did not try to hit me, if that's what  
23 you're asking.

24 Q. And you became aware during the course of the  
25 interview that he had been in rehab in the past?

1 A. I don't recall that. Is there a page you're  
2 looking at?

3 Q. I can direct you to page 8, 15 and 16.

4 A. I'm on eight.

5 Q. Toward the bottom?

6 A. Okay, talking about a sponsor, yes.

7 Q. So you're aware he'd been in rehab?

8 A. Yes.

9 Q. And you became aware that there was a  
10 purchase of alcohol by Miss Whitmarsh during the day  
11 of the incident?

12 A. I believe that's what he stated.

13 Q. Did you ever follow-up on that, check for  
14 receipts?

15 A. I did not at the scene, I wasn't there. I'm  
16 not sure if my partner was able to find anything like  
17 that or not.

18 Q. And you became aware during the interview  
19 that the couple had been at the Paris Hotel during the  
20 day?

21 A. That's what he stated, yes.

22 Q. Did you ever recover video tapes of  
23 surveillance tapes at the Paris Hotel?

24 A. No, ma'am.

25 Q. Have you requested it?

1 A. No, ma'am.

2 Q. You asked him during the interview how he got  
3 the marks on his face?

4 A. Yes.

5 Q. I'm showing you what's been marked as Defense  
6 Exhibit C. Is that how his face looked when you saw  
7 him?

8 A. Yes.

9 Q. And that injury was already there?

10 A. Yes.

11 Q. Did you have any information that told you  
12 when that injury occurred?

13 A. No.

14 Q. Did you have any information that he was  
15 injured during his arrest?

16 A. I did have information regarding that, yes.

17 Q. That he was injured?

18 A. Well, he was tazed. I didn't know the extent  
19 of injuries that that caused or what happened, if he  
20 struck his head, I didn't know that.

21 Q. And you looked at the crime scene photos in  
22 this case?

23 A. Yes.

24 Q. And this picture in particular, do you know  
25 who's holding his head up?

1 A. That's me.

2 Q. This picture did not appear to be taken  
3 during any interview room. Was that at the scene?

4 A. I believe we took photos at the scene also.

5 Q. You were at the scene also?

6 A. Yes.

7 Q. So this is your arm holding his head?

8 A. Yes. That has to be at the scene, because  
9 I'm wearing a jacket.

10 THE COURT: Which Exhibit is that?

11 MS. PALM: This is Defense C.

12 Q. If the time stamp on the video reflects that  
13 the interview concluded at 3:28, would that be about  
14 accurate?

15 A. I doubt the interview concluded. Once again,  
16 I'd have to review that. It might have been when we  
17 were done processing him. Is that the last time stamp  
18 before it shuts off?

19 Q. No, that would be 3:55 you come back in with  
20 C.S.A. Ford. It looked like the interview concluded  
21 at the 3:28 time?

22 A. Okay. I'm going to have to go with you on  
23 that, I haven't reviewed the video.

24 Q. You had to take kind of a long break during  
25 the middle of the interview, is that true?

1 A. Yes.

2 Q. So after the interview was concluded do you  
3 recall coming back in with C.S.A. Dan Ford and some  
4 other officers for photographs?

5 A. Yes.

6 Q. I'm showing you what's been marked as Defense  
7 Exhibits A and B. Do you recall when these  
8 photographs were taken?

9 A. Yes.

10 Q. And that's in the interview room after your  
11 interview?

12 A. Yes.

13 Q. So around 3:55 in the morning?

14 A. Yes.

15 Q. Do you know who the person is that's holding  
16 Mr. Okeefe upright?

17 A. That's an officer, and I don't know which  
18 officer that is.

19 Q. So it's not you?

20 A. That is not me, no.

21 Q. And is that how you recall Mr. Okeefe looking  
22 at the time?

23 A. Yes.

24 Q. During the photographs do you recall noting  
25 that Mr. Okeefe had several injuries on him?



1 A. Yes.

2 Q. Including bruises and scratch marks?

3 A. Yes.

4 Q. Those were also photographed?

5 A. Yes.

6 Q. And one of the reasons you do that is because  
7 you understand you have to preserve exculpatory  
8 evidence also?

9 A. Yes.

10 Q. It might be exculpatory that he has those  
11 injuries?

12 A. Yes, ma'am.

13 Q. During that process of photographing him you  
14 also check his clothing?

15 A. Yes.

16 Q. Do you recall who impounded that clothing?

17 A. It would have been C.S.A. Ford.

18 Q. So he should have an impound report from  
19 that?

20 A. Yes, ma'am.

21 Q. Mr. Okeefe is cooperative during this  
22 process, is that true?

23 A. Somewhat, yes.

24 Q. You ask for a penile swab?

25 A. Yes.

1 Q. He mentions he might need an attorney but he  
2 gives you a penile swab?

3 A. Yes.

4 Q. You ask for buccal swabs and he does that?

5 A. Yes.

6 Q. Did you have a warrant for those?

7 A. No.

8 Q. Do you recall helping hold him upright while  
9 he dressed, kind of to steady him while he's putting on  
10 the white jump suit?

11 A. I do recall that. I don't know if it was me  
12 personally.

13 Q. If it looks like you on the video?

14 A. Is it me? Okay.

15 Q. And do you recall helping him put his little  
16 bootie on right because it was not put on correctly?

17 A. Yes.

18 Q. What is the protocol, if you can tell me, for  
19 Metro whether you determine when to take or offer a  
20 suspect a blood or breath alcohol test?

21 A. Ask that again, I'm sorry.

22 Q. Does Metro have a protocol, especially in  
23 homicide cases, when an officer or detective would  
24 offer a suspect a blood or breath alcohol test or take  
25 one?

1 A. We don't have a protocol for that.

2 Q. You do it in some cases?

3 A. I can't think of one that I've done it in.

4 Q. Are you aware of other cases where it's been  
5 done?

6 A. No, ma'am.

7 Q. Have you reviewed the reports of the  
8 arresting officers in this case?

9 A. You mean, the patrolmen?

10 Q. Actually, I'm sorry, the recording  
11 conversations of the officers who were on scene?

12 A. I have not reviewed them recently, no, ma'am.

13 Q. If Mr. Okeefe was described by some of them  
14 as smelling heavily of alcohol, would you agree with  
15 that?

16 A. Yes.

17 Q. So he smelled heavily of alcohol in the  
18 interview room?

19 A. Yes.

20 Q. And as you said, he was a little slurred in  
21 his speech?

22 A. Yes.

23 Q. You asked him one question whether he was  
24 drinking and he never really answered that, did he?

25 A. That's what I recall, not answering it.

1 Q. Was it pretty obvious to you that he had been  
2 drinking?

3 A. Yes.

4 Q. How long have you been a homicide detective,  
5 officer?

6 A. Detective seven years.

7 Q. As a homicide detective, are you aware of  
8 case law saying a person's voluntarily intoxication  
9 could negate a person's liability from first to second  
10 degree?

11 A. I'm not --

12 MR. SMITH: Object, relevance.

13 MS. PALM: It's relevant to this  
14 investigation, also relevant to the Miranda waiver in  
15 this case.

16 THE COURT: Overruled.

17 THE WITNESS: I'm not aware.

18 MS. PALM:

19 Q. You're not aware of that case law?

20 A. No.

21 Q. Did you request any forensic testing on the  
22 evidence in this case?

23 A. Can I look at my book real quick.

24 Q. Sure.

25 A. Yes.

1 Q. You did?

2 A. Yes, ma'am.

3 Q. Can you tell me what you requested?

4 A. We requested any latent prints be examined.  
5 We requested a swab, blood taken at the scene to be  
6 compared to that of Mr. Okeefe and Miss Whitmarsh. We  
7 requested an analysis of the knife and the blood on  
8 the knife and to check it for prints. And a pair of  
9 black stretch pants that were recovered at the scene,  
10 apparently they were covered in blood or had blood on  
11 them, to be compared to the suspect and the victim.  
12 We also requested an analysis of buccal swabs  
13 collected, a sexual assault kit collected at autopsy  
14 and a medical examiner's kit collected at autopsy.

15 Q. Do you know if that medical examiners kit  
16 included preservation of any material under Miss  
17 Whitmarsh's fingernails?

18 A. Yes.

19 Q. So that was recovered, or material was  
20 recovered?

21 A. The fingernails, I don't know if they were  
22 clipped or scraped, but that was done, yes.

23 Q. And you requested that testing?

24 A. Yes.

25 Q. Do you have any reports back yet?

1 A. No, ma'am. Let me confirm that, I'm sorry.  
2 No, we don't.

3 Q. And you would agree to provide the district  
4 attorney so defense counsel could have copies of your  
5 requests for expert testing?

6 A. Of the requests themselves?

7 Q. Yes.

8 A. Absolutely.

9 MS. PALM: No further questions.

10 MR. SMITH: Nothing, Judge.

11 THE COURT: Thank you for your time today.  
12 Anything else on behalf of defense?

13 MR. PIKE: We've advised the defendant of  
14 his right to testify or not testify at the time of the  
15 preliminary hearing. Upon advice of counsel he will  
16 not be testifying this morning. The defense has no  
17 other witnesses.

18 THE COURT: Thank you.

19 On behalf of the State?

20 MR. SMITH: I'm going to submit it.

21 THE COURT: Argument?

22 MR. PIKE: We'll submit it.

23 THE COURT: It appearing from the amended  
24 criminal complaint on file and testimony adduced at  
25 today's hearing that the crime of murder with use of a



1 deadly weapon has been committed, there's sufficient  
2 evidence that the defendant, Bryan Okeefe, has  
3 committed said offense, I hereby order he be bound  
4 over and held to answer in the Eighth Judicial  
5 District Court.

6 THE CLERK: January 6, nine a.m.,  
7 Department Five, lower level, district court  
8 arraignments.  
9  
10  
11

12 ATTEST: Full, true and accurate transcript of  
13 proceedings.  
14

15   
16 TOM MERCER, C.C.R. No. 33  
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ORIGINAL

FILED

2009 JAN 26 P 3 06

*E. J. Smith*  
CLERK OF THE COURT

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DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

BRIAN O'KEEFE,

Defendant.

CASE NO. C250630  
DEPT. NO. XVII

**PETITION FOR WRIT OF HABEAS CORPUS or IN THE ALTERNATIVE  
MOTION TO PRECLUDE PROSECUTION FROM SEEKING FIRST DEGREE MURDER  
CONVICTION BASED UPON THE FAILURE TO COLLECT EVIDENCE**

DATE: 2-10-09  
TIME: 8:00a

TO: The Honorable Eighth Judicial District Court of the State of Nevada, in and for the County of  
Clark:

The Petition of RANDALL H. PIKE, Assistant Special Public Defender for the above-  
captioned individual, respectfully shows:

1. Petitioner is a duly qualified, practicing and licensed attorney and court-appointed  
counsel for Defendant BRIAN O'KEEFE (hereinafter "O'KEEFE").
2. That Petitioner makes application herein on behalf of her client for a Writ of Habeas

SPECIAL PUBLIC  
DEFENDER

CLARK COUNTY  
NEVADA

000125

1 Corpus; that the place where Applicant is restrained of his liberty is the Clark County Detention  
2 Center; that the officer by whom he is restrained is DOUG GILLESPIE, Sheriff.

3 3. That the imprisonment and restraint of said above-captioned client of Petitioner is  
4 unlawful in that the evidence adduced at the time of the Preliminary Hearing supports only  
5 remanding the matter to the District Court for trial on the charge of second degree murder: That the  
6 complaint charge of Open Murder is not supported by evidence.

7 4. That client of Petitioner waives the 60-day limitation for bringing said client to trial.

8 5. That client of Petitioner consents that if the Petition is not decided within 15 days  
9 before the date set for trial, the Court may, without notice or hearing, continue the trial indefinitely to  
10 a date designated by the Court;

11 6. That client of Petitioner consents that if any party appeals the Court's rulings and the  
12 appeal is not determined before the date set for trial, the trial date is automatically vacated and the  
13 trial postponed unless the Court otherwise orders.

14 7. That no other Petition for Writ of Habeas Corpus has heretofore been filed on behalf  
15 of defendant on this particular issue.

16 WHEREFORE, Petitioner prays that the Honorable Court issue an order directing the Clark  
17 County Clerk to issue a Writ of Habeas Corpus directed to the said Sheriff, commanding him to  
18 bring the above-captioned defendant before your Honor, and return the cause of imprisonment.

19 DATED this 26<sup>th</sup> day of January, 2009.

20 Respectfully submitted

21 

22 Randall H. Pike  
23 Assistant Special Public Defender  
24 Nevada Bar No. 1940  
25 Patricia Palm  
26 Deputy Special Public Defender  
27 Nevada Bar No. 6009  
28 330 S. Third Street, Second Floor  
Las Vegas, NV 89155

1                                   **POINTS AND AUTHORITIES IN SUPPORT OF**  
2                                   **PETITION FOR WRIT OF HABEAS CORPUS or in the alternative**  
3                                   **MOTION TO PRECLUDE STATE FROM SEEKING FIRST DEGREE MURDER**  
4                                   **CONVICTION BASED ON FAILURE TO COLLECT EVIDENCE**

5                                   **FACTUAL BACKGROUND**

6           Brian O'Keefe and Victoria Whitmarsh ("Victoria"), the alleged victim in this matter,  
7 enjoyed a fairly long, but tumultuous relationship together. They dated and cohabitated on and off  
8 since 2001, after meeting in a treatment facility. During the relationship, in 2004, Brian was  
9 ultimately convicted of burglary (entry into the couple's joint dwelling with intent to commit a crime  
10 against Victoria). He was given a sentence of probation for that crime, but his probation was later  
11 revoked when convicted of a third offense domestic battery against Victoria. He went to prison in  
12 March 2005. When he was released from prison in March 2007, he initiated a relationship with a  
13 woman named Cheryl Morris. (PHT 63) He separated with Ms. Morris several months before the  
14 incident so that Victoria could move into his apartment with him. Ms. Morris testified at the time of  
15 the preliminary hearing that Victoria voluntarily reentered into a relationship with Brian and began  
16 cohabitating with him in his apartment. (PHT 74) Victoria had called Ms. Morris several times and  
17 discussed her decision to return to Brian. (PHT 66)

18           At the time of the incident in November 2008, he was 45 years old. Victoria was 54. On  
19 the evening of the incident, a neighbor who lived below Brian and Victoria's apartment, Charles  
20 Toliver, reported to Todd Armbruster that he thought the girl who lived above him was dead. (PHT  
21 55) Armbruster went upstairs and saw Victoria lying on the ground. (PHT 55) She died of one stab  
22 wound to her side. (PHT 4) Armbruster tried to go towards Brian, but Brian took a swing at  
23 Armbruster, and returned to attend to Victoria. Armbruster described Brian as appearing to be  
24 intoxicated and disoriented. (PHT 60) He was stumbling and not very steady on his feet. (PHT 61-  
25 62) Neighbors called 911 at 11:00 p.m. (PHT 52) The police responded and found Brian lying on  
26 the floor next to Victoria's dead body, cradling and stroking her head. (PHT 26-27, 43-44)  
27 Although he was unarmed, his behavior was erratic, and at times he was incoherent. PHT 24. He  
28 did not cooperate with commands to move away from his position of lying with Victoria's body.  
After two TAZER shots he was handcuffed, removed from the premises and taken to the homicide

1 offices. (PHT 30-31, 45-47) He was in physical custody of law enforcement within twelve minutes  
2 from the 911 call. (PHT 52)

3 Victoria and Brian were drinking partners and were often seen drinking together on the patio  
4 of the residence where the incident occurred. (PHT 60) They had both been drinking on the date of  
5 the incident, and at the time of her death, Victoria's blood alcohol content was .24. (PHT 6) At the  
6 preliminary hearing, Medical Examiner Dr. Benjamin testified that the combination of Victoria's  
7 medications, as indicated by her toxicology screen and alcohol abuse could cause suicidal, violent or  
8 combative behavior by her. (PHT 8) Additionally, although Victoria's body showed multiple  
9 bruises, Victoria had Hepatitis C and somewhat advanced Cirrhosis of the liver, which is known to  
10 cause bruising upon slight bumping contact or other types of pressure to the body that is less than  
11 what is normally required for bruising. (PHT 5-6)

12 At the homicide offices subsequent to his arrest, Brian gave a rambling statement indicating  
13 that he was not aware of Victoria's death or its cause. In the interview, which began at 1:20 a.m., he  
14 was emotional, crying, raising his voice, talking to himself, slurring, belligerent, ridiculous, and  
15 detectives noted that he might be a "nut." (PHT 83-85, 93) Detective Wildemann agreed that during  
16 the interview, Brian smelled heavily of alcohol, and during photographs taken subsequent to the  
17 interview, at about 3:55 a.m., officers held him upright to steady him. (PHT 91-93) Detective  
18 Wildemann agreed that it was "pretty obvious" that Brian had been drinking. (PHT 94)

19 Brian was extremely intoxicated at the time of the incident, having recently relapsed into his  
20 addiction to alcohol. The fact that the government was or should have been aware of Brian's  
21 intoxication was shown by the preliminary hearing testimony of arresting officers, Homicide  
22 Detective Wildemann and lay witness Todd Armbruster, and is also evidenced in the video recording  
23 of Brian's interview with homicide detectives and the photographs documenting his arrest. The  
24 strong odor of alcohol about Brian's person at the time of his arrest is also documented in the  
25 statement and preliminary hearing testimony of arresting officer Ballejos. (PHT 35) The defense is  
26 not able to show what Brian's blood alcohol level was because law enforcement did not preserve this  
27 evidence by obtaining a test for his breath or blood alcohol level either before or after the interview.

28

1 **ARGUMENT**

2 **FAILURE TO PRESERVE GATHERED EVIDENCE IS GROUNDS FOR DISMISSAL**

3  
4 In the present case, the Defendant's actions during arrest were erratic. (PHT 24) He did  
5 apparently not understand officers' demands or orders, and officers were required to use a TAZER and  
6 subject him to two electric shocks. (PHT 27-31, 45-47) Some of the officers on the scene described  
7 Mr. O'Keefe as "smelling heavily of alcohol." (PHT 35, 93) The interviewing Detective Wildemann  
8 was questioned during the presentation of the Preliminary Hearing, and he noted that the Defendant  
9 "smelled heavily of alcohol" in the interview room (PHT 93) and that he was a "little slurred in his  
10 speech." (*id.*) Indeed, the Detective had to help him put a "bootie" on his right foot because he had not  
11 put in on correctly, and officers helped steady him when his photographs were taken subsequent to the  
12 interview. (PHT 90-92) It was "pretty obvious" to the interviewing detective that Brian had been  
13 drinking. (PHT 94)

14  
15 The loss of material and potentially exculpatory evidence by a law  
16 enforcement agency can deprive a defendant of the opportunity to corroborate  
his or her testimony, thereby severely prejudicing the defense.

17 Cook v. State, 114 Nev. 120, 124, 953 P.2d 712 (1998).

18  
19 The government is flirting with the danger of reversal any time evidence is  
20 lost or inadvertently destroyed. When evidence is seized, the government  
should take every reasonable precaution to preserve it.

