

ACKNOWLEDGEMENT

ATTEST: Pursuant to Rule 3C(d) of the Nevada Rules of Appellate Procedure, I acknowledge that this is a rough draft transcript, expeditiously prepared, not proofread, corrected, or certified to be an accurate transcript.

Verbatim Digital Reporting, LLC
Littleton, CO 80120
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Julie Lord

JULIE LORD, TRANSCRIBER

7-7-09

DATE

ORIGINAL

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * *

ORIGINAL

THE STATE OF NEVADA,

Plaintiff,

vs.

BRIAN KERRY O'KEEFE,

Defendant.

CASE NO. C-250630

DEPT. NO. 17

TRANSCRIPT OF
PROCEEDINGS

FILED

JUL 10 2009

Ed. A. Smith
CLERK OF COURT

BEFORE THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE

TUESDAY, FEBRUARY 10, 2009

ROUGH DRAFT TRANSCRIPT OF
ALL PENDING MOTIONS

APPEARANCES:

FOR THE PLAINTIFF:

PHILLIP SMITH, ESQ.
Deputy District Attorneys

FOR THE DEFENDANT:

RANDALL H. PIKE, ESQ.
PATRICIA A. PALM, ESQ.
Special Public Defenders

COURT RECORDER:

MICHELLE RAMSEY
District Court

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ROUGH DRAFT TRANSCRIPT

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CLERK OF THE COURT

1
2 LAS VEGAS, NEVADA, TUESDAY, FEBRUARY 10, 2009, 8:05 A.M.
3 THE COURT: C250630, State of Nevada versus Brian
4 O'Keefe
5 MR. PIKE: Thank you very much.
6 THE COURT: Mr. O'Keefe is present in custody.
7 MR. PIKE: Randal Pike (phonetic) and Patricia Palm
8 from the Special Public Defender's Office appearing with Mr.
9 O'Keefe.
10 MR. SMITH: Morning, Judge. Philip Smith on behalf
11 of the state of Nevada.
12 THE COURT: All right, and this is the petition for
13 writ of habeas corpus filed by the defense.
14 MR. PIKE: That's correct, your Honor. It's -- I
15 entitled it a writ of habeas corpus and in the alternative is
16 motion so that we just kind of accomplished all bases with
17 this. It has to do about the failure to preserve specific
18 evidence of intoxication in testimony at the preliminary
19 hearing testified that it was (indiscernible) present sense
20 impression of the officer or the detective that Mr. O'Keefe was
21 intoxicated at the time. Yet, they -- and they had AMR
22 individuals that were available to draw the blood. It's -- I
23 believe that the Court can even take judicial knowledge that
24 there was a nurse on duty at the Clark County Detention Center
25 that can always -- is always available to draw blood for DUIs

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1 as it is recovered and as it is processed in this case, that it
2 only be allowed to process to that extent allowed under the
3 law, and we believe that's our position.
4 THE COURT: All right, thank you. Mr. Smith.
5 MR. SMITH: Judge, it's our position that according
6 to the case law, the State's failure to preserve any evidence,
7 first of all, has to be made in bad faith and/or we have to
8 show prejudice. Here the evidence was, for lack of a better
9 phrase, inside of the defendant's body. The only thing that we
10 had custody of was the defendant himself.
11 The United States Supreme Court has clearly come down
12 and said that the State -- the defendant cannot force the State
13 to obtain certain evidence. In other words, it's not a fourth
14 amendment due process violation that the State did not do a
15 blood draw from him.
16 It would have been different and I would agree with
17 Mr. Pike had the State done a blood draw from him and then lost
18 or destroyed that evidence. But here the State simply never
19 had possession of the evidence because we never had the blood
20 draw.
21 So therefore, in order for Mr. Pike's motion to have
22 any merit, that presumes that the State had an affirmative duty
23 to take his blood and find out his blood alcohol content -- him
24 being the defendant -- so begin with because we never had
25 possession of it. The Supreme Court has clearly said that is

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1 for drug concerns.
2 And in relationship to this, where a specific intent
3 as to a first or second degree murder can be vitiated by even
4 voluntary intoxication, it becomes such an important piece of
5 evidence that the failure to -- the failure of the police to
6 preserve that evidence when it is known to them, and in this
7 case it was known to them, becomes only not excusable, but only
8 remedial by either allowing prosecution solely for secondary
9 murder or a corrective instruction such as it was done in the
10 case versus Sandborn.
11 And in relationship to this, as the interrogation of
12 the detective continues on, he was unaware even of the effect
13 of a (indiscernible) in relationship to a first or second which
14 it is disconcerting to begin with. And also, that there is,
15 according to his testimony, there's no policy to collect that
16 evidence in murder cases. And that creates an institutional
17 problem that can only be remedied by allowing for a second
18 degree offense.
19 Now, it -- as there's the companion motion that the
20 State has filed it at this point in time to allow in evidence
21 of other bad acts. They've requested only one of three felony
22 convictions to be allowed. So our motion may be -- appear a
23 victory if we're one because they could potentially petition
24 the court for an additional criminal adjudication.
25 But it's important that based upon the evidence that

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1 not the case.
2 So for that reason and that reason alone, the
3 defendant's motion must fail. We've never had possession of
4 the defendant's blood alcohol content.
5 Now, in regards to any instruction that the defendant
6 would like to have saying that, you know, because the State
7 didn't, I presume it would be something along the lines of that
8 since the State didn't draw the blood, you can presume x, y or
9 z. That's something that we can certainly argue at trial.
10 But simply because of the State, for whatever reason,
11 did not take a blood and urine -- a blood or urine alcohol test
12 in a case where the allegation is murder with use of a deadly
13 weapon, that doesn't rise to the level of a due process
14 violation that would warrant your Honor penalizing the State
15 saying you can only try him for first -- or excuse me, for
16 second degree murder or lesser of crimes and not first degree
17 murder.
18 THE COURT: How about on the evidence of -- bringing
19 in evidence of other, you know, bad acts?
20 MR. SMITH: Well, Judge, as my motion outlined, I
21 mean, there's a long historic history of domestic violence
22 between this defendant and the named victim in this case.
23 We're not trying to get every single domestic battery that he's
24 ever committed against this victim. We're trying to get one,
25 and that is the battery domestic violence -- the felony

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1 conviction that ultimately led to his previous time in prison.

2 And it's our position that that goes to motive in
3 this case in that Cheryl Morris testified in no uncertain terms
4 that the defendant made comments to her that because the victim
5 testified against him in that case, that that's why he wanted
6 to kill her. That's it. Our motion is strictly limited in its
7 scope. We're not trying to sully (phonetic) his reputation by
8 painting him as a woman beater in general. We simply want to
9 get that one conviction in because it is a crucial part of the
10 State's case in chief.

11 Now, in regards to any of the other domestic violence
12 between the two, you know, that could become important or
13 assault depending on what the defendant got into and
14 testified to. But with regards to our case in chief, we just
15 want to get the one incident in. I feel that the probative
16 value substantially outweighs any prejudicial effect. Sure-
17 it's prejudicial, but as I'm sure your Honor knows, all the
18 evidence that the State has is prejudicial against the
19 defendant. And because of that, we're asking that you grant
20 our motion.

21 THE COURT: All right, thank you. Mr. Pike, if a
22 defendant has glassy eyes and slurs his speech a little bit, is
23 there a requirement that the State or the police department
24 always take a blood draw?

25 MR. PIKE: There should be. We don't have evidence

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1 evidence, and so it has to be not just a presumption, it almost
2 has to be a conclusive fact as was done in Sandborn. The
3 conclusive instruction that at the time that this was done, he
4 was intoxicated.

5 He was -- and the only way to establish the policy
6 that should be in effect, just like the exclusionary rule, if
7 you don't give people their Miranda rights, you can't get those
8 statements in, in cases of this magnitude and of evidence that
9 is so easily and normally and available to be collected, it
10 would be appropriate to as a judicial function to preserve the
11 integrity of these types of charges to allow for or to require
12 that that blood draw occur when it's available because they
13 have exclusive control. He can't just draw blood and say here,
14 you have to do something with it.

15 In reference to the motion to introduce the evidence
16 of the prior bad act in the case in chief. Because there was
17 the testimony that was done at the time of the preliminary
18 hearing and because of the nature of the judgment of
19 conviction, counsel for the State and the defense agreed that
20 an abbreviated Petrichelli hearing and argument of this could be
21 done.

22 This is the concerns I have in relationship to that.
23 Number one, the statements that he's -- that he allegedly made
24 to Cheryl Morris are hearsay. Do they fall within an exception
25 of a statement against penal interest? At that point in time

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1 that it is the policy. However, as an officer of the court I
2 can indicate that Henderson does it, that we have other cases
3 in which an individual that has been arrested for this that has
4 exhibited signs of being under the influence of controlled
5 substances where there have been blood draws that were done by
6 the arresting officers at times contemporaneous to or closely
7 associated with the homicide in which the suspect is being
8 arrested.

9 In this case beyond that, we've got the client, Mr.
10 O'Keefe, who is over and holding Mrs. Witmarsh who is obviously
11 confused, who is unresponsive to officers, who is then shot by
12 a laser gun and given two electronic charges into his body, and
13 he's taken out and handcuffed, and he sat on the outside on the
14 balcony, and he's maintained there until the next morning when
15 he's brought down, interrogated and -- and by the police.

16 They -- the State had complete custody of that
17 exculpatory evidence, that necessary evidence. The blood that
18 was coursing within his veins and that was dissipating rapidly
19 that was there, it was readily available and at minimal expense
20 of the State's ability to do that.

21 Taking blood is so important that even on a
22 misdemeanor DUI, a defendant has a right to request and have
23 his own blood draw that -- at the time that he is arrested for
24 a DUI. He had no right, was never told of any right to do
25 that, and they controlled and maintained that sole piece of

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1 in which they were given, they do not. It was not directed.
2 It was an expression of anger, obviously, if it was indeed said
3 at all. Cheryl Morris, again, will be challenged as an
4 unreliable witness.

5 Nevertheless, based upon that, if it doesn't fit
6 specifically within the exception of the hearsay rule to the --
7 what he is saying to the individual at that time and in
8 reference to his actions at that time, this then becomes so
9 dissociated with the admission of the prior felony that the
10 prejudice grossly outweighs the probative value, and therefore
11 it should not be admitted.

12 Now, again, as Mr. Smith correctly pointed out, if
13 Mr. O'Keefe does take the stand, then the prior felony
14 convictions, of course, are available for impeachment purposes.
15 But not getting into statements that are allegedly said to an
16 unreliable third party.

17 THE COURT: On the issue of prior bad acts, I want to
18 hear more on that, so I'm going to schedule a Petrichelli
19 hearing. Whether or not the State meets their burden, this
20 Court has not decided yet whether it's going to come in, okay,
21 on the relevancy issue and the hearsay issue. But we'll go
22 ahead and set a hearing on that.

23 On the issue of the loss or destruction of the
24 evidence, I think the cases that have been cited apply more to
25 where the law enforcement actually retrieved -- has kept, has

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1 actual custody of the evidence. In this case the defendant's
2 not precluded from presenting evidence of his intoxication, but
3 I don't find that the State or the law enforcement acted in bad
4 faith.

5 And any prejudice here can be remedied by other
6 testimony stating his condition. And so that -- I know
7 (Indiscernible) has a petition for writ of habeas
8 corpus alternative to preclude the prosecutor from seeking
9 first degree murder charge. I'm going to deny that motion, and
10 then we'll have the hearing on the following day. Okay.
11 Before we set that, I see the trial's coming up March 16th. I
12 just want to double check right now, is all the evidence been
13 turned over? Is there any issues, anything missing, DNA?
14 Because I don't like people coming in -- I'm not saying any of
15 you have done this.

16 MR. PIKE: Right.

17 THE COURT: I just don't want to come into calendar
18 call and say oh, we're missing some photos or we're missing a
19 disk or were missing a test.

20 MR. PIKE: In relationship to that, there are two
21 housekeeping matters that we have. The State has prepared an
22 amended information. I've been provided a copy of that. That
23 can be filed without objection by the defense.

24 THE COURT: All right, that will be filed, then?

25 MR. PIKE: In -- okay.

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1 THE COURT: -- Mr. Pike?
2 MR. PIKE: If I may approach the bench?
3 THE COURT: Yes. Mr. Smith, you've reviewed the
4 order?

5 MR. SMITH: I have, Judge, and I signed it.

6 THE COURT: All right.

7 MR. PIKE: Thank you.

8 THE COURT: All right, if there's any other issues on
9 discovery, please immediately put them back on calendar.

10 MR. PIKE: Thank you.

11 THE CLERK: Do you need a Petrichelli hearing?

12 THE COURT: Yes.

13 THE CLERK: Held February 26th at 10:00 a.m.

14 MR. SMITH: That sounds good.

15 MR. PIKE: That will be fine, thank you.

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1 MR. SMITH: And just for the record, Judge, the
2 minute information simply fixes some (Indiscernible) errors
3 that were made upon the initial filing.

4 THE COURT: All right.

5 MR. PIKE: That's correct. And I didn't think it was
6 necessary to have a motion brought. In addition to that, there
7 was some medical records that we're going to (Indiscernible) by
8 the defense. Under new HIPAA rule requirements, we would
9 normally -- we require an order of the court. I advised the
10 State as to the records I was looking for and prepared a
11 stipulation and order in relationship to obtaining an order to
12 get those medical records.

13 I'll provide a copy to the State. Before they may be
14 used in court, I will appropriately notify the State if I
15 believe that I can use them and present something prior to
16 calendar call, but --

17 THE COURT: Do you have the order?

18 MR. PIKE: -- other than that, we -- there is only
19 one piece of evidence that is still being processed and that is
20 the knife, and I believe that that's being processed for DNA
21 and finger presents. The State doesn't have that. We've met
22 with the State to make sure that we've coordinated and we have
23 all evidence today.

24 THE COURT: All right, do you have your order --

25 MR. PIKE: I do.

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Julie Lord

JULIE LORD, TRANSCRIBER

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DATE

ORIGINAL

DISTRICT COURT
CLARK COUNTY, NEVADA

ORIGINAL

THE STATE OF NEVADA,

Plaintiff,

vs.

BRIAN KERRY O'KEEFE,

Defendant.

CASE NO. C-250630

DEPT. NO. 17

TRANSCRIPT OF
PROCEEDINGS

FILED

JUL 10 2009

CHIEF
CLERK OF COURT

BEFORE THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE

TUESDAY, JANUARY 20, 2009

ROUGH DRAFT TRANSCRIPT OF
ENTRY OF PLEA/TRIAL SETTING

APPEARANCES:

FOR THE PLAINTIFF:

PHILLIP SMITH, ESQ.
Deputy District Attorneys

FOR THE DEFENDANT:

RANDALL H. PIKE, ESQ.
PATRICIA A. PALM, ESQ.
Special Public Defenders

COURT RECORDER:

MICHELLE RAMSEY
District Court

TRANSCRIPTION BY:

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CLERK OF THE COURT

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1 LAS VEGAS, NEVADA, TUESDAY, JANUARY 20, 2009, 8:30 A.M.
 2 THE MARSHAL: We'll recall page 9, O'Keefe.
 3 THE COURT: The O'Keefe matter.
 4 THE MARSHAL: Yes, sir.
 5 THE COURT: All right, this is C250630. State of
 6 Nevada versus Brian O'Keefe. Mr. O'Keefe is present and in
 7 custody with counsel.
 8 MR. SMITH: Morning, Judge. Philip Smith on behalf
 9 of the State.
 10 THE COURT: All right.
 11 MS. PALM: Trisha Palm and Mr. Pike -
 12 THE COURT: I'm sorry -
 13 MS. PALM: - on behalf of Mr. O'Keefe.
 14 THE COURT: Yes. And we have his entry of plea or
 15 trial setting.
 16 MS. PALM: It's both, your Honor. And we've received
 17 a copy of information. We'll waive its reading. Mr. O'Keefe
 18 is going to be pleading not guilty, and he wants to invoke his
 19 right to a speedy trial.
 20 THE COURT: All right. Just for the record, sir,
 21 you've been provided with a copy of the information in this
 22 case charging you with murder with use of a deadly weapon?
 23 THE DEFENDANT: Not the information, your Honor, not
 24 yet. I have a copy of the complaint, your Honor.
 25 THE COURT: You have a copy of the information?

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1 MR. PIKE: I imagine it will take three to four days.
 2 MR. SMITH: That sounds about right.
 3 THE COURT: Okay. Not a death penalty case?
 4 MR. SMITH: No.
 5 MS. PALM: No.
 6 THE COURT: Okay.
 7 THE CLERK: So your calendar call will be March 10th
 8 at 8:00 a.m., with a trial date of March 16th at 10:00 a.m.
 9 MS. PALM: Thank you.
 10 MR. SMITH: Thank you.
 11 THE COURT: Does counsel (indiscernible) priority to,
 12 you know, murder and sexual assault case, and if there's any
 13 issue of discovery, please resolve those as soon as possible.
 14 If you're missing something, please put a motion on the
 15 calendar immediately, and we'll order -
 16 MS. PALM: We will.
 17 THE COURT: - any missing discovery.
 18 MS. PALM: Thank you.
 19 MR. SMITH: Thank you, sir.
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1 MS. PALM: We do have a copy of the information.
 2 MR. PIKE: And it is the same as the complaint that
 3 was filed in justice court. We went over that with our client.
 4 It just shows one count of open murder and a list of witnesses.
 5 THE COURT: And sir, you waive the reading of the
 6 information as well as the list of witness?
 7 THE DEFENDANT: (Indiscernible).
 8 THE COURT: Although your attorney said that. I just
 9 wanted to ask you on this charge.
 10 THE DEFENDANT: Yes, your Honor. Thank you for
 11 (indiscernible).
 12 THE COURT: Okay. And how do you plead to murder
 13 with use of a deadly weapon, guilty or not guilty.
 14 THE DEFENDANT: Not guilty, your Honor.
 15 THE COURT: And so he waives his right to a speedy
 16 trial; is that correct?
 17 MS. PALM: No, he's invoking, your Honor.
 18 THE COURT: Oh, invoking it, okay.
 19 MR. SMITH: And Judge, for the record, the State
 20 would also invoke.
 21 THE COURT: All right. Hopefully our calendar will
 22 get within the 60 days.
 23 THE CLERK: Okay, your calendar call will be March
 24 10th.
 25 THE COURT: How long is this case scheduled to go?

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 ROUGH DRAFT TRANSCRIPT

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DISTRICT COURT
CLARK COUNTY, NEVADA

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COURT

THE STATE OF NEVADA,

Plaintiff,

vs.

BRIAN KERRY O'KEEFE,

Defendant.

CASE NO. C-250630

DEPT. NO. 17

TRANSCRIPT OF
PROCEEDINGS

BEFORE THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE

FRIDAY, MARCH 20, 2009

ROUGH DRAFT TRANSCRIPT OF
JURY TRIAL - DAY 5

APPEARANCES:

FOR THE PLAINTIFF:

PHILLIP SMITH, ESQ.
STEPHANIE GRAHAM, ESQ.
Deputy District Attorneys

FOR THE DEFENDANT:

RANDALL H. PIKE, ESQ.
PATRICIA A. PALM, ESQ.
Special Public Defenders

COURT RECORDER:

MICHELLE RAMSEY
District Court

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CLERK OF THE COURT

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1 LAS VEGAS, NEVADA, FRIDAY, MARCH 20, 2009, 7:59 A.M.
2 (Outside the presence of the jury)

3 THE MARSHAL: Department 17 of the Eighth Judicial
4 District is now in session. The Honorable Judge Michael P
5 Villani presiding. Please be seated, remain in order. Make
6 sure your cell phones are turned off, please.

7 THE COURT: Let the record reflect we're outside the
8 presence of the jury panel. Mr. Smith, where's your
9 co-counsel?

10 MR. SMITH: Judge, I'm ready to proceed without her.

11 THE COURT: All right.

12 MR. SMITH: She's going to be here. She's late.

13 THE COURT: All right.

14 MR. SMITH: Apparently she was on the phone with her
15 granddaughter while her granddaughter was having the baby, and
16 she's running late, so --

17 THE COURT: All right.

18 MR. SMITH: I didn't go in detail.

19 THE COURT: Okay.

20 MR. SMITH: Okay.

21 THE COURT: I received the supplement points and
22 authorities on the issue of the self-defense issue. The
23 defense wants to either admit into evidence or have Mr. O'Keefe
24 testify regarding an October 2001 admission in Monte Vista
25 Hospital, and the following was highlighted for me by defense

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1 Past history of heavy alcohol use. History of pain medication
2 abuse.

3 There's an admission at Southern Nevada Adult Mental
4 Health in October '07. And the record show that in October --
5 I'm assuming referring to October '07 -- that the victim took
6 an overdose of pills and another apparent suicide -- attempt
7 suicide. And then there was a situation two or three days
8 prior to the incident in question at their residence that the
9 victim came after Mr. O'Keefe with -- is it knife or scissors?
10 Was it a knife?

11 MS. PALM: Knife.

12 THE COURT: Okay. And so defense wants to bring in
13 the medical records release those situations of the prior
14 attempt suicide, self-mutilation, her various mental health
15 counseling and diagnosis. Most recent case that I've been
16 referred to is Daniel v. State, 119, 498, 2003. It does
17 address the decision in Petty (phonetic). It says here and at
18 the admission of the victim's specific acts regarding --
19 regardless of its source is within the sound discretion of the
20 court.

21 It's limited to the purpose of establishing what the
22 defendant believed about the character of the victim. It
23 further states that when a defendant claims self-defense and
24 knew of relevant specific acts by a victim, evidence of the
25 acts can be presented through the defendant's own testimony,

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1 counsel:

2 In October '01, very cut her -- both of her wrists
3 with a knife, and she then she had reported of her fourth
4 suicide attempt and also it was information that she was on
5 numerous medications. She was diagnosed with major depression,
6 panic disorder, agoraphobia.

7 And in 2002 she was again admitted to Monte Vista
8 Hospital. She was taking three drugs, Xanax, Loraz,
9 Oxycotton. She had some blacking out episodes. She wasn't
10 functioning properly at work. She was diagnosed to having
11 severe anxiety and depression. She was hospitalized -- talk
12 about her hospitalization of '01. And it also talks about that
13 she was continued dependents on opiates, Xanax and major
14 depression. And that was again, from '01.

15 '06, Monte Vista admission, and I guess this was
16 during Mr. O'Keefe's incarceration, but my understanding is
17 that the victim had confided in Mr. O'Keefe --

18 MS. PALM: That's correct.

19 THE COURT: -- and provided him with this
20 information. And talked about again, her attempt suicide,
21 self-mutilation. There's drug abuse, alcohol abuse, and her
22 plan as of September '06 was anger management, therapy or
23 counseling sessions. Diagnosed that she had racing thoughts,
24 mood swings since 2000. Again, refers to suicide attempt.
25 Attempt, excuse me. History of high moods and anger problems.

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1 through cross-examination of a surviving victim and through
2 extrinsic proof. And I don't think there's any real
3 disagreement with that. Both parties cite Daniel or discuss
4 that. Both parties talk about Petty. Is there anything
5 further to add, Ms. Palm, to your brief?

6 MS. PALM: Just for the Court's information that --

7 THE COURT: These will be part -- the briefs or the
8 supplemental information will be made part of the record.

9 MS. PALM: Okay. And we were going to provide a
10 formatted clean copy to file today also. But just to clarify,

11 we also want to admit her medical records as extrinsic
12 evidence. I think that we're entitled to under Daniels and
13 Petty to corroborate his testimony because as Daniels notes, a
14 defendant's testimony is often viewed as self-serving, and he's
15 entitled to corroborate that with other extrinsic evidence.