21 United States v. Heiden, 508 F.2d 898, 903 n. 1 (9<sup>th</sup> Cir. 1974).

22  
23 In the present case, Detective Wildemann provided some background on his training and service  
24 within the LVMPD. He has served as a homicide detective for seven years. (PHT 94) He directed a  
25 series of requests for forensic testing and supervised the collection of the evidence from the crime scene.  
26 This evidence included "latent prints... a swab, blood taken at the scene to be compared to that of Mr.  
27 O'Keefe and Miss Whitmarsh.... analysis of the knife and the blood on the knife... a pair of black stretch  
28 pants that were recovered at the scene, apparently they were covered in blood or had blood on them, to



1 be compared to the suspect and the victim. We also requested an analysis of buccal swabs collected at  
2 autopsy." (PHT 95)

3 The detail in which the evidence was collected and processed seemed to stop at the collection  
4 of evidence likely to inculcate a defendant. Brian was "seized" when he was arrested, taken to homicide  
5 offices, and interviewed. He cooperated in detective's requests for photographs of his body and to  
6 provide penile and oral swabs. (PHT 92, 95) Shockingly, despite the obvious exculpatory nature of  
7 evidence that would have shown that at the time of his arrest and interview, he had a high level of blood  
8 or breath alcohol, and despite clear indicators that he was intoxicated, a decision was made to not offer  
9 to or secure a blood or breath sample from the suspect/now defendant. The Court may take judicial  
10 notice that there is a Nurse on duty at the CCDC at all times to collect blood from Defendants arrested  
11 for DUI's. The reports as well as the testimony outlined above indicate the care with which other  
12 physical evidence was collected at the scene, yet a key piece of evidence, the defendant's blood or urine  
13 which could verify the level of intoxication was "destroyed" or "lost" as a result of police action. When  
14 given the question "Does Metro have a protocol, especially in homicide cases, when an officer or  
15 detective would offer a suspect a blood or breath alcohol test or take one?"(PHT 92), the Detective  
16 indicated "we don't have a protocol for that." (PHT 93) The Detective indicated that he was "not  
17 aware" of any of the case law regarding the effect of voluntary intoxication negating the mens rea of  
18 murder from first to second degree. (PHT 94) However, he was aware of his duty to preserve potentially  
19 exculpatory evidence. (PHT 91)

20 This becomes even more troublesome when the evidence adduced at the time of the Preliminary  
21 hearing indicates that Metro has a policy to "call for medical assistance to check the health of somebody  
22 who has just been tasered" (PHT32) and A.M.R. (American Medical Response, a local paramedic and  
23 emergency service with paramedics) was already on the scene. (*id.*) Clearly there was no delay that  
24 would be occasioned by the Detective requesting that a blood sample be taken.

25 Specifically, the legal effect and potential defense value of voluntary intoxication is  
26 addressed by statute:  
27  
28

1 **NRS 193.220. When voluntary intoxication may be considered.** No act committed  
2 by a person while in a state of voluntary intoxication shall be deemed less criminal by  
3 reason of his condition, but whenever the actual existence of any particular purpose,  
4 motive or intent is a necessary element to constitute a particular species or degree of  
5 crime, the fact of his intoxication may be taken into consideration in determining the  
6 purpose, motive or intent.

7 Although the defense acknowledges that voluntary intoxication is not a complete defense, proof  
8 of voluntary intoxication may serve as a basis for a verdict less than first-degree murder. In addition,  
9 courts have recognized that extreme intoxication may mitigate a first-degree murder to the extent that  
10 the intoxication indicates the killing was not planned but was a reaction to an emotionally charged  
11 confrontation. See Chambers v. State, 113 Nev. 974, 944 P.2d 805 (1997); Daniel v. State, 119 Nev.  
12 498, 78 P.3d 890, 905 (2003).

13 A conviction may be reversed when the State loses evidence if the defendant is prejudiced by the  
14 loss or the State acted in bad faith in losing it. Sparks v. State, 104 Nev. 316, 319, 759 P.2d 180, 182  
15 (1988). To establish prejudice, the defendant must show that it could be reasonably anticipated that the  
16 evidence would have been exculpatory and material to the defense. See Boggs v. State, 95 Nev. 911,  
17 913, 604 P.2d 107, 108 (1979).

18 Further, the State cannot benefit from its failure to preserve evidence, and therefore, dismissal  
19 of the first degree murder charge is proper. Sparks at 319, 320.

20 In the present case, the loss of evidence severely prejudices Mr. O'Keefe's case by depriving  
21 him of the opportunity to present empirical, scientific evidence regarding his extreme intoxication. The  
22 lack of this evidence also inhibits the defense's ability to impeach witness testimony. In addition to the  
23 above, as the Defendant has prior felony convictions, it prevents the defendant from establishing this  
24 defense without his being required to take the stand and testify. This confluence of loss of evidence as  
25 well as the established prejudice by the showing the lost evidence could have been reasonably  
26  
27  
28

1 anticipated to be both exculpatory and material, clearly shows that this defendant meets the requirements  
2 of Cook, (id. at 127).

3  
4 Just as in cases wherein the Nevada Supreme Court has reversed a conviction where the lost  
5 evidence was material to the identification of the defendant. See Howard v. State, 95 Nev. 580, 600 P.2d  
6 214 (1979), the present evidence is so essential to the defense regarding the specific mens rea, intent,  
7 or ability for premeditation and deliberation, that the appropriate curative action would require allowing  
8 the prosecution to proceed on the second degree murder case alone.

9  
10 In the alternative, if this Honorable Court finds insufficient cause for dismissal of the first degree  
11 prosecution, the Defendant herein requests that proper corrective instructions be given the jury regarding  
12 the lack of ability on the part of the defendant to form the necessary specific intent to commit first degree  
13 murder due to intoxication. See Sanborn v. State, 107 Nev. 399, 812 P.2d 1279 (1991) (where  
14 mishandling of a gun resulted in loss of evidence as to blood and fingerprints, and thereby prejudiced  
15 defendant, he was entitled to a jury instruction setting forth the conclusive presumption that the victim  
16 had held and fired a gun).

### 18 CONCLUSION

19 Defendant BRIAN O'KEEFE respectfully requests this Court find that the loss and/or destruction  
20 of the intoxication evidence regarding the homicide be material and exculpatory; and that said loss  
21 and/or destruction of the intoxication evidence is prejudicial to the defendant's case. Defendant further  
22 requests based on the foregoing that the court grant this Motion to Dismiss the finding of the first degree  
23

24 ...

25 ...

26 ...

27 ...

28

1 portion of the "open murder" information, allow for the prosecution of the case as a second degree or  
2 lower homicide, or, in the alternative allow for appropriate corrective instructions.

3 DATED this 26<sup>th</sup> day of January, 2009.

5 Respectfully submitted:

6   
7

8 Randall H. Pike

9 Assistant Special Public Defender

10 Nevada Bar No. 1940

11 Patricia Palm

12 Deputy Special Public Defender

13 Nevada Bar No. 6009

14 330 S. Third Street, Second Floor

15 Las Vegas, NV 89155

ORIGINAL

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*Earl D. Smith*  
CLERK OF THE COURT

1 ROC  
2 DAVID M. SCHIECK  
3 SPECIAL PUBLIC DEFENDER  
4 Nevada Bar No. 0824  
5 Randall H. Pike  
6 Assistant Special Public Defender  
7 Nevada Bar No. 1940  
8 Patricia Palm  
9 Deputy Special Public Defender  
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15 rpike@co.clark.nv.us  
16 palmpa@co.clark.nv.us  
17 Attorneys for O'Keefe

11 DISTRICT COURT  
12 CLARK COUNTY, NEVADA

14 THE STATE OF NEVADA,  
15 Plaintiff,

CASE NO. C250630

DEPT. NO. XVII

16 vs.

17 BRIAN O'KEEFE,

18 Defendant.  
19

20 RECEIPT OF COPY

21 DATE OF HEARING: 2-10-09  
22 TIME OF HEARING: 8:00 am

23 RECEIPT of a copy of Petition for Writ of Habeas Corpus is hereby acknowledged.

24  
25 Dated: Jan 27, 2009

DISTRICT ATTORNEY OFFICE

*Judy Olney*  
200 Lewis Ave. 3<sup>rd</sup> Floor  
Las Vegas, NV 89155

SPECIAL PUBLIC  
DEFENDER

CLARK COUNTY  
NEVADA

RECEIVED  
JAN 27 2009  
CLERK OF THE COURT

  
CLERK OF THE COURT

1 **OPPS**  
2 **DAVID ROGER**  
3 **Clark County District Attorney**  
4 **Nevada Bar #002781**  
5 **PHILLIP N. SMITH, JR.**  
6 **Deputy District Attorney**  
7 **Nevada Bar # 10233**  
8 **200 Lewis Avenue**  
9 **Las Vegas, Nevada 89155-2212**  
10 **(702) 671-2500**  
11 **State of Nevada**

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

10 In the Matter of Application,

11 of  
12 **BRIAN O'KEEFE**  
13 **#1447732,**

Case No. C250630

Dept No. XVII

14 for a Writ of Habeas Corpus.  
15  
16

17 **RETURN TO WRIT OF HABEAS CORPUS**  
18 **DATE OF HEARING: 2/10/2009**  
19 **TIME OF HEARING: 8:00 A.M.**

20 COMES NOW, DOUG GILLESPIE, Sheriff of Clark County, Nevada, Respondent,  
21 through his counsel, DAVID ROGER, District Attorney, through Phillip N. Smith, Jr.,  
22 Deputy District Attorney, in obedience to a writ of habeas corpus issued out of and under the  
23 seal of the above-entitled Court on the 26th day of January 2009, and made returnable on the  
24 10th day of February, 2009, at the hour of 8:00 o'clock A.M., before the above-entitled  
Court, and states as follows:

25 1. The allegation(s) in Paragraph 1 of said Petition for Writ of Habeas Corpus do not  
26 require admission or denial.

27 2. The Petitioner is in the constructive custody of Doug Gillespie, Clark County  
28 Sheriff, Respondent herein, pursuant to an Information, a copy of which has been attached to



1 said Petition for Writ of Habeas Corpus as Exhibit B and is incorporated by reference herein.

2 3. Respondent admits the allegations of Paragraph 7 of said Petition for Writ of  
3 Habeas Corpus.

4 3. Respondent denies the allegations of Paragraph 3 of said Petition for Writ of  
5 Habeas Corpus.

6 4. The allegations in Paragraphs 4, 5, and 6 of said Petition for Writ of Habeas  
7 Corpus do not require admission or denial.

8 Wherefore, Respondent prays that the Writ of Habeas Corpus be discharged and the  
9 Petition be dismissed.

10 DATED this \_\_\_\_\_ day of January, 2009.

11 Respectfully submitted,

12 DAVID ROGER  
13 Clark County District Attorney  
14 Nevada Bar # 002781

15 BY /s/ PHILLIP N. SMITH, JR.  
16 PHILLIP N. SMITH, JR.  
17 Deputy District Attorney  
18 Nevada Bar #010233  
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1 upon Mrs. Whitmarsh at the hands of O'Keefe. This all culminated on November 5, 2008 at  
2 approximately 11:00 p.m., when LVMPD dispatch received a 911 call from Robin Kolacz,  
3 the manager of the "Casa Salvatore" apartments located at 5001 El Parque Avenue. Robin  
4 stated that the female in apartment C-35 was lying inside the apartment and there was blood  
5 everywhere. Police officers and medical personnel responded to the apartment complex.  
6 Patrol officers arrived at the apartment and found the front door open. Officers challenged  
7 the apartment and a male, later identified as O'Keefe, yelled at them to come in. The officers  
8 cleared the front room and could hear O'Keefe talking from the master bedroom. Officers  
9 continued to talk to O'Keefe, attempting to get him to come out of the bedroom; however, he  
10 refused. O'Keefe's actions made officers believe O'Keefe was attempting to "bait" them into  
11 the room for a confrontation. Officers from the Crisis Intervention Team approached the  
12 bedroom and observed O'Keefe holding the victim, identified as Victoria Whitmarsh.

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

26 Mrs. Whitmarsh appeared to have a stab wound on her right side under the arm pit  
27 area, an injury to the middle knuckle of her left hand, and an injury to her right index finger.  
28 Mrs. Whitmarsh was lying on her back on the floor and was nude from the waist down. The

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

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

25 Hathcox stated the next thing he heard was people yelling and he opened the door and  
26 saw Charles Toliver and Todd Armbruster standing in front of O'Keefe's door. The men  
27 told Hathcox, "he killed her and there's blood all over the place." Todd Armbruster stated  
28 that Charles Toliver came to his door and told him to call the police. Toliver told Todd that

1 he thought the girl in apartment 35 was dead. Todd went up to apartment 35, entered the  
2 apartment, and saw O'Keefe bent over Mrs. Whitmarsh and blood on the bed. O'Keefe  
3 looked up, saw Todd and took a swing at him and told him to "get the fuck out of here" (or  
4 words to that effect). Todd left the apartment, went to apartment C-37, and phoned the  
5 police. Detectives noted a large amount of blood on O'Keefe's clothing and hands, an  
6 incised wound on his right index finger and two abrasions on his forehead. O'Keefe also had  
7 several long scratch marks on his back at the belt line. O'Keefe was photographed and his  
8 clothing was impounded. O'Keefe was arrested and transported to the Clark County  
9 Detention Center, where he was booked for Murder with Use of a Deadly Weapon.

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

21 On November 20, 2008, Cheryl Morris gave a statement to the detectives assigned to  
22 the case. Cheryl Morris stated she had a dating relationship with O'Keefe prior to Mrs.  
23 Whitmarsh moving in with him at the 5001 El Parque address. Ms. Morris stated she and  
24 O'Keefe dated for several months (starting in early 2008) and in June or July of 2008 she  
25 and O'Keefe moved into the El Parque address. At this point, the relationship was going to  
26 be platonic. Ms. Morris said she slept in the master bedroom and O'Keefe slept on the  
27 couch. Ms. Morris said she and O'Keefe had an agreement that they would share the  
28 apartment as roommates, and after four (4) days O'Keefe called her and said he was bringing



1 Mrs. Whitmarsh home to live with them. Ms. Morris, not amenable to such a living  
2 situation, left the house and only returned to recover her property. Ms. Morris said that  
3 during the course of their relationship, O'Keefe would always talk about his prior  
4 relationship with Mrs. Whitmarsh and how he loved her and couldn't live without her.

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

### 17 ARGUMENT

18 Defendant's Petition for Writ of Habeas Corpus essentially argues that the Defendant  
19 should not have to answer to the charge of Open Murder as charged in the Amended  
20 Criminal Complaint because the State "lost" or "destroyed" evidence. According to the  
21 Defendant, the evidence that the State "lost" or "destroyed" is the Defendant's blood-alcohol  
22 level. It should be noted here that such evidence was never in the custody of the State. All  
23 of the cases cited as support by the Defendant involve the State actually seizing and  
24 impounding tangible evidence and subsequently losing it or breaking the chain of custody.  
25 The Defendant here would impose an affirmative duty to actually seize and impound  
26 "exculpatory" evidence. As will be illustrated below, this is not what is reflected in the case  
27 law. The State has a duty to preserve evidence *that it has already seized*. That is not what  
28 happened in the instant case. Here, the situation would be different if the State had actually



1 conducted a blood-alcohol test on the Defendant, impounded the blood or the breath strip  
2 and produced a report, and then subsequently lost or destroyed the evidence and the report.  
3 The State submits that it never lost or destroyed the evidence which the Defendant presently  
4 complains about, because the State never had the "evidence" in the first place.

5 While the State by no means concedes that the "evidence" here was in fact "lost" or  
6 "destroyed," even assuming *arguendo* that it was, the Defendant's argument nevertheless  
7 still fails. In Sparks v. State, 104 Nev. 316, 759 P.2d 180 (1988), the Nevada Supreme Court  
8 stated that in order for a conviction to be reversed due to a "loss of evidence," the defendant  
9 must prove either (1) that he has been prejudiced by the loss, or (2) the evidence was "lost"  
10 in bad faith by the government. The evidence adduced at the preliminary hearing (i.e.,  
11 testimony from percipient witnesses who observed the Defendant's demeanor and testified  
12 that he was clearly under the influence of alcohol) as well as evidence presently in the  
13 Defendant's possession (e.g., the video recording of the Defendant's interview) could easily  
14 establish that the Defendant was intoxicated. Therefore, the State submits that there is no  
15 prejudice.

16 The Defendant will still be able to claim that he was too intoxicated to formulate the  
17 intent for first-degree murder, and there is still evidence that is available that he can use in an  
18 attempt to corroborate that claim. Furthermore, the Defendant certainly has not illustrated  
19 that the evidence allegedly "lost" was done in bad faith by the government. The Defendant  
20 in this case was not arrested for an alcohol-related offense; he was arrested for murder.  
21 Whether or not the Defendant was intoxicated was not a fact required for determining  
22 whether there was probable cause to arrest him. It is therefore certainly not unusual that a  
23 blood draw was not completed. While the Court in Sparks did indeed hold that the State  
24 cannot benefit from its failure to preserve evidence, that case is easily distinguishable from  
25 the facts of the instant case. In Sparks, the defendant was convicted of Second Degree  
26 Murder with Use of a Deadly Weapon. The deadly weapon was a handgun. Specifically,  
27 the police found a loaded .357 caliber revolver at the crime scene in a felt bag in the master  
28

1 bedroom closet. The police visually examined the firearm and the bag for blood and hair.  
2 and found none. Furthermore, no chemical tests were performed.

3 **Although the firearm was initially booked into evidence**, the firearm and the felt  
4 bag were released shortly thereafter to the victim's son. The State had therefore clearly  
5 broken the chain of custody of the weapon, even though it was aware of the defendant's  
6 intent on claiming self-defense and the fact that the weapon was an integral part of her  
7 defense. The firearm was retrieved and rebooked into evidence almost five (5) months later.  
8 The State subsequently examined the weapon for blood and fingerprints. Finding none, the  
9 State used this fact during opening and closing arguments, ultimately securing a conviction  
10 based in part on these facts. The Court determined that the break in the chain of custody  
11 may have resulted in the loss of evidence, and consequently held that under those  
12 circumstances, the State improperly benefited. The Court therefore overturned the  
13 conviction.

14 Clearly, this is different from the instant case, where the "evidence" at issue here was  
15 never seized, booked into evidence, released, contaminated, or destroyed. This is a material  
16 fact, as indicated in Cook v. State, 114 Nev. 120, 953 P.2d 712 (1998)—also a case cited by  
17 the Defendant. In Cook, the defendant was convicted at trial of Sexual Assault. Pursuant to  
18 the preliminary investigation into the crime, the police department took photographs of the  
19 crime scene, photographs of blood at the scene, photographs of the defendant taken on the  
20 day of his arrest, and impounded the victim's clothing in order to perform blood and hair  
21 analysis. All of this evidence was lost and unavailable for trial. Furthermore, a detective's  
22 report with notes pertaining to the interview he conducted with the defendant was also lost.  
23 The Nevada Supreme Court held that this evidence was material and potentially exculpatory,  
24 and that the defendant's case was "unduly prejudiced." However, the Court went on to note:  
25 **"We do not suggest that the Sparks Police Department had a duty to collect evidence.**  
26 **Rather, we base our holding that Cook's defense was unduly prejudiced solely on the**  
27 **evidence that was gathered and then subsequently lost by the Sparks Police Department."**  
28 [Emphasis added.] Cook, 114 Nev. at 126, n. 6, 953 P.2d at 716, n. 6.

1 Since the Defendant is claiming that the State "lost" the Defendant's evidence of his  
2 blood-alcohol level, but this evidence was never in the actual possession of the State to begin  
3 with, the Defendant's argument is clearly based on the premise that the police had the duty  
4 to collect the Defendant's blood-alcohol level. The Nevada Supreme Court has made it clear  
5 however, that the police are under no such duty. Consequently, in this case, the Las Vegas  
6 Metropolitan Police Department was under no affirmative duty to collect a blood-alcohol  
7 sample from the Defendant, and that because the evidence was never gathered, it was never  
8 "lost." Federal courts (including the United States Supreme Court) have also reached the  
9 conclusion that the government's duty to preserve evidence does not impose a duty to obtain  
10 evidence. See, e.g., Miller v. Vasquez, 868 F.2d 1116, 1119-20 (9th Cir. 1989) (relying  
11 upon California v. Trombetta, 467 U.S. 479, 488-90, 104 S.Ct. 2528, (1984)); see also  
12 Arizona v. Youngblood, 488 U.S. 51, 58, 109 S.Ct. 333 (1988) (holding that the  
13 "fundamental fairness" requirement of the Due Process Clause, does not impose on the  
14 police a duty to retain and to preserve all material that might be of conceivable evidentiary  
15 significance in a particular prosecution).

16 The Defendant's present claim is without merit and therefore must fail.

### 17 CONCLUSION

18 Based on the foregoing, the State respectfully requests this Court deny Defendant's  
19 Petition for Writ of Habeas Corpus.

20  
21 DATED this \_\_\_\_\_ day of January, 2009.