16 And we don't have an authenticity problem. The DA
17 agreed to stipulate to the authenticity of records if we had a
18 foundation for them. And we did -- we did not want to submit
19 the medical records from the 2007 admission because as to those
20 medical records, they contained prejudicial prior bad acts of
21 Mr. O'Keefe. And so we wanted to admit medical records from
22 2001, 2002, and 2006. And we submitted those as our Proposed
23 Exhibit B.

24 And then finally, the State has introduced evidence
25 of Mrs. Witmarsh's peaceful character. They did that through

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1 their witness, Ms. Morris, who testified that Mr. O'Keefe said
2 that she was submissive. I think they intended to show the
3 jury that she was submissive and a peaceful person, and we're
4 allowed to impeach that with extrinsic proof. That would be
5 all I add to that.

6 THE COURT: Mr. Smith.

7 MR. SMITH: Judge, following up on the last thing Ms.
8 Palm said, we introduced evidence that Mr. O'Keefe said that
9 she was submissive to show Mr. O'Keefe's state of mind with
10 regards to his vision of her character. If it also happens to
11 infer that she was, in fact, submissive, well, then, so be it.
12 But we certainly weren't going there. We were just trying to
13 go to show what Mr. O'Keefe thought about her.

14 With regards to the proffer testimony that the
15 defendant is going to say that Ms. Witmarsh tried to tackle him
16 with a knife two nights before the incident, the State
17 conceives that that is admissible evidence. But we maintain
18 that evidence that she committed suicide -- well, not
19 committed, but attempt to commit suicide is not contemplated
20 under Daniel or Petty because it is not a specific act of
21 violence.

22 I mean, people can commit suicide not because they're
23 anger, but only because they're depressed or sad or no longer
24 see a reason for living. It's not a violent act. It's
25 contemplated. With regards to extrinsic proof, the proof that

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1 the Court's ruling. Anything else we need to address?

2 MR. SMITH: I just that you admonish the defendant,
3 Judge, because he seems really eager to state these things.

4 THE COURT: Well, just --

5 MR. SMITH: He's already blurted out that she called
6 him and told him she wanted to kill herself, so --

7 THE COURT: Well, Mr. O'Keefe as your attorney had
8 mentioned a couple times during your testimony, you know,
9 please listen very carefully to the question and, you know,
10 just listen -- I mean, she's leading you where she wants you to
11 go. I don't mean leading questions, but she's asking questions
12 of what she feels would be, you know, your theory of the case,
13 and you'd be wise to follow her advice and direction in that
14 regard.

15 It never looks good for a witness or for a party
16 where the court has to admonish a witness on the stand in front
17 of a jury. I'm not doing it to embarrass you or to hurt your
18 case, but if there's an objection, I'm going to rule, you know,
19 accordingly. And also, if I need to, you know, advise the jury
20 that to disregard your testimony, again, it's just not
21 something that looks good for a witness. Okay, do you
22 understand that, sir?

23 THE DEFENDANT: Yes, your Honor.

24 THE COURT: All right. And as your testimony went on
25 yesterday afternoon, at parts got lower and lower and lower.

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1 we were talking about in these two cases or that the court was
2 addressing in those two cases was actual other witnesses that
3 had been attacked by the same defendant. That was to show
4 corroboration. Not that -- I mean, it's kind of -- it's not
5 analogous to this current situation where they want to get in
6 evidence that she tried to kill herself and/or that she was in
7 anger management classes.

8 I mean, it's too attenuated for one. And it's -- we
9 submit it's not contemplated by the case law.

10 THE COURT: All right. The Court has reviewed all
11 the cases cited by the parties and their supplemental briefs in
12 this matter. It's -- both parties agree that in a claim of
13 self-defense that specific acts of violence by the victim would
14 be admissible. The Court does not find her attempted suicide
15 to be a specific act of violence.

16 So the Court's ruling that her records from '01 or
17 those situations from '01, '02 and '06 as well as '07 are not
18 coming in. The defense can -- Mr. O'Keefe can testify that two
19 or three days prior to the incident that the victim, I guess,
20 came at him with a knife or -- I'm sorry, I know you just told
21 me. Knife or scissors at their residence. So he'll be allowed
22 to testify in that regard.

23 But as far as also the fact that she had in the past
24 was going to therapy classes for anger management is not a
25 specific act as identified in Daniel or Petty, and so that's

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1 And again, it just looks better -- I mean, I don't want to keep
2 reminding you, and I know your attorney was helping to remind
3 you to raise your voice. I know it's a emotional situation,
4 but the 12 individuals, you know, to your right need to hear
5 your testimony, you know, hear your side of the story, and if
6 we have to keep asking you to raise your voice, it interferes
7 with their evaluation of your testimony. That's to help you,
8 that's why I'm saying that. Just please raise your voice so
9 they can hear you. All right?

10 THE DEFENDANT: I will do so, your Honor.

11 THE COURT: Okay. Anything else on this issue?
12 Anything else?

13 MR. PIKE: Just in reference to the understanding of
14 defense counsel and our obligation in presenting testimony.
15 Again, the Court has cautioned about -- the defendant about
16 blaring out any testimony that's been disallowed. If that
17 occurs, it's my understanding that at that point in time or if
18 there's any indication to us that testimony that may be
19 unsupportable or patently untrue, that at that point in time we
20 have an obligation to discontinue asking questions altogether.

21 And that would surely impinge the defendant's ability
22 to present his entire story because we would have to stop at
23 that point in time and just discontinue asking questions, so I
24 explained that to him again last night. I went over and went
25 over the testimony with him while Ms. Palm was working on her

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1 brief that was -- went to the Court.

2 But that is always a cautionary portion, and we
3 didn't really address that during the canvassing of the client,
4 but he controls how long his testimony runs, and we have
5 certain restrictions on what we can and how far we can go with
6 testimony. Thank you.

7 THE COURT: Do you have any questions in that regard,
8 Mr. O'Keefe, because I'm not going to answer those onto
9 something that you would do in private with your attorney, but
10 you understand what he just said?

11 THE DEFENDANT: Yes, your Honor.

12 THE COURT: Okay. Like I said, I don't want you to
13 hurt your case.

14 THE DEFENDANT: I think damage has already been done,
15 your Honor.

16 THE COURT: Well, that's fine, but if you believe
17 that, that's fine, but you don't want to make it worse, all
18 right.

19 THE DEFENDANT: Yes, sir, your Honor.

20 THE COURT: Okay.

21 MS. PALM: Your Honor, I have one additional thing.
22 I just wanted to inform the Court that I have been on
23 antibiotics for treatment of an ear infection since last Friday
24 and I have a bulging eardrum on one side. I have not
25 intentionally, as Ms. Graham accused me of yesterday, been

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1 believe, recalling Dr. Benjamin to the stand. We do not have a
2 rebuttal for Dr. Benjamin's testimony. I would not be
3 recalling Dr. Christensen, and I think absent any other
4 witnesses --

5 MR. SMITH: The only potential snag is that Dr.
6 Benjamin is performing an autopsy this morning, and so she
7 can't be here number 1:00 o'clock. I will represent that her
8 testimony is going to be really short. I'll have it now to
9 like five or six questions, but that's the earliest she can be
10 here because she has to cut somebody this morning. But I
11 anticipate --

12 THE COURT: How many other witnesses --

13 MR. SMITH: That's it.

14 THE COURT: Oh, you're just going to have one --

15 MR. SMITH: Just Dr. Benjamin.

16 THE COURT: -- rebuttal?

17 MR. SMITH: That's it. So I anticipate if we settle
18 jury instructions this morning and we get done with the
19 defendant, we can take, you know, a longer break, come back at
20 1:00, put her on the stand, and then put this thing to bed.

21 THE COURT: Okay.

22 MR. PIKE: And if we can advise the jury that there
23 is just that one short witness --

24 MR. SMITH: Yeah, I'm sure they --

25 MR. PIKE: -- they'll get it early this morning.

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1 trying to speak loud at the bench. When the white noise is on,
2 I can't hear up there, and so when you remind me, I try to
3 lower the volume, but it's -- actually I have a hearing issue
4 going on right now.

5 Mr. Pike just inched that if I come around to this
6 side, the white noise is not so bad, and I will try to do that
7 for bench conferences in the future. But I just want the Court
8 to know I'm not intentionally trying to make the jury hear
9 anything I say.

10 THE COURT: I appreciate that, and I didn't -- I did
11 not interpret that you were trying to do that intentionally.

12 MR. SMITH: Neither did I.

13 MS. PALM: Thank you.

14 THE COURT: Okay. Anything else on --

15 MR. PIKE: No.

16 THE COURT: Anything else?

17 MR. SMITH: No.

18 THE COURT: Now, we do -- I'm just finishing up some
19 of the review on the jury instructions so we can -- now, the
20 jury's coming at 9:30, is that correct?

21 THE CLERK: Yes.

22 THE COURT: All right, so we have about 15, 20
23 minutes and I'll meet with counsel again and --

24 MR. PIKE: I think that we should be able to finish
25 up today. Mr. O'Keefe is our last witness. They anticipate, I

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1 MR. SMITH: Yeah, I agree.

2 MR. PIKE: Then they have some confirmation as to --

3 MR. SMITH: And they have some idea --

4 MR. PIKE: -- the time frame.

5 MR. SMITH: Exactly.

6 MR. PIKE: And they've alleviate their anxiety.

7 MR. SMITH: I agree. And you can -- and, in fact, if
8 you want to just ask me about the witness, and they can hear me
9 say we have one witness that's going to be short.

10 THE COURT: Okay.

11 MR. SMITH: We can do it that way.

12 MR. PIKE: And if he wants to make a representation
13 that it's Dr. Benjamin, she's in the middle of an autopsy,
14 otherwise she'd be here earlier --

15 MR. SMITH: Right. I'll --

16 MR. PIKE: -- that's fine, too.

17 MR. SMITH: -- put that on the record. Okay, great.

18 MR. PIKE: In front of the jury, I --

19 MR. SMITH: That's great.

20 MR. PIKE: -- that -- I just want -- they've been
21 nervous --

22 MR. SMITH: Yeah.

23 MR. PIKE: -- they've been anxious.

24 MR. SMITH: We don't want them pissed.

25 MR. PIKE: So we want them to be able to focus when

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1 they deliberate.

2 THE COURT: All right. Mr. Pike, I do know -- like I
3 said, I'm judgment finalizing, putting all the instructions
4 together, yours and theirs that match up and some differences.
5 But there was one of your instructions that said there was a
6 irrebuttable presumption that Mr. O'Keefe was intoxicated.

7 MR. PIKE: That's correct, your Honor. And that --

8 THE COURT: I wasn't quite clear where the authority
9 was for that.

10 MR. PIKE: Well, if you look in Sandborn, I took the
11 Sandborn opinion out, and I specifically marked that paragraph
12 with a post-it before I sent the book back. In Sandborn there
13 was a failure to collect, a failure to test and when the
14 supreme court reversed it, they sent it back with instructions
15 that because that was not done, that they ordered an
16 instruction that said you are -- there is an irrebuttable
17 presumption that would have been favorable for the defense.
18 Fortunately, Mr. Sandborn -- I did the post conviction on it,
19 and then Mr. Sheek (phonetic) got the retrial after we got the
20 instruction, and he won it. But in reference to that, when in
21 circumstances such as this, that's where that comes from and so
22 I specifically marked it.

23 THE COURT: All right. I'll review that. Okay, and
24 like I said, I'll be back in about 15, 20 minutes, and --

25 MR. PIKE: Okay.

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1 THE CLERK: Go ahead and have a seat.

2 THE COURT: All right. Okay. All right. Go ahead,
3 Ms. Palm.

4 MS. PALM: Thank you.

5 DIRECT EXAMINATION (RESUMED)

6 BY MS. PALM:

7 Q Brian, yesterday when we left off, we had discussed
8 your background, and so I want to take you up to November 2008,
9 the beginning of November 2008. Were you facing any unusual
10 stressors at that time financially?

11 A Yes, me'um, I was.

12 Q What were they?

13 A I was behind a little bit in my rent being out of
14 work, and my car payment was a couple payments behind. I had
15 spent -- well --

16 Q Was Victoria facing any additional stressors?

17 A Yes, she was.

18 Q And what were they?

19 A Well, she had --

20 MR. SMITH: Judge, I'm going to object because it
21 calls for speculation as to what Victoria was suffering.

22 MS. PALM: Okay, I'm talking about --

23 THE COURT: Sustained.

24 MS. PALM: -- her financial condition.

25 BY MS. PALM:

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1 THE COURT: Okay.

2 MR. PIKE: Thank you.

3 (Court recessed at 8:15:17 p.m. until 9:39:02 a.m.)

4 (In the presence of the jury)

5 THE MARSHAL: -- cell phones are turned off, please.

6 THE COURT: Good morning, ladies and gentlemen. I'm
7 going to advise you of our schedule for today. We're going to
8 complete the testimony of Mr. O'Keefe, and hopefully this
9 morning, and the State may be calling one rebuttal witness, and
10 that witness cannot be here until 1:30. Immediately after that
11 witness, I believe at --

12 MR. SMITH: 1:00 o'clock.

13 THE COURT: 1:00 o'clock. Okay, 1:00 o'clock.

14 Immediately after that witness, we will -- I will read you the
15 jury instructions and closing arguments will commence, okay.
16 We can tell you that counsel and myself, we've been here since
17 8:00 o'clock this morning resolving a lot of legal issues as
18 well as resolving the jury instructions because we want to
19 minimize your downtime today, so we just want to today as
20 smooth as possible. All right, why don't we -- since we've had
21 evening recess, why don't you swear in Mr. O'Keefe today.

22 THE CLERK: Please stand. Raise your right hand.

23 BRIAN KERRY O'KEEFE, DEFENDANT'S WITNESS, SWOR

24 THE CLERK: Please be seated.

25 THE WITNESS: Thank you.

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1 Q Were you aware of her financial condition?

2 THE COURT: Okay, I'm sustaining the objection but
3 I'm going to allow that question.

4 MS. PALM: Thank you.

5 THE COURT: Yes or no, sir?

6 THE WITNESS: Yes, I -- yes.

7 BY MS. PALM:

8 Q Okay. And what was her financial situation?

9 A She had no employment. She had unemployment and she
10 had one week left on it. She was highly, you know, concerned
11 about that trying to get an extension, and they told her she
12 was more than likely going to be denied because there was no
13 money available.

14 Q Okay. Now, let me take you to the date of her
15 birthday. What was her birthday? What date was that?

16 A November -- November 2nd, Sunday.

17 Q Okay. What was Victoria's behavior like -- just her
18 behavior -- on November 2nd?

19 MR. SMITH: Objection to the form of the question.
20 Judge. Why is her behavior on November 2nd, 2008 relevant?

21 THE COURT: If you're getting to that situation that
22 we -- that's allowable, why don't you just get straight into
23 that.

24 MS. PALM: Okay.

25 BY MS. PALM:

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1 Q Did anything unusual startling happening on November
2 2nd, 2008?

3 A Yes, it did.

4 Q And what happened?

5 A Later in the evening Victoria had been drinking some
6 wine, and, you know, I realized that I wasn't drinking, which,
7 you know, I wanted to, but, you know, I didn't, and --

8 Q Let me stop you for a second. Had you completed your
9 MINDS counseling at that time?

10 A Yes.

11 Q And you were still dry?

12 A Yes. Two days before on the 31st. Friday was the
13 last night.

14 Q Okay. So Victoria's drinking, and what happens?

15 A Later in the evening she's cooking, and I passed out
16 on the couch. Was watching TV, just, you know, letting her do
17 her own thing. Everything was -- seemed to be okay, and her --
18 can I say? I don't --

19 Q Well --

20 A She wasn't acting with her medication. She was a
21 little -- it wasn't going good with the wine, and I'm asleep,
22 and she's cooking, and she comes over and is telling me to get
23 up, and I'm asleep. And she had this same knife in her hand,
24 and --

25 Q What was she doing with the knife, Brian?

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1 A Yes, I did.

2 Q What was going on in your home? What were you doing
3 when you got up?

4 A We spent the whole night on the couch watching the
5 election until wee hours of the morning. She had been drinking
6 a little bit. I didn't have a problem. I was excited. You
7 know, I wanted to see. I'm sure a lot of people did, and she
8 retired maybe about 1:00. I was up until like 3:30 on the
9 couch. It was still made up, as you seen, from the night
10 before we were on it.

11 Q Tell me about your -- the daily events after you both
12 woke up. What were you doing?

13 A She had started acted up a little bit, and I
14 basically convinced her just to go bed. To let me watch TV.
15 She come out in the morning, got up. She was a little
16 embarrassed. Goes into the kitchen to make something to eat.
17 I'm up already on the couch trying to make some phone calls.
18 She slept in until about probably about 10:00.

19 And I had done been up some format, coffee. I'm an
20 early riser. I get up early, and basically, you know, what are
21 we going to do. And I informed her Obama had won, and, you
22 know.

23 Q Okay. Let's just go to what did you do in
24 particular. Did you make any phone calls that day?

25 A I made 30 calls to prospective employers. Tracy

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1 A She was pointing it at me, and I mean, I didn't know
2 -- she was pointing at me yelling, arguing. I mean, you know,
3 not screaming crazily, but she was severely agitated. The
4 medication wasn't working. It was a new medication.

5 MR. SMITH: Objection, Judge. Calls for speculation.

6 THE COURT: Sustained.

7 BY MS. PALM::

8 Q Okay, were you startled by her waking you by
9 screaming and jabbing a knife at you?

10 A Yes.

11 Q And were you able to calm her down?

12 A Well, yes, I was -- I wasn't -- because I wasn't
13 drinking, I was able to diffuse the situation. I was able to
14 calm her down and --

15 Q And how did you do that?

16 A By talking with her and asking her what's going on
17 calmly. Basically, look, get ahold of yourself. You know
18 what, you want me to get up, I -- you know, she started to back
19 up. She came to her senses. You know, whatever you want. You
20 know, I'll get off the couch. I won't watch TV, whatever, and,
21 you know.

22 Q Okay. So three days after that on November 5th,
23 2008, until that day did you maintain your sobriety?

24 A Yes.

25 Q Okay. And did you fall off the wagon on that date?

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1 Berger being one of them. Another several foremen I worked
2 with. I was kind of -- you know, the money situation and
3 trying to keep myself busy. We had just --

4 Q Okay, let's just do a little bit at a time, okay.

5 A Yes, ma'am.

6 Q So when you say 30 phone calls, you don't know the
7 exact number of phone calls, do you?

8 A No, there was multiple calls.

9 Q Okay. And one of those calls was the call to Tracy
10 Berger that he testified about in court?

11 A Yes, ma'am.

12 Q And did that call give you hope that you'd be going
13 back to work soon?

14 A Yes, it did. Absolutely.

15 Q And had Victoria left the house prior to that?

16 A Yes.

17 MR. SMITH: Objection, Judge. Non-responsive. The
18 answer is yes.

19 THE COURT: Sustained.

20 BY MS. PALM::

21 Q Where did she go?

22 A She went to Von's to get some food and some wine.

23 Q Okay. And did she come back with food and wine?

24 A Yes, she did, and I continued making phone calls.

25 Q Okay. At what point did you decide that you were

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1 going to go out and drink again?
 2 A I know I shouldn't of, but after talking to Tracy,
 3 prospective employment for the long time, all my burdens were
 4 relieved, and I'm talking very good money in a matter of weeks.
 5 I could have got everything, and I wanted to refinance the car
 6 and whatever, but I -- her birthday and one for want to reward
 7 myself for sobriety. I did it. I'm not going to lie, folks, I
 8 wanted to drink any excuse, but I said let's go out. Come on,
 9 let's go celebrate it. And I even had a -- two --
 10 Q Okay.
 11 A -- glasses of wine.
 12 Q Okay. So you were finding an excuse to drink? You
 13 admit that?
 14 A I -- I'm an alcoholic.
 15 Q And do you struggle with that alcoholism everyday of
 16 your life?
 17 A That's why they say one day at a time. One's too
 18 many and a million's not enough.
 19 Q So at some point the two of you decide to go out.
 20 Did you do any errands after you left the house?
 21 A Yeah, I had just purchased a sweeper the week before,
 22 and I was cleaning up my spare bedroom with all the tools,
 23 wrangling my hardhats, and I spilled some screws, and I swept
 24 over them and they got caught in the belt, and it broke the
 25 belt. So I said well, the first thing we need to do, let's

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1 Q Okay.
 2 MR. SMITH: Objection, Judge, and move to strike.
 3 He's talking about facts not in evidence.
 4 THE COURT: I sustain that. The jury's instructed to
 5 disregard the last statement from the defendant.
 6 BY MS. PALM::
 7 Q So you believe that you went to Paris about 6:00,
 8 6:30 p.m.?
 9 A That is correct.
 10 Q At this point you had had two glasses of wine. How
 11 much had Victoria had?
 12 A A bottle and a -- a bottle.
 13 Q And what did you do at the Paris?
 14 A We valeted the car. We walked over briefly to see
 15 the times on the lights. We'd always go down there. But we
 16 went back to Paris and we went to the roulette tables.
 17 Q Were you gambling that night?
 18 A Yes, I was.
 19 Q And did that gambling allow you the ability to get
 20 five drinks?
 21 A Yes.
 22 Q And were both you and Victoria drinking at the Paris?
 23 A Yes.
 24 Q What were you drinking?
 25 A I was drinking double -- double shots of Absolute

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1 drop the sweeper off right around the corner, and then we'll
 2 head down to Paris Hotel. I did that and got to the sweeper
 3 shop. She waited in the car. I took it in.
 4 The guy told me it would take five minutes. Went in
 5 the back.
 6 Q Okay. Let's move on. So you do the sweeper errand
 7 and then you go to Paris? Yes?
 8 A That is correct.
 9 Q Okay. Do you have a good fix looking back on the
 10 times that all of that was occurring?
 11 A Yes.
 12 Q Okay. What time do you think you went to Paris?
 13 A It was -- we valeted about -- it was around 6:30.
 14 Q Okay. And prior to 6:30, had you been drinking?
 15 A I had two glasses of wine.
 16 Q Okay.
 17 MR. SMITH: And I'm sorry, Judge, just so there's
 18 clarity, are we talk being 6:30 a.m. or p.m.?
 19 MS. PALM: 6:00 --
 20 BY MS. PALM::
 21 Q Is it a.m. or p.m.?
 22 A It was 6:30 p.m.
 23 Q And that's on November 5th?
 24 A On November 5th. The receipt that I received from
 25 the sweeper shop shows 5:59 p.m. that we were there.

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1 straight up.
 2 Q Okay.
 3 A I had one also white Russian which that's what
 4 Victoria was drinking.
 5 Q Okay. So Victoria's drinking White Russians while
 6 she's there?
 7 A That is correct.
 8 Q Do you know how much she had?
 9 A At least three, maybe four.
 10 Q Are things going well? Are you getting along while
 11 you're at the Paris?
 12 A We're having a great time. Everything's okay. She's
 13 feeling good at that point. She started a little bit earlier
 14 than me, and I was kind of like catching up, but she was ahead,
 15 but she was fine, and she was --
 16 Q Okay. So you're enjoying your time at the Paris?
 17 A Very much so. I was winning.
 18 Q Okay. Were you also losing?
 19 A I end up losing a hundred so back of that winning,
 20 which she wasn't happy with.
 21 Q Okay. Do you recall leaving the Paris?
 22 A Not really. Somewhat.
 23 Q Do you know what time you left the Paris?
 24 A No, I didn't have a watch.
 25 Q No?

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1 A No.
2 Q Okay. Do you have any memory of getting in the car?
3 A Somewhat. No.
4 Q No? It's not a clear memory?
5 A It's not clear. It's not.
6 Q Okay. Have you had problems because of your
7 alcoholism with having blackouts in the past?
8 A Yes.
9 Q So were you -- looking back, do you think you
10 experienced a blackout?
11 A Yes.
12 Q Do you remember the drive home from the Paris?
13 A No.
14 Q Do you remember being back at the apartment complex,
15 at your apartment complex in the parking lot?
16 A Yes, I do.
17 Q Okay. When at the point that you can remember again,
18 tell me where you are and where she is?
19 A We pulled into the parking spot, and she's like we're
20 here. She was a little agitated. Well, she was a little more
21 than agitated. She was starving, but she thought we're here,
22 get up, get up, and I --
23 Q Okay. Let me stop you there. Why is she telling you
24 to get up?
25 A She was saying she was here. She didn't care. We're

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1 Q Okay. Was she upset with you about anything?
2 MR. SMITH: Objection, Judge, to the form of the
3 question. Unless she can lay a foundation.
4 BY MS. PALM:
5 Q Were you aware --
6 THE COURT: Sustain the objection.
7 MS. PALM: Okay.
8 BY MS. PALM:
9 Q Were you aware when she went upstairs whether she was
10 angry with you or not?
11 A Yes.
12 Q And what was what over?
13 A Cumulative things. A couple of things. I had made a
14 last minute bet for 25 cash. We went to cash the chips out,
15 she counted how much we had, I made one more bet. No, no, no.
16 I lost 25. She wanted to go out. She was ready to eat. But
17 once I got start the to drinking, I wanted to drink. You know,
18 you're -- you started hours before me. Let me -- so, you know,
19 she wanted to eat. She didn't want to have to go home and
20 cook.
21 Q Okay. So at some point do you get out of the car and
22 go up to your apartment?
23 A Yes, I do.
24 Q Do you remember going up the stairs to your
25 apartment?

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1 here, we're home.
2 Q Okay. What were you doing?
3 A I was laying back in the seat sleeping.
4 Q Had she been the driver?
5 A Yes.
6 Q Okay. And were you reclining in the passenger seat?
7 A In the front passenger seat, yes.
8 Q Were you -- so she wants you to wake up and you're
9 reclining, and then what happens?
10 A I don't think she cared whether I got up or not. She
11 was just --
12 MR. SMITH: Objection, Judge. Calls for speculation.
13 THE COURT: Sustained.
14 BY MS. PALM:
15 Q Okay. What happened? Not what she's thinking, what
16 happened?
17 A She got up and went up to the apartment.
18 Q Okay. Did you stay down stairs?
19 A Yes.
20 Q Inside the car?
21 A Yes.
22 Q Were you still reclining?
23 A Yes.
24 Q Okay. Did you know what time it was?
25 A I had no idea. I had no idea.

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1 A Yes, somewhat.
2 Q What do you remember about it?
3 A Staggering up. Bounced off the wall. That's when
4 Jimmy came out, the next door neighbor, heard me.
5 Q Okay. Would that be Jimmy Hatchcoos?
6 A Yes, 35. Came out and he looked at me. I was
7 standing out there finishing the cigarette, looked --
8 Q Okay. Did Jimmy stay outside or did he go back in?
9 A It was -- he just -- I heard the door open, and I
10 just -- we just looked at each other, and he seen me. He
11 basically just went back in, and I went into my place, opened
12 up the door.
13 Q Okay. When you got upstairs, had the door been
14 closed or was it open?
15 A It was closed at that time.
16 Q Okay. So you enter into the apartment?
17 A Yeah, I had to pee bad.
18 Q Okay. When you get in there, were the lights on in
19 the living room?
20 A There -- there was the one light by the couch.
21 Q Is that a table lamp?
22 A Not where the roses were. The light on the other end
23 of the couch.
24 Q Okay.
25 A The three pronged. The middle light was on.

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ROUGH DRAFT TRANSCRIPT

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1 Q Okay.
2 A And we have little night lights in, and there was a
3 light that I could see coming from the bedroom. The bathroom
4 light was on.
5 Q What did you do next in?
6 A I walked into the spare bathroom which I utilize a
7 lot, and used the bathroom. Came out, got a cigarette, went
8 outside, opened the door wide open, which I normally always
9 did. Everyone's always seen me. I don't smoke in the
10 apartment. I went out and smoked some cigarettes.
11 Q Okay. Did you know what Victoria was doing when you
12 came in or went back out?
13 A She was in the bathroom changing clothes, thumping
14 around. I heard some noise. There was no conversation. She
15 was in there thumping around. I heard thumping, and I didn't
16 really -- she was in the bathroom. I wasn't going to go in
17 there -- okay.
18 Q So do you know how long you were outside on the
19 terrace smoking cigarettes?
20 A I have no idea. I was out there until I came back
21 in.
22 Q Okay. Do you know how many cigarettes you smoked?
23 A Two or three. I had got some off the counter.
24 Q Okay. Were you still drinking at that point?
25 A I don't remember. I don't remember.

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ROUGH DRAFT TRANSCRIPT

1 Q So was some light coming out of the bedroom?
2 A Well, yeah, absolutely.
3 Q And so you've taken your coat off. What are you
4 going to do?
5 A I'm going to walk toward the closet and hang it up.
6 Q Okay. And did something happen?
7 A Victoria came out of the bathroom, and she had a
8 knife in her hand.
9 Q Okay. How was she holding the knife?
10 A In her right hand coming at me.
11 Q And how did you learn that she was coming at you with
12 a knife?
13 A I had my back to her. I'm walking to the closet.
14 She comes out behind the bathroom, heard me walking, and I turn
15 around and see it.
16 Q Okay. And were you startled?
17 A Startled was beyond -- I was surprised. I had -- it
18 was like coming at me.
19 Q Okay. And how did you respond?
20 A I swung my jacket at her. Told her to get back. I
21 asked her -- so many -- it was so fast, folks. It was --
22 Q Okay. Try and describe to the jury what happened
23 that -- from the point you throw your jacket in steps. What
24 happened next?
25 A I turned around, she came out. The light -- when she

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ROUGH DRAFT TRANSCRIPT

1 Q Do you remember going back into the apartment?
2 A Yes. I had a lot to drink, and I was sweating, and I
3 was hot. I was -- and I had my -- I had just got my brand new
4 union jacket, the big winter jacket, and I was hot from all the
5 alcohol. And it was a nice night out. I took my jacket off,
6 and I went into the bedroom to hang up my jacket.
7 Q Okay. When you went into the bedroom, were the
8 lights on in the bedroom?
9 A No.
10 Q Okay. What kind of lighting is in that bedroom?
11 A There's -- when you walk in, there's a switch that
12 controls -- and there's the bed. On the other side of the bed,
13 there's a little table and one little lamp. There was also a
14 radio there. When you walk around the bed, there's one of
15 those little night lights. I always kept it plugged in.
16 Minimal light, just so you can see where you're walking.
17 There's no overhead light at all. The bathroom,
18 though, has four pretty big lights up above the vanity on the
19 top. And when you turn that light on and open the door, the
20 light really, it shines in.
21 Q Okay. So when you walked in the bedroom, none of the
22 bedroom lights themselves were on other than the night light?
23 A The little night light, correct.
24 Q Okay. Was the bathroom door open or closed?
25 A Partially.

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ROUGH DRAFT TRANSCRIPT

1 came out of the bathroom, the door opened up extremely and the
2 really light comes in, and I turned and looked and seen her
3 coming at me with the knife. And I'm like -- I start backing
4 up, and I back into the door. I'm plastered. I'm swinging
5 what are you doing now?
6 I knew she was mad about not -- she was mad about a
7 lot of things. I --
8 Q Okay.
9 A -- swing my jacket at her, tell her to get back with
10 the knife. He swing my jacket and I just throw it and it hits
11 the blinds. She's coming at me with the knife, and I grab the
12 knife. And she yanks the knife. I didn't have a good enough
13 hold on it, and she yanks it out of my hand. It cuts me.
14 She's coming at me some more, and I grab her wrist,
15 and she's got the knife in her hand. I can't get by her
16 because she's got me backed into the room. There's only the
17 walkway. She's in that walkway coming out of the bathroom door
18 backing me up. I start pushing her back. I mean, I had a hold
19 of her, and I'm trying to get her back.
20 Q Okay, Brian, how long does the struggle go on? Do
21 you have both of her wrists at that point?
22 A No, I don't think -- I know I had her left.
23 Q And --
24 A At one point I think I had her right hand, too, and I
25 was pushing her back.

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ROUGH DRAFT TRANSCRIPT

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1 Q Okay. Did you have her hand that was holding the
2 knife?
3 A Yes.
4 Q Okay.
5 A My left hand was around. She had on her hand holding
6 her because when I went to grab the blade, she yanked -- pulled
7 it out, and it -- I didn't grab it hard enough and I was --
8 Q Okay. I'm not understanding something.
9 MS. PALM: May I approach --
10 THE COURT: Yes.
11 MS. PALM: -- your Honor?
12 BY MS. PALM:
13 Q Okay, if you could just show me. She has the knife
14 in her right hand or her left hand?
15 MR. SMITH: Can I approach, Judge, so I can see?
16 THE WITNESS: Yes.
17 THE COURT: Yes.
18 BY MS. PALM:
19 Q She has the right in her right or her left?
20 A She has it in her right hand.
21 Q Okay. And how do you grab her hands?
22 A I grab her hand like this.
23 Q Okay. And you're holding that hand?
24 A I'm holding her hand.
25 Q During -- and this hand --

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ROUGH DRAFT TRANSCRIPT

1 A I --
2 Q Do you fall on top of her?
3 A I fall on top of her, the weight.
4 Q Okay. And what happened next? And not to speculate.
5 I want you to tell me what you remember happened --
6 A It happened --
7 Q -- next.
8 A -- so fast. It was -- I fell down on her. When I
9 completely down on her, I'm trying to push the knife away. Her
10 head hits the back of the head board. My head hits the front
11 of her head. I don't know what -- I didn't even know she was
12 punctured. I didn't know --
13 Q I'm asking you what you did know, all right. So at
14 some point does something change with Victoria?
15 A She relaxed.
16 Q After this fall?
17 A She relaxes.
18 Q Relaxed?
19 A She relaxes.
20 Q And how do you respond to that?
21 A Not sure. Shocked. I don't know. I'm like --
22 Q Do you know that she's bleeding at that point?
23 A I did not even know.
24 Q Okay. Do you get back up?
25 A Yes.

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ROUGH DRAFT TRANSCRIPT

1 A This hand I'm shaking.
2 Q Okay.
3 A And at some point I think I do grab her and I'm
4 pushing back, you crazy -- what --
5 Q Okay.
6 A Pushing her back the whole -- trying to get her back.
7 We go down onto the bed.
8 Q Okay. When you go down onto the bed, is she still
9 holding the knife in her right hand?
10 A Yes.
11 Q And did you still have a hold of her hand?
12 A I had a hold of her left hand. I know that.
13 Q The knife hand or the other hand?
14 A The knife -- the hand with the knife in it, I had it.
15 Q Okay, so you're saying with your left hand, you had
16 a hold of the --
17 A My left hand --
18 Q -- right hand?
19 A Yes.
20 Q Okay.
21 A The right hand.
22 Q So when you go onto the bed, does she fall on her
23 back or how does she fall?
24 A She goes on her back.
25 Q Okay.

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ROUGH DRAFT TRANSCRIPT

1 Q When do you realize Victoria is bleeding?
2 A When she doesn't respond to me. She's like not
3 looking at me. I mean --
4 Q Does some time go by or do you notice that there's
5 blood on the bed around Victoria?
6 A I'm sitting on the edge of the bed and it's dark, and
7 I feel something starts getting wet, and I don't know what it
8 is. And I started realizing it's blood.
9 Q And what is your mental state regarding -- as far as
10 the intoxication goes at this time?
11 A I was fuckin' drunk.
12 Q Okay. You realized there's something wet, and are
13 you trying to make sense of what it is? Are you trying to
14 figure out what it is?
15 A I'm trying to figure out what happened.
16 Q Okay. Do you look for the knife?
17 A I start -- I don't know.
18 Q What do you remember doing?
19 A I remember pulling her down, and I'm seeing the
20 blood. The blood was -- I could start seeing a brown spot on
21 the bed.
22 Q Did you move her to a different --
23 A I pull her down some, and I lift the pillowcase cover
24 off and I'm trying to push it against, and all I know I
25 remember is I picked her because (indiscernible) from --

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ROUGH DRAFT TRANSCRIPT

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1 Q Let's do this a little bit at a time, okay. Do you
2 remember Victoria's pants coming off?
3 A Yeah.
4 Q And do you remember thinking about that?
5 A I just thinking I got to -- what am I going to do? I
6 picked her up. I got her. I fell on the floor. Dropped her
7 on the floor. There was a --
8 Q Okay. At what point did her pants come off?
9 A At that time. There was blood -- there was -- it was
10 getting so red, and I didn't know if she had any other cuts or
11 anything.
12 Q Okay. So you're looking for cuts on her body?
13 A Yes.
14 Q Okay. And at that time were her pants bloody?
15 A They were saturated.
16 Q Okay. So at what point, if you did, find a stab
17 wound?
18 A I don't know. It was so fast. It was automatic
19 responses.
20 Q Okay.
21 A I needed something else. I checked and I -- there
22 was a rag in the bathroom. There was a scarf. I go over and I
23 grab it, and I roll it, and I'm trying to -- and I don't know
24 if I got to give her CPR, and I'm laying beside her saying V.
25 I don't -- it was automatic responses. I would in the leave my

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ROUGH DRAFT TRANSCRIPT

1 yourself because you got a little ahead of me. Are you ready?
2 A I'm sorry.
3 Q Okay. Brian, do you remember your neighbors coming
4 in? Do you remember the first time Cookie (phonetic) said he
5 came in?
6 A Yes, I -- yeah. Cookie said he heard a -- what's
7 going up here, and I'm saying Cookie come in here. Help me.
8 Help me with her. Call. I think she's dying. I think she's
9 that. I don't know what I said. Help me. Call some -- call.
10 And all I remember is he ran in, and he -- he lost
11 it. He run around. What -- he just took off. Call. And I'm
12 trying to hold her. I'm over her. I'm saying somebody help
13 me. Somebody --
14 Q Were you --
15 A -- come and help me.
16 Q Were you still talking to Victoria --
17 A Yes.
18 Q -- at that time?
19 A I wasn't talking then. I was concentrating. I was
20 talking to V.
21 Q Do you remember Cookie coming back in with Tom
22 Armbruster?
23 A I -- yeah. I thought wow, someone's -- someone heard
24 that I -- I didn't --
25 Q Okay.

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ROUGH DRAFT TRANSCRIPT

1 partner. I --
2 Q Okay. You're trying to figure out what happened.
3 You're trying to stop the bleeding you know about; is that
4 true?
5 A Yes.
6 Q Okay. And at that point do you know whether she's
7 alive or dead?
8 A I don't know. I'm not sure. I was trying to listen.
9 I kept thinking she's breathing. I'm -- you're alive, you're
10 dead. I'm -- it was so fast, folks. You don't -- you could
11 see her ask me for hours what next, what next, what -- in a
12 real time situation this happened so fast. I was panicked.
13 I'm so frickin' drunk.
14 Q Okay.
15 A You can't sit here and say I did this and then I put
16 this right here and I remember exactly I did that --
17 Q Okay, Brian --
18 A -- and this.
19 MR. SMITH: Objection, Judge.
20 BY MS. PALM::
21 Q -- let me stop you.
22 MR. SMITH: This is completely non-responsive.
23 THE COURT: Okay. Sustained.
24 BY MS. PALM::
25 Q I'm just going to give you a second to collect

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ROUGH DRAFT TRANSCRIPT

1 A -- know who was -- who --
2 Q Let me ask you this. You heard the testimony that
3 you got up and took kind of a stumbling swing at Todd. Do you
4 remember doing that?
5 A I -- I don't know. I may have. I don't know. I --
6 I think I was agitated because all it was like everyone want to
7 run up and see the dead -- like, why don't you fucking people
8 go call someone instead --
9 Q Okay.
10 A -- of everyone wanting to come up and think they got
11 her. Hey, yeah.
12 Q Brian. Can you please take a second and just take a
13 couple deep breath, because you have to answer my questions
14 directly, okay. Yes or no, do you remember not waiting Cookie
15 and Todd in the room?
16 A Yes.
17 Q Okay. Do you remember what you were thinking about
18 that?
19 A Where are the paramedics. Why are you here? I
20 didn't have much time to concentrate on that. I was trying to
21 deal with her.
22 Q Okay.
23 A I --
24 Q All right, stop, please. I don't know if you were
25 watching when the photographs came in, but we've shown you some

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ROUGH DRAFT TRANSCRIPT

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1 of the photographs in this case, and Victoria had some bruises.
 2 Do you agree with that?
 3 A Yes, I -- they're there, yes.
 4 Q Do you know how Victoria got those bruises?
 5 A Which bruises?
 6 Q Do you remember how she got any of the bruises that
 7 they were talking about?
 8 A The pink ones or fresh -- I didn't see them all.
 9 Q Okay.
 10 A I started to look and then I couldn't. I -- I'm sure
 11 I had her -- I'm sure I picked her up. I mean, dead weight is
 12 dead weight.
 13 Q Okay.
 14 A And I'm yanking her up. I just picked -- I --
 15 Q Brian, did you hit Victoria that evening?
 16 A No, I did not.
 17 Q Did you slam her into anything?
 18 A No. The only thing was we fell back on the bed and
 19 her head hit the head board. My head went on her.
 20 Q Okay. Do you know how your back got scratched?
 21 A I think that was from the police.
 22 Q Okay. Do you know how the bruise got there on the
 23 your shoulder blade?
 24 A I -- no.
 25 Q Do you know how the bruises got on your bicep?

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ROUGH DRAFT TRANSCRIPT

1 have gotten on there because you might have been trying to turn
 2 on the light?
 3 A Needed light. Needed more light.
 4 Q Is the office that Todd Ambruster and Robin Colaxe
 5 (phonetic) lived in, was that across the courtyard
 6 from your apartment?
 7 A Yes.
 8 Q How long would it have taken a person in your
 9 experience to walk from your apartment to that office?
 10 A 15 seconds.
 11 Q Want to talk about Ms. Morris' jail visit with you in
 12 December of 2008 after you were arrested. Do you remember her
 13 visiting you?
 14 A Cheryl, yes.
 15 Q You heard the story that she testified to in court
 16 regarding what she says you said to her. Do you remember that?
 17 About what happened to Victoria.
 18 A What she said happened?
 19 Q What she said you -- what Cheryl Morris testified you
 20 told her at the jail visit. Do you remember that?
 21 A Yes.
 22 Q Okay. When Cheryl Morris visited you in jail, what
 23 did she want?
 24 A Money. My accounts.
 25 Q And did you ever talk to Cheryl Morris about what

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ROUGH DRAFT TRANSCRIPT

1 A I think the police. I don't --
 2 Q Are you not sure?
 3 A I'm not sure.
 4 Q Okay.
 5 A I don't know.
 6 Q If you're not sure, don't speculate.
 7 A Okay, I don't --
 8 Q I'm not sure.
 9 A If I don't know, I don't know.
 10 Q Okay. The crime scene photographs showed that the
 11 closet doors were off track. Do you know how the closet door
 12 got off track? The one closet door was off track.
 13 A She backed me into it.
 14 Q Okay.
 15 A I do -- yeah, that's exactly the area I was at.
 16 Q Do you know why there's blood on the light switch?
 17 A I don't know if subconsciously I went to turn that
 18 on, and I -- the light switch was to the radio. It didn't
 19 power the light. She would put the switch up, and her radio
 20 was programmed. She couldn't see close -- it was easier for
 21 Victoria to flip --
 22 Q Okay.
 23 A I wasn't thinking of that. I'm running around. I'm
 24 like --
 25 Q Okay. My question is you think that the blood might

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ROUGH DRAFT TRANSCRIPT

1 happened that evening?
 2 A I might have said something. She -- yeah -- yes.
 3 Q Okay. Did you say what she said you said?
 4 A No, I did not.
 5 Q Okay. What do you think you told her?
 6 A That she came at me with a knife, and she told me the
 7 neighbors said she was stabbed --
 8 MR. SMITH: Objection.
 9 BY MS. PALM:
 10 Q Okay.
 11 A -- 16 times.
 12 MR. SMITH: Objection, Judge.
 13 THE COURT: Sustained.
 14 BY MS. PALM:
 15 Q Brian, prior to the police coming there, coming to
 16 the apartment, did you ever attempt to leave the scene?
 17 A I wouldn't leave Victoria. No one would come in. I
 18 was -- I wasn't going to leave her. I'm --
 19 Q So you had no plan to leave?
 20 A No way.
 21 Q Do you recall the officers and the fact that you
 22 would not respond to their commands to come out of the
 23 apartment -- or to come out of the bedroom? Just do you recall
 24 it?
 25 A I wasn't sure who was who or what after --

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ROUGH DRAFT TRANSCRIPT

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1 Q I'm not asking you what you were thinking. I'm just
2 asking do you recall what they testified to?
3 A Some.
4 Q Okay. Hearing their testimony in court, how do you
5 feel about your behavior --
6 MR. SMITH: Objection.
7 BY MS. PALM:
8 Q -- and your thoughts to the officers?
9 MR. SMITH: Objection, Judge.
10 THE COURT: Sustained.
11 MR. SMITH: To relevance.
12 BY MS. PALM:
13 Q Are you angry with the officers?
14 MR. SMITH: Objection, Judge. Relevance. What does
15 it matter if he's angry at the officers today?
16 THE COURT: Sustained. Sustained.
17 BY MS. PALM:
18 Q Do you recall watching the videotape of your
19 statement to detectives?
20 A Yes.
21 Q Did you remember the details of what was shown on the
22 video before you watched it?
23 A No.
24 Q Why didn't you give the officers a clear account of
25 what happened?

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ROUGH DRAFT TRANSCRIPT

1 MS. PALM: Thank you.
2 BY MS. PALM:
3 Q Okay, Brian, please try and listen really carefully
4 to my questions before you respond, and don't add anything to
5 them, okay. Do you remember being evaluated by medical
6 personnel at the jail following your interview and arrest?
7 A I remember talking to some people. I don't know who
8 was who or what, really.
9 Q Okay. If they stated that you appeared to be
10 disheveled, would you agree with that?
11 A Define, please. I'm sorry.
12 Q Disheveled, messed up.
13 A Yes.
14 Q If they stated that your behavior was incoherent,
15 would you dispute that? Just yes or no?
16 A Yes. Yes.
17 Q You would dispute that or you would agree with it?
18 A I would agree with it. I lost control of the
19 situation. I couldn't control --
20 Q Okay, just limit yourself to responding to the direct
21 question, okay. If they said that your affect was tearful,
22 would you agree with that?
23 A Yes.
24 Q If they said that you appeared to be in shock, would
25 you agree with that? I'm sorry?

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ROUGH DRAFT TRANSCRIPT

1 A I couldn't process the data. I couldn't -- I wasn't
2 really sure what had happened.
3 Q What was your mental state as far as intoxication at
4 the time of that interview?
5 A I was too intoxicated to (indiscernible).
6 Q Do you remember falling asleep in the police vehicle
7 prior to that?
8 A No.
9 Q Do you remember trying to tell the officers what
10 happened?
11 A Some of it. I remember some of the things.
12 Q Do you recall making a statement referring to ten
13 years?
14 A No.
15 Q Do you recall being examined by medical personnel at
16 the jail?
17 A No.
18 Q Do you remember being placed in the special housing
19 at the jail?
20 A Yes.
21 Q What kind of housing was that?
22 MR. SMITH: Objection, Judge. Relevance.
23 THE COURT: Counsel approach, please.
24 (Off-record bench conference).
25 THE COURT: Go ahead, Ms. Palm.