22 Respectfully submitted,

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

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

**CERTIFICATE OF FACSIMILE TRANSMISSION**

I hereby certify that service of RETURN TO WRIT OF HABEAS CORPUS, was made this 29th day of January, 2009, by facsimile transmission to:

DAVID SCHIECK  
SPECIAL PUBLIC DEFENDER  
FAX #(702) 455-6273

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

ORIGINAL

FILED

2009 JAN 30 P 3:19

*E. J. Smith*  
CLERK OF THE COURT

ROC  
DAVID M. SCHIECK  
SPECIAL PUBLIC DEFENDER  
Nevada Bar No. 0824  
Randall H. Pike  
Assistant Special Public Defender  
Nevada Bar No. 1940  
Patricia Palm  
Deputy Special Public Defender  
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palm@co.clark.nv.us  
Attorneys for O'Keefe

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

BRIAN O'KEEFE,

Defendant.

CASE NO. C250630

DEPT. NO. XVII

RECEIPT OF COPY

DATE OF HEARING: 2-10-09

TIME OF HEARING: 8:00 am

RECEIPT of a copy of Petition for Writ of Habeas Corpus is hereby acknowledged.

SHERRIFF'S OFFICE

DISTRICT ATTORNEY OFFICE

*Ang Lynch*  
Sgt. CCDC  
Las Vegas, NV 89155

*Judy Olney*  
200 Lewis Ave. 3<sup>rd</sup> Floor  
Las Vegas, NV 89155

Dated: 1/30/09

Dated: Jan 30, 2009

SPECIAL PUBLIC  
DEFENDER  
CLARK COUNTY  
NEVADA

ORIGINAL

FILED

2009 JAN 30 P 3:20

*E. J. Smith*  
CLERK OF THE COURT

1 WRIT  
2 DAVID M. SCHIECK  
3 SPECIAL PUBLIC DEFENDER  
4 Nevada Bar No. 0824  
5 Randall H. Pike  
6 Assistant Special Public Defender  
7 Nevada Bar No. 1940  
8 Patricia Palm  
9 Deputy Special Public Defender  
10 Nevada Bar No. 6009  
11 330 South Third Street, Suite 800  
12 Las Vegas, NV 89155-2316  
13 (702) 455-6265  
14 (702) 455-6273  
15 Attorneys for O'Keefe

10 DISTRICT COURT  
11 CLARK COUNTY, NEVADA

13 THE STATE OF NEVADA,

14 Plaintiff,

15 vs.

16 BRIAN O'KEEFE,

17 Defendants.

CASE NO. C250630  
DEPT. NO. XVII

18 WRIT OF HABEAS CORPUS

19 Date of Hearing: 2-10-09  
20 Time of Hearing: 8:00am

21 TO: CLARK COUNTY SHERIFF  
22 CLARK COUNTY, NEVADA

23 GREETINGS:

24 We command that you have the body of the above-captioned person, by you  
25 imprisoned and detained, as it is alleged, together with the time and cause of such  
26 imprisonment and detention, by whatever name said above-captioned person shall be  
27 called or charged, before the Honorable MICHAEL VILLANI, District Court Judge, at his  
28 Chambers or his courtroom in the Regional Justice Center, 200 S. Lewis, City of Las

CLERK OF THE COURT

JAN 30 2009

RECEIVED

SPECIAL PUBLIC  
DEFENDER

CLARK COUNTY  
NEVADA

000147



1 Vegas, County of Clark, State of Nevada, on the 10th day of February, 2009, at the hour of  
2 8:00 a.m., to do and receive that which shall then and there be considered concerning the  
3 said above-captioned person and have you then and there this Writ.


4 DATED AND DONE this 30<sup>th</sup> day of Jan, 2009.

5 COURT CLERK

6  
7  
8 By: John Thomas

9  
10 SUBMITTED BY:

11 DAVID M. SCHIECK  
12 SPECIAL PUBLIC DEFENDER

13   
14 Randall N. Pike  
15 Assistant Special Public Defender  
16 Nevada Bar No. 1940  
17 Patricia Palm  
18 Deputy Special Public Defender  
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20 330 South Third Street, Suite 800  
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22 (702) 455-6265  
23  
24  
25  
26  
27  
28

ORIGINAL

FILED

2009 JAN 30 P 1:20

*Ed Smith*  
CLERK OF THE COURT

1 ORDR  
2 DAVID M. SCHIECK  
3 SPECIAL PUBLIC DEFENDER  
4 Nevada Bar No. 0824  
5 Randall H. Pike  
6 Assistant Special Public Defender  
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17 Attorney for O'Keefe

10 DISTRICT COURT  
11 CLARK COUNTY, NEVADA

12 THE STATE OF NEVADA,

CASE NO. C250630  
DEPT. NO. XVII

MO3

Plaintiff,

vs.

14 BRIAN O'KEEFE

Defendant

16 ORDER

17 Date of Hearing: 2-10-09

18 Time of Hearing: 8:00am

19 The Petition of BRIAN O'KEEFE, by and through his attorneys, DAVID M.  
20 SCHIECK, Special Public Defender, RANDALL PIKE, and PATRICIA PALM, Deputy  
21 Special Public Defenders, having been filed in the above-entitled matter.

22 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Clerk of the  
23 Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, issue a  
24 Writ of Habeas Corpus, as is attached hereto.

25 DATED this 29<sup>th</sup> day of January, 2009.

26 SUBMITTED BY:

27 *Randall H. Pike*  
28 Randall H. Pike  
Assistant Special Public Defender

*Murphy*  
DISTRICT COURT JUDGE *me*

CLERK OF THE COURT

JAN 30 2009

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RECEIVED BY  
DEPT. 17 ON

JAN 29 2009

SPECIAL PUBLIC  
DEFENDER

CLARK COUNTY  
NEVADA

000149

1 giving a statement the early morning hours of November  
2 6 at 1:37 a.m., a recorded statement?

3 A. Yes.

4 Q. Do you recall indicating in that statement  
5 that O C spray was of no use in a case like this?

6 A. Yes.

7 Q. Is that because of the close quarters of the  
8 room?

9 A. No. What it is, there's two reasons  
10 actually. To use something like the oleoresin capstun  
11 on Mr. Okeefe, Victoria would have also been  
12 contaminated. We didn't know at this point what her  
13 condition was, so to basically punish her while she's  
14 already injured. The other thing is the paramedics  
15 and A.M.R. have to handle her to treat wounds or  
16 whatever. And to contaminate those injuries with  
17 something as painful as a oleoresin capstun wasn't  
18 reasonable.

19 Q. From your training are you aware O.C. spray  
20 might not be as effective on somebody under the  
21 influence of alcohol or drugs?

22 A. Yes.

23 Q. Did that cross your mind at the time also?

24 A. I didn't know if he was under the influence  
25 of any substance et cetera so no.

1 Q. Is it fair to say from some of the things he  
2 was yelling that he was acting erratically?

3 A. Yes.

4 Q. You indicated that Kahn entered the bedroom  
5 first and then yourself and then Officer Taylor and  
6 possibly a forth person, you're not sure who that was?

7 A. Like I said, I found out later who it was but  
8 at the time I knew we had stacked up.

9 Q. Was that Sergeant Newberry?

10 A. Sergeant Newberry, from what I remember, is  
11 the one -- he went ahead to a position where he could  
12 peek around the door and see exactly what the layout  
13 of the room looked like, how many bodies were inside  
14 and if he saw any weapons. He indicated when we did  
15 go in where we would find Mr. Okeefe and Mrs.  
16 Whitmarsh. And then he noticed the knife on the bed  
17 also.

18 Q. Sergeant Newberry did not go in the room?

19 A. I don't know. When I go in my main target,  
20 I'm the non-lethal option. So I was watching  
21 primarily where Mr. Okeefe's hands were placed.

22 Q. Yes or no is fine.

23 A. I want to explain.

24 Q. Mr. Smith can help you explain your answer  
25 later if necessary.

1 THE COURT: Just wait for another  
2 question.

3 MS. PALM:

4 Q. So you don't know if Sergeant Newberry went  
5 in to the room is the answer?

6 A. My goal is to --

7 Q. Yes or no?

8 A. His actions and lethal options.

9 MS. PALM: Could you instruct the witness  
10 to answer yes or no question with yes or no.

11 THE COURT: Answer that particular  
12 question.

13 MS. PALM:

14 Q. The answer is you don't know if Sergeant  
15 Newberry went into the room?

16 A. No.

17 Q. And you indicated Sergeant Newberry told you  
18 when he took his quick peek he didn't see any weapons  
19 and he saw both Mr. Okeefe's hands?

20 A. He saw the knife on the bed and he saw where  
21 they were positioned. Mr. Okeefe is at the edge of  
22 the bed, the victim is at the edge of the bed.

23 Q. And he told you that he saw both of Mr.  
24 Okeefe's hands and there was no weapons in his hands?

25 A. Yeah.

1 Q. As you enter the room it's at least three of  
2 you in the room that have made entry. How far are you  
3 away from Mr. Okeefe at that point?

4 A. Probably within -- maybe five feet.

5 Q. And you indicated he's laying on the floor  
6 with Miss Whitmarsh's body?

7 A. Yes.

8 Q. Was he doing anything that you saw to harm  
9 her during that time?

10 A. No. It looked like at that point whatever  
11 damage had been done was done.

12 Q. And he was partially covering his body with  
13 his left knee but his right leg was on the floor?

14 A. That's right.

15 Q. So that would mean he was facing you?

16 A. Uh-huh.

17 Q. So you could see his face and see his hands  
18 at that time?

19 A. Yes.

20 Q. Was he basically face-to-face with Miss  
21 Whitmarsh's body?

22 A. Yeah, I would say so.

23 Q. What was he doing with his hands before the  
24 whole waving, trying -- I think you indicated he was  
25 waving his hands, saying "don't look"?



1 A. He was saying simultaneously don't look at  
2 her, don't look at her and was covering up her torso.

3 Q. So, basically, trying to cover the naked part  
4 of her body with her shirt?

5 A. Her torso. From her waist down was totally  
6 exposed, the T-shirt wouldn't have covered it.

7 Q. And he was pulling on her shirt during that  
8 point?

9 A. Yes.

10 Q. Now, you indicated that you did the first  
11 E.C.D. cycle and it wasn't fully effective but two  
12 prongs had entered?

13 A. As far as I know, yes.

14 Q. And Mr. Okeefe is still laying down at that  
15 point?

16 A. Yeah, his right side is down, his right arm  
17 is free. After the -- after the first cycle completes  
18 and Officer Taylor has one hand behind the back.

19 Q. So you would estimate you were about seven  
20 feet away from him, so you do the E.C.D. cycle and  
21 then is it just Officer Taylor that goes over to try  
22 and take physical custody of Mr. Okeefe, or do other  
23 officers join him?

24 A. I don't know.

25 Q. Are you standing back looking at the whole

1 thing because you're the one firing?

2 A. My job at that point, when I deploy that  
3 C.D., I'm married in a sense, my whole responsibility  
4 is Mr. Okeefe, monitoring his actions. I know Officer  
5 Taylor steps in because he's right there. Other  
6 officers I can't vouch for exactly how many are in  
7 there. My total responsibility is him, if he's not  
8 complying or becomes violent or a weapon comes out of  
9 somewhere, I need to be able to assess that.

10 Q. The only officer you indicate is trying to  
11 take physical custody is Officer Taylor, you don't  
12 dispute that's correct, do you?

13 A. No. There was very small quarters back  
14 there.

15 Q. In fact, where Mr. Okeefe is laying on the  
16 floor there's probably about two feet behind him and  
17 the closet wall, so there's not a lot of room to  
18 operate on the other side?

19 A. No.

20 Q. So from you to the body is seven feet, Mr.  
21 Okeefe is on the other side of the body and then you  
22 have two more feet. So if Officer Taylor is going  
23 over there he has to step over the victim's body?

24 A. He steps from behind Okeefe's feet. He's not  
25 over the body at all.

1 Q. But he last to actually get over the body  
2 somehow so. . .

3 A. There was space off to the right side to  
4 maneuver.

5 Q. Is there a dresser right below her feet,  
6 pretty close to her feet?

7 A. I never noticed that.

8 Q. Do you know from your training on tazer use,  
9 do you have to be certified to use a tazer?

10 A. Yes.

11 Q. From your training, are you told whether a  
12 tazer is less effective on somebody who's under the  
13 influence of alcohol or drugs?

14 A. It can be. Like I said, I had no knowledge  
15 of any alcohol or drug use.

16 Q. So, basically, Officer Taylor could not get  
17 both arms so you decided to do a second cycle?

18 A. Exactly. There was a lot of blood. We was  
19 informed as we were getting to the house that the  
20 victim may have tested positive for AIDS or hepatitis  
21 C. So exposure to that blood was also a concern. So  
22 to get down there, you know, wrestling with him, we  
23 wanted to get him out as quickly as possible so she  
24 could be treated.

25 Q. What type of E.C.D. device do you use, is it

1 M26 or X26?

2 A. It's the X26.

3 Q. Do you know how many volts of electricity  
4 that delivers?

5 A. Not right offhand, no.

6 Q. It basically has two probes per use, so when  
7 you fire it two probes are ejected?

8 A. Right. Those probes are the same probes that  
9 remain intact for the second cycle. So it's not an  
10 additional set of probes. It's the seconds cycling.  
11 There's a thousand volts that are conducted in the two  
12 inch spread. It's not the volts that are conducted in  
13 to the person, it's the amperes. I think it's two  
14 point two amperes that are inflicted on the person to  
15 bring them under control or disrupt their muscular  
16 control.

17 Q. So after the first five second cycle of the  
18 tazer, that's the ordinary cycle, five seconds?

19 A. Right.

20 Q. After the first five second cycle, Mr. Okeefe  
21 still wasn't incapacitated?

22 A. No. It was kind of strange. It happens  
23 sometimes, if you're in close within less than five  
24 feet, if the spread is not large enough it will not  
25 incapacitate the entire body. So to have a spread

1 that maybe goes from under the arm pit to the waist  
2 you're not going to get full compliance from the  
3 subject. What is more ideal is maybe a shot, a probe  
4 that hits in the upper body and one in the lower body.

5 Q. And you also have said you might not get full  
6 compliance if somebody is under the influence of  
7 alcohol or drugs, that might affect compliance?

8 A. Any non-lethal tool, drugs and alcohol can  
9 also be a factor.

10 Q. Does Metro have a department policy on the  
11 use of tazer force when the subject is unarmed?

12 A. Yes.

13 Q. Is it a written policy?

14 A. Yes.

15 Q. Is there a department policy using when the  
16 subject is apparently under the influence of alcohol  
17 or drugs?

18 A. No. If they are pregnant, elderly, those  
19 types of situations, handcuffed. It's not to be used  
20 in any type of punitive, just punishing somebody or  
21 moving somebody off a park bench.

22 Q. Sure. Does the policy say not to use this  
23 force repeatedly unless there's a great threat to  
24 somebody?

25 A. Yes. In that situation there definitely was.

1 Q. Is it possible that because Mr. Okeefe fell  
2 on his right arm, that that was part of the reason  
3 Officer Taylor couldn't get his right arm behind him?

4 MR. SMITH: I'd object, speculation.

5 THE COURT: Overruled.

6 THE WITNESS: No. That arm was free,  
7 because after the cycle completed he was physically  
8 able to move that arm and as they were trying to grab  
9 it he was moving it away.

10 Q. So after the first time that you used the  
11 tazer, at that point you could see both of Mr.  
12 Okeefe's hands, he had no weapons, is that correct?

13 A. Right.

14 Q. And there are at least four officers in the  
15 room?

16 A. Yes.

17 Q. Do you know whether Metro has a policy to  
18 call for medical assistance to check the health of  
19 somebody who has just been tasered?

20 A. Yes. They were already on the scene.

21 Q. That was A.M.R.?

22 A. Yes.

23 Q. You talked about taking Mr. Okeefe out of the  
24 room. Do you recall who specifically took him out of  
25 the room?



1       A.    I remember Officer Taylor kept in control of  
2 his arms. He was moved out in to the bedroom so they  
3 could get control of both arms and both legs because  
4 he just went dead weight and wouldn't cooperate. We  
5 needed to get that path cleared because it was the  
6 main walkway to get in to the apartment and in to the  
7 bedroom. So he went dead weight on us so they moved  
8 him out in to the living room, grabbed at his limbs  
9 and moved him out to the catwalk. I don't know which  
10 officers.

11       Q.    Did you see Mr. Okeefe being placed on the  
12 catwalk?

13       A.    Yes.

14       Q.    Was he put on his belly on the catwalk?

15       A.    Yes.

16       Q.    Do you know whether any injuries occurred to  
17 Mr. Okeefe during that process?

18       A.    No, I don't. There was no complaint of  
19 injury.

20       Q.    I'm showing you what's been marked as Defense  
21 Exhibit C. Does that appear to be how Mr. Okeefe  
22 looked after his arrest that night?

23       A.    Yes.

24       Q.    Do you recall whether that injury was present  
25 on his forehead when you encountered him in the

1 bedroom?

2 A. No, I don't.

3 Q. So it could have happened during the arrest?

4 A. I have no idea.

5 Q. During the arrest did you ever see him put on  
6 his face in the bedroom?

7 A. Yes. They were trying to move him, he went  
8 dead weight and wasn't cooperating. He wasn't put on  
9 his face, he wormed his way out of the hold. So he  
10 fell down, they pulled him out there and that's why  
11 they used four people as opposed to two to take him  
12 out the rest of the way. Like I said, that's what was  
13 the strange thing about it. It was not a person --

14 MS. PALM: Officer, there's no question  
15 before you right now.

16 THE COURT: Do you have any other  
17 questions?

18 MS. PALM: Court's indulgence.

19 Q. Officer, you indicated in your statement that  
20 you had actually tried to speak with Mr. Okeefe  
21 subsequent to him being taken into custody?

22 A. Not prior to him being taken in custody.  
23 Once we were out on the catwalk.

24 Q. Were you assigned that duty, to try and  
25 interview him at the scene?

1 A. I'm a C.I.T. officer. He was very angry.

2 Q. That's a yes or no question?

3 A. I don't think it is, ma'am. Honestly.

4 MS. PALM: Your Honor, could you direct  
5 him to answer yes or no. I asked if he was assigned  
6 the duty to interview him.

7 THE WITNESS: Then yes.

8 THE COURT: Any other questions?

9 MS. PALM: Yes, Your Honor.

10 Q. How long did you talk to Mr. Okeefe outside?

11 A. I'm not sure.

12 Q. Do you know how long he was on the catwalk?

13 A. Just a few minutes.

14 Q. Was that when A.M.R. checked him out?

15 A. He walked under his own power down the  
16 stairs, out into the court yard.

17 Q. Was he put into your car or somebody else's?

18 A. After he stood outside for a while and then  
19 went into a patrol car.

20 Q. You again had tried to talk to him  
21 downstairs, is that correct?

22 A. Yes.

23 Q. And you indicated in your statement that he  
24 smelled heavily of alcohol at that time?

25 A. Yes.

1 Q. Do you have training on the detection of  
2 whether somebody's under the influence of alcohol or  
3 drugs?

4 A. No, it was just an observation.

5 Q. Have you ever been a part of any D.U.I.  
6 arrests?

7 A. Yes.

8 Q. Do you know what the symptoms of being under  
9 the influence are?

10 A. Glossy-eyed, redness of the eyes, slurred  
11 speech, unsteady gaze, odor of alcohol.

12 Q. So in addition to the odor of alcohol, which  
13 other of these affects did you notice?

14 A. Just what I remember was the odor of alcohol.

15 Q. You don't recall whether his speech was  
16 slurred?

17 A. No.

18 Q. And you never asked him if he had anything to  
19 drink?

20 A. No.

21 Q. Would it have been your responsibility or  
22 somebody else's to determine whether to give him a  
23 test for the use of alcohol?

24 A. It wasn't a D.U.I. so I don't know that there  
25 would have been any type of blood draw or breath test.

1 Q. If it was somebody's determination to make it  
2 wasn't yours?

3 A. Right.

4 Q. And did you indicate in your statement Mr.  
5 Okeefe was really hard to talk to during the time you  
6 had talking to him?

7 A. He was very standoff-ish. He wouldn't answer  
8 any questions or respond appropriately to any  
9 question. When I tried to solicit his name or  
10 Victoria's name so A.M.R. could have that information  
11 to know blood type, approximate age, he just kept  
12 saying, "You guys are mad at me, you guys are mad at  
13 me."