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1 A Yes.
2 MS. PALM: Your Honor, I would move to admit
3 Defendant's Proposed Exhibit LLEJ., and that is records from the
4 (Indiscernible).
5 MR. SMITH: Subject to the objection that we placed
6 on the record, Judge, the State has no objection.
7 THE COURT: And the redaction.
8 MR. SMITH: Oh, with the exception of that.
9 MS. PALM: Subject to the redaction.
10 MR. SMITH: (Indiscernible), right?
11 MR. PIKE: There's HIPAA requirements that require
12 that some items not be --
13 THE COURT: Right.
14 MR. PIKE: -- provided, and so we'd ask that we
15 follow the federal ruling on that. Thank you.
16 THE COURT: It will be admitted with the redaction as
17 discussed.
18 BY MS. PALM:
19 Q Brian, did you intentionally kill Victoria?
20 A No, I did not.
21 Q Do you take any responsibility for her death?
22 A I took all the responsibility because I shouldn't of
23 drank, and I couldn't control -- and I couldn't control myself.
24 I lost control of the situation. My (indiscernible) ruined my
25 life. I'm sick. She's sick.

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1 Q Okay. Brian --
2 A I'm helpless.
3 Q Brian, I'm going to pass you as a witness. That
4 means that the district attorney now gets to cross-examine you,
5 okay.

6 CROSS-EXAMINATION

7 BY MR. SMITH::

8 Q Mr. O'Keefe, have you ever heard of the term called
9 selective recall?

10 A No.

11 Q Okay. It seems that here you're able to remember
12 certain things that are helpful to you, but you can't remember
13 other things; is that correct?

14 MS. PALM: Objection, your Honor. That's
15 argumentative.

16 MR. SMITH: I'll pose another question.

17 THE COURT: Sustained. Sustained.

18 MR. SMITH: I'll pose a question.

19 BY MR. SMITH::

20 Q You're able to remember that on the night and time in
21 question you smoked three cigarettes on the porch; is that
22 correct?

23 A I really don't know how many, sir. I thought I said
24 two or three. I don't know.

25 Q Okay. But you remembered where you got the pack of

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ROUGH DRAFT TRANSCRIPT

1 evidence from your own mouth that you were plastered that
2 night, right?

3 A Yeah.

4 Q Yeah?

5 A Yes. Yes.

6 Q Okay. And so you couldn't remember what happened
7 when you were plastered, but now today, some six months later,
8 you can remember it pretty much to a T?

9 A I don't recall it that way, Mr. Smith. Not at all.

10 Q Okay. Let's talk about this alleged altercation that
11 took place between you and Mrs. Witmarsh on her birthday. Do
12 you remember talking about that?

13 A Yes, sir.

14 Q When she allegedly tried to stab you with the knife,

15 A Yes.

16 Q Okay. Why don't you tell me about that again?

17 Actually, let me ask you some specific questions. Now, you
18 testified that November 2nd, 2008, three days before the night
19 in question, that was her birthday.

20 A Yes.

21 Q And you guys -- actually, you said she had two
22 glasses of wine, right?

23 A No.

24 Q You didn't just testify on direct examination that
25 she had two glasses of wine?

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ROUGH DRAFT TRANSCRIPT

1 cigarettes from, correct?

2 A I ran out, sir, yes.

3 Q Okay. But you can't remember how the knife got
4 inside Ms. Witmarsh?

5 A No, sir.

6 Q Okay. Would you agree that those seconds were
7 probably the most important seconds of your life?

8 A Absolutely.

9 Q At the time that Mrs. Witmarsh's life ended?

10 A No denying that, absolutely.

11 Q And you'd agree that under most circumstances a
12 person could remember crucial seconds like that, correct?

13 MS. PALM: Objection, your Honor.

14 THE COURT: Sustained.

15 BY MR. SMITH::

16 Q On direct examination you testified that back when
17 the police detective, Detective Wildemann, asked you what
18 happened, you said that the reason why you couldn't provide any
19 information was because you weren't really sure what happened;
20 is that correct, at that time?

21 A Yes.

22 Q Okay.

23 A That's what I said, yes. I didn't know. Didn't

24 quite exactly know. I --

25 Q Okay. And we've heard a tremendous amount of

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ROUGH DRAFT TRANSCRIPT

1 A She was drinking wine that night, Mr. Smith.

2 Q Okay.

3 A But I don't know remember saying exactly two.

4 Q Okay. How much wine had she had?

5 A That night?

6 Q Yes.

7 A She had a bottle, but how much of it she drank, I
8 don't know, Mr. Smith.

9 Q Okay. So she drank some wine.

10 A Yes.

11 Q And then at some point she gets violent with you.

12 A Yes.

13 Q And why don't you tell us again what she does with
14 the knife.

15 A She comes at me, and she's saying get up.

16 Q Okay. And where are you at?

17 A I'm laying on the couch.

18 Q You awake or asleep?

19 A I was asleep at first, Mr. Smith.

20 Q Okay. How long had you guys been they house before
21 this happened?

22 A We were there practically all day.

23 Q Okay. Where did she get the wine from?

24 A Von's. We always went to Von's.

25 Q Okay. You guys got -- had she gotten wine before

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ROUGH DRAFT TRANSCRIPT

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1 like say November 1st, 2008?
 2 A Yes. She's always --
 3 Q Okay. I understand. But she didn't try and stab you
 4 that day, right?
 5 A Which day, Mr. Smith?
 6 Q November 1st, 2008.
 7 A Not November 1st, no.
 8 Q Okay. But on November 2nd, 2008, she tried to stab
 9 you because she was angry about what?
 10 A She had mood swings. She -- I never remember saying
 11 exactly what. That was part of the problem. I wasn't quite
 12 sure.
 13 Q Okay.
 14 A Her mood swings, her medicine, the mixture, I don't
 15 know. I would think that I do remember she was like get up off
 16 the couch, you know, the TV.
 17 Q Okay. And you suspected that the wine contributed to
 18 that, right?
 19 A I know it did.
 20 Q Okay. So now let's fast forward to November 5th,
 21 2008. We've heard your statement from the detective where
 22 Victoria said I wanted to go get some wine, and you said sure,
 23 honey, go right ahead and go get it. Do you remember that?
 24 A I absolutely did, yes.
 25 Q Okay. So despite the fact that according to you on

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ROUGH DRAFT TRANSCRIPT

1 Q Okay.
 2 A I'm like what are you doing?
 3 Q Did the blade touch you?
 4 A She might have poked me, yeah.
 5 Q Okay.
 6 A But, I mean, she didn't stab me and she didn't -- she
 7 wasn't trying to actually kill me, but she was not herself.
 8 Q She wasn't trying to kill you; is that what you just
 9 said?
 10 A She wasn't trying to put it in my body, but she was
 11 coming at me with the knife tapping. It's like hey. That's
 12 not normal behavior, Mr. Smith.
 13 Q Okay.
 14 MR. SMITH: Judge, objection to -- I move to strike
 15 the part after it's normal behavior.
 16 THE COURT: Sustained. The jury's expect to
 17 disregard the last statement of the defendant.
 18 BY MR. SMITH::
 19 Q How many times did she jab the knife at you?
 20 A I don't know, Mr. Smith, exactly.
 21 Q Okay. So --
 22 A I was just waking up, sir.
 23 Q Okay. So you talked her out of it?
 24 A Yeah, I started talking to her, yes.
 25 Q How long did it take you to diffuse the situation?

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ROUGH DRAFT TRANSCRIPT

1 November 2nd, 2008, her birthday while she's drinking wine she
 2 tries to stab you and/or kill you, couple days later you
 3 nevertheless tell her to go get some more wine?
 4 A Yeah.
 5 Q Okay. You also said that on November 2nd, 2008,
 6 Victoria was agitated because her unemployment insurance was
 7 running out. Do you recall that?
 8 A Yes.
 9 Q Okay. Did you think that simply because her
 10 unemployment insurance was running out that increased her
 11 agitation on that day?
 12 A Yes.
 13 Q Okay. Now, when she tried to stab you with the knife
 14 on November 2nd, how did you diffuse the situation again?
 15 A By talking to her.
 16 Q Okay. What --
 17 A She was pointing the knife, Mr. Smith --
 18 Q Okay.
 19 A Give me -- at me saying hey, get up.
 20 Q Okay.
 21 A But it's a little bit more, sir, than just a
 22 nonchalant --
 23 Q Well, show us.
 24 A It's she's get up, kind of like I was on -- get up,
 25 hey.

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ROUGH DRAFT TRANSCRIPT

1 A I would say probable three or four minutes.
 2 Q Okay. And then what happened with the knife?
 3 A She goes back in the kitchen. She was cooking.
 4 Q Okay. So for some reason you're asleep on the couch
 5 --
 6 A Yes.
 7 Q -- and, in fact, I think you said that she was in the
 8 kitchen cooking at first before any of this happened, correct?
 9 A Yes.
 10 Q And then she just decides that she's going to come
 11 and grab a knife and then poke it at you to wake you up.
 12 A Yes.
 13 Q But you didn't think she was going to kill you with
 14 it?
 15 A I wasn't sure what she was going to do, Mr. Smith.
 16 Q Okay. And you talk her out of it for three or four
 17 minutes, right?
 18 A Yes.
 19 Q And then she walks right back in the kitchen and
 20 keeps on cooking?
 21 A Basically.
 22 Q Okay. But you didn't call the police or anything,
 23 though, right?
 24 A No.
 25 Q To report that she had just came at you with a knife?

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ROUGH DRAFT TRANSCRIPT

000373

1 A No, I did not.
 2 Q Okay. Now we hear about November 5th, 2008 where you
 3 just said that you fell off the wagon. Is that what you just
 4 said?
 5 A Yes, I did, sir.
 6 Q Okay. And so let's talk about after you guys leave
 7 the Paris, because we know what happened at the Paris, right?
 8 A Yes, sir.
 9 Q Victoria drank, you drank.
 10 A Yes, sir.
 11 Q Okay. But you don't know -- actually strike that.
 12 Who drove you guys home?
 13 A She did.
 14 Q Okay. What condition were you in upon leaving the
 15 Paris?
 16 A Pretty plastered.
 17 Q Okay. So you let her drive.
 18 A Um-h'm. She was mad about that.
 19 Q Okay. You guys -- you make it home okay?
 20 A Yes.
 21 Q Victoria goes upstairs.
 22 A Yeah.
 23 Q All right. At this point Victoria's pretty drunk.
 24 right?
 25 A Yeah.

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ROUGH DRAFT TRANSCRIPT

1 stepped out of his apartment.
 2 A Yes, sir.
 3 Q But at some point Jimmy pokes his head back into his
 4 apartment, and he closes his door, right?
 5 A Yeah, no words were exchanged.
 6 Q Okay.
 7 A He just shut the door, and --
 8 Q And he saw that look on your face that we heard
 9 about.
 10 A That's what he said. I --
 11 Q Okay. And then you open your door and then go
 12 inside?
 13 A Yes.
 14 Q Okay. So would you disagree, then, with Jimmy's
 15 testimony that when he walked outside or when he poked his
 16 outside that your door was open?
 17 A The door was shut at that time, I do believe.
 18 Q Okay.
 19 A The door was shut.
 20 Q Okay. So according to you, the door's shut. You go
 21 inside?
 22 A Yes, I open the door and go in.
 23 Q And then Victoria's in the bathroom?
 24 A Victoria's in the master bedroom in the bathroom.
 25 Q And what's she doing?

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ROUGH DRAFT TRANSCRIPT

1 Q Okay. So she goes upstairs and you stay in the car
 2 for how long?
 3 A Oh, I don't even know, Mr. Smith.
 4 Q You don't remember that detail?
 5 A All I remember is going up. When I went up it was
 6 when Jimmy came out of the -- his apartment, sir.
 7 Q Okay.
 8 A So --
 9 Q And we've heard Jimmy testify that he came out of his
 10 apartment because he heard some kind of commotion, like a
 11 noise.
 12 A Yes, on the rail.
 13 Q Okay. And that was you, what, falling over the rail?
 14 A I kicked the rail. Was on the rail right outside the
 15 doors.
 16 Q Okay. And then Jimmy goes back in his apartment.
 17 A No, Jimmy was in his apartment, sir. I was hanging
 18 over the rail.
 19 Q Okay. Well, how did Jimmy see you, then?
 20 A Jimmy said he heard me outside, and he said he popped
 21 open his door and looked and seen me out there.
 22 Q Okay, so --
 23 A And I kind of looked at him and --
 24 Q Okay, so I think you're a little confused. I didn't
 25 mean that Jimmy -- I didn't mean to imply that Jimmy actually

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ROUGH DRAFT TRANSCRIPT

1 A I have no idea. She's a little bit of upset.
 2 thumping around, stomping around. What she was doing, changing
 3 clothes, you know, I don't know.
 4 Q How long is she thumping around?
 5 A I had just come up, Mr. Smith. I was asleep in the
 6 car. I got up. She was in there from the time she went up.
 7 Q How long were you asleep in the car?
 8 A I don't know. It had to be an hour, hour and a half.
 9 Q Okay.
 10 A I have no idea. You can't -- I don't know. I told
 11 you I don't know at the time. Whenever time Jimmy, sir, came
 12 out was the first time I went up to the apartment.
 13 Q So Victoria now is in the house thumping around by
 14 herself?
 15 A I don't know what she's doing. I wasn't there, sir.
 16 Q Okay. But at the time you get up there, according to
 17 you, she's now in the apartment and she's thumping around?
 18 A She's thumping around. She heard me come in, I'm
 19 sure. She's in the bathroom thumping around, bedroom, her
 20 bathroom. I go to my bathroom.
 21 Q Okay.
 22 A I urinate, sir.
 23 Q Okay.
 24 A I go in the kitchen to get some cigarettes. As
 25 actually, the last cigarette that I had was the one that I

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ROUGH DRAFT TRANSCRIPT

000374

1 smoked going up.
 2 Q Okay. Why didn't you go see what was wrong with her
 3 if you heard her thumping around?
 4 A Because she was in the bathroom.
 5 Q Again, why didn't you go and see why she was thumping
 6 around?
 7 MS. PALM: Asked and answered, your Honor.
 8 MR. SMITH: Okay, fair enough. I'll withdraw the
 9 question an.
 10 THE COURT: Sustained.
 11 BY MR. SMITH:.
 12 Q Because she was in the bathroom; that's your answer?
 13 A Yes.
 14 Q Okay. So then you go back outside to smoke some more
 15 cigarettes?
 16 A Yeah, I went outside. I took -- yeah, I went outside
 17 and opened the door. The door -- that's what we would always
 18 do.
 19 Q Okay.
 20 A Open the door. It's wide open the entire time.
 21 Q Okay.
 22 A There's no voices, no conversation, no -- the TV
 23 wasn't even on, the radio wasn't even on.
 24 Q I get you, sir. So when you come back inside, what
 25 happens next?

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ROUGH DRAFT TRANSCRIPT

1 A Yes, sir.
 2 Q Where is 5001 El Parque? What are the nearest cross
 3 streets?
 4 A Oakley and Decatur.
 5 Q Decatur and Oakley.
 6 A Yes.
 7 Q So it's pretty late at this point, right?
 8 A Yeah.
 9 Q And you're going to go where at this point? Are you
 10 getting ready to retire for the night?
 11 A No.
 12 Q What are you planning on doing now?
 13 A Hang up my jacket and go outside. I have a -- an
 14 ashtray out there. I don't smoke. I was going to go outside
 15 on the patio.
 16 Q Okay. So this -- would this have been the third time
 17 you were planning on smoking or the third -- because remember,
 18 you testified that when you first arrive you walked upstairs --
 19 A And I got a cigarette.
 20 Q You got a cigarette, right?
 21 A And I'm out on the rail.
 22 Q Right. And then at some point --
 23 A Exactly --
 24 Q -- Jimmy Hatchcoos peeks his head out and sees you.
 25 A Hears me on the rail, sees me, throw my cigarette,

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ROUGH DRAFT TRANSCRIPT

1 A I'm starting to get a little sweaty, hot, getting my
 2 body moving again, the alcohol. I go into to hang up my jacket
 3 in the master -- in the bedroom.
 4 Q Okay. And --
 5 A She's --
 6 Q And you're sweating, you said?
 7 A Yeah, yeah, I was warm. I had a lot of alcohol in
 8 me, yes.
 9 Q Okay. Is Victoria still thumping around?
 10 A She's in the bathroom at that time.
 11 Q She's still in the bathroom?
 12 A She's still in the bathroom.
 13 Q Then where do you walk once you come back in the
 14 apartment?
 15 A I go -- I come into the apartment, the door's still
 16 wide open.
 17 Q The door to the bathroom or the front door?
 18 A The front door was wide open, Mr. Smith.
 19 Q Okay.
 20 A I walk in. It's wide open. I walk in to take my
 21 jacket off. I walk into the master bath -- bedroom, sir.
 22 Q Okay. So at this point it's about 10:00 o'clock at
 23 night, right?
 24 A No, at this time it's -- it's almost 11:00 o'clock.
 25 Q It's later?

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ROUGH DRAFT TRANSCRIPT

1 yep, he goes in.
 2 Q And then you go in and get some more cigarettes from
 3 the pack?
 4 A I go in -- Mr. Smith, I testified I go in to use the
 5 bathroom.
 6 Q Okay. When do you get those other cigarettes?
 7 A When I came out of the bathroom, I went to the
 8 kitchen. We have a drawer there filled with everything.
 9 Q Okay. And then you come back out?
 10 A Yeah.
 11 Q Okay. And then you smoke some more cigarettes?
 12 A Yes.
 13 Q Yes? And then at this point you realize that you're
 14 hot and sweaty?
 15 A Yeah. The jacket bulky big (indiscernible).
 16 Q Okay. So then you go inside, as you just testified
 17 to, with the intention of hanging up your jacket?
 18 A Right, I go in. The door was wide open.
 19 Q Okay. You go in with the intention to hang up your
 20 jacket..
 21 A That is correct.
 22 Q And then you come back out -- you're getting --
 23 A No.
 24 Q -- you're getting ready -- you want to come back
 25 outside to smoke some more cigarettes?

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ROUGH DRAFT TRANSCRIPT

000375

1 A No, that's not what I said.
 2 Q Okay. What was your intention once you hung up your
 3 jacket?
 4 A I didn't get to hang up my jacket, Mr. Smith.
 5 Q That's not my question, sir. When you walked in
 6 there to hang up your jacket, you had a plan in your mind,
 7 right?
 8 A Probably get a drink, go out and smoke.
 9 Q Okay.
 10 A I don't know, Mr. Smith.
 11 Q Okay, that was my question. You were planning on
 12 hanging up your jacket to do what next. Regard of what -- we
 13 know what actually happened. Regardless of that, what were you
 14 intending on doing?
 15 A Going back outside because I left my door wide open,
 16 Mr. Smith.
 17 Q Okay. But you weren't able to do that?
 18 A No, sir.
 19 Q Okay. So you're going to hang up your jacket and
 20 Victoria is still in the bathroom?
 21 A When I walk in to hang up my jacket, she hears me,
 22 she darts out of the bathroom, sir.
 23 Q Okay. So she's waiting for you?
 24 A I guess if you want to call it that.
 25 Q Okay. So she darts out of the bathroom, right?

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 ROUGH DRAFT TRANSCRIPT

1 driver's license. She's five, four, a buck, right? A hundred
 2 pounds?
 3 A 110, yeah.
 4 Q Okay. And you're what, five, ten?
 5 A Five, nine, five, ten.
 6 Q Back then -- we've seen pictures of you -- what were
 7 you about a buck ninety?
 8 A 180, 185, I don't know.
 9 Q Okay. So you had about 80 pounds on this woman and
 10 six inches, correct?
 11 A Yes.
 12 Q And at this point in time she has close to a 24
 13 because that's what she had at the time of her death, correct?
 14 A That's what it states.
 15 Q Okay. So this little bitty thing that we've just
 16 heard about that weighs five, four and a hundred pounds and
 17 you, combat trained veteran who's won a brooze star, tell me
 18 how this -- tell me how this transpires again. She comes at
 19 you with the knife and you do what?
 20 A I have my jacket. I swing my jacket at her.
 21 Q And that didn't work?
 22 A No, I -- oo, it did not.
 23 Q Okay. So what's your next attack?
 24 A I didn't attack.
 25 Q Okay, fair enough. What's the next thing you do?

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 ROUGH DRAFT TRANSCRIPT

1 A With the knife in her hand.
 2 Q Okay in the left hand?
 3 A In her right hand, sir.
 4 Q Now, on direct examination first you said that it was
 5 in her right hand, but then later on you said it was in her
 6 left hand?
 7 A No, I said the --
 8 MS. PALM: Objection. Misstates his testimony.
 9 MR. SMITH: That does not misstate his testimony at
 10 all.
 11 THE COURT: Well, I think there may have been some
 12 confusion. I'm not sure but I'm going to sustain the
 13 objection.
 14 BY MR. SMITH:--
 15 Q So it's your testimony that the knife is in her right
 16 hand?
 17 A Yes.
 18 Q And how is she holding it? Like how you'd normally
 19 would hold a knife like that?
 20 A Yes, Mr. Smith.
 21 Q Okay.
 22 A That's absolutely correct.
 23 Q But not like that?
 24 A Not like this. Like this.
 25 Q Okay. And she's -- I mean her -- we've seen her

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 ROUGH DRAFT TRANSCRIPT

1 A I'm talking to her, swinging the jacket asking her
 2 what -- what are you doing?
 3 Q Okay. And what is she doing while you're talking to
 4 her?
 5 A She's coming at me with the knife. She's very angry.
 6 Q But your door's wide open. Why not just run outside?
 7 A Because she has me blocked in, Mr. Smith.
 8 Q The five, four inch, 185 pound woman has you blocked
 9 in?
 10 MS. PALM: Argumentative, your Honor?
 11 THE COURT: Sustained.
 12 BY MR. SMITH:--
 13 Q Okay. She has you blocked in?
 14 A Yes.
 15 Q You can't get by her?
 16 A No.
 17 Q Why not?
 18 A I'm pretty intoxicated. I was surprised.
 19 Q Okay. So what do you do?
 20 A I finally end up grabbed the knife, Mr. Smith.
 21 Q Right. And you testified that she yanked it out of
 22 your hand.
 23 A I grabbed the knife, I didn't have a firm hold on it.
 24 Q Right, and that's why she was able to yank it want?
 25 A She yanked it out, and it cut me.

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 ROUGH DRAFT TRANSCRIPT

000376

1 Q Okay. But it didn't cut you on your palms where you
2 would expect it would if the blade is facing --
3 MS. PALM: Objection, your Honor.
4 BY MR. SMITH:
5 Q -- down; is that correct?
6 THE COURT: Sustained. Sustained.
7 MR. SMITH: All right.
8 BY MR. SMITH:
9 Q Let me ask the question, did your palms get cut? Is
10 that a yes or no?
11 A No.
12 Q Okay. So when she yanks that blade, what do you do?
13 A I shake my hand. I'm looking at my hand.
14 Q Okay.
15 A Well, what do you -- natural response. Scared. I'm
16 like -- I'm pretty intoxicated, and it's in a dark room, Mr.
17 Smith.
18 Q Okay.
19 A I was -- element of surprise was very much there.
20 Q But again, you are trained combat veteran, correct?
21 A Yes.
22 Q Okay. She has the element of surprise, the blade is
23 being yanked out --
24 A Was.
25 Q -- and you still -- does she have you cornered?

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ROUGH DRAFT TRANSCRIPT

1 Q Okay.
2 A My hand was cut, sir. Instantly I don't know.
3 Again, it's not why didn't I do this, why didn't I do three,
4 why didn't I do four, a, b, c.
5 Q Okay.
6 A I thought, okay, get ahold of her hand, grab the
7 knife.
8 Q Okay, and that didn't work?
9 A Try to get -- to get ahold of her hand.
10 Q And that didn't work, right?
11 A I tried to grab her wrist several times. I don't --
12 Q Well, I thought you just said she yanked the knife,
13 and then you said ouch --
14 A Right -- and --
15 Q -- or actually --
16 A -- I'm shaking my right hand.
17 Q -- you shake your right hand.
18 A And she's --
19 Q And then --
20 A -- coming at me again, and I grab her wrist.
21 Q Okay, wait a minute.
22 A I grab her hand, her hand. The knife's still in her
23 hand.
24 Q Okay. I'm trying to figure out when you did this and
25 backed up because you just said -- let me finish my question,

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ROUGH DRAFT TRANSCRIPT

1 A She -- I was backing up -- I was backing away from
2 her backing up into the sliding doors, Mr. Smith.
3 Q Okay. Why not just kick her out of the way?
4 A Why not do a lot of things, Mr. Smith?
5 Q Well that --
6 MR. SMITH: Objection, Judge. Non-responsive.
7 THE COURT: Sir, be asked the question like your
8 attorney does. You answer the questions.
9 BY MR. SMITH:
10 Q Why didn't you just kick her out of the way?
11 A It didn't seem the appropriate action.
12 Q But at this point, according to you, you're afraid
13 now, right?
14 A Yes. When she yanked the knife away from me and it
15 cut me.
16 Q So your testimony is that the appropriate action is
17 to leave yourself defenseless and back up instead of taking an
18 offensive maneuver like kicking her out of the way?
19 MS. PALM: Objection, your Honor. Argumentative.
20 MR. SMITH: It's not argumentative. It's a question.
21 THE COURT: No, overruled. Overruled.
22 THE WITNESS: I'm trying to grab the knife. I want
23 to get control of the knife, but I could not. I failed the
24 first time, Mr. Smith.
25 BY MR. SMITH:

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ROUGH DRAFT TRANSCRIPT

1 sir.
2 A Okay, sir.
3 Q You just said that you tried to grab the knife. You
4 didn't get a good hold of it. She snatches the knife and then
5 you start backing up, and she's still coming at you. That's
6 what you just said initially.
7 A And there's not far to back up. A step may be.
8 Q Okay, so --
9 A You're against the back already. It's a small room.
10 Q Sir, I'm not trying to confuse you. I'm just trying
11 to make sure I understand --
12 A Oh, sure, sir.
13 Q -- the sequence of events.
14 A Okay.
15 Q Because you'd agree that's important here, correct?
16 A Absolutely.
17 Q Okay. So this didn't work. You back up, she's still
18 coming at you.
19 A Yes, thank you.
20 Q At this point in time, you do not try and kick her or
21 do anything to get her out of the way; is that correct?
22 A No.
23 Q Okay. So instead, you do this, correct?
24 A No, I didn't raise my hands.
25 Q Well, that's the motion you just did on the stand.

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ROUGH DRAFT TRANSCRIPT

000377

1 A I mean, I'm shaking my hand. I didn't -- I'm shaking
2 my hand backing up.
3 Q Okay.
4 A And --
5 Q So now --
6 A -- then when she comes at me again, basically I grab
7 for her hand that has the knife in it.
8 Q Okay. So now you're shaking your hand doing this and
9 you're not doing this?
10 A I'm not doing them simultaneously.
11 Q Okay.
12 A I mean --
13 Q But if I have her hand and you're shaking this hand,
14 then how is she coming at you more repeatedly?
15 A She had already come at me repeatedly --
16 Q Okay.
17 A -- by the time I got ahold of her hand.
18 Q So you grabbed the knife hand at this point, right?
19 Let's fast forward to the point where you testify that you have
20 control of the weapon.
21 A I have her hand. Have her -- which she has the knife
22 in it.
23 Q Right.
24 A And I'm trying to push her back. I'm pushing her
25 back, let me get by.

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ROUGH DRAFT TRANSCRIPT

1 A Yes.
2 Q Okay.
3 A That --
4 Q Okay. So you got one hand on her knife wielding
5 hand, and your other hand is hurt. So what happens next?
6 A I'm pushing her back. Eventually I do. My right
7 hand does come up. I never released this hand with the knife
8 in it. I never release it. There's a very small where you
9 walk in -- you've seen in the diagram of the room. I'm trying
10 to push her back toward the doorway. I'm trying to get her on
11 the bed, but when I push, I go down with her. I'm trying to
12 just back her up and get her away and get out. I just want to
13 get away from the situation.
14 Q Okay. So when you push, and you end up on the bed
15 with her, then what happens?
16 A We go down on the back of the bed. Lost my -- went
17 down. We went down pretty hard. My head hits her head. Her
18 head hits the back of the head board. She goes limp. I'm --
19 it was so fast.
20 Q How did she land on the bed, Mr. O'Keefe?
21 A I'm pushing her back. Her back -- it's a small
22 walkway. The bed's up to here. When I'm pushing her back, the
23 back of her feet hit the side of the mattress --
24 Q Okay.
25 A -- which she tends to go over and I still have ahold

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ROUGH DRAFT TRANSCRIPT

1 Q Okay. But you didn't just grab the knife and take it
2 out of that hand?
3 A No, because this hand was on her hand and this hand
4 was cut.
5 Q So because this hand was cut -- and let's look at
6 that cut. That's Defense quadruple J. That's the cut we're
7 talking about, right?
8 A Yes, there's --
9 Q Okay.
10 A There's one underneath here.
11 Q Okay.
12 A Underneath and this.
13 Q Okay. So those small cuts prevented you from
14 grabbing the knife a second time?
15 MS. PALM: Objection, your Honor. Nobody
16 characterized the length or --
17 THE COURT: Just say those cuts.
18 MR. SMITH: Okay.
19 BY MR. SMITH:--
20 Q Those cuts prevented you from trying to grab the
21 knife a second time?
22 A Yes. I wasn't going to try to grab the blade again.
23 Again --
24 Q Despite the fact that this is now apparently a life
25 or death struggle?

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ROUGH DRAFT TRANSCRIPT

1 of her, and we both go down.
2 Q Okay. And do you land directly on top of her?
3 A Pretty much.
4 Q And does she --
5 A Like --
6 Q And does she land back like this?
7 A She lands back.
8 Q Okay.
9 A And I --
10 Q I would --
11 A My hand and all my weight --
12 Q Okay.
13 A -- goes down.
14 Q Okay.
15 A There were just --
16 Q Okay. So let me get it straight. You go forward and
17 she goes back, yes?
18 A Yes, she's falling back, and I'm pushing her. I'm
19 going -- I end up going with her.
20 Q Okay.
21 A On top of her.
22 Q Okay. And then what happens?
23 A She goes limp.
24 Q And what do you do?
25 A You know what happened.

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000378

1 Q I know, but just like your attorney got to ask you to
2 explain it --
3 A Yes, sir.
4 Q -- I get to ask you, too.
5 A Yes, sir.
6 Q Okay. She goes limp, yes?
7 A Yes.
8 Q But at this point you don't know that anything's
9 wrong, right?
10 A No, I don't. I don't know. I did not even know the
11 knife punctured her. I didn't know.
12 Q Okay. So she didn't make a sound?
13 A No, there was no sound.
14 Q You'd agree that people usually make sounds when they
15 get punctured with a knife four inches, correct?
16 A I don't know what they do when they get punctured.
17 Q Well, your common sense.
18 MS. PALM: Objection, your Honor. He's asking him
19 common sense about other people and whether they make noises
20 when they get stabbed.
21 MR. SMITH: All right.
22 THE COURT: Sustained.
23 BY MR. SMITH:
24 Q So I'll just make sure it's clear. In your -- you
25 don't know -- you have no idea whether people make noises when

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ROUGH DRAFT TRANSCRIPT

1 seconds? Excuse me, 180, I apologize.
2 A Repeat the question, Mr. Smith.
3 Q You just said that it was two to three minutes before
4 you realized something was wrong. Let me -- I'm going to
5 repeat the question. You testified that once you guys fell,
6 she didn't make a sound and didn't move. So from the time that
7 you guys fell to the time you realized that something was going
8 on was either 120 or 180 seconds. What were you doing?
9 A Looking at her. I -- it was so fast I don't --
10 Q Okay. And blood wasn't spurting out of her side?
11 A No.
12 Q Okay.
13 A She had the two shirts or whatever. That's what was
14 -- it -- whatever she had on. No, there wasn't no blood
15 squirting out.
16 Q Showing you Defense 5. So how long -- at what point
17 -- at what point do you realize that the scene looks like
18 this?
19 A I have no idea.
20 Q You don't recall that?
21 A No, I don't -- I had moved her to the floor.
22 Q Okay.
23 A I don't know, sir.
24 Q Okay.
25 A Please, I don't know.

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1 a blade punctures them four inches?
2 MS. PALM: Same objection, your Honor.
3 MR. SMITH: I just want to make sure it's clear.
4 MS. PALM: Now he's asking in the reverse. It's not
5 relevant --
6 THE COURT: Sustained the objection.
7 MS. PALM: -- what other people do.
8 BY MR. SMITH:
9 Q Suffice it to say, they makes no sound, correct?
10 A Yes.
11 Q Okay. And now still don't know what's going on?
12 A (Indiscernible).
13 Q How long does it take before you realize what's going
14 on?
15 A Mr. Smith, I -- it's a couple minutes, two, three,
16 four minutes, I don't know. Don't ask me to say a time. I
17 don't know. It was -- I don't know.
18 Q What was going on in those two to three minutes?
19 A I got up, I'm sitting on the edge of the bed.
20 Q She hasn't moved yet, right?
21 A No, not -- no, not really.
22 Q And you're still not concerned that something's going
23 in that --
24 A I don't know --
25 Q Let me finish my question. In that 120 to 150

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ROUGH DRAFT TRANSCRIPT

1 Q Okay. So after the two to three minutes past and you
2 do finally realize that something is terribly, terribly wrong,
3 what do you do?
4 A I -- when she's on the bed, on the floor or when,
5 sir?
6 Q At what point did you realize that something was
7 wrong, Mr. O'Keefe?
8 A After a few minutes it started getting wet.
9 Q Okay.
10 A It started getting wet, sir.
11 Q What did you think that wetness was?
12 A I wasn't sure. I was not sure.
13 Q Was it a lot of wetness?
14 A Define a lot.
15 Q Okay. Once you realized that something's wrong,
16 before you move her to the ground, what do you do?
17 A I -- I think I grabbed a pillow, and I immediately
18 took the pillowcase off, and I balled it up or I squeezed it --
19 I don't -- and I'm putting it on her side. I'm holding it
20 because I realized it's blood.
21 Q Okay.
22 A And I'm moving her around, and I'm on the bed, too,
23 and the bed's going -- and I -- I'm trying to pull her down,
24 and I -- I got to get her on the flat floor. I got to -- and
25 I'm trying, and I pick her up and --

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1 Q Okay, let me stop you right there. What's the
2 purpose of getting her to a flat floor -- to the flat floor?
3 A If I had to try to give her CPR or whatever. I don't
4 know, my -- it was muscled memory. Just reaction.
5 Q Right. And, in fact, you said these are automatic
6 responses, right?
7 A Some of them was --
8 Q Okay. But it wasn't an automatic response for you to
9 take one of the three cell phones in your apartment and call
10 911?
11 A I -- that's --
12 Q That wasn't an automatic response?
13 A No, I was too involved with her. And I thought when
14 I told Cookie, when he ran out, I says call, please come help
15 me.
16 Q Okay.
17 A I was very --
18 Q Okay. Let me back up because I'm talking about when
19 you first realized that something was wrong. Not when Cookie
20 comes upstairs after he hears everything, because you're the
21 first person that realizes that something is wrong, correct?
22 A That is correct, Mr. Smith.
23 Q Not Charles Toliver, right?
24 A I realized, yes, I am --
25 Q Let me finish. Not Joyce Toliver, right?

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ROUGH DRAFT TRANSCRIPT

1 medical aid to this woman, right?
2 A I'm trying to do everything I can, yes.
3 Q But that doesn't really answer my question. You
4 moved her to the ground because you wanted to give her medical
5 assistance, correct?
6 A That is correct.
7 Q Each though you're plastered, correct?
8 A That is correct.
9 Q Okay. So at some point you realize that your efforts
10 aren't going to work, right?
11 A That's correct.
12 Q Okay. And then at some point after that, you got
13 four people coming upstairs -- or actually strike that. You
14 got two people, Charles Toliver and Todd Amburstier coming
15 upstairs to see what's going on, right?
16 A Yes.
17 Q And, in fact, when Todd comes in to try and see
18 what's going on, you take a swing at him, right?
19 A He states.
20 Q You don't remember that?
21 A I really don't remember that. I don't know, Mr.
22 Smith. I don't know.
23 Q Okay. And you testified that you actually told Todd,
24 for him to call 911, right?
25 A I cannot explain again that in real time it happened

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ROUGH DRAFT TRANSCRIPT

1 A No, sir.
2 Q Not Jimmy Hatchcoos, right?
3 A That is correct.
4 Q And not Todd Amburstier, right?
5 A That's correct.
6 Q It was you, right?
7 A That's correct.
8 Q Okay. You did not pick up any one of those phone
9 calls -- those phones to call 911, right?
10 A I did not.
11 Q And that's usually an automatic response in a
12 situation like this, right?
13 A That's -- you're absolutely correct. I --
14 Q Unless you want the person to die, right?
15 MS. PALM: Objection, your Honor. Argumentative.
16 MR. SMITH: It's not argumentative. It's a yes or no
17 question.
18 THE COURT: Well, I'm going to overrule that.
19 BY MR. SMITH:;
20 Q Unless you want to make sure they're dead, right?
21 A I don't want her dead, Mr. Smith.
22 Q Okay. So now we know you didn't call 911. And then
23 at some point you move her to the ground, right?
24 A Yes.
25 Q And it's your testimony because you want to render

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ROUGH DRAFT TRANSCRIPT

1 so fast, Mr. Smith.
2 Q Okay.
3 A And all I meant was for someone to help me, and I
4 swear I told -- I told Cookie, the first person, help me with
5 her, call, and he runs out, and I just assumed if he seen it --
6 yes, I made a mistake when I --
7 Q Well --
8 A -- did not call.
9 Q Okay.
10 A I did not call. It was my fault. Is that what you
11 want to hear? It's my fault for getting drunk. I didn't want
12 to leave her. I did not. I would not leave her.
13 Q Okay. So according to you, you're concerned about
14 this woman's welfare, right?
15 A Yes.
16 Q Let's jump forward a little bit to when the police
17 arrive. Do you remember that?
18 A Not really.
19 Q Now you don't remember --
20 A Some of it.
21 Q -- when the police arrived?
22 A I hear voices.
23 Q Voices telling you hey, get out of here. We need to
24 get her help, police. Metropolitan Police. Are those the
25 voices that you heard? Do you remember hearing that, Mr.

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1 O'Keefe?
 2 A Sometimes.
 3 MS. PALM: Your Honor, I'd ask Mr. Smith not to yell
 4 at my client.
 5 MR. SMITH: I'm trying to recreate the situation.
 6 MS. PALM: Well, he's yelling his questions now.
 7 THE COURT: Well, I'm going to sustain the objection.
 8 BY MR. SMITH::
 9 Q The police are telling you to come out there in a
 10 loud voice, right?
 11 A And I'm telling them to get in here and help me.
 12 Q Or our saying getting in here and help me and not
 13 fuck you, get in here?
 14 A I'm even after at first I'm saying please -- yes, I'm
 15 saying get the fuck in here. Help me, get in here. Help me.
 16 Q Okay. Okay. So we've heard testimony from Officer
 17 Conn and the other officers who were there that Officer Conn is
 18 telling you come out here, we need to get her some help. We're
 19 trying to get some help. Come out here. Show us your hands.
 20 And what do you do?
 21 A I did not do that.
 22 Q Okay. But you want to make sure that she gets
 23 helped, right?
 24 A In my mind I did not do anything wrong, Mr. Smith.
 25 and I was -- I did not understand the concept because I did not

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ROUGH DRAFT TRANSCRIPT

1 bruises. You testified that you think she got them when you
 2 were trying to render aid to her, correct?
 3 A That's correct.
 4 Q And how exactly did you try and render aid to her,
 5 Mr. O'Keefe?
 6 A By trying to put a cold compress on her, by trying to
 7 get her on the floor, so --
 8 MS. PALM: Okay. And your Honor, I'd like to clarify
 9 which bruises because Mr. O'Keefe --
 10 MR. SMITH: I'm going to -- I'm going to get there,
 11 I'm sorry.
 12 THE COURT: Okay.
 13 MR. SMITH: I just want to look at the photographs.
 14 BY MR. SMITH::
 15 Q So how do you get her off the bed?
 16 A I don't exactly know, Mr. Smith. I'm pulling her up.
 17 I'm pulling at her. I'm pulling on her.
 18 Q Okay. Let me ask you this, is her body lifeless at
 19 this point, as far as you know? I mean, she's not moving,
 20 right?
 21 A I didn't know.
 22 Q Well, you said she was dead weight at this point.
 23 A She felt like it. She was pretty --
 24 Q Well, okay. So somehow you get her on the ground.
 25 A That's correct.

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ROUGH DRAFT TRANSCRIPT

1 do anything wrong.
 2 Q Well, if you didn't do anything --
 3 A I was saying get in and help.
 4 Q Okay. Well, if you --
 5 A But there was no guilt in my mind of anything.
 6 Q Let's talk --
 7 A Come in and help me.
 8 THE COURT: Sir, wait for the next question.
 9 BY MR. SMITH::
 10 Q Let's talk about guilt in your mind. You said you
 11 didn't do anything wrong and there was no guilt in your mind,
 12 right? So why make the statement let's go, let's do the ten
 13 years?
 14 A That -- I never made that statement to a cop.
 15 Q You didn't say that? Did you make it at all?
 16 A I don't remember. They say I mumbled it. I was
 17 talking about it.
 18 Q So you don't deny that you didn't say it. It's just
 19 your contention that nobody else would have been able to hear
 20 it?
 21 A Mr. Smith, I'm not saying that I didn't say it. I'm
 22 not saying that I did.
 23 Q Could have you said it, sir?
 24 A Absolutely.
 25 Q Okay. Now, let's talk a little bit about these

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ROUGH DRAFT TRANSCRIPT

1 Q And she ends up kind of how like we see in this
 2 photograph right here, kind of off to the side; is that
 3 correct?
 4 A That is correct, sir.
 5 Q Okay. And then she rests like that, yes?
 6 A She what, sir?
 7 Q I mean, she obviously never moves again from that
 8 position, right?
 9 A I don't know, sir.
 10 Q Okay?
 11 A I don't know, honestly.
 12 Q So you don't know if she ever moved once she ended up
 13 on -- once you got her off the bed to the ground like that?
 14 A I was laying beside her, Mr. Smith. I -- at that
 15 point when they --
 16 Q Do you remember if she ever moved?
 17 A I don't remember.
 18 Q Okay.
 19 A I don't, sir.
 20 Q Okay. Well, we heard testimony from the medical
 21 examiner that Ms. Wijnmarsh had an injury that was actually
 22 underneath the back of her -- in fact, she pointed. She said
 23 it was right back here. You heard that testimony, right?
 24 A Something to that, yes.
 25 Q So she had an injury to the back of her head, and we

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1 also know that she had this injury on the front of her head.
 2 Now, can you explain how that happened?
 3 A I don't know what I'm looking at, sir.
 4 Q Okay, I'm zoom it out. How about now, can you tell
 5 what you're looking at now?
 6 A Oh, yeah. We hit heads.
 7 Q Oh, that's when you hit heads?
 8 A Yeah.
 9 Q Okay.
 10 A Yeah.
 11 Q She ended up with that? Yes?
 12 A Apparently.
 13 Q Okay.
 14 A It's there, sir.
 15 Q Okay. And it's your testimony that she got the rest
 16 of the bruises that we saw while you were trying to help her?
 17 A I didn't see all the bruises you're speaking of, Mr.
 18 Smith.
 19 Q Okay. Here, I'll show them to you. There's State's
 20 33.
 21 A Absolutely.
 22 Q Wait, hold on, I'm going to show them all to you.
 23 There's State's 34. There's State's 37. There's three
 24 different ones. So that's six by my count. There's State's
 25 40, which is on her kneecap. You'd agree she's not laying on

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ROUGH DRAFT TRANSCRIPT

1 trying to get her up.
 2 Q You were yanking her up on the bed?
 3 A I mean, I'm grabbing her arms pulling her up.
 4 Q Okay.
 5 A Lift -- pulling her up trying to -- I mean --
 6 Q So this actually all coming to you as you're talking
 7 about it?
 8 A I'm sorry?
 9 Q Because it seems like now you're remembering even
 10 more.
 11 A No, I said that earlier. I pulled her up.
 12 Q Okay.
 13 A I mean, when I realized when I put the -- when
 14 finally decided to get her on the floor, I'm trying -- I got to
 15 pull her up sometimes, Mr. Smith --
 16 Q Okay.
 17 A -- so I can get her up onto the floor. She didn't
 18 get there by herself, sir.
 19 Q Well, she didn't get stabbed by her either, did she?
 20 A Who said she was stabbed, sir?
 21 MS. PALM: Objection. Argumentative.
 22 THE COURT: Sustained.
 23 BY MR. SMITH:
 24 Q Now, in direct examination you were asked some
 25 questions about your military service, right? When did you get

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ROUGH DRAFT TRANSCRIPT

1 her knee, right? So that's seven. Here's some more on her
 2 feet. There's some more over here. There's one on the palm of
 3 her feet. I actually, I'm not going to count anymore. Let's
 4 just go through these and make sure that you're testifying that
 5 she got all those by you trying to help her.
 6 I think there's some more on her stomach. There's
 7 one right there. There's two more right there. There's
 8 another one right there. Actually, I'm going to -- I could go
 9 on, but the point is that you're testifying that she got all
 10 those by you trying to help her.
 11 MS. PALM: I don't think that was his testimony. He
 12 hadn't seen the pictures already.
 13 MR. SMITH: They --
 14 MS. PALM: He did not --
 15 THE COURT: I'm overruling the objection. You can
 16 clarify that in redirect.
 17 BY MR. SMITH:
 18 Q She got those by you trying to help her?
 19 A I believe so, yes.
 20 Q Okay. But you don't -- you say you believe so. You
 21 don't remember?
 22 A I don't remember.
 23 Q Okay.
 24 A I know I picked her up multiple times and was holding
 25 her. People testified. I know I was yanking her up on the bed

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ROUGH DRAFT TRANSCRIPT

1 out of the military?
 2 A Which part, sir?
 3 Q Well, let's go active duty. When did you get out for
 4 active duty?
 5 A '85.
 6 Q What's that, about 24 years ago?
 7 A That's correct.
 8 Q And then after you got out the active duty, did you
 9 go to the reserves? I think that's what you said during direct
 10 examination.
 11 A Yes, for --
 12 Q Yes?
 13 A Yes.
 14 Q You actually got kicked out of reserves, correct?
 15 A I no longer had to go. It was voluntary deal.
 16 Q It was voluntary?
 17 A Yeah, I didn't show up. I didn't go. I didn't have
 18 to.
 19 Q So isn't the reason why you got kicked out of the
 20 reserves was because you didn't show up?
 21 A Yes.
 22 Q Okay.
 23 A I didn't go.
 24 Q All right. Then we've heard testimony about your
 25 prior family life, that you were married twice before?