14 Q. In fact, he got the name of Victoria wrong,  
15 didn't he? When he first told you her name he said  
16 Veronica?

17 A. Yes.

18 Q. Did it seem to you he was a little  
19 disoriented?

20 A. It seemed to me it was kind -- he didn't want  
21 us to know her name.

22 Q. And did you have any further contact with Mr.  
23 Okeefe beyond the downstairs conversation?

24 A. On the catwalk.

25 Q. After that, after he had gone downstairs?

1 A. No?

2 Q. After you talked downstairs he was taken into  
3 custody. Did you have any further contact with him?

4 A. No. I was going to talk to him one more time  
5 but he was asleep.

6 Q. Did you write a written report?

7 A. I did a use of force report and was --  
8 homicide did a taped interview with me.

9 Q. Do you know how long it took him to be  
10 transported from the scene?

11 A. I don't.

12 MS. PALM: No other questions, Your Honor,  
13 thank you.

14 THE COURT: Anything else?

15 MR. SMITH: Real brief, Judge. I promise  
16

17 REDIRECT EXAMINATION  
18

19 MR. SMITH:

20 Q. Two questions for you. You've already  
21 testified that you saw a knife inside the bedroom, is  
22 that correct?

23 A. Yes.

24 Q. Where did you see that knife?

25 A. On the bed.



1 Q. Showing you what's been admitted as State's  
2 Exhibit 2, is that a photograph of the knife you saw?

3 A. Yes.

4 Q. Does there appear to be apparent dried blood  
5 on that knife?

6 A. On the tip and on the handle.

7 Q. Finally, officer, you testified there was  
8 some concern regarding a communicable disease that  
9 Miss Whitmarsh may have had, do you recall testifying  
10 about that?

11 A. Yes.

12 Q. Where did you receive that information from?

13 A. Over dispatch. And from downstairs  
14 neighbors.

15 MR. SMITH: No further questions.

16 THE COURT: Anything else?

17 MS. PALM: Nothing further.

18 THE COURT: Thank you for your time today

19

20 (Interruption in proceedings.)

21

22 THE COURT: Recalling Bryan Okeefe,

23 08F23348X.

24 The State may call their next witness.

25 MR. SMITH: State calls Officer Sean

1 Taylor.

2  
3 (Whereupon, the witness was duly sworn.)

4  
5 THE CLERK: State your name, for the  
6 record, and spell it.

7 THE WITNESS: Sean Taylor, S-e-a-n,  
8 T-a-y-l-o-r.

9  
10 DIRECT EXAMINATION

11  
12 MR. SMITH:

13 Q. Mr. Taylor, how are you presently employed?

14 A. I'm a patrol officer with Las Vegas  
15 Metropolitan Police Department.

16 Q. Were you working as patrol officer back on  
17 November 5, 2008?

18 A. Yes, I was.

19 Q. Did you have occasion to be dispatched to  
20 5001 El Parque?

21 A. Yes, sir.

22 Q. You responded to that scene?

23 A. Yes.

24 Q. When you responded to that scene, did you  
25 come into contact with a person later identified to

1 you as a Bryan Okeefe?

2 A. Yes, sir.

3 Q. Do you see Mr. Okeefe present in court today?

4 MS. PALM: Stipulate to identification.

5 THE COURT: Thank you.

6 MR. SMITH: On that I'll pass the witness.

7

8 CROSS EXAMINATION

9

10 MS. PALM:

11 Q. Do you recall giving a statement to Detective  
12 Vaughn on November 6, about 1:38 in the morning?

13 A. Yes, I do.

14 Q. And you had indicated when you entered  
15 Officer Kahn, the C.I.T. officer, was in the living  
16 room yelling in to the back northwest bedroom?

17 A. Yes.

18 Q. Do you recall if the lights were on or off  
19 when whether you entered the apartment?

20 A. The lights in the living room were not on at  
21 the time. The lights in the hallway were on and the  
22 lights in the bathroom were on and the lights in the  
23 back bedroom that he was yelling into were on.

24 Q. So the other bedroom was dark?

25 A. Yes, ma'am.

1 Q. And the kitchen was dark?

2 A. Yes, it was.

3 Q. And the living room?

4 A. Yes, the living room we were standing in was  
5 dark.

6 Q. So after your entry you stack up behind  
7 Officer Kahn?

8 A. Yes.

9 Q. And eventually you make entry in to the  
10 bedroom?

11 A. Yes.

12 Q. Do you recall who else entered along with  
13 you?

14 A. Yes.

15 Q. Who was that?

16 A. Officer Kahn was first in the stack, Officer  
17 Ballejos was second and I was third.

18 Q. So the three of you entered or is it four?

19 A. I was the third person in the stack, I don't  
20 know who was behind me.

21 Q. Do you recall whether Sergeant Newberry went  
22 in to the room or not?

23 A. During the time we went in with the stack I  
24 don't recall if he was behind me or not. When I went  
25 in I didn't look behind me.

1 Q. When you first entered the bedroom, do you  
2 see Mr. Okeefe right away?

3 A. Yes, I do.

4 Q. Could you see that he had no weapons in his  
5 hands?

6 A. Yes.

7 Q. He's basically laying on the floor next to  
8 the body of the female victim?

9 A. Beside the body, yes.

10 Q. And is he doing anything with his hands at  
11 that time?

12 A. Yes, he was.

13 Q. What was he doing?

14 A. He was rubbing her scalp and the other hand  
15 he was sort of covering her, hovering his hands over  
16 her.

17 Q. Was that to shield her from your view?

18 A. I don't know what he was thinking. I don't  
19 know why he was hovering his hand over her.

20 Q. So the way he was laying, his right hip was  
21 on the ground and he's facing you, at that time you  
22 can see his face?

23 A. I can see his face. He wasn't facing me, he  
24 was looking down at her. His head was to the west,  
25 his feet were to the east.

1 Q. So he's face-to-face with her sort of?

2 A. He's looking at her, then looking at us when  
3 we were shouting commands, then looking back at her.

4 Q. And you never saw him with a weapon at that  
5 point, did you?

6 A. At that point he did not have a weapon.

7 Q. You never saw him make any movement toward  
8 the female as if to harm her?

9 A. He was rubbing her scalp and I really wanted  
10 him to stop, just because of the way her body was  
11 looking.

12 Q. He was not hitting her scalp?

13 A. No.

14 Q. And he never made any verbal threats to you  
15 at that time?

16 A. No.

17 Q. So Officer Kahn is yelling commands to get  
18 away from her?

19 A. Yes.

20 Q. He's basically staring at her and rubbing her  
21 head?

22 A. And shouting at us, yes.

23 Q. And Ballejos indicates he's going to use the  
24 tazer?

25 A. Yes.



1 Q. And how far away were you from him when the  
2 tazer was deployed?

3 A. I didn't measure or anything like that. A  
4 few feet away. I was prepared to go hands-on.

5 Q. Prior to firing the tazer, when at least the  
6 three of you enter the room you're all together?

7 A. Yes.

8 Q. Standing kind of side by side?

9 A. We were stacked up behind each other.

10 Q. It's a pretty small bedroom?

11 A. Yes.

12 Q. And the distance from you to the females body  
13 at that point, can you estimate?

14 A. I would estimate a few feet. I didn't  
15 measure it. It was really quick. I can't give you an  
16 exact number.

17 Q. So during that tazer cycle you indicated in  
18 your report or in your statement that Mr. Okeefe's  
19 body didn't completely tense up and he still wouldn't  
20 listen to commands to get off the body?

21 A. Correct.

22 Q. And never got off the ground at that point,  
23 so he's still laying there next to the body?

24 A. Yes.

25 Q. And during that first tazer cycle you could

1 see he could still move his arms?

2 A. Yes. At that point he wouldn't give me his  
3 right arm, even though I could tell he could still  
4 move it because he was moving it.

5 Q. So if you indicated in your statement that  
6 you didn't try to cuff him until after the second  
7 tazer statement, is that incorrect?

8 A. No, that's not incorrect. I was telling him  
9 put his arms behind his back and he wouldn't give me  
10 his arm.

11 Q. So the first tazer cycle, do you approach him  
12 during that cycle or after that cycle?

13 A. I approached him during that cycle and  
14 starting to give commands to put his arms behind his  
15 back, lay flat on his stomach.

16 Q. At that point you haven't laid your hands on  
17 him?

18 A. I don't believe I touched him during the  
19 first cycle.

20 Q. You were waiting for him to tense up  
21 completely?

22 A. Yes.

23 Q. So after the second tazer cycle is when you  
24 tried to get his arm into cuffs and you were finally  
25 able to?

1 A. After the first cycle, either during the  
2 second cycle or after that he still wouldn't give me  
3 that right arm. I was putting the left arm into a  
4 lock and then I was finally able to get the other arm.

5 Q. After he was tasered twice he still wasn't  
6 fully cooperative?

7 A. I have to grab his arm, his other arm and put  
8 it behind his back.

9 Q. Was he still tensed up because of the tazer  
10 firing?

11 A. When I finally got the other arm handcuffed,  
12 the tazer cycle was over, both cycles were over.

13 Q. So you actually had your hands on him during  
14 the second tazer cycle?

15 A. Near the end of it I believe I had his left  
16 arm.

17 Q. And that's about a five-second cycle?

18 A. Yes. That's what we are told during  
19 training.

20 Q. Do you recall who took him out of the room at  
21 that point?

22 A. I was one of the people that took him out of  
23 the room. I grabbed his legs, Officer Kahn grabbed  
24 his torso.

25 Q. So the two of you carried him?

1 A. Yes.

2 Q. I imagine you had to step over the female  
3 body on the floor, because he was on the side of her?

4 A. I didn't step over the body, I don't know if  
5 Officer Kahn did. I was at the feet because I grabbed  
6 his legs and he's taller than the female. I stepped  
7 around the body.

8 Q. How many officers had to go around the body  
9 to take him into physical custody?

10 A. I don't recall what Officer Kahn did, if he  
11 stepped over her or lifted him over. I grabbed his  
12 legs because his legs were further down than hers and  
13 I picked his legs up.

14 Q. That area, from her body to the far wall  
15 where Mr. Okeefe was basically, there's about two feet  
16 until you hit the wall, right?

17 A. I didn't really look at the far wall.

18 Q. Is it a pretty small room?

19 A. What would you call a small room?

20 Q. It's not a very big space?

21 A. It wasn't a large space, no.

22 Q. Do you recall whether Mr. Okeefe was injured  
23 when you were taking him into custody?

24 A. I couldn't tell if he was injured or not.  
25 There was far too much blood everywhere.

1 Q. Officer, I'm showing you what has been marked  
2 as Defense Exhibit C. Is that how Mr. Okeefe appeared  
3 to you on the evening in question?

4 A. That's definitely Mr. Okeefe, but I  
5 remember -- I don't remember if this was on his head  
6 or not. I remember I just was looking around and I  
7 saw blood everywhere, all over his arms.

8 Q. Would you have noticed an injury on his head  
9 when you first observed him?

10 A. I didn't look at his face. Once I had him  
11 handcuffed and we were carrying him he was face down.

12 Q. You wouldn't have noticed it when you were  
13 standing five feet from him telling him get away from  
14 the bed?

15 A. I was focused on his arms. I was trying to  
16 get him away from the female.

17 Q. Was he put on his stomach in the bedroom  
18 during the arrest process?

19 A. No, ma'am. He was still on his side when I  
20 got his arms and Officer Kahn hooked his arm and I  
21 grabbed both of his legs. Once we finally got him off  
22 the ground he was then facing towards the ground but  
23 he wasn't on the ground.

24 Q. Did you take him out to the balcony or was  
25 that another officer?

1       A.    I was one of the officers that did take him  
2 out to the balcony. Officer Kahn and I laid him on  
3 the living room floor and another officer, Officer  
4 Hatchet, picked him up because I started yelling,  
5 medical couldn't get through him in the living room  
6 and Officer Hatchet picked him up and we carried him  
7 on to the terrace and set him up on the terrace.

8       Q.    Did you ever lay him in such a position that  
9 he would have sustained this injury to his forehead ?

10      A.    No, I did not.

11      Q.    When Mr. Okeefe was on the stairwell or the  
12 terrace, you left; is that correct?

13      A.    Yes. I got orders from a sergeant to start  
14 doing other things on perimeter, so I did leave.

15      Q.    Officer, do you have any training in  
16 recognizing whether a person is under the influence of  
17 alcohol or drugs?

18      A.    I am trained to use an evaluation process to  
19 determine if a person is impaired, yes.

20      Q.    You make D.U.I. arrests, I assume?

21      A.    Yes.

22      Q.    Can you tell me what the symptoms are if  
23 somebody is under the influence of alcohol?

24      A.    Staggered gait, odor of alcoholic beverage on  
25 their breath, red watery eyes, slurred speech.

1 Q. Pupils dilated?

2 A. Yes, they could.

3 Q. And Mr. Okeefe smelled heavily of alcohol  
4 that evening, correct?

5 A. I don't recall what he smelled like.

6 Q. Did you spend very much time with him?

7 A. No, I didn't.

8 Q. So you basically arrested him and dropped him  
9 off?

10 A. That's correct.

11 Q. Were you present when A.M.R. arrived to check  
12 out Mr. Okeefe?

13 A. Yes, I was.

14 Q. And how long did it take them to arrive?

15 A. I don't recall how long it took. I thought  
16 they were somewhere waiting, a block or two away. I  
17 assume they were waiting a block or two away like they  
18 usually are for us to tell them to come in.

19 Q. Basically, do you agree that the incident was  
20 reported around 11:01 in the evening and Mr. Okeefe  
21 was in custody by 11:13?

22 A. I don't recall the exact times. I didn't  
23 check my watch.

24 Q. Well, 12 minutes from the initial call to in  
25 custody, does that sound correct to you?



1 A. I don't know. I do know from the moment I  
2 got there to the time he was in custody there were a  
3 minute or two maybe. I never looked at the printout  
4 to know the exact times.

5 Q. Would it help refresh your recollection if I  
6 showed you the dispatch log?

7 A. Sure.

8 Q. Do you recall what time the call went out?

9 A. It went out just after 2300 hours, at 2313 we  
10 said he was in custody.

11 Q. So 12 minutes from initial call that he was  
12 in physical custody?

13 A. Yes, ma'am.

14 Q. Do you recall how long he sat outside before  
15 he was taken from the scene?

16 A. I don't.

17 Q. Were you there when he was taken from the  
18 scene?

19 A. No. After I left him on the terrace I was  
20 there while paramedics were walking up the stairs.  
21 Sergeant Castor approached me and started giving me  
22 commands on what to do on perimeter and I left and  
23 followed those orders.

24 Q. Did you write any written reports regarding  
25 this incident?

1       A.    I did fill out an occupational illness form  
2 because of the amount of blood, and I was bare handed.  
3 It's just our protocol.

4       Q.    Did you complete a use-of-force report  
5 because of the use of tazers?

6       A.    No, I did not complete the use-of-force  
7 report, another officer did.

8           MS. PALM:  No more questions.  Pass the  
9 witness.

10          MR. SMITH:  Nothing further.

11          THE COURT:  Thank you for your time.  
12 You're excused.

13          The State may call their next wet.

14          MR. SMITH:  The State calls Todd  
15 Armbruster, A-r-m-b-r-u-s-t-e-r.

16  
17          (Whereupon, the witness was duly sworn.)  
18

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

21          THE WITNESS:  Todd Armbruster,  
22 A-r-m-b-r-u-s-t-e-r.

23          MR. SMITH:  May I proceed?

24          THE COURT:  Please proceed.  
25

## DIRECT EXAMINATION

MR. SMITH:

Q. Mr. Armbruster, where do you presently reside?

A. 5001 El Parque, Number Two.

Q. What apartment number?

A. Number Two.

Q. Incidentally, do you kind of work at that location as well?

A. Yeah, maintenance.

Q. As a maintenance person?

A. Yes.

Q. Who do you reside with?

A. Robin Kolacz, K-o-l-a-c-z.

Q. What's her job function at that place?

A. Manager-type.

Q. Kind of like on-site supervisor?

A. Uh-huh.

Q. Is that a "yes"?

A. Yes.

Q. I want to draw your attention to November 5, 2008, approximately eleven o'clock p.m. Did anything unusual happen that day at that time?

A. At that time, yeah, Cookie, who lives in

1 number 29, come running down the apartment saying I  
2 need to call 9-1-1. He said he thought this girl was  
3 dead in the apartment above him.

4 Q. You said cookie Tolliver?

5 A. Charles.

6 Q. Charles?

7 A. Yeah.

8 Q. I wanted you to do me a favor.

9 A. Say yes?

10 Q. He's taking down everything you say so I want  
11 you to wait for me to ask the question before you  
12 answer it?

13 A. Uh-huh.

14 Q. Is that yes?

15 A. Yes.

16 Q. Charles Tolliver runs down and what does he  
17 do? Bang on your door?

18 A. No, he was yelling.

19 Q. You can hear him?

20 A. Yes, sir.

21 Q. As a result of what Charles Tolliver told  
22 you, what did you do?

23 A. I told Robin to call 9-1-1 and I ran up to  
24 the apartment he was talking about.

25 Q. What apartment was that?

- 1 A. 35.
- 2 Q. Is that directly above you?
- 3 A. Directly above him.
- 4 Q. Directly above Charles Tolliver?
- 5 A. Yes.
- 6 Q. So would this be the third floor?
- 7 A. Second floor.
- 8 Q. So when you go upstairs to the apartment, is
- 9 the door open?
- 10 A. The door was wide open.
- 11 Q. Do you go inside?
- 12 A. Yes.
- 13 Q. What do you see upon entry?
- 14 A. I didn't see anything until I went in to the
- 15 bedroom.
- 16 Q. So when you walked in the apartment, you walk
- 17 in to the living room first?
- 18 A. Right.
- 19 Q. You didn't see anything?
- 20 A. No.
- 21 Q. So then do you progress into the bedroom?
- 22 A. Yes.
- 23 Q. What do you see then?
- 24 A. Saw the bed with a bunch of rags on top of
- 25 it; Bryan standing at the end of the bed and the lady

1     laying on the floor.

2           Q.     Bryan being Bryan Okeefe?

3           A.     Yes.

4           Q.     Do you see Mr. Okeefe present in court today?

5           A.     Yes.

6                   MS. PALM: Stipulate to identification.

7     MR. SMITH:

8           Q.     So what happens next?

9           A.     HE was bending over, telling her, asking her  
10    to get up.

11          Q.     He, being Bryan Okeefe?

12          A.     Yes. Then he turned around and saw me,  
13    started to take a swing at me and stopped what he was  
14    doing, told us to get the hell out of his apartment.  
15    We turned around and left and called the police.

16          Q.     Did you know -- strike that.

17                 When you walked in to the apartment do you  
18    also see a female laying inside the bedroom?

19          A.     You can't until you get in to the bedroom.

20          Q.     That's my question. Did you see a female  
21    laying on the ground when you walked inside the  
22    bedroom?

23          A.     Yes.

24          Q.     Did she look to be deceased to you?

25          A.     She wasn't moving. She didn't appear to be

1 breathing.

2 Q. Did you know that female?

3 A. I didn't know her personally. I never really  
4 met, no, I didn't know her.

5 Q. So your testimony is when you made entry in  
6 to the bedroom, the defendant took a swing at you and  
7 told you to get out of there?

8 A. Yes.

9 Q. And you subsequently did in fact leave?

10 A. Yes.

11 Q. What did you do after you left?

12 A. I went to Apartment 37, which was two doors  
13 down, and called the police on a land line.

14 MR. SMITH: Pass the witness.

15

16 CROSS EXAMINATION

17

18 MR. PIKE:

19 Q. We've had an opportunity to speak before. In  
20 fact, you were kind enough to take us around the  
21 apartment complex where all this occurred?

22 A. Right.

23 Q. You have responsibilities at that complex,  
24 you're like an on-site manager?

25 A. Maintenance.



1 Q. And you reside in a building that is kind of  
2 at almost at a right angle to the apartment where this  
3 happened?

4 A. Correct.

5 Q. The apartment where this happened is on the  
6 second story of a two-story building, and it's on the  
7 end of that building, is that correct?