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1 A That is correct.
 2 Q Both of those marriages ended because you say due to
 3 alcoholism?
 4 A Yes.
 5 Q Okay. You meet Victoria sometime in October, 2001,
 6 right?
 7 A Yes.
 8 Q And that in April '07, that's when you testified that
 9 you were released from prison from the battery constituting
 10 domestic violence charge.
 11 A Yes.
 12 Q And it is, in fact, true that you served about three
 13 years in custody over that charge; isn't that correct?
 14 A No, sir.
 15 Q You didn't serve three years in custody?
 16 A It was a two to five, sir. You're a prosecutor, you
 17 know better than that.
 18 THE COURT: Sir, answer the question yes or no.
 19 THE WITNESS: On that, no, I did not, sir.
 20 BY MR. SMITH:
 21 Q How much of that two to five did you serve?
 22 A Two.
 23 Q So you're saying you served two years in custody?
 24 A On that charge, yes, sir.
 25 Q Okay. And you also admitted that you weren't honest

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ROUGH DRAFT TRANSCRIPT

1 Q For felony criminal non-support of dependents, and
 2 that's actually two counts, correct?
 3 A Two children, yes, sir.
 4 Q So in total you have four felony convictions,
 5 correct?
 6 MS. PALM: Objection, your Honor. I don't think
 7 that's correct.
 8 MR. SMITH: If it's two counts, it --
 9 THE COURT: It's three separate cases.
 10 MR. SMITH: Three separate cases, but four felony
 11 convictions.
 12 BY MR. SMITH:
 13 Q Is that correct?
 14 A There is the case in Ohio. I guess, if that's the
 15 way it would be classified, a count for each child. I'm --
 16 Q I'm just make sure it's clear. Three separate cases,
 17 but four felony convictions.
 18 A I think they charged me for each child, yeah, it was
 19 one case, Mr. Smith.
 20 Q Okay.
 21 MR. SMITH: Judge, I'm pass the witness.
 22 THE COURT: All right. Any redirect?
 23 MS. PALM: No, your Honor.
 24 THE COURT: All right. Thank you, sir.
 25 THE WITNESS: Thank you.

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1 with Cheryl about your ongoing relationship with Victoria
 2 Witmarsh; is that correct?
 3 A That is correct, sir.
 4 MR. SMITH: Court's indulgence. Judge, I'm pass the
 5 witness. Thanks.
 6 THE COURT: All right. If I --
 7 MR. SMITH: Actually, I'm sorry.
 8 THE COURT: All right.
 9 MR. SMITH: I'm sorry.
 10 BY MR. SMITH:
 11 Q I just want to clarify one other thing. Regarding
 12 your prior experience, you get out of the military, and we
 13 obviously know that you've kind of come into some trouble with
 14 the law by way of these felony convictions since you've gotten
 15 out of the military; is that correct?
 16 A That's correct, Mr. Smith.
 17 Q And we've hear that you're a convicted felon for
 18 burglary, right?
 19 A That's correct, Mr. Smith.
 20 Q And also that you're a convicted felon for battery
 21 constituting domestic violence, right?
 22 A That is correct, Mr. Smith.
 23 Q And I want to make sure I get it right. And you're
 24 also convicted out of Ohio -- is it Ohio? Yes, Ohio.
 25 A Yes, sir.

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ROUGH DRAFT TRANSCRIPT

1 THE COURT: Go down with your -- any other -- oh, I'm
 2 sorry. I'm sorry. I apologize. We have some questions from
 3 the jurors. If you could hand those to the marshal, please.
 4 Counsel approach, please.
 5 (Off-record bench conference).
 6 THE COURT: Mr. O'Keeffe, we have, as you know, we
 7 allow questions from the jurors, and we have some questions for
 8 you, all right.
 9 THE WITNESS: Yes, Judge.
 10 THE COURT: One of the jurors, it says when you got
 11 out of the car, did you know Victoria was angry at you?
 12 THE WITNESS: Does that have to be a yes or no,
 13 Judge.
 14 THE COURT: I think at this point it does, and your
 15 attorney or Mr. Smith can follow up.
 16 THE WITNESS: That would have to be --
 17 THE COURT: It says did you -- I'll read it again to
 18 you, sir. When you got out of the car, did you know Victoria
 19 was angry at you?
 20 THE WITNESS: Yes.
 21 THE COURT: And were you in turn angry at her?
 22 THE WITNESS: No, I was happy.
 23 THE COURT: All right. Next question, where was the
 24 knife when you were wadding up the pillowcase?
 25 THE WITNESS: On the bed somewhere. I don't -- on

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1 the bed.
 2 THE COURT: Okay. What direction on the bed did
 3 Victoria land? I mean, did she sort of fall side to side or
 4 top to bottom?
 5 THE WITNESS: Is there the diagram that they could
 6 show of the room? Is that okay?
 7 THE COURT: Do we have one?
 8 THE WITNESS: For the -- to show the juror?
 9 MR. SMITH: No, Judge, that's not okay.
 10 THE COURT: All right. Okay. At this point there --
 11 THE WITNESS: She fell on her -- okay, when you walk
 12 in the bedroom door, there's a little just walkway about like
 13 that, and the bed's right to the left. When I was pushing back
 14 backing her up going through, we went side ways. We were right
 15 like in the middle of the bed sideways, and I pushed back, and
 16 she went on her back and the head board was there. Head hit
 17 the head board, and I was on top of her. If --
 18 THE COURT: Okay.
 19 THE WITNESS: That's --
 20 THE COURT: I think there was a question here about
 21 the jacket we were just going to exhibit the photograph again,
 22 is that correct?
 23 MR. PIKE: That's correct, your Honor.
 24 THE COURT: All right. We'll just put it on the
 25 Elmo. There's a question of where was his jacket that was

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ROUGH DRAFT TRANSCRIPT

1 she will be here at 1:00 o'clock.
 2 THE COURT: Okay. Ladies and gentlemen, I've been
 3 advised that the testimony of that witness will be relatively
 4 short. And after her testimony, then we will go straight into
 5 jury instructions and closing argument, okay. So make sure you
 6 take all the breaks you need to take before we take the -- you
 7 know, go back in the courtroom at 1:00 o'clock. All right, so
 8 it's about 11:25 now here so you have a little extra lunchtime,
 9 and we'll see you back at 1:00 o'clock.
 10 And during this lunch recess it is your duty not to
 11 converse among yourselves or with anyone else on any subject
 12 connected with this trial or to read, watch or listen to any
 13 report over commentary on the trial by person connected with
 14 the trial or by any medium of information, including without
 15 limitation, newspaper, television, radio or the Internet.
 16 You're not to form or express an opinion on in my
 17 opinion subject connected with this case until this matter is
 18 finally submitted to you. Actually, if you can hang on, I
 19 think the that Marshal Cliff was going to perhaps do something,
 20 here. Just hang on one second, please.
 21 Ladies and gentlemen, my court recorder or maybe
 22 that's perhaps the marshal. Open the door. Okay, the marshal
 23 will escort you out of the courtroom, okay, and we will see you
 24 back at 1:00 o'clock. He should be meeting you at that door in
 25 just a second here. And ladies and gentlemen, just so you're

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ROUGH DRAFT TRANSCRIPT

1 thrown at Victoria.
 2 MR. PIKE: Defendant's Exhibit W.
 3 THE COURT: All right. Those are all the questions,
 4 correct, that we were going to ask?
 5 MS. PALM: Yes.
 6 THE COURT: All right. And any follow-up, Ms. Palm?
 7 MS. PALM: No, thank you.
 8 THE COURT: All right.
 9 MR. SMITH: Just briefly.
 10 BY MR. SMITH:
 11 Q So she fell back?
 12 A Yes, she --
 13 MR. SMITH: No further questions.
 14 THE COURT: All right. Any other questions by the
 15 jurors? All right, thank you, sir. Any other witnesses for
 16 the defense?
 17 MR. PIKE: No, your Honor. At this time the defense
 18 rests.
 19 THE COURT: Okay. Any rebuttal -- you have a
 20 rebuttal witness at 1:00 p.m.; is that correct?
 21 MR. SMITH: We do have a rebuttal witness at 1:00
 22 o'clock p.m., and for the record, it is the medical examiner.
 23 We anticipate that her testimony will be very short and
 24 limited. Unfortunately, she is conducting an autopsy as we
 25 speak. That's why she can't be here this morning this. But

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1 clear, he's going to escort you to the jury deliberation room,
 2 but you are not to deliberate until this case -- you know,
 3 after the closing arguments. You're there -- okay.
 4 As soon as the jury gets into the room there, I want
 5 counsel to come back so we can finish the jury instructions.
 6 (Court recessed at 11:26:33 a.m. until 13:01:24 p.m.)
 7 (Outside the presence of the jury)
 8 THE MARSHAL: You may be seated ladies and gentlemen.
 9 Let's check and make sure our cell phones are turned off,
 10 please. All cell phones are turned off.
 11 Please remain seated and come to order. Department
 12 17 of the Eighth Judicial District is again in session.
 13 Honorable Judge Michael P. Villani presiding. Let's make sure
 14 your cell phones are turned off, please.
 15 THE COURT: Good afternoon, ladies and gentlemen.
 16 Okay, just for our schedule today we're going to have the --
 17 just one witness for the State. It should be relatively short.
 18 And then we'll have the jury instruction and arguments.
 19 Arguments with the jury instruction may take up approximately,
 20 I don't know, two hours or so. I don't rush the counsel who
 21 are presenting their cases.
 22 And so because of that, we're going to -- after the
 23 last witness here, we'll probably take a ten minute break. And
 24 I know you've been from lunch hour, but you need to take a ten
 25 minute break, get all the evidence ready to go back to the

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1 deliberation room, and then have you come in and then we'll do
2 the jury instructions, okay.
3 Mr. Smith, call your next witness or call your
4 rebuttal witness.
5 MR. SMITH: Judge, the State calls Dr. Jacqueline
6 Benjamin.
7 THE MARSHAL: Dr. Benjamin, if you'll raise your
8 right hand, please, and face the clerk.
9 DR. JACQUELINE BENJAMIN, PLAINTIFF'S WITNESS, SWORN
10 THE CLERK: Please be seated. Will you please state
11 your name and spell it for the record.
12 THE WITNESS: Jacqueline Benjamin.
13 J-a-c-q-u-e-l-i-n-e, B-e-n-j-a-m-i-n.
14 THE COURT: Go ahead, Counsel.
15 MR. SMITH: Thank you, Judge.
16 REBUTTAL DIRECT EXAMINATION
17 BY MR. SMITH:
18 Q Doctor, Benjamin, we've heard testimony from a Dr.
19 Tawni Christensen, an emergency room doctor, wherein she
20 indicated that it was her opinion that the amount of
21 venlafaxine in her system as reported in the Quest report was
22 of an overdose level. Do you have any opinion as to that?
23 A I certainly do. As I had mentioned previously, the
24 level was actually, in fact, therapeutic, and that's based on
25 two different sources that we use in forensic practice.

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1 report.
2 Q And is that report is one that's prepared by Quest
3 Diagnostics; is that correct?
4 A The actual - our toxic lab is Quest Diagnostics, but
5 the test on the venlafaxine was sent to NMS.
6 Q Okay. We heard testimony from Dr. Christensen in
7 that - pardon me. She review the Quest Diagnostic and she
8 saw, which is now clearly in evidence, that the venlafaxine in
9 Mrs. Wilmars's system was 990 nanograms per milliliter.
10 Would you agree that that's an accurate statement of the
11 report?
12 A Yes, that's an accurate statement.
13 Q Ms. Christensen offered opinion that it was, in fact,
14 an overdosage amount based on indication in a separate part of
15 the Quest report stating that you would expect it to be 93 to
16 334 nanograms per milliliter if it was 150 milligrams per day.
17 Are you familiar with that part of the report?
18 A Yes, I am.
19 Q Is that an accurate baseline to do such a comparison?
20 A The - what that physician was looking at is NMS is
21 giving you reference ranges for both steady state and steady
22 state peak concentrations of the drugs after, I believe it's
23 two hours here, and also the trough, meaning the lowest drug
24 concentration in the system.
25 If you were to use 150 milligrams a day or 225 or 450

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1 Q And why don't you tell us what those sources are.
2 A Yes, I have both the sources here with me. One is
3 Winicks Drug and Chemicals Blood Level Data (pharmetic) from
4 2001. And the other is Disposition of Toxic Drugs and
5 Chemicals in Man, 8th edition, published in 2008.
6 Q How often would you say in your practice do you have
7 to interpret the toxicity level of a prescription drug in a
8 person's system?
9 A On a regular basis.
10 MR. PIKE: Objection, your Honor. Irrelevant. The
11 toxicity wasn't the issue. The overdose is beyond the
12 prescribed amount.
13 MR. SMITH: Okay, then I'll restate my question.
14 THE COURT: It's sustained. Okay want.
15 BY MR. SMITH:
16 Q How often would you, in your practice, have to assess
17 the dosage level in a person's system?
18 A As a forensic pathologist I look at the level of the
19 drugs in a person's system to determine whether that drug level
20 is, in fact, therapeutic or it's in toxic or lethal
21 concentrations.
22 Q And so is it your testimony that you, in fact, have
23 to do that pretty much in every case that you handle?
24 A Yes, we draw toxicology in all descendants and those
25 results are reviewed and incorporated into the final autopsy

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1 milligrams a day. What she probably wasn't aware of is that
2 these values for normal individuals who have normal function.
3 This drug is metabolized in the liver predominantly.
4 Q Okay. So do you have an opinion as to whether or not
5 the values give on the Quest Diagnostics form would be reliable
6 on the facts and circumstances of this case?
7 A The information given is reliable. However, it
8 cannot - you cannot use these to say this is an overdose. All
9 they are telling you is that in an average person who takes 150
10 milligrams a day, your steady state peak concentration should
11 be between 93 and 334. It says nothing about overdose. It -
12 this is not giving you the values for an overdose.
13 Q So is it your testimony, then, that a person who had
14 liver problems, such as say if they suffer from cirrhosis
15 and/or Hepatitis C, would that impact their ability to
16 metabolize venlafaxine?
17 A Yes, definitely.
18 Q Would that contribute to the information that is
19 reported in terms of the amount that was in her system at the
20 time?
21 A That information cannot be incorporated into a
22 standard toxicology report because the values for someone with
23 liver disease are not tested. The data that we look at that
24 the NMS Laboratory's looking at and that this textbook looks at
25 is in normal individuals. So I don't have data ranges for

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1 someone with cirrhosis.
 2 Q Okay. So you can't tell us what you would expect the
 3 nanograms per milliliter to be in a person taking 150
 4 milligrams per day of venlafaxine if she suffer from cirrhosis
 5 and or Hepatitis C?
 6 A I don't have those data ranges, no. And I'm not -- I
 7 don't know if those are published.
 8 Q Okay. Now, we also heard testimony from Ms.
 9 Christensen that --
 10 MR. PIKE: Dr. Christensen, your Honor.
 11 MR. SMITH: Dr. Christensen, I'm sorry.
 12 MR. PIKE: Thank you.
 13 MR. SMITH: I mean no disrespect.
 14 MR. PIKE: Then -- I'm sorry. Inappropriate comment.
 15 I'll withdraw and apologize.
 16 BY MR. SMITH:
 17 Q We also heard testimony from Dr. Christensen that the
 18 combination of alcohol and venlafaxine has a potential side
 19 effect of aggression. Do you have any opinion as to that?
 20 A I'm actually not aware of aggression as a side
 21 effect, not on review of the Physician's Desk Reference or that
 22 Bagalt textbook.
 23 Q And can you explain to the jury what the Physician's
 24 Desk Reference is.
 25 A Yes, it lists the drugs -- all various pharmaceutical

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1 MR. SMITH: Judge, thank you. I'll pass the witness.
 2 THE COURT: Mr. Pike.
 3 MR. PIKE: Thank you.
 4 CROSS-EXAMINATION
 5 BY MR. PIKE:
 6 Q Thank you for coming back, Dr. Benjamin.
 7 A Not a problem.
 8 Q I understand you were busy this morning.
 9 A Quite.
 10 Q In going through and making a determination in
 11 reference to this, you've -- you consulted a couple of
 12 different resources that were available to you, texts or
 13 alternate sources; is that correct?
 14 A That's correct.
 15 Q And it would be an accurate or safe statement to say
 16 that there are a large number of resources that you may look at
 17 some, another doctor may look at another, and it's not uncommon
 18 for doctors to arrive at different opinions?
 19 A In respect to?
 20 Q In respect to the proper amount of medication for one
 21 person or another.
 22 A I would imagine there are different resources, but I
 23 don't treat patients, so I wouldn't know the proper amount of
 24 medication to prescribe to a particular patient.
 25 Q Okay. And so you wouldn't know, in this case, if 150

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1 drugs, the side effect of those drugs, how those drugs are
 2 metabolized.
 3 Q And that's a publication that -- actually strike
 4 that. Is that a publication that would be available to pretty
 5 much anyone in the medical industry?
 6 A Yes.
 7 Q And it's your testimony that consulting that
 8 Physician's Desk Reference, it does not indicate that combining
 9 alcohol and venlafaxine can lead to aggression?
 10 A Correct.
 11 Q Now, suffice it to say, doctor, does it, in fact,
 12 list some potential side effects of the drug?
 13 A Yes, it lists the side effect of the drugs in the
 14 clinical trials that were performed before the drug went to
 15 market.
 16 Q Now, does that mean that the potential side effects
 17 would necessarily affect a specific person?
 18 A No. Again, it's the side effects that was brought
 19 out in clinical trials. Some people experience some side
 20 effects, while others experienced other side effects, and not
 21 everyone experienced all of the listed side effects.
 22 Q So, in fact, is there any way that we can know what
 23 side effects Victoria Witmarsh suffered, if any?
 24 A I would have no way of knowing that having only --
 25 the only experience I had with her was performing her autopsy.

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1 milligrams a day was a proper prescriptive amount for Mrs.
 2 Witmarsh?
 3 A I would not. I'm not a treating physician.
 4 Q Now, the -- and forgive me, you indicated that there
 5 -- this drug from your research is something that is processed
 6 within the liver, and the liver, if it's affected, it can
 7 maintain too much of it?
 8 A Well, what happens is it is metabolized, meaning that
 9 the chemical is converted in the liver, and so if the liver is
 10 not functional because of something like cirrhosis, where most
 11 of the liver cells are converted to fibrous tissue, then you
 12 have less conversion of the drug and more of the parent drug in
 13 your bloodstream.
 14 Q Okay. So you have the apparent drug which would show
 15 up as the actual drug itself.
 16 A Correct.
 17 Q And then the trace amounts of what that which would
 18 have been processed would be the metabolites?
 19 A The metabolites.
 20 Q And what was the level of the metabolites in this
 21 case?
 22 A The metabolite oldismethyl (phonetic) venlafaxine was
 23 870 nanograms per mill.
 24 Q Okay. Now, the --
 25 MR. PIKE: May I approach the witness, your Honor?

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1 THE COURT: Yes.
 2 MR. PIKE: I'm going to refer to the Quest
 3 Diagnostics. Okay, great.
 4 BY MR. PIKE:
 5 Q The document that you received from Quest Diagnostics
 6 was a -- it basically, from what you've described, and correct
 7 me if I'm wrong, it was that doctor's or that company's
 8 interpretation of how much the regimen that they would believe
 9 that you see in the blood system of a normal person that was
 10 doing the prescription at 150 milligrams per day.
 11 A There were various levels. 150 was one of the level.
 12 Q Right. And they actually gave you a range. This is
 13 how much you'd find at 75 milligrams per day, 225 milligrams a
 14 day or 450 milligrams a day.
 15 A Correct.
 16 Q Okay. And even at 450 milligrams per day, which is
 17 approximately three times that dose, still for a normal person
 18 they expect the range would not exceed 600 nanograms per
 19 milliliter.
 20 A 597.
 21 Q Okay. So both the metabolites, the amount that had
 22 already processed into the system, as well as the amount that
 23 had yet to be processed into the system, both of those exceeded
 24 even the highest level that was provided to you in the Quest
 25 Diagnostics documents that you rely upon as part of your duties

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1 documents provided by the company that makes the drug.
 2 A No.
 3 Q You didn't, okay.
 4 A No.
 5 Q It would be safe to say that there are some drugs
 6 that are introduced into the system. They may be approved for
 7 doctors to prescribe, that go through the testing process. And
 8 it's not until they're actually introduced into the public that
 9 difficulties are found with that.
 10 A That is true, because clinical trials only use a
 11 certain amount of individuals, and when it's -- the drug is put
 12 on the market, you have a much larger sample size.
 13 Q And that would be like the Fen Phen, you know, the
 14 diet drug, and that affected people's livers.
 15 A Correct.
 16 Q And one of the worst cases, I guess, would be
 17 phlodayan (phonetic), right?
 18 A Phlodayan, right.
 19 Q Okay, and that was prescribed for pregnant women and
 20 it resulted in a large number of birth defects.
 21 A Correct.
 22 Q And yet, that had been introduced and was sold over
 23 the counter.
 24 A Correct. I'm not sure it was sold over the counter.
 25 but that was --

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1 as a coroner.
 2 A Those levels are increased as compared to this. But,
 3 again, I just don't look at the levels in isolation. I have to
 4 look at what the therapeutic ranges are and what the toxic
 5 ranges are.
 6 Q Okay. And certainly, we're not saying this is a
 7 toxic range.
 8 A Not at all.
 9 Q Okay. But we're talking about a range for a normal
 10 person, and in the amount that's involved with Mrs. Witmarsh,
 11 Mrs. Witmarsh was only weighed about a hundred pounds, 110
 12 pounds.
 13 A I believe it was 108 --
 14 Q Okay --
 15 A -- if I'm not mistaken.
 16 Q -- it's right around there. And so you'd expect that
 17 a smaller person like that you would have a representatively
 18 smaller amount of dosage in that individual.
 19 A That's not really a fair statement. It depends on
 20 how much that individual took of the parent drug initially, and
 21 also in this case the toxicology is performed on heart blood
 22 and not peripheral blood which was not available. So that
 23 makes the value a little higher than it should be anyway.
 24 Q Okay. And one of the documents that you relied upon,
 25 I think you said you relied upon the pre-marketing tests or the

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1 Q No, I meant --
 2 A Yeah.
 3 Q I'm sorry, thank you. By prescription. When I meant
 4 over the counter, I meant by -- prescribed by doctors and they
 5 were following the protocols, and it was found to have that
 6 type of an effect.
 7 A Correct. Thank you for your time today, Dr.
 8 Benjamin. Appreciate you being here.
 9 THE COURT: Any redirect?
 10 MR. SMITH: No, Judge.
 11 THE COURT: All right, thank you, doctor, for your
 12 testimony. Any other rebuttal witnesses? I'm sorry, was there
 13 a question? I thought I saw someone's head go up. No. Okay.
 14 Thank you for your testimony, doctor.
 15 THE WITNESS: Sure.
 16 THE COURT: Any other rebuttal witnesses for the
 17 State?
 18 MR. SMITH: No, Judge.
 19 THE COURT: Any surrebuttal for the defense?
 20 MR. PIKE: No, your Honor.
 21 THE COURT: Okay. And at this point defense has
 22 rested, correct?
 23 MR. PIKE: Yes.
 24 THE COURT: State has rested?
 25 MR. SMITH: Yes, Judge.

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1 THE COURT: Okay. Ladies and gentlemen, we've
2 completed the portion of trial of the evidentiary portion of
3 the trial. As I said, we just need to take about a ten min
4 break and then we'll go through the instructions and closing
5 argument and then deliberations. All right.

6 So during this recess it is your duty not to converse
7 among yourselves or with anyone else on any subject connected
8 with the trial, to read, watch or listen to any report over
9 commentary on the trial by my person connected with the trial
10 or by any medium of information, including without limitation,
11 newspaper, television, radio or the Internet.

12 You're not to form or express an opinion on any
13 subject connected with this case until this matter is finally
14 submitted to you. We'll see you back just a few minutes.
15 Marshal will escort you out.

16 (Off-record bench conference).

17 (Outside the presence of the jury)

18 THE COURT: My JEA was just retyping, making some of
19 the corrections. I'll see if she's completed those, and we'll
20 bring out the stack.

21 MS. PALM: Okay.

22 (Court recessed at 1:21:59 p.m. until 1:29:54 p.m.)