8 A. Yes.

9 Q. And Mr. And Mrs. Tolliver live underneath  
10 that?

11 A. Yes.

12 Q. And there's stairs that go up to a catwalk or  
13 kind of a balcony that's out in front of that  
14 apartment?

15 A. Correct.

16 Q. And being a maintenance individual or having  
17 that job with that apartment complex, you have an  
18 opportunity to go around and get to know the people  
19 that are in the apartment complex?

20 A. Right.

21 Q. You kind of know who belongings there, who  
22 doesn't belong there, in case anybody is doing any  
23 damage or if they are just good tenants?

24 A. Right.

25 Q. And you had occasion to see Bryan and

1 Victoria often while they were living there?

2 A. Yes.

3 Q. And you had occasion to see them both up on  
4 the catwalk, sitting outside drinking?

5 A. Right.

6 Q. You're obviously over 21?

7 A. Yes.

8 Q. And you're familiar, you drink alcoholic  
9 beverages?

10 A. Occasionally.

11 Q. And so you have some experience with whether  
12 or not somebody is getting to the point where they are  
13 intoxicated or not intoxicated?

14 A. Right.

15 Q. And on the night that this happened when you  
16 came in and you saw Bryan, were you able to form an  
17 opinion, based upon your observation, as to whether or  
18 not he was intoxicated?

19 A. To me he appeared intoxicated, yes.

20 Q. Did he seem disoriented as to what was going  
21 on?

22 A. Yes.

23 Q. When you saw him in there, can you kind of  
24 tell me how he was in relationship to the body of  
25 Victoria?

1 A. At her feet.

2 Q. Was he talking to her?

3 A. Yes.

4 Q. Do you recall what he was saying?

5 MR. SMITH: Objection, calls for hearsay.

6 MR. PIKE: Present sense impression, facts  
7 upon which he's basing whether or not he was  
8 intoxicated. Evidence not for the truth of the matter  
9 as to the content, but his reaction and his  
10 interpretation of the present sense based upon his  
11 reaction to the police officers and to Todd.

12 THE COURT: Overruled.

13 MR. PIKE:

14 Q. What did he say?

15 A. Like I said, he bent you down with the hand  
16 on her knee and her hand, "Come on, baby, get up,  
17 don't do this to me, get up."

18 Q. At the time you saw him get up, did he have  
19 any sort of a weapon?

20 A. No.

21 Q. Did you see any sort of a weapon anywhere on  
22 the bed or anywhere in the apartment?

23 A. No, I didn't.

24 Q. After he took the swing at you, did it appear  
25 he was stumbling or was not very steady on his feet?

1 A. Yes.

2 Q. And after he took the one swing he didn't  
3 follow you out when you left the apartment?

4 A. No.

5 Q. In fact, he turned around and went back to  
6 the body of Victoria?

7 A. Yes.

8 Q. She wasn't moving, you were doing everything  
9 that you could to get the police there and medical  
10 help as quickly as possible?

11 A. Yes.

12 Q. Had you seen Victoria when she was  
13 intoxicated prior to this time?

14 A. No.

15 Q. Did you ever have an opportunity during the  
16 course of all of this to see how long Mr. Okeefe was  
17 out on the catwalk before the police took him away?

18 A. No. He wasn't on the catwalk that night.

19 Q. Did you personally hear any noises coming out  
20 of that apartment?

21 A. No, I didn't.

22 Q. Other than conversations or what you heard  
23 Mr. Okeefe say and what you saw when you went in, was  
24 there anything else that you heard him say or do that  
25 evening?

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

2  
3       **BRIAN K. O'KEEFE,**  
              Appellant,  
4       vs.  
5       **THE STATE OF NEVADA**  
              Respondent.

**Supreme Court No.:**  
District Court Case No. 08C250630

Electronically Filed  
Dec 01 2015 10:50 a.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

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7                   **APPELLANT'S APPENDIX - VOLUME 1 - PAGES 0001-0199**

8  
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1	Order for Transcripts filed on 04/30/12	3442
2	Order Granting and Denying in Part Defendant's Ex-Parte Motion for Production of Documents (Specific) Papers, Pleadings, and Tangible Property of Defendant filed on 02/28/14	4818-4820
3	Order Granting Ex parte Motion for Defense Costs filed on 07/01/10	1044-1045
4	Order Granting Request for Transcripts filed on 01/20/11	2966-2967
5	Order Granting Request for Transcripts filed on 04/27/11	3043
6	Order Granting Request for Transcripts filed on 09/14/10	1430-1431
7	Order Granting Request for Transcripts filed on 09/16/10	1438-1439
8	Order Granting, in Part, and Denying, in Part, Motion by Defendant O'Keefe for Discovery filed on 08/23/10	1394-1395
9	Order Granting, in Part, and Denying, in Part, Motion by Defendant O'Keefe to Preclude the State from Introducing at Trial Other Act or Character Evidence and Other Evidence Which is Unfairly Prejudicial or Would Violate his Constitutional Rights filed on 09/09/10	1427-1429
10	Order Granting, in Part, the State's Motion to Admit Evidence of Other Bad Acts filed on 03/13/12	3199-3200
11	Order Releasing Medical Records filed on 04/08/11	3039-3040
12	Order Requiring Material Witness to Post Bail or be Committed to Custody filed on 03/10/09	0230-0231
13	Order Shortening Time filed on 08/16/10	1283
14	Petition for a Writ of Mandamus or in the Alternative Writ of Coram Nobis filed on 12/06/13	4663-4694
15	Petition for Writ of Habeas Corpus or in the Alternative Motion to Preclude Prosecution from Seeking First Degree Murder Conviction Based Upon the Failure to Collect Evidence filed on 01/26/09	0125-0133
16	Petition for Writ of Habeas Corpus Pursuant to NRS 34.360 Exclusive 1 Based On Subject-Matter of Amended Information Vested in Ninth Circuit by notice of Appeal Then "COA" Granted on a Double Jeopardy Violation with No Remand Issued Since filed on 09/15/14	4940-4949
17	Petitioner's Supplement with Exhibit of Oral Argument Scheduled by the Ninth Circuit Court of Appeals for November 17, 2014, Courtroom #1 filed on 10/01/14	4984-4988
18	Pro Se "Reply to State's Opposition to Defendant's Pro Se Motion to Modify and/or Correct Illegal Sentence filed on 03/04/14	4821-4832
19	ProSe "Reply" to State's Opposition to Defendant's (Ex-Parte) "Motion for Reimbursement of Incidental Costs Subsequent the Courts Declaring Defendant Indigent and Granting Forma Pauperis" filed on 02/24/14	4792-4799
20	Receipt of Copy filed on 01/03/11	2761
21	Receipt of Copy filed on 01/12/11	2812
22	Receipt of Copy filed on 01/12/11	2813
23	Receipt of Copy filed on 01/18/11	2876
24	Receipt of Copy filed on 01/27/09	0134
25	Receipt of Copy filed on 01/30/09	0146
26	Receipt of Copy filed on 02/06/09	0168

1	Receipt of Copy filed on 03/04/09	0221
2	Receipt of Copy filed on 03/24/09	0323
3	Receipt of Copy filed on 05/24/10	1031
4	Receipt of Copy filed on 06/13/11	3163
5	Receipt of Copy filed on 06/30/10	1036
6	Receipt of Copy filed on 08/02/10	1240
7	Receipt of Copy filed on 08/02/10	1241
8	Receipt of Copy filed on 08/02/10	1242
9	Receipt of Copy filed on 08/02/10	1243
10	Receipt of copy filed on 08/13/10	1255
11	Receipt of Copy filed on 09/14/10	1432
12	Receipt of Copy filed on 09/17/10	1433
13	Receipt of Copy filed on 09/21/10	1440
14	Receipt of File filed on 07/01/10	1046
15	Reply in Support of Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) filed on 08/25/15	5500-5510
16	Reply to State's Response to Defendant's Pro Per Post-Conviction Petition for Habeas Corpus filed on 06/16/15	5423-5432
17	Reply to State's Response to Defendant's Supplemental Petition for Writ of Habeas Corpus filed on 08/24/15	5489-5499
18	Regeust for Rough Draft Transcripts filed on 10/21/15	5549-5551
19	Request for Rough Draft Transcripts filed on 07/17/12	3458-3460
20	Request for Certified Transcript of Proceeding filed on 09/09/09	0772-0723
21	Request for Rough Draft Transcript filed on 05/21/09	0329-0331
22	Request for Rough Draft Transcripts filed on 11/20/12	4629-4631
23	Return to Writ of Habeas Corpus filed on 01/29/09	0135-0145
24	Second Amended Information filed on 08/19/10	1326-1328
25	State's Opposition to Defendant's (Ex-Parte) "Motion for Reimbursement of Incidental Costs Subsequent the Courts Declaring Defendant Indigent and Granting Forma Pauperis" filed on 02/07/14	4768-4791
26	State's Opposition to Defendant's Motion for a Reasonable Bail filed on 09/27/10	1452-1461
27	State's Opposition to Defendant's Motion for Judicial Notice – The State's Failure to File and Serve the Response in Opposition filed on 03/10/14	4834-4839
28	State's Opposition to Defendant's Motion to Dismiss filed on 03/21/12	3407-3411
	State's Opposition to Defendant's Motion to Preclude the State from Introducing at Trial Improper Evidence and Argument filed on 01/12/11	2814-2871
	State's Opposition to Defendant's Motion to Seal Records filed on 04/05/12	3431-3433
	State's Opposition to Defendant's Motion to Suppress his Statements to Police, or, Alternatively, to Preclude the State from Introducing Portions of his Interrogation filed on 08/17/10	1306-1319
	State's Opposition to Defendant's Motion to Withdraw Counsel for Conflict and Failure to Present Claims When I.A.C. Claims Must be	

1	Raised Per Statute in the First Petition Pursuant to Chapter 34 filed on 06/25/15	5442-5446
2	State's Opposition to Defendant's Pro Per Motion for Leave of Court to File Motion. . Rule 2.4 filed on 09/12/14	4935-4939
3	State's Opposition to Defendant's Pro Per Motion to Chief Judge to Reassign Case to Jurist of Reason Based on Pending Suit Against Judge Michael Villani for Proceeding in Clear "Want of Jurisdiction" Thereby Losing Immunity, Absolutely filed on 09/12/14	4930-4934
4	State's Opposition to Defendant's Pro Per Motion to Modify and/or Correct Illegal Sentence filed on 02/24/14	4811-4817
5	State's Opposition to Motion for Evidentiary Hearing on Whether the State and CCDC have Complied with their Obligations with Respect to the Recording of a Jail Visit Between O'Keefe and State Witness Cheryl Morris filed on 08/10/10	1244-1247
6	State's Opposition to Motion to Admit Evidence Pertaining to the Alleged Victim's Mental Health Condition and History, Including Prior Suicide Attempts, Anger Outbursts, Anger Management Therapy, Self-Mutilation and Erratic Behavior filed on 08/16/10	1277-1282
7	State's Opposition to Motion to Admit Evidence Showing LVMPD Homicide Detectives Have Preserved Blood/Breath Alcohol Evidence in Another Recent Case filed on 08/10/10	1248-1252
8	State's Opposition to Motion to Dismiss and, Alternatively, to Preclude Expert and Argument Regarding Domestic Violence filed on 01/18/11	2908-2965
9	State's Opposition to Motion to Preclude Expert Testimony filed on 08/18/10	1320-1325
10	State's Response and Motion to Dismiss Defendant's Motion for Relief from Judgment Based on Lack of Jurisdiction for U.S. Court of Appeals had not Issued any Remand, Mandate or Remittature of filed on 08/07/14	4891-4902
11	State's Response and Motion to Dismiss to Defendant's Pro Per Petition for Writ of Habeas Corpus Pursuant to NRS 34.360 Exclusive based on Subject-Matter of Amended Information Vested in Ninth Circuit by Notice of Appeal Then "COA" Granted on a Double Jeopardy Violation with No Remand Issued Since (Post Conviction), Amended Petition and Accompany Exhibits, Opposition to Request for Evidentiary Hearing, and Opposition to Pro Per Motion to Appoint Counsel filed on 10/10/14	5041-5050
12	State's Response to Defendant's Motion to Preclude the State from Introducing at Trial Other Bad Acts or Character Evidence and Other Evidence that is Unfairly Prejudicial or Would Violate his Constitutional Rights filed on 08/16/10	1268-1276
13	State's Response to Defendant's Petition for a Writ of Mandamus or in the Alternative Writ of Coram and Response to Motion to Appoint Counsel filed on 12/31/13	4708-4713
14	State's Response to Defendant's Pro Per Post-Conviction Petition for Writ of Habeas Corpus filed on 06/02/15	5145-5147
15	State's Response to Defendant's Pro Per Supplemental Petition for Writ	

1	of Habeas Corpus and Evidentiary Hearing Request, "Motion for Leave to	
2	File Supplemental Petition Addressing all Claims in the First Instance	
3	Required by Statute for Judicial Economy with Affidavit," "Reply to	
4	State's Response to Defendant's Pro Per Post Conviction Petition for	
5	Habeas Corpus," and "Supplement with Notice Pursuant NRS 47.150(2);	
6	NRS 47.140(1), that the United States Supreme Court has Docketed (#14-	
7	10093) the Pretrial Habeas Corpus Matter Pursuant 28 USC 2241(c)(3)	
8	from the Mooting of Petitioner's Section 2241 Based on a Subsequent	
9	Judgment Obtained in Want of Jurisdiction While Appeal Pending" filed	
10	on 07/09/15	5455-5458
11	State's Response to Defendant's Reply in Support of Supplemental Post-	
12	Conviction Petition for Writ of Habeas Corpus filed on 09/03/15	5511-5516
13	State's Response to Defendant's Supplement to Supplemental Petition for	
14	Writ of Habeas Corpus (Post-Conviction) filed on 07/31/15	5473-5475
15	State's Supplemental Opposition to Motion to Seal Records filed on	
16	04/17/12	3436-3437
17	Stipulation and Order filed on 02/10/09	0173-0174
18	Substitution of Attorney filed on 06/29/10	1034-1035
19	Supplement to Supplemental Petition for Writ of Habeas Corpus (Post-	
20	Conviction) filed on 07/13/15	5459-5460
21	Supplement with Notice Pursuant NRS 47.150 (2); NRS 47.140 (1), That	
22	the United State's Supreme Court has Docketed (#14-10093) The Pretrial	
23	Habeas Corpus Matter Pursuant 28 U.S.C. § 2241 ©(3) From the Mooting	
24	of Petitioner's Section 2241 Based on a Subsequent Judgment Obtained in	
25	Want of Jurisdiction While Appeal Pending filed on 06/17/15	5433-5437
26	Supplemental Appendix of Exhibits to Petition for a Writ of Habeas	
27	Corpus Exhibits One (1) Through Twenty Five (25) filed on 06/12/15	5161-5363
28	Supplemental Notice of Defendant's Expert Witnesses filed on 07/29/10	1117-1151
	Supplemental Notice of Expert Witness filed on 05/17/12	3443-3447
	Supplemental Notice of Expert Witnesses filed on 01/03/11	2756-2760
	Supplemental Notice of Expert Witnesses filed on 08/13/10	1266-1267
	Supplemental Notice of Expert Witnesses filed on 08/16/10	1297-1305
	Supplemental Notice of Witnesses filed on 01/14/11	2872-2875
	Supplemental Notice of Witnesses filed on 03/10/09	0228-0229
	Supplemental Notice of Witnesses filed on 03/11/09	0237-0238
	Supplemental Petition for Writ of Habeas Corpus (Post Conviction) filed	
	on 04/08/15	5094-5144
	Supplemental Petition for Writ of Habeas Corpus filed on 06/15/15	5364-5419
	Verdict filed on 03/20/09	0289
	Verdict filed on 06/15/12	3457
	Verdict Submitted to the Jury but Returned Unsigned filed on 09/02/10	1397-1398
	Writ of Habeas Corpus filed on 01/30/09	0147-0148



## TRANSCRIPTS

Document	Page No.
Transcript – All Pending Motions and Calendar Call filed on 02/04/11	2996-3038
Transcript – All Pending Motions filed on 07/10/09	0351-0355
Transcript – All Pending Motions filed on 08/30/12	3461-3482
Transcript – All Pending Motions filed on 11/23/10	1464-1468
Transcript – All Pending Motions on 07/10/09	0348-0350
Transcript – Calendar Call filed on 02/04/11	2968-2973
Transcript – Calendar Call filed on 08/30/12	3520-3535
Transcript – Continued Hearing: Motion in Limine to Present Evidence of Other Bad Acts filed on 08/30/12	3483-3509
Transcript – Defendant's Petition for Writ of Habeas Corpus (Post Conviction) filed on 10/29/15	5560-5564
Transcript – Defendant's Pro Per Motion to Dismiss Based Upon Violation(s) filed on 08/30/12	3510-3519
Transcript – Defendant's Motion to Settle Record filed on 07/10/09	0342-0345
Transcript – Entry of Plea/Trial Setting filed on 07/10/09	0356-0358
Transcript – Jury Trial – Day 1 filed on 10/14/09	0724-1022
Transcript – Jury Trial – Day 1 filed on 07/10/09	0582-0651
Transcript – Jury Trial – Day 1 filed on 07/10/09	0652-0721
Transcript – Jury Trial – Day 1 filed on 09/04/12	4278-4622
Transcript – Jury Trial – Day 1 filed on 11/23/10	1579-1602
Transcript – Jury Trial – Day 2 filed on 07/10/09	0515-0581
Transcript – Jury Trial – Day 2 filed on 11/23/10	1603-1615
Transcript – Jury Trial – Day 2 on 09/04/12	4001-4227
Transcript – Jury Trial – Day 3 filed on 07/10/09	0462-0514
Transcript – Jury Trial – Day 3 filed on 11/23/10	1616-1738
Transcript – Jury Trial – Day 3 on 09/04/12	3779-4000
Transcript – Jury Trial – Day 4 filed on 07/10/09	0408-0461
Transcript – Jury Trial – Day 4 filed on 11/23/10	1739-2032
Transcript – Jury Trial – Day 4 on 09/04/12	3600-3778
Transcript – Jury Trial – Day 5 filed on 07/10/09	0359-0407
Transcript – Jury Trial – Day 5 filed on 09/04/12	3538-3599
Transcript – Jury Trial – Day 5 filed on 11/23/10	2033-2281
Transcript – Jury Trial – Day 6 filed on 11/23/10	2282-2507
Transcript – Jury Trial – Day 7 filed on 11/23/10	2508-2681
Transcript – Jury Trial – Day 8 filed on 11/23/10	1469-1470
Transcript – Jury Trial – Day 9 filed on 11/23/10	1471-1478
Transcript – Matthew D. Carling's Motion to Withdraw as Attorney of Record for Defendant filed on 10/29/15	5557-5559
Transcript – Motions Hearing – August 17, 2010 filed on 11/23/10	1479-1499
Transcript – Motions Hearing – August 19, 2010 filed on 11/23/10	1500-1536
Transcript – Motions Hearing – August 20, 2010 filed on 11/23/10	1537-1578

1	Transcript – Notice of Motion and Motion by Defendant O’Keefe to	
2	Preclude the State from Introducing at Trial Improper Evidence and	
3	Argument filed on 02/04/11	2974-2989
4	Transcript – Partial Transcript of the Jury Trial - Day 2 filed on 03/18/09	0240-0244
5	Transcript – Petrocelli Hearing filed on 05/19/11	3049-3162
6	Transcript – Proceedings filed on 01/02/09	0028-0124
7	Transcript – Sentencing August 16, 2012 filed on 12/03/12	4632-4635
8	Transcript – Sentencing August 28, 2012 filed on 12/03/12	4636-4652
9	Transcript – Sentencing filed on 07/10/09	0337-0341
10	Transcript – Status Check: Availability of Dr. Benjamin for Trial filed on	
11	02/04/11	2990-2995

  
CLERK OF THE COURT

**INFO**  
**DAVID ROGER**  
Clark County District Attorney  
Nevada Bar #002781  
**PHILLIP N. SMITH, JR.**  
Deputy District Attorney  
Nevada Bar #0010233  
200 Lewis Avenue  
Las Vegas, Nevada 89155-2212  
(702) 671-2500  
Attorney for Plaintiff

I.A. 01/06/09  
9:00 AM  
PD

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,

Plaintiff,

-vs-

**BRIAN KERRY O'KEFFE,**  
#1447732

Defendant.

Case No: C250630  
Dept No: V

**INFORMATION**

STATE OF NEVADA }  
COUNTY OF CLARK } ss.

DAVID ROGER, District Attorney within and for the County of Clark, State of Nevada, in the name and by the authority of the State of Nevada, informs the Court:

That BRIAN KERRY O'KEFFE, the Defendant(s) above named, having committed the crime of **MURDER WITH USE OF A DEADLY WEAPON (OPEN MURDER)** (**Felony - NRS 200.010, 200.030, 193.165**), on or about the 5th day of November, 2008, within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada,

///

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1 VICTORIA WHITMARSH, a human being, by stabbing the said VICTORIA  
2 WHITMARSH, with a deadly weapon, to-wit: a knife.

3  
4  
5 

6  
7 DAVID ROGER  
8 DISTRICT ATTORNEY  
9 Nevada Bar #002781

10 Names of witnesses known to the District Attorney's Office at the time of filing this  
11 Information are as follows:

<u>NAME</u>	<u>ADDRESS</u>
12 ARMBRUSTER, TODD	5001 OBANNON DR #34 LVNV
13 BALLEJOS, JEREMIAH	LVMPD #8406
14 BENJAMIN, JACQUELINE DR	ME 0081
15 BLASKO, KEITH	LVMPD #2995
16 BUNN, CHRISTOPHER	LVMPD #4407
17 COLLINS, CHELSEA	LVMPD #9255
18 CONN, TODD	LVMPD #8101
19 CUSTODIAN OF RECORDS	CDC
20 CUSTODIAN OF RECORDS	LVMPD COMMUNICATIONS
21 CUSTODIAN OF RECORDS	LVMPD RECORDS
22 FORD, DANIEL	LVMPD #4244
23 FONBUENA, RICHARD	LVMPD #6834
24 HATHCOX, JIMMY	5001 EL PARQUE AVE #C-36 LVNV
25 HUTCHERSON, CHRISTOPHER	LVMPD #12996
26 IVIE, TRAVIS	LVMPD #6405
27 KYGER, TERESA	LVMPD #4191
28 KOLACZ, ROBIN	5001 EL PARQUE AVE #38 LVNV

1	LOWREY-KNEPP, ELAINE	DISTRICT ATTORNEY INVESTAGATOR
2	MALDONADO, JOCELYN	LVMPD #6920
3	MORRIS, CHERYL	UNKNOWN
4	MURPHY, KATE	LVMPD #9756
5	NEWBERRY, DANIEL	LVMPD #4956
6	PAZOS, EDUARDO	LVMPD #6817
7	RAETZ, DEAN	LVMPD #4234
8	SANTAROSSA, BRIAN	LVMPD #6930
9	SHOEMAKER, RUSSELL	LVMPD #2096
10	TAYLOR, SEAN	LVMPD #8718
11	TINIO, NORMA	2992 ORCHARD MESA HENDERSONNV
12	TOLIVER, CHARLES	5001 EL PARQUE #29 LVNV
13	TOLIVER, JOYCE	5001 EL PARQUE #C-29 LVNV
14	WHITMARSH, ALEXANDRA	7648 CELESTIAL GLOW LVNV
15	WHITMARSH, DAVID	7648 CELESTIAL GLOW LVNV
16	WILDEMANN, MARTIN	LVMPD #3516
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27	DA#08F23348X/1s	
28	LVMPD EV#0811053918	
	(TK9)	

**JUSTICE COURT, LAS VEGAS TOWNSHIP**

CLARK COUNTY, NEVADA

2008 DEC 26 A 9 35

STATE OF NEVADA,  
Plaintiff,

vs.

O-KEEFE, BRIAN KERRY,  
Defendant(s)

District Court Case No.: C250630  
CLERK OF THE COURT  
Justice Court Case No.: 08F23348X

**CERTIFICATE**

I hereby certify the foregoing to be a full, true and correct copy of the proceedings as the same appear in the above case.

Dated this December 18, 2008



Justice of the Peace, Las Vegas Township

RECEIVED  
DEC 26 2008  
CLERK OF THE COURT



# Justice Court, Las Vegas Township

08F23348X  
PAGE TWO

STATE VS. OKEEFE, BRIAN KERRY

CASE NO. \_\_\_\_\_

DATE, JUDGE  
OFFICERS OF  
COURT PRESENT

APPEARANCES — HEARING

CONTINUED TO:

DECEMBER 17, 2008  
J. BONAVENTURE  
P. SMITH, DA  
P. PALM, SPD  
R. PIKE, SPD  
T. MERCER, CR  
M. KRAUS, CLK

TIME SET FOR PRELIMINARY HEARING  
DEFENDANT PRESENT IN COURT \*\*IN CUSTODY\*\*  
STATE FILES AN AMENDED CRIMINAL COMPLAINT IN OPEN COURT  
**MURDER WITH USE OF A DEADLY WEAPON (OPEN MURDER)**  
ADVISED OF CHARGES  
STATE WITNESSES — JACQUELINE BENJAMIN  
JEREMIAH BALLEJOS — DEFENSE STIPULATES TO ID  
SEAN TAYLOR — DEFENSE STIPULATES TO ID  
~~TODD ARMBRUSTER — DEFENSE STIPULATES TO ID~~  
CHERYL MORRIS — DEFENSE STIPULATES TO ID

1/6/09 9:00 DC  
ARRAIGNMENT

STATE RESTS  
DEFENDANT ADVISED OF HIS STATUTORY RIGHT TO MAKE A SWORN OR  
UNSWORN STATEMENT, TO WAIVE MAKING A STATEMENT, AND/OR OF  
HIS RIGHT TO CALL WITNESSES  
DEFENDANT WAIVES HIS RIGHT TO MAKE A STATEMENT  
DEFENSE CALLS WITNESSES  
DEFENDANT WITNESS — MARTIN WILDMAN

DEFENSE RESTS  
SUBMITTED WITHOUT ARGUMENT  
DEFENDANT BOUND OVER TO DISTRICT COURT #5 AS CHARGED  
DEFENDANT TO APPEAR IN THE LOWER LEVEL ARRAIGNMENT  
COURTROOM A  
DATE SET

DEFENDANT REMANDED TO THE CUSTODY OF THE SHERIFF

EVIDENCE - #1 - #3 - PHOTOS - OFFERED - ADMITTED  
#A - #C - PHOTOS - OFFERED - ADMITTED

MRK  
CASE FORWARDED TO  
DEC 26 2008  
COUNTY CLERK'S OFFICE

000006

# Justice Court, Las Vegas Township

STATE VS. OKEEFE, BRIAN KERRY

CASE NO. 08F23348X

DATE, JUDGE  
OFFICERS OF  
COURT PRESENT

APPEARANCES — HEARING

CONTINUED TO:

NOVEMBER 7, 2008

**CRIMINAL COMPLAINT FILED:  
MURDER WITH USE OF A DEADLY WEAPON**

SDF

NOVEMBER 10, 2008

A. SILVER FOR  
J. BONAVENTURE  
R. BLAZE, DA  
A. LUEM, PD  
APPOINTED  
T. MERCER, CR  
S. FISHER, CLK

INITIAL ARRAIGNMENT  
DEFENDANT PRESENT IN COURT IN CUSTODY  
DEFENDANT ADVISED OF CHARGES/WAIVES READING OF COMPLAINT  
PASSED BY COURT FOR STATUS CHECK ON POSSIBLE CONFLICT  
  
DEFENDANT REMANDED TO THE CUSTODY OF THE SHERIFF

11/12/08 7:30 #9

DMC

NOVEMBER 12, 2008

I. GUBLER, FOR  
I. BONAVENTURE  
R. BLAZE, DA  
A. LUEM, PD  
R. PIKE, ESQ. ~~920~~  
(APPOINTED)  
T. MERCER, CR  
S. FISHER, CLK

DEFENDANT PRESENT IN COURT-**IN CUSTODY**  
MOTION BY DEFENSE TO WITHDRAW AS ATTORNEY OF RECORD DUE TO  
CONFLICT- MOTION GRANTED  
PRELIMINARY HEARING SET

11/26/08 9:00 #9

OCG

DEFENDANT REMANDED TO THE CUSTODY OF THE SHERIFF

NOVEMBER 26, 2008

J. BONAVENTURE  
P. SMITH, DA  
P. PALM, SPD  
T. MERCER, CR  
M. KRAUS, CLK

TIME SET FOR PRELIMINARY HEARING  
DEFENDANT PRESENT IN COURT **\*\*IN CUSTODY\*\***  
PRELIMINARY HEARING CONTINUED BY STIPULATION OF COUNSEL  
DATE SET AT COUNSEL'S REQUEST

12/17/08 9:00 #9

DEFENDANT REMANDED TO THE CUSTODY OF THE SHERIFF

**CASE FORWARDED TO**

**DEC 26 2008**

**COUNTY CLERK'S OFFICE**

**000007**

ORIGINAL

FILED IN OPEN

COURT

December 17, 2008  
DANIELA R. RALLI  
COUNT CLERK

JUSTICE COURT, LAS VEGAS TOWNSHIP

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

BRIAN O'KEEFE, aka,  
Brian Kerry Okeefe #1447732,

Defendant.

CASE NO: 08F23348X

DEPT NO: 9

AMENDED

CRIMINAL COMPLAINT

The Defendant above named having committed the crime of MURDER WITH USE OF A DEADLY WEAPON (OPEN MURDER) (Felony - NRS 200.010, 200.030, 193.165), in the manner following, to-wit: That the said Defendant, on or about the 5th day of November, 2008, at and within the County of Clark, State of Nevada, did then and there wilfully, feloniously, without authority of law, and with premeditation and deliberation, and with malice aforethought, kill VICTORIA WHITMARSH, a human being, by stabbing the said VICTORIA WHITMARSH, with a deadly weapon, to-wit: a knife.

All of which is contrary to the form, force and effect of Statutes in such cases made and provided and against the peace and dignity of the State of Nevada. Said Complainant makes this declaration subject to the penalty of perjury.

Philipp N. Suda  
12/17/2008

08F23348X/cb  
LVMPD EV# 0811053918  
(TK9)

000008

PAWPDOS\COMPLT\FCOMP\023\02334802.DOC



FILED

JUSTICE COURT, LAS VEGAS TOWNSHIP

Nov 7 12:12 PM '08  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

BRIAN O'KEEFE, aka,  
Brian Kerry Okeefe #1447732,

Defendant.

JUSTICE COURT  
LAS VEGAS NEVADA

JP.

JA

DEPUTY

CASE NO: 08F23348X

DEPT NO: 9

CRIMINAL COMPLAINT

The Defendant above named having committed the crime of MURDER WITH USE OF A DEADLY WEAPON (Felony - NRS 200.010, 200.030, 193.165), in the manner following, to-wit: That the said Defendant, on or about the 5th day of November, 2008, at and within the County of Clark, State of Nevada, did then and there wilfully, feloniously, without authority of law, and with premeditation and deliberation, and with malice aforethought, kill VICTORIA WHITMARSH, a human being, by stabbing the said VICTORIA WHITMARSH, with a deadly weapon, to-wit: with an unknown object.

All of which is contrary to the form, force and effect of Statutes in such cases made and provided and against the peace and dignity of the State of Nevada. Said Complainant makes this declaration subject to the penalty of perjury.

  
11/7/2008

08F23348X/cb  
LVMPD EV# 0811053918  
(TK9)

000009

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NOTICE OF WITNESSES

[NRS 174.234]

TO: Defendant or attorney of record:

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

NAME

ADDRESS

CUSTODIAN OF RECORDS  
Communication

Las Vegas Metropolitan Police Department

These witnesses are in addition to those witnesses noted in the discovery or other  
documents provided.

DATED this 7th day of November, 2008.

000010

INTEK NAME (AKA, ALIAS, ETC.)  
LAST FIRST MIDDLE  
O'KEEFE Bryan

ADDRESS  
5001 EL PASO STREET  
CITY Las Vegas  
STATE NV  
ZIP 89102

DATE OF BIRTH 3-14-1963  
RACE W  
SEX M  
HEIGHT 5'4"  
WEIGHT 200  
HAIR Brun  
EYES Blu

LOCATION OF CRIME (e.g. Street, City, State, Zip)  
5001 EL PASO C-35 LV NV 89102  
SOCIAL SECURITY 530-76-7555  
LOCATION OF ARREST Same

CHARGE  
S045 MURDER W.D.U. 700.030 SIC  
M AGM F  
AIR TYPE  
EVENT NUMBER  
WARR/NOCC NUMBER  
LY JC DC OTHER

APPROVAL CONTROL # FOR ADDITIONAL CHARGES

APPROVAL CONTROL # FOR ADDITIONAL CHARGES

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APPROVAL CONTROL # FOR ADDITIONAL CHARGES

ARREST TYPE PC - PROBABLE CAUSE BS - BONDSMAN SURRENDER BW - BENCH WARRANT WA - WARRANT RM - REMAND GI - GRAND JURY IND.  
SIGNATURE  
CHARGE  
11/7/08  
7:30  
9

Time Stamp at Booking

FOR PROBABLE CAUSE/NO HIT ARREST SEE PAGE TWO FOR DETAILS

BENCH WARRANT SERVED ON

WARRANT SERVED ON

GRAND JURY INDICTMENT SERVED ON

TYPE OF ID FOR VERIFICATION

JUDGE

STANDARD BAIL

O.R. RELEASE

PROBABLE CAUSE

IAD

FAXED BY

5107 03013457

LAS VEGAS METROPOLITAN POLICE DEPARTMENT  
ARREST REPORT

08F233487/9

<input checked="" type="checkbox"/> City	<input type="checkbox"/> County	<input checked="" type="checkbox"/> Adult	<input type="checkbox"/> Juvenile	Detention/Release	U.S.
INVESTIGATOR 08105-3018		ARRESTEE'S NAME (Last, First, Middle) O'KEEFE, BRYAN			S.S.N. 630-75-7055
ARRESTEE'S ADDRESS (Number, Street, City, State, Zip Code) 8001 EL PARQUE C-35, LAS VEGAS, NEVADA 89102					
CHARGE: MURDER WITH A DEADLY WEAPON					
OCCURRED: 11-5-08		DATE 11-5-08	DAY OF WEEK WEDNESDAY	TIME 2301	LOCATION OF ARREST (Number, Street, City, State, Zip Code) 8001 EL PARQUE C-35 LAS VEGAS, NV 89102
RACE W	SEX M	D.O.B. 3-14-83	HT 5'8"	WT 250	HAIR BLK
EYES BLU		PLACE OF BIRTH Lancaster, Ohio			

## CIRCUMSTANCES OF ARREST

On 11/5/2008 at approximately 2300 hours, LVMPD dispatch received a 911 call from Robin Kolacz, the manager of the apartments located at 8001 El Parque. Robin stated the female in apartment C-35 was lying inside the apartment and there was blood everywhere. Police officers and medical personnel responded to the apartments.

Officers arrived at the apartment and found the front door open. Officers attempted to contact the male inside of apartment C-35. The male, later identified as Brian O'Keefe, ID#1447732, refused to come to the door. Officers continued to call to O'Keefe, attempting to get him to come out of the bedroom. O'Keefe refused to come out of the bedroom. Officers approached the bedroom and observed O'Keefe holding the victim, identified as Victoria Whitmarsh. The Officers could see that there was blood all over the bed. Officers attempted to expedite the removal of O'Keefe from the bedroom in an attempt to render aid to the victim, Whitmarsh, who was lying on the bedroom floor in a pool of blood. O'Keefe moved slightly away from the victim and received one cycle from the E.C.D. (Electronic Control Device). O'Keefe still refused to comply and received one additional cycle from the E.C.D. O'Keefe then complied with the officers commands and was taken into custody and removed from the bedroom enabling medical personnel to enter and attend to Whitmarsh. Medical personnel found the victim, Victoria Whitmarsh dead on the floor in the master bedroom of the apartment.

Homicide Detectives arrived and a telephonic warrant was requested and obtained by Sgt. Shoemaker. Whitmarsh appeared to have a stab wound on the right side under the arm pit area, an injury to the middle knuckle of her left hand and an injury to her right index finger. Whitmarsh was lying on her back on the floor and was nude from the waist down. The bed linens were saturated in blood and there was a bloody black handled kitchen butcher knife (approximately 8-8 inches) lying on the bed. The scene was processed and photographed and the evidence impounded by Crime Scene Analysis.

O'Keefe made the following spontaneous statements to Officer C. Hutcherson, PD12096: "I swear to God 'V', I didn't mean to hurt you", "what did I do wrong", and "let's go let's do the ten years". O'Keefe was taken to the homicide office and advised of his rights of an arrested person, which he stated he understood. Detectives spoke with O'Keefe who stated he did not know what happened to

ARRESTING OFFICER(S) Det. Whitmarsh/Det. Ruff	PD ---	APPROVED BY LT. NAJLER 5106 11-6-08 @ 1640 HRS	CONNECTING RPT'S. (Type or Event Number) TOR, DCA, OR
--	-----------	--	--

UNOFFICIAL COPY - AUTOMATICALLY GENERATED

CONFIDENTIAL  
000012

LAS VEGAS METROPOLITAN POLICE DEPARTMENT  
CONTINUATION REPORT

IOEvent Number: 001105-0918

Page 2 of 2

Whitmarsh. O'Keefe stated only he and Whitmarsh were in the apartment but he did not know where all the blood came from.

Detectives spoke to Charles and Joyce Toliver, who live directly below O'Keefe. Joyce stated she heard loud thumping noises in the apartment above that began around 2200 hours. The noise continued and eventually woke up Joyce's husband, Charles. Charles used the broom to strike the ceiling in an attempt to have the upstairs neighbors, O'Keefe and Whitmarsh quiet down. When the thumping noise continued, Charles went up to apartment C-35. Charles found the front door of the apartment open and yelled into O'Keefe. O'Keefe called for Charles to "come in and get her, she's dead". Charles entered the apartment and walked to the master bedroom. Charles only saw Whitmarsh and O'Keefe in the apartment. Charles looked into the bedroom and saw O'Keefe standing over the body of Whitmarsh. O'Keefe was attempting to lift Whitmarsh at the waist. Whitmarsh was naked from the waist down and did not appear to be moving. Charles could see blood all over the bed and there was a black handled knife lying on the bed. Charles ran from the room and called the police.

Jimmy Hathcox, who lives in apartment 36, next to O'Keefe and Whitmarsh, heard loud thumping at approximately 2200 hours. Hathcox stated he went outside of his apartment and saw O'Keefe standing outside of his apartment. O'Keefe looked at Hathcox strangely and walked back into his apartment. Hathcox stated the next thing he heard was people yelling and he opened the door and saw Charles Toliver aka "Cookie" and another neighbor, Todd Ambruster, standing in front of O'Keefe's door. The man told Hathcox, "he killed her and there's blood all over the place".

Todd Ambruster stated Charles Toliver, who he knows as "Cookie", came to his door and told him to call the police. Toliver told Todd that he thought the girl in apartment 35 was dead. Todd's girlfriend, Robin Kolecz, called the police and Todd went up to apartment 35. Todd entered the apartment and saw Brian bent over his girlfriend and blood on the bed. O'Keefe looked up and saw Todd and took a swing at him. Todd left the apartment and the police arrived.

Detectives noted a large amount of blood on O'Keefe's clothing and hands, an incised wound on the right index finger and two abrasions on his forehead. O'Keefe also had several long scratch marks on his back at the belt line. O'Keefe was photographed and his clothing was impounded.

O'Keefe was arrested and transported to the Clark County Detention Center, where he was booked for Murder with a Deadly Weapon.

000013



Page 1 of 1

LAS VEGAS METROPOLITAN POLICE DEPARTMENT  
DECLARATION OF ARREST

I.D. #: 1447732

True Name: BRYAN O'KEEFE

Date of Arrest: 11-5-08

Time of Arrest: 2315

OTHER CHARGES RECOMMENDED FOR CONSIDERATION:

THE UNDERSIGNED MAKES THE FOLLOWING DECLARATIONS SUBJECT TO THE PENALTY FOR PERJURY AND SAYS: That I am a peace officer with LVMPD (Department), Clark County, Nevada, being so employed for a period of 20 1/2 years. That I learned the following facts and circumstances which lead me to believe that the above named subject committed (or was committing) the offense of THE ABOVE at the location of THE ABOVE (ADDRESS / CITY / STATE / ZIP) and that the offense occurred at approximately 2301 hours on the 5<sup>TH</sup> day of November, 2008, in the county of ☐ Clark or ☒ City of Las Vegas, NV.