23 (Outside the presence of the jury)

24 THE COURT: Okay. Defendant's present. We're
25 outside the presence of the jury. The jury instructions that

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1 feel it accurately established -- was established under Nevada
2 law.

3 MR. SMITH: Right. And it was the State's objection
4 that it came too close to impinging upon the reasonable doubt
5 instruction because it made it sound as if the State must show
6 that only one thing happened here and only one thing could have
7 happened.

8 THE COURT: All right. And I think the -- it does go
9 to the reasonable doubt instruction. I think that covers this
10 particular issue as well as I think it might be misleading to
11 the jury, so that's why I declined to give that, and why don't
12 we have that marks next in line as the State -- as the Court's
13 exhibit.

14 MR. PIKE: Okay. Actually, I have them as a packet.

15 THE COURT: Okay.

16 MR. PIKE: And I'll submit the packet, but --

17 THE COURT: All right.

18 MR. PIKE: -- the next instruction in that packet is
19 if the evidence in the case is subject to two constructions or
20 interpretation, each of which of you appear to be reasonable.
21 I indicated that I felt that that was appropriate based in
22 Krane versus State (phonetic). In a case in -- that it was
23 appropriate to give that in a case in which the evidence was
24 circumstantial. After argument by Counsel, I believe the Court
25 found that because there was circumstantial as well as direct

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1 the Court's going to give are being copied as we speak, and
2 they'll be numbered in just a minute. However, there were
3 certain instructions requested by both sides which the Court is
4 declining to offer or to provide to the jury. And so, Mr.
5 Pike, why don't you go first.

6 MR. PIKE: Thank you, your Honor.

7 THE COURT: And then Mr. Smith, if you can respond.

8 MR. PIKE: We were able to arrive at resolutions
9 regarding a number of the instructions and have been able to
10 have a complete set that -- to go before the jury. I had
11 submitted a proposed instructions regarding a finding of guilt
12 as to a crime may not be based on circumstantial evidence
13 unless it's consistent with the theory of the State. I cited
14 Kalfick, 201 as the authority for there. There was not a
15 Nevada case on point, but California law suggesting that, and
16 that was an offer, and the Court after argument rejected
17 that.

18 THE COURT: All right, Mr. Smith. Do you mind if Mr.
19 Smith just stands next to you.

20 MR. PIKE: Oh, yeah, yeah.

21 MR. SMITH: Okay, which one was it?

22 MR. PIKE: This -- as I indicated the Court's ruling
23 was based upon the fact of the circumstantial instruction that
24 there was not Nevada law on point, and that the citation to the
25 California instruction was insufficient, and the Court didn't

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1 evidence in the case, that this was not an appropriate
2 instruction for this case.

3 THE COURT: Mr. Smith,

4 MR. SMITH: And the State's objection to that
5 instruction was to the exact same as to the previous one.

6 THE COURT: And that's why Court declined to give
7 that instruction.

8 MR. PIKE: I asked for a corrective instruction
9 indicating that -- to instruct the jury that test the events
10 contained in this case, that the defendant was irrebuttably
11 presumed to have been intoxicated. I based that upon the
12 authority of Sandborn versus State in which the Nevada Supreme
13 Court found a corrective instruction to be appropriate where
14 there was evidence it was within the direct control of the
15 police and it was destroyed and or lost and it's a spoilage
16 instruction borrowed from -- borrowed criminally from civil
17 case.

18 And this case we brought in evidence that Mr. O'Keefe
19 appeared to be gross -- or very intoxicated, and yet, during
20 the entire time that he was held during the interview, the
21 alcohol rate or proof there of was dissipating, and we should
22 be entitled to that instruction.

23 MR. SMITH: And Judge, we actually litigated that
24 very issue during pretrial motion, and it was the State's
25 objection that there was nothing to warrant that instruction be

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1 given under the circumstances of this case. Specifically that
2 there was never any showing of spoilage or malicious intent or
3 anything on the behalf of the detectives who were involved in
4 this case. And that it was not a duty imposed upon the State
5 to take a blood alcohol test under these circumstances.

6 THE COURT: Also, I think it's factually dissimilar
7 to Sandborn, so the Court was not going to give that
8 instruction.

9 MR. PIKE: Thank you very much. And the next one
10 it's a non-flight after crime instruction. I borrowed the
11 instruction from State indicating that you can consider a
12 defendant's flight after a -- or from the scene of a crime as
13 evidence of guilt and twisted that to indicate that if the
14 non-flight of a person from the location immediately attended
15 to a crime indicates that lack of a consciousness of guilt, and
16 the Court has indicated it's disinclined to give that
17 instruction.

18 MR. SMITH: And it was merely the State's contention
19 that instruction was not supported in law.

20 MR. PIKE: Okay.

21 THE COURT: Again, that's why the Court did not give
22 that instruction. Mr. Pike, can you hold on one minute,
23 please.

24 MR. PIKE: Okay, let's see. I offered the malice
25 aforethought instruction.

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1 of the Runion, there is a portion of that indicating that the
2 killing of another in self-defense. One of the portions of
3 that is that it is absolutely necessary under the
4 circumstances. We object to absolutely necessary language that
5 was use in that and believe that that changes the burden of
6 proof from a reasonable standard to a burden that the -- is
7 beyond a reasonable doubt as far as the defense. It improperly
8 changes the burden of proof, and we'd object to that on
9 constitutional grounds.

10 MR. SMITH: I understand their objection of
11 constitutional grounds. It was the State's position that that
12 language quoted specifically language approved by the Nevada
13 Supreme Court in Runion v. State.

14 MR. PIKE: And it does.

15 THE COURT: All right, and that's correct. We are
16 giving an instruction that was contained in that case.

17 (Off the record colloquy).

18 THE COURT: All right.

19 MR. SMITH: And I'll spell Runion for the record.
20 R-u-n-i-o-n.

21 THE COURT: Any others, Mr. Pike?

22 MR. PIKE: I had submitted a benefit of doubt
23 instruction indicating that the jury was satisfied beyond a
24 reasonable doubt that the killing was unlawful, but you have a
25 reasonable doubt whether the crime is murder or manslaughter.

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1 THE COURT: All right, next. Sorry, Mr. Pike.

2 MR. PIKE: In relation to the malice aforethought
3 instruction that's being given by the Court, we felt that that
4 inadequately and improperly stated the laws of the state of
5 Nevada and we offered a much shorter one, and the Court
6 declined to allow our instruction, feeling that the one offered
7 by the State was -- contained, although items we objected to,
8 that it sufficiently stated the law and the Court approved
9 their instruction over ours.

10 MR. SMITH: Was that the one that talked about -- oh,
11 right, it was the State's position that the instruction we
12 tendered was one that is an instruction that has been given
13 many, many, many times and is supported in the case law.

14 THE COURT: That's correct, and this is why the
15 Court's not -- that's why the Court's giving the instruction
16 that it is. I think we can put on the record that there were
17 certain instructions that the Court is giving that are not in
18 dispute, but some of the instructions were, I guess, joint
19 instructions as far as each changes we made to various -- but
20 sometimes we call stock instructions, but the parties did come
21 to agreement on making various modifications to those
22 instructions which the Court is giving, and we'll go over those
23 in just a minute.

24 MR. PIKE: Yes. And in relationship to the
25 self-defense issues and the instructions that were pulled out

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1 that you must give the defendant the benefit of such doubt.
2 The instructions in the manner in which this has -- it has
3 previously been directed to juries to start at the top and work
4 down. I don't feel that adequately expresses to the jury the
5 concept of reasonable doubt, and although that has been
6 approved, I think that this is a necessary addition to that in
7 order to allow the jury to understand the constitutional
8 protections that are involved.

9 MR. SMITH: And it was the State's position that
10 intent -- the idea that it's attempted to be conveyed in that
11 instruction is conveyed in the other instructions, including
12 the reasonable doubt instructions. Because of the potential
13 for confusion, the State objected to it.

14 THE COURT: The Court did find that the other
15 instruction appropriately define the law in question, and
16 that's why I did not give the defense requested instruction.

17 MR. PIKE: Thank you. The defense also tendered an
18 instruction indicating murder and voluntary manslaughter to be
19 distinguished, one between the other, and in that we -- in that
20 instruction the language that we sought regarding the burden on
21 the State to prove beyond a reasonable doubt each of the
22 elements of murder and that the death was caused or not was not
23 done in the heat of passion want.

24 It's similar to once we've established prima facie
25 defense, then the burden of proof shifts back to the State. I

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1 cted Robert for State versus that (sic). The Court found that
2 the concepts and defenses associated with that were adequately
3 contained in other instructions and denied that motion or that
4 instruction.

5 MR. SMITH: And it was the State's position that this
6 instruction was covered by the instructions already offered.

7 MR. PIKE: And similarly, there was a lesser included
8 benefit of the doubt instruction regarding manslaughter which
9 cites the Lizbi versus State (phonetic). That was a potential
10 alternate to the benefit -- the shorter benefit of the doubt
11 instruction that we previously argued, and the Court issued the
12 same ruling on that.

13 The -- I tendered an instruction indicating that a
14 person is entitled to use self-defense even though the danger
15 to life or personal security may not have been real if from the
16 circumstances in the viewpoint of the defendant it would -- it
17 would have reasonably believe that he was in eminent danger of
18 death or great bodily harm citing to Paneda (phonetic) versus
19 State, and the Court declined that instruction.

20 MR. SMITH: And the State's objection to that was
21 that it's covered in the Runion instruction.

22 MR. PIKE: Okay.

23 THE COURT: That's correct. Go ahead, Mr. Pike.

24 MR. PIKE: We offered an instruction that good
25 character when considered in connection with the other evidence

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1 Court's ruling.

2 THE COURT: All right, the last part of the
3 instruction says you must consider the actions of the State and
4 police officer withholding this evidence in determining the
5 State has met its burden of proof meaning the charge against
6 the defendant.

7 MR. PIKE: Thank you, your Honor.

8 THE COURT: I think it's incorrect statement of a --
9 you know, there's no requirement much that, and I don't think
10 there's any testimony that it was improperly withheld. It was
11 -- the testimony stands in that regard, so --

12 MR. PIKE: Thank you. And for the record, those
13 proposed jury instructions that have been placed with a cover
14 sheet on them indicating the defendant's replaced jury
15 instructions. I'd ask they be filed as a court exhibit for the
16 record.

17 THE COURT: Will be. And Mr. Smith, you had two
18 instructions?

19 MR. SMITH: We had proffered an instruction, and I
20 believe it's from the Tomarchie case. I believe the spelling,
21 for the record, is T-o-m-a-r-c-h-i-e. It's commonly known as
22 the bad act instruction. And since the State has introduced
23 evidence in this case to a prior bad act of the defendant, we
24 proffered that instruction as has been ordered for the State to
25 do by the supreme court.

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1 may generate a reasonable doubt alone. This is in reference to
2 the past service that Mr. O'Keefe provided to the country. The
3 State objected to that. The Court found that it was adequately
4 covered in other instructions.

5 MR. SMITH: Well, and then just to supplement. I
6 believe what happened is the State proffered an alternate
7 instruction, and the parties agreed they would (indiscernible).
8 We kind of agreed that they didn't like our instruction and we
9 didn't like theirs, so we just decided to fore go it.

10 THE COURT: I think that's correct, isn't it, Mr.
11 Pike?

12 MR. PIKE: That actually is. If one was not going to
13 be given separately, they were both going to be given, and so
14 the defense did concede that --

15 THE COURT: All right.

16 MR. PIKE: -- in settlement of instructions. A final
17 instruction offered by the defense was that it was a form -- in
18 the form of a corrective instruction regarding the officer's
19 providing the use of force report. The Court found that we
20 have established such evidence to argue any of those questions
21 before the jury, and did -- and felt that this instruction
22 would improperly bring that single issue before the Court.

23 THE COURT: Let me see that instruction again, Mr.
24 Pike.

25 MR. PIKE: Okay. I hope I'm correctly stating the

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1 It's the defense's decision to request that
2 instruction. Not to give it, but in this case they actually
3 did or they agreed with the giving of that instruction. I
4 think we also proffered an adoptive admission instruction, and
5 the Court declined to give that, and I think that was it.

6 THE COURT: I didn't think there was such evidence of
7 the adoptive admission, so that's why the Court didn't give it.
8 And also it was objected to by the defense, correct?

9 MR. PIKE: That's correct, your Honor.

10 THE COURT: All right.

11 MR. PIKE: Thank you. You should have the packet of
12 instructions in front of you. They've been handed out or we
13 have them here.

14 THE CLERK: (Indiscernible).

15 THE COURT: They've been numbered. They're not
16 numbered on your stack there, but they're instructions --
17 they're jury instructions 1 through 11 instructions.

18 MS. PALM: They -- we should number them ourselves?
19 They are numbered?

20 THE COURT: Right. We just didn't number those yet,
21 but they are -- it's 1 through 44.

22 MS. PALM: Okay.

23 THE COURT: And we went over these instructions.
24 Besides the objections, Mr. Pike, of what you just stated on
25 the record, as far as the instructions I was giving the State

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1 presented, do you have any other objections to instructions I
2 through 44?

3 MR. PIKE: The only -- I have just a few brief ones.
4 The instruction that indicates that -- regarding voluntary
5 intoxication is an instruction that was adapted from State
6 versus Lukich, I-u-k-i-c-h, 29 Nevada 217. I believe that's
7 contrary to the Biford (phonetic) instructions and the
8 statement of the law within that case.

9 MR. SMITH: Which instruction are you talking about
10 right now, I'll sorry?

11 MR. PIKE: The volunteer intoxication case or
12 instruction.

13 MR. SMITH: And it was the State's position that that
14 is an accurate statement of the law.

15 THE COURT: Anything else, Mr. Pike?

16 MR. PIKE: The -- I believe that in the heat of
17 passion instruction, that as I've indicated, that improperly or
18 impermissibly shifts the burden from a subjective standard to
19 an objective standard regarding the mens rea elements of
20 murder.

21 THE COURT: Mr. Smith.

22 MR. SMITH: I'm sorry, Judge. They had an objection
23 to this one, and I believe our contention was that this is, in
24 fact, an accurate statement of the law with regards to what the
25 heat of passion must be in order to reduce a murder to a

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1 THE COURT: Okay. And besides the two instructions
2 you had requested, any other instructions you request be given
3 by the Court you?

4 MR. SMITH: No, Judge.

5 THE COURT: And besides the ones you had requested,
6 Mr. Pike, any other instructions?

7 MR. PIKE: No.

8 THE COURT: All right. Let's call the jury in.
9 Questions?

10 MS. GRAHAM: Oh, no. I was just going to ask for a
11 quick bathroom break, but --

12 THE COURT: Can you hold that? Are you okay? I
13 don't want you to have --

14 MR. PIKE: That's just fine.

15 MS. GRAHAM: Can I just set this up --

16 THE COURT: Yes.

17 MS. GRAHAM: -- and make sure it's going to go on
18 there correctly so I don't have to do it in front of the jury,
19 Judge?

20 THE COURT: Yes.

21 MS. GRAHAM: Okay.

22 (Off the record colloquy).

23 MS. PALM: Judge, instruction 23 and 29 are the same.
24 and I don't want to undo emphasis. So can we take out 29?

25 MR. SMITH: Oh, yeah.

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1 voluntary manslaughter.

2 THE COURT: That's what the Court found. Any others,
3 Mr. Pike?

4 MR. PIKE: The only other instruction that I find
5 objectionable is -- well, actually, I will indicate for the
6 Court for the record in this that the defendant did make a
7 number of objections in relationship to language. Kind of
8 Archaean language about (indiscernible) depraved in a needless
9 spirit, and the parties were able to find more appropriate,
10 more current instructions that didn't strike on the religious.
11 And so there was a great deal of effort that went into
12 correcting some of the Archaean language that appears.

13 MR. SMITH: That's correct, Judge, we were able to
14 come to an agreement.

15 THE COURT: Okay. And you're familiar with the
16 verdict form, Mr. Pike?

17 MR. PIKE: I am. We have no objection to that.

18 THE COURT: Okay. Mr. Smith, you're familiar with
19 instruction I through 44?

20 MR. SMITH: Yes, I am, Judge.

21 THE COURT: Any objection to those instructions?

22 MR. SMITH: Not as give.

23 THE COURT: All right. Any objection to the verdict
24 form?

25 MR. SMITH: Oh, I'm sorry, no, Judge. No objection.

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1 MS. PALM: At least in our packet it's in there
2 twice.

3 THE COURT: Yep, so it will be instruction I through
4 43. I'm have to remember those, but --

5 MS. PALM: Okay.

6 MR. SMITH: So we're taking out what? Which one?

7 MS. PALM: We're taking out 29.

8 THE COURT: 29.

9 MR. SMITH: Okay. I think we're ready, Judge. I'm
10 sorry.

11 (In the presence of the jury)

12 THE MARSHAL: Officers and members of the court.
13 Department 17 jurors. You may be seated, ladies and gentlemen.
14 Let's make sure all cell phones are turned off, please.

15 THE COURT: Let the record reflect we're back in the
16 presence of the jury panel. Party's ready to proceed with the
17 closing?

18 MS. PALM: Yes, your Honor.

19 MR. SMITH: Yes, your Honor.

20 MS. GRAHAM: Yes, your Honor.

21 THE COURT: Ladies and gentlemen, it is now my duty
22 as judge to instruct you on the law that applies to this case.

23 (Thereupon, the jury instructions were given but not
24 transcribed).

25 THE COURT: Counsel approach, please.

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1 (Off-record bench conference).
2 THE COURT: I'm sorry, ladies and gentlemen.
3 (Reading of the jury instructions resumed but not
4 transcribed).
5 THE COURT: Counsel.
6 MS. GRAHAM: Yes, Judge. Court's indulgence. I'm
7 not a technical person. I apologize. So Mr. Smith is helping
8 me out setting this up. And while we're waiting to do that, I
9 just -- it's been a long week, I think you'd all agree. It's
10 been a long week. A lot to take in. This is a really serious
11 case. Somebody's dead. It's the State's position that she was
12 murdered, and it's also I'm going to tell you right off the
13 bat, it's the State's position that defendant committed first
14 degree murder with a deadly weapon.
15 You're going to have a verdict form here that gives
16 lots of options for you to consider. First degree murder with
17 use of a deadly weapon, first degree murder, second degree
18 murder with use of a deadly weapon, second degree murder,
19 voluntary manslaughter with use of a dead weapon, voluntary
20 manslaughter, involuntary manslaughter with use of a deadly,
21 involuntary manslaughter, and obviously not guilty.
22 The State's position is that this is first degree
23 murder with use of a deadly weapon. You're going to have
24 copies of the jury instructions. I think the judge informed
25 you of that. So I know that that was a lot of stuff to hear

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1 Direct evidence. We heard direct evidence in this case.
2 Direct evidence is evidence from witnesses, okay. You were
3 able to observe them while they testified, to hear the content
4 of their testimony, to judge their credibility by their actions
5 on the stand, their eye contact, their mannerisms. That's
6 really important. And you all have life experience. I mean,
7 you can judge somebody's credibility.
8 So and credibility's another one of the instructions.
9 But the witnesses, that's direct evidence okay. Their
10 testimony is direct evidence. The weight of that evidence is
11 going to be determined by you. And I just gave an example.
12 Circumstantial evidence is a chain of facts. And
13 this is real important, okay. Circumstantial evidence is a
14 chain of facts that draws an inference that you can give weight
15 to. And you're to give the same weight to direct evidence,
16 evidence that you've actually heard, as things that can be
17 inferred, and I'll give you an example of that. And I think,
18 you know, the judge gave you an example of that at the
19 beginning of this case.
20 I guess the best example that comes to my mind is
21 because I'm from the midwest, and it snows there a lot. You
22 are home, you're awake, you lookout the window, you see the
23 snow falling on the ground, you see the snow. That's the
24 direct evidence. The difference between that, circumstantial,
25 is I go to bed that night, I wake up the next morning, I

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1 and read. You're not going to have to try to remember it.
2 You're getting copies of all of that to take back with you.
3 My job now is to try to help explain all of those
4 things that the judge said and how that would apply to this
5 case. And how the evidence in this case proves that he
6 committed first degree murder with use of a deadly weapon, a
7 knife.
8 Now let's see if this works for me. Your job is very
9 important, as the judge told you when you first got here and
10 through voir dire, and that's why we took a lot of time. The
11 system wouldn't work without you guys because, you know, we
12 want everybody of different backgrounds and different
13 experiences on our jury. Your sole duty when you go back in
14 that deliberation room right now is to determine what crime was
15 committed by the defendant.
16 Jury instructions, those are the law. That's the law
17 in Nevada per the judge and actually per our legislatures.
18 Whether you agree with the law or not, it's the law, and you
19 all took an oath to follow the law. And what the judge
20 described to you and what my attempts to explain to you the law
21 in the state and of course, defense will explain to you law of
22 the state, that's the law, folks. And that's what you have to
23 apply to the evidence in this case. But, again, you're going
24 to have copies.
25 Two types of evidence. Direct and circumstantial.

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1 lookout the window, there's snow all over the ground. I can
2 infer that it snowed last night, right. I mean, that's an
3 inference I can draw because when I went to bed, it -- there
4 was no snow on the ground, I didn't see it snow. I didn't see
5 it snow, but when I woke up, there's snow on the ground, so
6 wouldn't that be a reasonable inference? Yes, that would be a
7 reasonable inference.
8 And you're to give the same weight to circumstantial
9 evidence as you are to direct evidence. So you can infer. You
10 need to use your common sense. Credibility of the witnesses,
11 live testimony. Like I said, he discussed that. That's so
12 important. You know, we've had so many people testify. We've
13 had officers testify today. We've had the defendant testify.
14 We've had lay witnesses, neighbors testify, medical examiners
15 testify, doctors testify. That live testimony, you can judge
16 the credibility of those witnesses because you were here, you
17 watched, you observed. Evaluate the ones that are supposed to
18 judge the credibility and their motives to lie.
19 You can disregard the entire testimony of a witness
20 if you don't find them credible. That's important. If you
21 find any one of our witnesses not credible, you're free under
22 the law to disregard that entire testimony. So remember that.
23 Don't get caught up in trying to figure things out. Common
24 sense. That's a big one want you don't leave it at the door.
25 There's a jury instruction -- I think there a jury

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1 instruction that says you bring your common sense and life
2 experience in. You don't leave it at the door. That's why
3 there's so many -- you know, on each side of you, you're all
4 different. You all have different life experience. You're to
5 bring that life experience and your common sense into that
6 deliberation room. Don't forget it, okay.

7 Punishment. Your duty at this point right now when
8 you go back in the deliberation room is confine to the guilt of
9 the defendant. Whether or not he's guilty and what he's guilty
10 of. You were not to discuss punishment. The judge instructed
11 you on that. Or consider the subject of punishment during your
12 deliberations as to his guilt. That cannot be a factor in your
13 determination of what he's guilty for. The judge has
14 instructed you on that, and that is the law in Nevada. You
15 need to put that aside.

16 What is murder? I'm going to try to break it down.
17 I mean, it's so complicated. There's just -- you know, you --
18 I was watching some of you. It's like well, what does all that
19 mean? Well, murder is the unlawful killing of a human being
20 with malice aforethought. Malice aforethought can be expressed
21 or implied. What is malice aforethought? We know what killing
22 another human being is, right? Okay. But what's malice
23 aforethought? Intentional killing without legal cause or
24 excuse or what the law would consider adequate provocation.

25 Okay, so it's intentional. An intentional killing

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1 What happened to my Power Point?

2 The intent to kill, though, can be a certain or
3 deduced from the facts and circumstances of the killing. So
4 the intention of the person that killed, you can deduce that
5 from all of the facts and circumstance of the evidence that we
6 presented to you today or throughout the week. Most
7 importantly, such as the use of a weapon that's calculated a
8 deduced detective in the manner that it was used and the
9 circumstances surrounding that act. That can be inferred.