DETAILS FOR PROBABLE CAUSE:

SEE ARREST REPORT

Wherefore, Declarant prays that a finding be made by a magistrate that probable cause exists to hold said person for preliminary hearing (if charges are a felony or gross misdemeanor) or for trial (if charges are a misdemeanor).

Declarant must sign second page with original signature.

Declarant's Signature

M. WILDEMAN

Print Declarant's Name

351b

000014

**JUSTICE COURT, LAS VEGAS TOWNSHIP**  
**CLARK COUNTY, NEVADA**

**PRETRIAL SERVICES INFORMATION SHEET**

<b>CASE #</b>	<b>DEPT #</b>	<b>REQUESTED BY:</b>
08F23348X	JC-9	
<b>NAME:</b>	<b>ID #</b>	
Brian O'Keefe	1447732	
<b>CHARGES:</b>		
MURDER WITH A DEADLY WEAPON		
<b>CURRENT BAIL:</b>		
SIC		

---

**VERIFIED: ADDRESS: NOT INTERVIEWED, , ,**  
**WITH WHOM/HOW LONG: /**

**VERIFIED: EMPLOYMENT STATUS: /**  
**LENGTH:**

**VERIFIED: RELATIVES - LOCAL: NOT LOCAL:**

---

**FELONY/GROSS MISDEMEANOR CONVICTIONS: 05 OH DESERTION**  
**04 NV BURG; 05 NV BATT DV 3RD**  
**MISDEMEANOR CONVICTIONS: 6 (06, 04, 04 BATT DV)**

**FAIL TO APPEAR: 5**

**COMMENTS: ALSO L/C ON PROBATION VIOLATION.**

---

**RECOMMENDATION:**

**DATE: 12/10/2008**

**PRETRIAL SERVICES: Anna Vasquez**

**CONFIDENTIAL**

**000015**



**JUSTICE COURT, LAS VEGAS TOWNSHIP**  
**CLARK COUNTY, NEVADA**

**PRETRIAL SERVICES INFORMATION SHEET**

**CASE #**  
**08F23348X**

**DEPT #**  
**JC-9**

**REQUESTED BY:**

**NAME:**  
**Brian O'Keefe**

**ID #**  
**1447732**

**CHARGES:**  
**MURDER WITH A DEADLY WEAPON**  
**CURRENT BAIL:**  
**NO BAIL**

---

**VERIFIED: ADDRESS: NOT INTERVIEWED,,,**  
**WITH WHOM/HOW LONG: /**

**VERIFIED: EMPLOYMENT STATUS: /**  
**LENGTH:**

**VERIFIED: RELATIVES - LOCAL :** **NOT LOCAL: .**

---

**FELONY/GROSS MISDEMEANOR CONVICTIONS: 05 NV BATT DV 3<sup>RD</sup>; 04 NV BURG;**  
**05 OH DESERTION**

**MISDEMEANOR CONVICTIONS: 6**

**FAIL TO APPEAR: 5**

**COMMENTS: ALSO I/C ON PROBATION VIOLATION**

---

**RECOMMENDATION:**

**DATE: 11/21/2008**

**PRETRIAL SERVICES: Anna Vasquez**

**CONFIDENTIAL**

**000016**

**CONFIDENTIAL**

***JUSTICE COURT, LAS VEGAS TOWNSHIP***  
**CLARK COUNTY, NEVADA**

**PRETRIAL SERVICES INFORMATION SHEET**

**CASE #**  
**08F23348X**

**DEPT # JC9**

**REQUESTED BY:**

**NAME:**  
**Brian O'Keefe**

**ID #**  
**1447732**

**CHARGES:**  
**MURDER WITH A DEADLY WEAPON**  
**CURRENT BAIL: NO BAIL**

---

**VERIFIED: ADDRESS: NOT INTERVIEWED,,,**  
**WITH WHOM/HOW LONG: /**

**VERIFIED: EMPLOYMENT STATUS: /**  
**LENGTH:**

**VERIFIED: RELATIVES - LOCAL: NOT LOCAL:**

---

**FELONY/GROSS MISDEMEANOR CONVICTIONS: 05 NV BATT DV 3<sup>RD</sup>;**  
**04 NV BURG; 05 OH DESERTION**  
**MISDEMEANOR CONVICTIONS: 6**

**FAIL TO APPEAR: 5**

**ALSO IC: PROBATION VIOLATION**

---

**RECOMMENDATION:**

**DATE: 11/09/2008**

**PRETRIAL SERVICES: Cheryl Allen**

**000017**

C250630

FILED

JUSTICE COURT, LAS VEGAS TOWNSHIP

CLARK COUNTY, NEVADA

Dec 17 12 10 PM '08

JUSTICE COURT  
LAS VEGAS, NEVADA  
CASE NO. DBF23348x  
DEPT. NO. 9 DEPUTY

THE STATE OF NEVADA,

Plaintiff,

vs.

BRIAN O'KEEFE,

Defendant.

DATE: \_\_\_\_\_

TIME: \_\_\_\_\_

**EX PARTE APPLICATION AND ORDER TO TRANSPORT**

COMES NOW, Defendant BRIAN O'KEEFE, by and through his attorneys, DAVID M. SCHIECK, Special Public Defender, RANDY PIKE, Deputy Special Public Defender, and PATRICIA A. PALM, Deputy Special Public Defender, and hereby requests this Court Order the Defendant be transported from Clark County Detention Center to the offices of Ron Slay, 1920 S. Maryland Parkway, Las Vegas for a polygraph test.

Counsel for Defendant avers that all of the Detention Center rules, regulations and protocol will be followed in regards to the number of transport officers, the presence of the officers directly outside the secured room used for the polygraph. The secured room will be inspected and approved by corrections officers prior to said examination. The officers shall approve and follow their protocol of securing the inmate at all times both during transportation

1 and during the examination itself to ensure the safety of civilians present at the offices of Mr.  
2 Slay during the time of the appointment.

3 The date of the test is December 29, 2008 at 1:30 p.m. and is expected to last 2 hours.

4 DATED: December 15, 2008

5 SUBMITTED BY:  
6 DAVID M. SCHIECK  
7 SPECIAL PUBLIC DEFENDER

8   
9 RANDY H. PIKE  
10 PATRICIA A. P.A.M.  
11 330 S. Third Street, Ste. 800  
12 Las Vegas, Nevada 89155  
13 (702) 455-6265  
14 Attorneys for Defendant

15 **ORDER TO TRANSPORT**

16 TO: Clark County Detention Center  
17 Fax: 671-3763

18 This matter having come on by Ex Parte Application, the matter having been fully  
19 reviewed, and good cause appearing therefor,


20 IT IS HEREBY ORDERED that the Clark County Detention Center transport Brian  
21 O'Keefe, No. 1447732 to the offices of Ron Slay, 1920 S. Maryland Parkway, Las Vegas,  
22 Nevada for the purpose of a polygraph examination on December 29, 2008, at 1:30 p.m. All  
23 of the Detention Center rules, regulations and protocol are to be followed in regards to the  
24 number of transport officers, the presence of the officers directly outside the secured room  
25 used for the polygraph. The secured room will be inspected and approved by corrections  
26 officers prior to said examination. The officers shall approve and follow their protocol of  
27  
28

1 securing the inmate at all times both during transportation and during the examination itself  
2 to ensure the safety of civilians present at the offices of Mr. Slay during the time of the  
3 appointment.

4 DATED and DONE: December 17, 2009

5  
6 JA  
JUSTICE OF THE PEACE

7 SUBMITTED BY:

8   
RANDY H. PIKE  
PATRICIA A. PALM  
9 330 S. Third Street, Ste. 800  
Las Vegas, Nevada 89155  
10 (702) 455-6265  
Attorneys for Defendant  
11  
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ORIGINAL

FILED

2008 DEC 31 P 3:39

CLERK OF THE COURT

0001  
DAVID SCHIECK  
Special Public Defender  
Nevada Bar No. 0824  
RANDALL H. PIKE  
Assistant Special Public Defender  
Nevada Bar No. 1940  
PATRICIA PALM  
Deputy Special Public Defender  
Nevada Bar No. 6009  
330 S. Third Street,  
Las Vegas, Nevada 89155-2316  
(702) 455-6265  
(702) 455-6273 fax  
rpik@co.clark.nv.us  
palmpa@co.clark.nv.us  
Attorneys for O'KEEFE

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

BRIAN O'KEEFE,

Defendant.

CASE NO. C250630  
DEPT. NO. II

DEFENDANT'S SUBMISSION TO CLARK COUNTY  
DISTRICT ATTORNEY'S DEATH REVIEW COMMITTEE

Date of Hearing: 1/07/09  
Time of Hearing: 1:30 p.m.

COMES NOW, Defendant BRIAN O'KEEFE, by and through his counsel DAVID M. SCHIECK, Special Public Defender, RANDALL H. PIKE, Assistant Special Public Defender, and PATRICIA PALM, Deputy Special Public Defender, and submits the following to the Death Review Committee and moves this Honorable Body to not recommend that a Notice of Intent to Seek Death Penalty be filed in this case.

This submission is based upon the attached Memorandum, the papers and pleadings on file in this case, and any argument deemed appropriate and necessary if allowed

CLERK OF THE COURT

SPECIAL PUBLIC  
DEFENDER

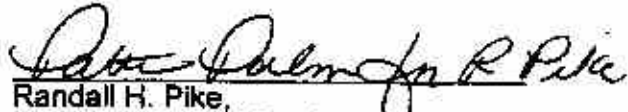
CLARK COUNTY  
NEVADA

000021

1 before the Committee.

2 DATED this 31<sup>st</sup> day of December, 2008.

3 Respectfully submitted

4   
5 Randall H. Pike,  
6 Assistant Special Public Defender  
7 Nevada Bar No. 1940  
8 330 S. Third Street, Second Floor  
9 Las Vegas, NV 89155

10 **MEMORANDUM**

11 In presenting the following facts and arguments, Defendant Brian O'Keefe ("Brian") is  
12 relying upon the facts as contained within the police reports, generally, as well as those  
13 contained within the witnesses' statements. Additionally, Brian will rely upon some of the  
14 testimony offered at the time of the preliminary hearing in this matter. Any reliance upon the  
15 evidence set forth herein does not constitute a concession that any such evidence is  
16 accurate, reliable, or admissible in any judicial proceedings. Nor does such reliance constitute  
17 a waiver of attorney/client privilege.

18 **FACTS**

19 Brian O'Keefe and Victoria Whitmarsh ("Victoria"), the alleged victim in this matter,  
20 enjoyed a fairly long, but tumultuous relationship together. They dated and cohabitated on  
21 and off since 2001, after meeting in a treatment facility. During the relationship, in 2004, Brian  
22 was ultimately convicted of burglary (entry into the couple's joint dwelling with intent to commit  
23 a crime against Victoria). He was given a sentence of probation for that crime, but his  
24 probation was later revoked when convicted of a third offense domestic battery against  
25 Victoria. He went to prison in March 2005. Brian did well in prison and incurred no discipline.  
26 When he was released from prison in March 2007, he initiated a relationship with a woman  
27 named Cheryl Morris. He separated with Ms. Morris several months before the incident so  
28 that Victoria could move into his apartment with him. Ms. Morris testified at the time of the  
preliminary hearing that Victoria voluntarily reentered into a relationship with Brian and began



1 cohabitating with him in his apartment. Victoria had called Ms. Morris several times and  
2 discussed her decision to return to Brian. Victoria's daughter and husband expressed to her  
3 their opposition to that decision; however, Victoria nevertheless made the choice to return to  
4 the man she loved.

5 Brian had completed his parole in March 2008, and at the time of the incident in  
6 November 2008, he was 45 years old. Victoria was 54. On the evening of the incident, the  
7 neighbors who lived below Brian and Victoria's apartment, Mr. and Mrs. Toliver, heard loud  
8 banging noises for close to an hour. Mr. Toliver went upstairs and found Brian holding  
9 Victoria, who was lying dead on the ground. She died of one stab wound to her side. Another  
10 neighbor, Todd Armbruster, entered the apartment and tried to go towards Brian, but Brian  
11 took a swing at Armbruster, and returned to attend to Victoria. Neighbors then called 911.  
12 The police responded and found Brian lying on the floor next to Victoria's dead body, cradling  
13 and stroking her head. Although he was unarmed, his behavior was erratic, and at times he  
14 was incoherent. He did not cooperate with commands to move away from his position of lying  
15 with Victoria's body. After two TAZER shots he was handcuffed, removed from the premises  
16 and taken to the homicide offices. There, he gave a rambling statement indicating that he was  
17 not aware of Victoria's death or its cause.

18 Brian was extremely intoxicated at the time of the incident, having recently relapsed into  
19 his addiction to alcohol. The fact of Brian's intoxication was shown by the preliminary hearing  
20 testimony of Homicide Detective Wildemann and lay witness Todd Armbruster, and is also  
21 evidenced in the video recording of Brian's interview with homicide detectives and the  
22 photographs documenting his arrest. The strong odor of alcohol about Brian's person at the  
23 time of his arrest is also documented in the statement of arresting officer Ballejos. The  
24 defense is not able to show what Brian's blood alcohol level was because law enforcement  
25 did not preserve this evidence by obtaining a test for his breath or blood alcohol level either  
26 before or after the interview.

27 Victoria and Brian were drinking partners and were often seen drinking together on the  
28 patio of the residence where the incident occurred. Neighbors were shocked to learn of the

1 incident because the couple always seemed to be very in love with each other. They had both  
2 been drinking on the date of the incident, and at the time of her death, Victoria's blood alcohol  
3 content was .24. At the preliminary hearing, Medical Examiner Dr. Benjamin testified that the  
4 combination of Victoria's medications, as indicated by her toxicology screen, and alcohol  
5 abuse could cause suicidal, violent or combative behavior by her. Additionally, although  
6 Victoria's body showed multiple bruises, Victoria had Hepatitis C and somewhat advanced  
7 Cirrhosis of the liver, which is known to cause bruising upon slight bumping contact or other  
8 types of pressure to the body that is less than what is normally required for bruising.

9  
10 **PRESENTLY AVAILABLE MITIGATION EVIDENCE**  
11

12 NRS 200.035 indicates that first-degree murder may be mitigated by certain statutory  
13 mitigating circumstances, including, inter alia, that "[t]he murder was committed while the  
14 defendant was under the influence of extreme mental or emotional disturbance," as well as  
15 by "any other mitigating circumstance." Brian O'Keefe submits that at the very least, the  
16 following mitigating circumstances are present:

17 **(1) Brian was under the influence of extreme mental or emotional disturbance.**

18 Brian has a long history of addiction to alcohol. He has, in the past, sought out  
19 treatment for his addiction. Brian has had numerous admissions to hospitals and treatment  
20 centers dating back to 2001, and has repeatedly suffered physical withdrawal symptoms each  
21 time, but has not been strong enough to maintain sobriety. He and Victoria actually met in  
22 2001, when the two of them were undergoing inpatient treatment. Although both had periods  
23 of recovery, they had nonetheless relapsed at the time of the incident in question and were  
24 extremely intoxicated at the time of the incident.

25 Although the defense acknowledges that voluntary intoxication is not a complete  
26 defense, proof of voluntary intoxication may serve as a basis for a verdict less than first-degree  
27 murder. In addition, courts have recognized that extreme intoxication may mitigate a first-  
28 degree murder to the extent that the intoxication indicates the killing was not planned but was

1 a reaction to an emotionally charged confrontation. See Chambers v. State, 113 Nev. 974,  
2 944 P.2d 805 (1997).

3 Additionally, although Brian is awaiting expert evaluations, at the time of his  
4 incarceration, the doctors at Clark County Detention Center determined that he required  
5 medication for his mental anxiety. Initial contact with family historians and others indicates  
6 that Brian may be suffering from PTSD, as a result of his military service, which is addressed  
7 below. He was also underweight at birth and family members report possible birth  
8 complications. According to his siblings, he also has a family history of mental health  
9 disorders, including bipolar disorder, and his alcohol dependency may have resulted from self-  
10 medicating these afflictions.

11 **(2) Brian is a Decorated Veteran of the United State's Military.** Brian voluntarily joined the  
12 United States Army when he was 18 years old, in 1981. He was a paratrooper during this time  
13 and he served on active duty until his Honorable Discharge in 1985. He was decorated during  
14 his service with an Army Service Ribbon, an Army Good Conduct Medal, an Armed Forces  
15 Expedition Medal and a Bronze Star Medal for Valor.

16 **(3) Brian is remorseful.** From the time that Brian was arrested until today, he continues to  
17 be emotionally distraught over the death of Victoria, his partner of several years.

18 **(4) Brian's children will be harmed by the execution of their father.** Brian has three adult  
19 children (ages 19, 21, and 25) and two minor children (ages 8 and 9), and these children will  
20 undoubtedly be adversely affected if their father were executed.

21 **(5) Brian's other family members will be harmed by his execution.** Brian's mother, father,  
22 step-mother and four living siblings care about Brian and will be adversely affected if he is  
23 executed.

24 **(6) Brian maintained gainful employment for a significant part of his life.** After the  
25 military, and prior to succumbing to his alcohol addiction, Brian was steadily employed as a  
26 computer technician. After moving to Nevada in 1996, his employment became sporadic due  
27 to his drinking. Subsequent to his incarceration, however, he undertook study to become a  
28 journeyman, through a construction laborer's union, and was completing that program just

1 prior to the incident.

2 (7) Brian as a minor child was exposed to an inappropriate and transient lifestyle. At  
3 an early age, Brian's father, who was a traveling musician took him and his siblings on the  
4 road, exposing him to an inappropriate environment of bars and adult entertainment clubs and  
5 transient housing arrangements.

6 **TIME CONSTRAINTS ON MITIGATION PRESENTATION**

7 Counsel for Brian O'Keefe has been diligently reviewing both the evidence as well as  
8 the possible existence of mitigators on his behalf. Because of time constraints, this  
9 investigation remains at its early stages; however, the defense feels confident that as other  
10 records are obtained, additional mitigating evidence will become available.

11 **THE NEED FOR ADEQUATE PROPORTIONALITY REVIEW**

12 In order to protect against arbitrariness in capital sentencing, the State of Nevada  
13 should ensure proportionality in capital cases. Because proportionality is better achieved at  
14 the front end rather than the back end, a capital case review committee as it exists within a  
15 prosecutor's office exercises final discretion as to whether the death penalty may be sought.  
16 The Nevada Supreme Court has been loathe to conduct a comparative proportionality review,  
17 in which it compares the death sentence under review with sentences imposed on similarly  
18 situated defendants, during the direct appeal stage of capital cases. Thus, to encourage  
19 transparency and the even application of the death penalty, prosecuting agencies should have  
20 written policies for identifying cases in which to seek the death penalty. Under the current  
21 constraints regarding access to such information, the defense must rely upon the discretion  
22 of the Death Review Committee. The defense requests that this Honorable Body strive to  
23 ensure the proportional application of the death penalty, and recognize that this penalty is not  
24 appropriately sought in this instance.

25 ...

26 ...

27 ...

28

1 **CONCLUSION**

2 For the reasons set forth above, Counsel, on behalf of Brian O'Keefe, asks that this  
3 Honorable Committee determine that this is not an appropriate case to seek death.

4 DATED this 31<sup>st</sup> day of December, 2008.

5  
6 Respectfully submitted:


7 

8 RANDALL H. PIKE  
9 PATRICIA PALM  
10 330 S. Third Street, Suite 800  
11 Las Vegas, NV 89155  
12 Attorneys for O'Keefe  
13  
14

15 **RECEIPT OF COPY**

16  
17 RECEIPT of a copy of the foregoing Submission to Clark County District Attorney's  
18 Death Review Committee is hereby acknowledged this 31 day of December, 2008.

19 DISTRICT ATTORNEY'S OFFICE

20   
21 200 Lewis Ave., 3rd Floor  
22 Las Vegas NV 89155  
23  
24  
25  
26  
27  
28

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 2008-000000  
CLERK J. J. 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



1 Las Vegas, Nevada, December 17, 2008

2 9:00 a.m.

3 \* \* \* \* \*

4 P R O C E E D I N G S

5  
6 THE COURT: State of Nevada versus Bryan  
7 Okeefe, 08F23348X.

8 Mr. Okeefe is present, in custody,  
9 represented by the special public defender's office.

10 This is the time set for preliminary  
11 hearing. Is the defense ready to proceed?

12 MR. PIKE: We are, Your Honor.

13 THE COURT: State?

14 MR. SMITH: Yes, sir.

15 THE COURT: Preliminary matters?

16 MR. PIKE: We would invoke the  
17 exclusionary rule.

18 THE COURT: The exclusionary rule is in  
19 effect on the Okeefe matter. Any witnesses on this  
20 case please remain outside. Who is your first  
21 witness.

22 MR. SMITH: The first witness is Dr.  
23 Benjamin, Dr. Jacquelin Benjamin.

24 THE COURT: I was just handed a copy of  
25 the original amended criminal complaint. Counsel, did



1 you receive an amended criminal complaint?

2 MR. PIKE: We did, Your Honor. It just  
3 adds, identifies the deadly weapon. We have no  
4 objection to it being filed.

5

6 (Whereupon, the witness was duly sworn.)

7

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

10 THE WITNESS: Jacqueline Benjamin, J  
11 a-c-q-u-e-l-i-n-e B -e-n-j-a-m-i-n.

12

13 DIRECT EXAMINATION.

14

15 MR. PIKE: For the purposes of the  
16 preliminary hearing, Your Honor, we are going to  
17 stipulate to the doctor's qualifications, expertise  
18 and that she's testified as an expert and would be  
19 qualified to offer expert opinion; she performed an  
20 autopsy and was able to determine the cause of death,  
21 which was a single stab wound, and the identity of the  
22 deceased was Victoria Whitmarsh.

23 MR. SMITH: Are you also going to  
24 stipulate the manner of death was homicide?

25 MR. PIKE: Yes.

1 THE COURT: Defense is also going to  
2 stipulate that the manner of death was homicide?

3 MR. PIKE: That's correct, Your Honor.

4 THE COURT: Those stipulations will be  
5 noted.

6 MR. SMITH: With that, I have no questions  
7 for the witness. I'll pass the witness.

8 MR. PIKE: That's the fastest direct  
9 testimony the doctor's ever had. I have a few  
10 questions, Your Honor.

11 THE COURT: Please proceed

12

13 CROSS EXAMINATION

14

15 MR. PIKE:

16 Q. Doctor, you had an opportunity to perform the  
17 autopsy in this matter, is that correct?

18 A. That is correct.

19 Q. As I indicated in the stipulation, there was  
20 a single stab wound. Can you demonstrate for the  
21 Court where that was located?

22 A. On the right lateral body wall, at the level  
23 of the nipple.

24 Q. And that went into the body about four and a  
25 quarter inches?

1 A. Approximately.

2 Q. In relationship to the autopsy that was  
3 performed, there were other significant findings  
4 regarding medical condition, is that correct?

5 A. Yes.

6 Q. And that was cirrhosis of the liver?

7 A. Correct.

8 Q. How advanced was that?

9 A. The cirrhosis was fairly advanced. It would  
10 be more described as moderate to advanced stage.

11 Q. In addition to that there was hepatitis C  
12 that was also found?

13 A. On laboratory testing, that is correct.

14 Q. There was also a testing for HIV, which  
15 turned out to be negative?

16 A. That's correct.

17 Q. During the course of the physical  
18 examination, the exterior examination of the body,  
19 there was some bruising that was present; is that  
20 correct?

21 A. That's correct.

22 Q. Can you describe for the Court how cirrhosis  
23 of the liver and hepatitis C would affect bruising or  
24 the manifestation of bruising of the body?

25 A. There are a number of causes of cirrhosis,

1 one is hepatitis C. Another that we commonly see in  
2 our population is alcoholic abuse. The virus or  
3 chemical alcohol can cause damage to the liver, which  
4 results in the liver regenerating with fibrous tissue.  
5 When you develop cirrhosis the liver doesn't function  
6 as it normally does, so it does increase things like  
7 the clotting factors, so you would bruise a lot easier  
8 than a normal individual.

9 Q. And based upon your observations, the  
10 bruising that was manifested on the exterior  
11 examination may have been influenced by the hepatitis  
12 C, or manifested more predominantly as a result of the  
13 cirrhosis of the liver of the patient?

14 A. She would bruise a lot easier.

15 Q. In relationship to the chemical examination  
16 that was performed, it's my understanding there was  
17 blood drawn and request for toxicology and that  
18 revealed the blood alcohol level. Do you recall the  
19 blood alcohol level?

20 A. Yes, point 24 gram percent.

21 Q. That's approximately three times the level of  
22 intoxication, legal level of intoxication?

23 A. Yes.

24 Q. The deceased we are talking about was a  
25 rather petite woman?

1 A. Correct.

2 Q. What was her height and weight, if you  
3 recall?

4 A. She was 65 inches and 108 pounds.

5 Q. For the record, the document you're looking  
6 at is your autopsy report prepared by yourself,  
7 dictated and then transcribed?

8 A. Yes.

9 Q. Also in relationship to that, there was an  
10 indication there was venlafaxine within her system?

11 A. Yes.

12 Q. And that is an antidepressant?

13 A. Correct.

14 Q. Is there a counter indication, or help me  
15 with the word I'm looking for, what would be some  
16 possible adverse side effects from the combination of  
17 an antidepressant with that amount of alcohol?

18 A. Some of the side effects of venlafaxine are  
19 nausea, dizziness, sleepiness and the alcohol is also  
20 a depressant, so the two in combination can cause to  
21 be drowsy.

22 Q. In relation to that, is there some reports in  
23 relationship to the manufacturer of the drug Effexor  
24 indicating there may be easy bruising or bleeding as a  
25 result of taking the anti depressants?

1 A. I don't recall that specifically, I would  
2 have to look that up.

3 Q. I didn't have a chance to talk with you  
4 before court today. Are the effects of this drug  
5 something that you'd be more prepared for if you had a  
6 chance to research it prior to coming in here?

7 A. Yes.

8 Q. And if I indicated there was also a side  
9 effect with some sort of change in personality, such  
10 as agitation, aggravation, suicide or possible  
11 physical aggressiveness you wouldn't have any reason  
12 to doubt that, would you?

13 A. No, I don't. Those are some of the side  
14 effects.

15 MR. PIKE: Thank you. No further  
16 questions.

17

18

19

DIRECT EXAMINATION

20

21 MR. SMITH:

22 Q. Doctor, for the record, do you recall what  
23 date you performed the autopsy on Miss Whitmarsh?

24 A. I do. The date was November 7.

25 Q. November 7, 2008?

1 A. Correct.

2 MR. SMITH: Thank you. No further  
3 questions.

4 MR. PIKE: I have one question.

5 Q. When you are performing an autopsy, normally  
6 you are not able to set an exact time of death; is  
7 that correct?

8 A. That's correct.

9 MR. PIKE: Thank you. Nothing further.

10 THE COURT: Thank you for your time this  
11 morning. You're excused.

12 MR. PIKE: For the record, the State also  
13 has three photographs that they have indicated they  
14 were going to present at the time of the preliminary  
15 hearing. We've reviewed those and have no objection  
16 to them being introduced.

17 MR. SMITH: Judge, at this point I move  
18 for admission of State's Proposed 1, 2 and 3.

19 THE COURT: Motion is granted, 1, 2 and 3  
20 will be admitted.

21 MR. SMITH: For the record, I have what  
22 will be Defendant's Proposed A, B and C. The State  
23 has no objection to those being admitted at this time.

24 THE COURT: You're moving for admission of  
25 A, B and C?



1 MR. PIKE: We do.

2 THE COURT: Motion is granted.

3 MR. SMITH: The State's next witness is  
4 going to be Officer Jeremiah Ballejos.

5  
6 (Whereupon, the witness was duly sworn.)

7  
8 THE CLERK: State your name, for the  
9 record, and spell it.

10 THE WITNESS: Jeremiah Ballejos,  
11 B a-l-l-e-j-o-s, J e-r-e-m-i-a-h.

12  
13 DIRECT EXAMINATION

14  
15 MR. SMITH:

16 Q. Mr. Ballejos, how are you presently employed?

17 A. I'm a police officer with the Las Vegas  
18 Metropolitan Police Department.

19 Q. And how long have you worked in that  
20 capacity?

21 A. Four years.

22 Q. What detail are you presently assigned to?

23 A. Bolden Area Command, Problem Solving Unit.

24 Q. Were you operating in that capacity on  
25 November 5, 2008?

1 A. Yes.

2 Q. Were you dispatched to 5001 El Parque?

3 A. Yes. We assigned ourselves to that call.

4 Q. Did you respond to that address?

5 A. Yes, we did.

6 Q. Why did you respond to that address?

7 A. The details of the call sounded violent.

8 There was either possible suicide or some type of a  
9 stabbing had occurred. There was reports of lots of  
10 blood and there was a C.I.T. officer on the scene.  
11 I'm also a Crises Intervention Team Officer.

12 Q. Explain to us what crises intervention team  
13 does? What are they tasked with doing?

14 A. Just high priority calls where we have active  
15 shooters, somebody who's trying to physically injure  
16 themselves or attempting to commit suicide, hostage  
17 situations, active shooters. We try to get there and  
18 bring the situation under control verbally if we can.

19 Q. Is this something commonly known as a  
20 negotiator?

21 A. Yes.

22 Q. At the 5001 El Parque address, had you  
23 received some information that gave you cause to  
24 believe there was still a dynamic situation at that  
25 residence?

1 A. Yes.

2 Q. When you responded to the residence were you  
3 wearing a uniform?

4 A. No.

5 Q. How were you dressed?

6 A. Plain clothes with black hoodie, jeans, my  
7 hanging badge displayed.

8 Q. Your badge, meaning your identification as a  
9 Metropolitan police officer?

10 A. Yes.

11 Q. Was that clearly displayed upon you arriving  
12 to this address?

13 A. Yes.

14 Q. When you arrived to the address, who else was  
15 with you?

16 A. My sergeant and Officer Sean Taylor.

17 Q. What's your sergeant's name?

18 A. Daniel Newberry.

19 Q. Is he a member of the C.I.T. team?

20 A. I'm not sure.

21 Q. Is officer Taylor a member of the C.I.T.  
22 team?

23 A. No.

24 Q. Was Officer Taylor present at the scene upon  
25 your arrival, or did you guys get there at the same

1 time?

2 A. We were all in the same vehicle.

3 Q. So when you arrived at the scene, tell us  
4 what happens next?

5 A. When I arrived at the scene there's neighbors  
6 standing outside their apartment doors. You go up the  
7 steps along a catwalk and this is where Officer Kahn  
8 is already inside, trying to get access to this person  
9 that was injured, to Victoria.

10 Q. You just said victoria. Would that be  
11 Victoria Whitmarsh?

12 A. Yes.

13 Q. Suffice it to say you did not know her name  
14 at the time?

15 A. No, I did not.

16 Q. You subsequently learned her name?

17 A. Yes, sir.

18 Q. What happens next?

19 A. Because Officer Kahn has already established  
20 contact with Bryan, or Mr. Okeefe, Mr. Okeefe is kind  
21 of barricaded himself or set up a barrier between  
22 Officer Kahn and himself and Victoria, or the victim.  
23 They are in the back bedroom.

24 Q. He, being Bryan Okeefe?

25 A. Yes.

1 Q. Incidentally, do you see Bryan Okeefe present  
2 in court today?

3 MR. PIKE: Stipulate to identity.

4 THE COURT: Thank you.

5 MR. SMITH:

6 Q. You referred to him as Bryan Okeefe. Did you  
7 know his name at this time?

8 A. No, I did not.

9 Q. You subsequently learned his name?

10 A. Yes, sir.

11 Q. Continue, please.

12 A. Officer Kahn is trying to talk to Mr. Okeefe  
13 in the back bedroom, trying to get him to come out,  
14 because the ambulance will not come in until we've  
15 caused the scene to be static, where there's no more  
16 violence or no more dynamic situation going on.

17 Q. No threat of further danger or harm?

18 A. Exactly. So we are trying to ask Mr. Okeefe  
19 to come out of the bedroom. Because at this point we  
20 can't visibly see where he's at. One of the  
21 statements I heard him saying to Officer Kahn is,  
22 "fuck you, you come in here."

23 Based on my experience on the department,  
24 a lot of times when that happens somebody is trying to  
25 get you to give up your -- your position of

1 concealment or protection, they are trying to bait you  
2 in where now you are subject to being shot at. We  
3 just didn't know anything about Mr. Okeefe at the  
4 time.

5 Q. So, suffice it to say there was concern for  
6 officer's safety?

7 A. Yes.

8 Q. As a result of that what happened next?

9 A. Sergeant Newberry ends up moving to a point  
10 just around the door near the kitchen. He does a  
11 quick peek just around the door to get an idea of  
12 where the suspect was in the bedroom.

13 Q. And where are you at?

14 A. Right behind Officer Kahn. We have moved to  
15 the deep south part of the living room. The reason  
16 for that was to try and get a good line of sight or  
17 see as deep in to the bedroom as we could.

18 Q. At this point had you seen inside the  
19 bedroom?

20 A. You could see the bedroom. All I could make  
21 out at that point was the bed. The sheets were soaked  
22 in blood.

23 Q. Officer, for the record, I'm showing you  
24 what's been admitted as State's Exhibit 3. Does that  
25 picture accurately reflect the scene that you just

1 described?

2 A. Yes.

3 Q. Continue, please.

4 A. All we can make out from that position was  
5 the bed. And there was large amounts of blood. So  
6 the victim -- we knew there was a serious injury. So  
7 we -- Sergeant Newberry does a quick peek to kind of  
8 get a position where the suspect is. We stack up,  
9 which is just based on our training, in a four man  
10 element to go into the room.

11 Q. Had you seen any bodies inside the room at  
12 this point?

13 A. No.

14 Q. What happens next, officer?

15 A. As we enter the room, Officer Kahn, followed  
16 by myself, follow by Officer Taylor and I believe  
17 there was a fourth man, I didn't know who it was, I  
18 just knew another officer was behind me. We enter the  
19 room. As we enter into bedroom, I see the victim's  
20 feet showing from outside the edge of the bed.

21 Q. Yes, sir.

22 A. Her body is in a position where she's facing  
23 up.

24 Q. Okay.

25 A. And as we move in with a lethal option and a



1 non-lethal option, which is the electronic control  
2 device which commonly known as the tazer, started  
3 giving him verbal commands.

4 Q. Him being Bryan Okeefe?

5 A. Yes.

6 Q. Does he respond to those verbal commands?

7 A. He starts telling us, "Don't look at her,  
8 don't look at her." He's trying to cover up, starts  
9 tugging at her shirt.

10 Q. What were the verbal commands that you were  
11 giving him?

12 A. Trying, to get up off her and to move away  
13 from her.

14 Q. Had you identified yourselves as officers of  
15 the Las Vegas Metropolitan Police Department?

16 A. Yes, sir. And there was two officers in  
17 standard uniform dress.

18 Q. What happened next?

19 A. He's shouting over us.

20 Q. He, being the defendant?

21 A. Yes, sir. Mr. Okeefe is shouting over the  
22 commands.

23 What I notice when we go in, he's kind of  
24 trying to cover the body from us, won't let us get to  
25 her. And the shouting just continues. We were

1 worried with the amount of blood that we've already  
2 seen if we didn't get to her and get him out so we can  
3 get in the worse she was going to be.

4 Q. Let me ask you this. When you observed the  
5 body of the female, were you able to ascertain if  
6 there were any signs of life, in your training and  
7 experience?

8 A. Her eyes were open, her mouth was open. What  
9 I noticed about her she was lying on her back, head  
10 facing to the west, toes to the east. It didn't look  
11 like she had any other clothing other than a T-shirt.

12 Q. Let me ask you this. When you saw her at  
13 this point did she appear to be deceased?

14 A. I honestly didn't know.

15 Q. Couldn't tell?

16 A. I couldn't tell.

17 Q. Showing you what's been admitted into  
18 evidence as States Exhibit 1. Does that picture  
19 accurately reflect the body of the person that you  
20 just described?

21 A. Yes.

22 Q. What happened next, officer?

23 A. Because we wanted to get help to Victoria, I  
24 saw a moment of opportunity. He was kind of swinging  
25 his arm away from us to keep us at bay, and he exposed

1 his torso.

2 Q. Yes, sir.

3 A. So we used the E.C.D. device with the probes  
4 placement in his torso area to try and get him under  
5 control. The E.C.D. cycles for a five second cycle.

6 Q. Okay.

7 A. He was -- Officer Taylor was able to get one  
8 hand under control and behind his back. That five  
9 second cycle expired so he was still able -- trying to  
10 fight off.

11 Q. He, being the defendant?

12 A. Okeefe was trying to fight off with his right  
13 hand. He was given a warning to comply or there would  
14 be a second cycle.

15 Q. What happened next?

16 A. He did not comply, so there was a second  
17 cycle of the E.C.D. He was brought under power,  
18 handcuffed and removed from the apartment and placed  
19 out on the catwalk.

20 Q. You said there was a second deployment of the  
21 E.C.D. cycle. Did you deploy that cycle?

22 A. Yes, both times.

23 MR. SMITH: Pass the witness, Judge.

24

25

CROSS EXAMINATION

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MS. PALM:

Q. Good morning, officer.

A. Good morning.

Q. When you arrived at the apartment, you said that Officer Kahn was already inside, the C.I.T. officer?

A. Yes.

Q. Were there other officers already inside?

A. Yes.

Q. Would that be Santa Rosa and Fambosa (ph)?

A. Officer Fambosa was there; Santa Rosa, I didn't learn his name until later.

Q. So the three of you came in together, you, Sergeant Newberry and Officer Taylor?

A. Yes.

Q. Joining the two other officers already in there plus Officer Kahn?

A. Yes.

Q. When you entered all the lights were off except for the bedroom light?

A. What drew my attention is the living room was primarily dark. The back bedroom there was a light on.

Q. That would be the bedroom that Mr. Okeefe was

1 ultimately found in?

2 A. Yes.

3 Q. The living room light off, kitchen light off,  
4 do you recall?

5 A. That I don't know.

6 Q. You testified on direct that in your  
7 experience you felt sometimes people who are calling  
8 you into a room are trying to bait you basically?

9 A. Right.

10 Q. But when you eventually looked around the  
11 corner Mr. Okeefe wasn't doing anything to cause  
12 danger to officers, was he?

13 A. No.

14 Q. He didn't have any weapons in his hands?

15 A. No. There was a knife on the bed but no  
16 weapons.

17 Q. And he was a distance from that knife on the  
18 bed, he was actually on the floor, correct?

19 A. Yes.

20 Q. And while you were standing there observing  
21 the bedroom before you made entry, you never saw Mr.  
22 Okeefe walking back and forth across your line of  
23 sight?

24 A. No.

25 Q. When you were hearing this voice, could you

1 tell whether it was stationary or not, when you  
2 couldn't see him?

3 A. Other than it was coming from the bedroom, I  
4 couldn't tell.

5 Q. When you stacked up outside of the bedroom  
6 door, how far away from the actual bedroom door were  
7 you?

8 A. It's not that very big an apartment. Maybe  
9 12, 15 feet.

10 Q. And at that stack-up position you still  
11 couldn't see inside the bedroom?

12 A. Right. The reason that took place as opposed  
13 to just walking in there, it was eerie. Officer Kahn  
14 is trying to talk to him, man, we need to get the  
15 ambulance in there, we need to make sure she's okay,  
16 these guys want to help but you need to come out of  
17 there so they can come in. And it was eerie the way  
18 he said it, not like an urgent fuck you, come in here,  
19 I need help now, it was like, "Fuck you, come in  
20 here."

21 Q. So his voice didn't seem consistent to you  
22 with somebody that --

23 A. It didn't seem as though the offering of help  
24 was wanted by Mr. Okeefe.

25 Q. I saw that you indicate -- do you recall