10 Deduced. There doesn't have to be an amount of time,
11 a (indiscernible) amount of time needed between the formation
12 of the intent to kill and the act of killing itself, okay.

13 What is deliberation? You think about it first, you weigh the
14 options, consider the consequences, you make a decision. That
15 decision, folks, can be made very, very quickly by
16 premeditation, decision to kill, formed in the mind of the
17 killer, before the killing. It can be as instantaneous as
18 successive thoughts of the mind. Less than a minute.

19 The law doesn't measure the length of time of
20 premeditation, okay. It doesn't require how long that thought
21 must be pondered in the mind before it's premeditated. That's
22 really important for you to understand. Time can be varied
23 based on the individual and the circumstances of the evidence
24 that is presented to you. Instantaneous just is successive
25 thought in the mind. The law doesn't look at the duration of

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1 without legal cause or excuse. Anger, hatred, revenge, ill
2 will or spite is not required for malice, okay. That's in your
3 injury instructions, so don't feel like you're going to have to
4 remember everything that I tell you. Expressed malice is the
5 deliberate intention to take away the life of another.

6 Deliberately do it. Implied malice. Malice can be implied
7 just kind of like the circumstantial evidence kind of thing.

8 You know, you can imply malice when no considerable
9 provocation appears or when all of the circumstance of a
10 killing show an abandoned or malignant heart. So there's
11 implied malice as well as expressed. It can be deliberate or
12 you can imply it. And you can imply it with no provocation
13 appears and when all of the circumstances showing a killing of
14 an abandoned or malignant heart.

15 Simply put, malice aforethought means it wasn't an
16 accident, okay. Malice aforethought simply put, not an
17 accident. What is first degree murder? The killing was
18 willful, deliberate, premeditated. All of those have
19 definitions, too, believe it or not. Of course, they do.
20 Okay. And each one is different.

21 What is willfulness? The intent to kill. The intent
22 to kill -- you intended it kill. That's willful. You know, we
23 kind of all know we what -- we willfully do things everyday.
24 You know, we willfully get in our car and come to the -- start
25 it and drive down to the court house to sit for jury duty.

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1 time for premeditation.

2 If you believe the evidence -- from the evidence that
3 the act constituting the killing has opinion preceded by and
4 has been the result of premeditation, no matter how rapidly,
5 the killing's premeditated.

6 What is second degree murder? The killing was not
7 deliberate, not premeditated. Just intentional. Voluntary
8 manslaughter. Killing without malice aforethought,
9 deliberation or premeditation with provocation. An example
10 would be a serious injury. Self-defense, maybe. Or somebody
11 is trying to hurt you. With no time to think. An irresistible
12 impulse in the heat of passion.

13 And the objective standard, though, for that heat of
14 passion is an ordinary person would have killed without
15 thinking. I mean, it's just innate, okay. You're in a
16 circumstance where, you know, let's say that you're at the zoo
17 and a tiger comes out of the cage and he's loose, I mean, it
18 would be -- you wouldn't even think to try to save your
19 daughter or, you know, that's instantaneous. That's an
20 instantaneous -- that's what an ordinary person would do. You
21 know, a situation where an ordinary person would kill.

22 Involuntary manslaughter, killing without any intent
23 during the commission of an unlawful act or a lawful act which
24 probably might produce such a consequence in an unlawful
25 manner. But where the involuntary killing occurs in the

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1 commission of an unlawful act which in its consequences
2 naturally tends to destroy the life of a human being the
3 offense is murder.

4 What's a deadly weapon? Well, it's complicated,
5 according to the law. Any instrument if used in the ordinary
6 manner contemplated by its design and construction will or is
7 likely to cause substantial bodily harm or death. Or any
8 weapon, device, any instrument, under the circumstances it was
9 used or attempt to be used or threaten to be used that's
10 readily capable of causing substantial bodily harm or death is
11 a deadly weapon. And of course, our contention is that a knife
12 was the deadly weapon.

13 Substantial, what's substantial bodily harm?
14 Substantial bodily harm means that it's bodily injury which
15 creates a substantial risk of death or causes serious
16 impairment, disfigurement or prolonged physical pain. All
17 right, what's self-defense. We use the reasonable person
18 standard. Honest but unreasonable does not negate malice and
19 does not reduce the offense from murder to manslaughter.

20 It has to be reasonable under the reason person
21 standard. There has to be the threat of eminent death.
22 Eminent means quicker than immediate. Or substantial bodily
23 harm. So there has to be a risk of eminent death or
24 substantial bodily harm, which, again, was, you know, the
25 threat of serious bodily injury.

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1 instantaneous? How do we know all this? Well, I'm going to
2 get to that want it was deliberate. And there was definitely
3 malice aforethought, either express, definitely implied. Okay.

4 MR. PIKE: Objection, your Honor. May we approach
5 the bench, I'm sorry.

6 THE COURT: All right.

7 MR. PIKE: I hate to interrupt Counsel's argument.
8 (Off-record bench conference).

9 MS. GRAHAM: Okay. So we look at the evidence before
10 the murder, during the murder and after the murder. What did
11 he say, the defendant? What did he do before the murder? He
12 said I want to kill the bitch. He told Cheryl Morris that. I
13 want to kill the bitch, she's poison. Why? He told her why.
14 She took three years of his life.

15 You can judge the credibility of Cheryl Morris
16 herself. He even told her how he could kill somebody with a
17 knife. He demonstrated to Cheryl that he can kill somebody
18 with a knife. He talked about his proficiency in the services
19 with a knife. His training. Before the murder he said all
20 that.

21 What about during the murder? Well, that's a little
22 tougher because we don't really know what was said or exactly
23 in what order that transpired. We know that the Tolivers, who
24 live directly under the defendant and Victoria that night,
25 directly under, were in their bedroom where the murder occurred

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1 The killing was absolutely necessary to avoid your
2 death or substantial bodily harm in this case, as it applies in
3 this case. The reasonable person standard. Fear alone is not
4 enough. And you cannot use more force than was necessary under
5 the law. And it doesn't apply to initial aggressors.

6 Intoxication. We've heard about intoxication. If an
7 intoxicated person has the capacity to form the intent to take
8 a life and he conceives and executes that intent, that's no
9 grounds for reducing the degree of this crime. There are other
10 instructions that are the packet. Those are pretty much
11 self-explanatory.

12 How do we know defendant killed Victoria? Well, for
13 one thing, there's been absolutely no evidence that anybody was
14 in the room but the defendant and Victoria. I don't think
15 identity's an issue in this case. All right, this is how we
16 know it's first degree murder. It wasn't an accident. It was
17 willful. I don't think I have to go through all the facts.

18 You guys, there's been so much testimony here. Use your common
19 sense. Use all the evidence. You can infer that there was no
20 accident here. The medical examiner testified that the
21 location of the wound -- you can view the photos yourself and
22 determine that this was no accident. It was willful. The act
23 of stabbing Victoria was willful.

24 It was premeditated. He had time to think about it
25 and thought about it. Remember, premeditation can be quick

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1 directly under. And Joyce told you as she was laying in bed,
2 she heard lots of thumping, lots of noises, a woman crying.
3 She kept turning up the volume. It got louder. It won't on
4 for about an hour. She heard thumps, she heard crying. And
5 then at one point it got so loud, it woke Cookie (phonetic) up.
6 You remember, he jumps up, what the hell? Stick the broom up
7 -- you know, the old broom trick on the ceiling, you know, to
8 try to quiet it down. It didn't quiet it down. It got louder.

9 And then Cookie was so fuckin' irritated because he
10 was awoken. He went up there to tell them to quiet down, and
11 what did he see? Well, he saw Victoria laying there in a pool
12 of blood. And Cookie's reaction is what the hell did you do?
13 He ran down stairs, started calling for people to call 911.
14 Defendant never asked him to call 911. He saw Cookie. Told
15 him to get out. Most importantly, one of the things that we
16 can infer that during the murder, since we don't know exactly
17 how everything transpired, we have photos.

18 The photos, and you know the saying? A picture is
19 worth a thousand words. These are all going to be back in the
20 jury room, State's Exhibit 55, State's Exhibit 36, State's
21 Exhibit 59, State's Exhibit 46, State's Exhibit 39, State's
22 Exhibit 58, 57. There's more, folks. I'm not going to show
23 you all of them. How about this one, 8? State's Exhibit 60.
24 How about this one, Defendant's Exhibit UU? That says it all,
25 really. Picture's worth a thousand words.

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1 After, well after -- after, we have Todd coming in
2 the room. Todd Armbruster, remember the neighbor or the
3 maintenance guy that worked on the property? He came in the
4 room because Cookie's like dude, you know, call 911. He's done
5 killed that little girl. Todd goes up there. He goes into the
6 room. He sees Victoria laying on the pool of blood. And what
7 does the defendant do? He says get the fuck out, and he takes
8 a swing at him, right? That's what Todd testified to. You can
9 believe Todd if you want to, but --

10 So he takes a swing at Todd. Todd calls 911. They
11 leave. Cookie says he sees this face. They all -- Todd,
12 Cookie, and even the neighbor next door, Doomy (phonetic), who
13 saw the defendant that night -- described this face, this scary
14 face that the defendant had. It scared Cookie. You remember
15 he wanted to get the hell out of there. He wanted to get the
16 hell out of there because he said he didn't know what would
17 happen to him.

18 So defendant didn't call 911. We know that because
19 Detective Wildemann told you that he checked the cell phones,
20 and there was absolutely no entry of 911. I think there were
21 three cell phones, maybe four recovered from that apartment.
22 He didn't call 911. He didn't call for help. If this was an
23 accident, if this was self-defense, if she stabbed herself,
24 you'd call 911 for help.

25 And when they came, because other people had to call,

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1 blood on the floor.

2 They cannot send emergency personnel in a situation,
3 a dynamic situation like that. Defendant would allow -- even
4 if she was alive at that point, he wouldn't allow her to be
5 treated. He would not allow them to enter the room to help
6 her. They had to buzz him twice and drag him out of the room.
7 Well, he says he doesn't want to leave her body.

8 He testified -- I mean -- let's see, what else
9 happened after? Okay, he told Hutcherson, you know, once he
10 was in custody he was put in the back of a patrol car -- a
11 patrol car. He says sorry, V, I didn't mean to hurt you, let's
12 go, let's go, let's do the ten years. Sorry V doesn't cut it.
13 Sorry V.

14 The fact that you have remorse after you kill someone
15 does not negate the intent to kill at the time. Sorry V, that
16 doesn't cut it. He made so many statements. You know what, I
17 can't -- I'm not even going to go into them because we would be
18 here all week.

19 You saw the defendant testify in his taped statement.
20 Well, you saw the taped statement that Detective Wildemann --
21 it was Detective Wildemann and Detective Krieger (phonetic), I
22 believe -- Krieger. You guys saw that. You know how many
23 different statements he made and things he said. You were able
24 to watch his demeanor, and you were able, you know, to observe
25 Detective Wildemann and Detective Krieger with him. You can

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1 you wouldn't have a stand off in the bedroom with them. You
2 would let them attend to a woman that you supposedly love
3 bleeding all over the floor. But that didn't happen. Instead
4 when they got there, you heard from Officer Conn, Santarossa,
5 Ballejos, Taylor, Hutcherson, they were all on the scene. He
6 wasn't going to let them near him and Victoria. They're
7 shouting to him, you know, is she hurt? What is defendant
8 saying? She's dead, she's alive, get the fuck out, go away.
9 fuck you, fuck -- there's so many inconsistent statements.
10 There's so many things the defendant said.

11 But what we do know is he never would allow -- and
12 the police announce Metro, we need to get her help, is she
13 alive, is she dead? He wouldn't respond want get the fuck out.
14 We need to get medical to her. Get the fuck out. Okay, so
15 what happens, you know? They're worried about this woman
16 laying on the floor. They can't go in there? Why can't they
17 go in there? There's protocol. They don't have him in his
18 line of sight?

19 They see a woman's feet at first. Sergeant Newberry,
20 I believe peeks around the corner, there was testimony of that,
21 and sees and says cover me, you know. They can't go there.
22 They think he's baiting him, you know. They testified to all
23 the things that he was saying and his demeanor, and they think
24 they're baiting him. He -- they can't see. They don't know if
25 there's a weapon. They just see a woman lying in a pool of

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1 judge their credibility and theirs during that interview. And
2 you guys are going to have that, and if you want to, you can
3 watch it again.

4 He testified today, so you can judge that credibility
5 of him on the stand today, you know. You can infer, you can,
6 you know, the demeanor. You know, there's a box of Kleenex
7 right there. I didn't see one Kleenex lifted out of that box
8 while he was up there. You guys saw it. You know when he said
9 I can't go over it, it's -- there's too much.

10 You know what's interesting, in opening statement Mr.
11 Pike gave, you know, a brief opening where he said one stab
12 wound, one stab wound. And I find it really ironic that today
13 on the stand the defendant when referred to alcohol, what did
14 he say? One is too many. One drink is too many. Well, one
15 stab wound is too many.

16 This is much more than second degree murder. Second
17 degree would only apply if defendant acted intentionally but
18 did not have the time to think about what he was doing
19 (indiscernible). No successive thoughts before
20 stabbing Victoria death. He hadn't folks. The facts show he
21 had plenty of time for the weighing of choices and decided to
22 kill despite the possible consequences. There's plenty of
23 time.

24 I mean, co-counsel Smith's -- even if you believe the
25 defendant's version of, you know, the incident between him and

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1 Victoria, he had plenty of time to think about it. The
2 defendant had time to premeditate. Again, remember
3 premeditation. It's not, you know, planning for days or weeks.
4 Prior to the stabbing defendant had successive thoughts about
5 what he was going to do. This is much more than voluntary
6 manslaughter. Again, defendant had plenty of time to think
7 about what he was about to do, to weigh his choices and
8 consider the consequences. Defendant want the Victoria dead.
9 It's not self-defense.

10 We talked about self-defense and what that is by law.
11 It's not self-defense. You know, even if you believe the
12 defendant's version that Victoria had the knife and came at him
13 and was the initial aggressor, you know, he's bigger. What did
14 everybody say, all the neighbors? She's an itty bitty thing.
15 She was a little thing. You know, we have her driver's
16 license. She was what -- well, he even admitted, what, she's
17 five, four, a buck ten, as Mr. Smith said. You know, she's a
18 little bitty thing.

19 And he could have used other means. So self-defense
20 is just absolutely -- it -- it's so far from the realm of
21 self-defense. Deadly weapon. This is a murder with use of a
22 deadly weapon. The knife was the cause of death, okay.
23 According to the law, I at this point that this would qualify,
24 even though Wolfgang Puck probably didn't contemplate his
25 butcher knife being used to stab somebody to death, I think

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1 told you in the -- talked about regarding the jury
2 instructions. When Mr. Pike argued to you, he told you that
3 you should start your deliberations in this case with a second
4 degree murder or in other words, you'll be able to rule out a
5 first degree murder pretty fast, and here's why: Instruction
6 34 tells you how you consider evidence of voluntary
7 intoxication, and you can consider that evidence to reduce the
8 intent -- as far as the intent requirement for a murder.

9 A first degree premeditated murder, as instruction 16
10 will tell you, requires -- oops. It requires deliberation.
11 That's this right here. Deliberation's the process of
12 determining upon a course of action to kill as a result of
13 thought, including weighing the reasons for and against the
14 action and considering the consequences of the action. A
15 deliberate determination may be arrived at in a short period of
16 time, but in all cases the determination must not be formed in
17 passion or if formed in passion, it must be carried out after
18 there's been time for the passion to subside and deliberation
19 to occur. A mere unconsidered and rash impulse is not
20 deliberate, even if it includes the intent to kill.

21 And also, a first degree murder requires that you
22 find premeditation. As far as premeditation is defined, the
23 truth (indiscernible) duration of time, but the extent of the
24 reflection. A cold, calculated, judgment and decision may be
25 arrived in a short period of time, but a mere unconsidered

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1 that this certainly qualifies under the law as a deadly weapon.
2 He talked about his proficiency with a knife.

3 In conclusion, after weighing all of the evidence --
4 and there's a lot, you guys have a task ahead of you -- State
5 is asking you to return a verdict of guilt for first degree
6 murder with use of a deadly weapon. Thank you.

7 THE COURT: Thank you, Ms. Gram. Ms. Palm.

8 MS. PALM: Thank you, Judge. Good afternoon, ladies
9 and gentlemen. This may be your last time that I get to talk
10 to you because as you heard at the beginning of this case, if
11 you come back with anything other than a first degree murder
12 verdict, we're done. If you come back with a first degree
13 murder verdict, then we would be doing another penalty phase
14 after this. So and after my closing today, the State will get
15 another chance. They get that other chance to argue again
16 because they have the burden of proof.

17 MS. GRAHAM: Objection, Judge. You know, the law
18 says --

19 MR. SMITH: Can we approach?

20 MS. GRAHAM: -- that we're not --

21 MR. SMITH: Let's approach.

22 THE COURT: Sustained. No, overruled. Go ahead, Ms.
23 Palm, you're fine. Go ahead.

24 MS. PALM: So they will argue again, and this will be
25 it for us. I just want to address some points that Ms. Graham

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1 and rash impulse, even though it includes an intent to kill, is
2 not a deliberation, and premeditation as will fix the unlawful
3 killing of murder of the first degree.

4 So you can consider Mr. O'Keefe's extreme
5 intoxication when you're considering whether the State has
6 proved to you a first degree murder, and I submit to you they
7 have not. In addition the State has the burden of proving,
8 before you consider any of crimes, they have the burden of
9 proving beyond a reasonable doubt the absence of self-defense
10 and accident. They have not done so.

11 And I also submit that Ms. Graham has spoke a little
12 bit as far as implied malice because implied malice in this
13 case does not apply to a first degree murder theory. If you
14 were going to find guilt under a theory of implied malice, you
15 have to only go to second degree murder.

16 And there's another instruction that might be a
17 little confusing to you, and that is instruction 18. It talks
18 about second degree murder. The only part of this instruction
19 that applies to this case is the first part, murder of the
20 second degree is murder which is an unlawful killing of a human
21 being with malice aforethought, the same thing required for
22 third degree murder, but without the deliberation and
23 premeditation for a first degree murder.

24 MR. SMITH: Judge, may we approach?

25 THE COURT: I think it's okay. It's argument. Go

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1 ahead.

2 MS. PALM: Thank you.

3 THE COURT: Go ahead.

4 MS. PALM: I also want to draw your attention to jury
5 instruction number 17. This jury instruction tells you that if
6 all 12 of you think it's a murder, but not all 12 of you think
7 it's a first degree murder -- some of you think first, some of
8 you think second -- you have to go with second. You can't go
9 with first. It tells you that if you think he's guilty between
10 the two degrees, he must be convicted of the lesser offense.

11 And then if you find that he did not commit a first
12 or second degree murder, then you look at manslaughter.
13 There's voluntary manslaughter and involuntary manslaughter.
14 Ms. Graham talked about the instruction for a voluntary
15 manslaughter. And what I want to draw your attention to in the
16 language in here, this middle paragraph, the provocation
17 required for voluntary manslaughter must either consist of a
18 serious and highly provoking injury inflicted upon the person
19 killing sufficient to excite an irresistible passion in a
20 reasonable person or an attempt by the person killed to commit
21 a serious personal injury on the person killing. That does not
22 require a physical injury. An a voluntary manslaughter can
23 result after a passion from you walk in and you find somebody
24 sleeping with your husband or your wife. That's the kind of
25 passion we're talking about. It's an injury, but it doesn't

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1 as evidence of motive, if you think that there is motive here.

2 Brian has a severe and chronic disease with his
3 alcoholism. You heard that from Mr. Paisano, who does the
4 MINDS counseling. He has suffered for a long time from it.
5 It's influenced his choices, and he's made some bad choices.
6 And he's paid the price for those just like he has paid the
7 price for his prior crimes. He's lost loved ones, he's lost
8 relationships. It's affected his jobs, and now he's in a
9 criminal situation.

10 I'd ask you to think about the whole person that Brian
11 is because there's some good about him, too. As a very young
12 man, 17 years old, he goes into the service. He serves in
13 combat. He's a combat veteran. He was decorated. He did some
14 good things. And then he succumbed to this disease, and he has
15 battled it every day of his life. It's cost him dearly, and
16 it's a struggle that he's succumbed to over and over.

17 But he is entitled to the protection of the
18 Constitution that he fought to defend, and that Constitution
19 requires that if you convict him of a crime, it must be because
20 every element of that crime is proved beyond a reasonable doubt
21 and not because he's done some bad things or you don't like him
22 or you don't like us or -- these require that you hold the
23 State the burden of the proof because that's what our
24 Constitution requires.

25 Brian told you what happened on November 5th. He

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ROUGH DRAFT TRANSCRIPT

1 mean it has to be a physical injury.

2 And this has been sort of a long trial for a one week
3 trial. And sometimes as trials go, they get a little bit
4 contentious, and I just want to say right now if I or Mr. Pike
5 have done anything to offend any of you, we do not want you to
6 hold that against our client because we are proud to be
7 representing Mr. O'Keefe. And so please forgive us for any of
8 our transgressions.

9 Brian O'Keefe is not proud of the choices in his life
10 and of things that he can't control. You heard about the three
11 prior felony convictions he has, and there are instructions
12 telling you how you can use those, and they're a little bit
13 confusing, so I just want to point those out to you, too.
14 They're jury instructions number 8 and 9.

15 Number 8 tells you that the fact that he's been
16 convicted of a felony may only be considered for the purpose of
17 determining credibility. It does not necessarily destroy or
18 impair his credibility. It's one of the circumstances you can
19 consider. So that is an instruction telling you how to
20 consider the credibility of a witness. Because Mr. O'Keefe
21 testified, you can consider all three of those convictions for
22 that purpose, but it's not evidence of his guilt.

23 Instruction 9 talks about the one conviction that was
24 let in for the purpose of showing motive, and that's the prior
25 domestic battery conviction. That conviction can be considered

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ROUGH DRAFT TRANSCRIPT

1 didn't have to. He didn't have to take the stand. A criminal
2 defendant is never required to testify, and he got up there and
3 he told you what happened. The State has offered you
4 absolutely no proof that anything else occurred. On that
5 evening he and Victoria were celebrating the prospect of him
6 going back to work, and he admitted to you that he was looking
7 for a reason to drink. He wanted to have something to
8 celebrate. He wanted to drink again.

9 And they went out and they had a good time, and they
10 were acting as a couple, and that evening did not start out
11 with any intent to harm Victoria. They started drinking wine
12 at home, then they went to the Paris and they drank free drink
13 after free drink. That's why they were there. He doesn't
14 remember who drove home, but he remembers parts of it, and he
15 remembers waking up in the passenger seat, and the State's
16 evidence supports that. This is State's Exhibit CC.

17 If you note from that photograph, the passenger seat
18 in the car is reclined. The driver's seat is moved up. There
19 are even glasses in the center console.

20 When he wakes up, they're having a little bit of an
21 argument. She wanted to go out to eat. He wanted to keep
22 drinking because he wanted to catch up with her. She goes
23 upstairs, he stays down stairs, and he sleeps for a little
24 built longer. He remembers going upstairs. He remembers
25 hitting the rail. He remembers Jimmy Hatchcoos coming out, and

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1 that is supported by Jimmy Hatchco's testimony. Jimmy heard a
2 loud noise, came out, and he said Brian's standing out there.

3 He remembers going in the apartment to use the
4 bathroom. Using the bathroom. Victoria's in the master
5 bedroom bathroom making some noises, apparently still angry.
6 He decides he wants to smoke sop more. He goes back outside.
7 He's smoking outside. And then he told you what happened when
8 he went into the bedroom.

9 He goes in the bedroom, was going to hang up his
10 jacket. The lights were off. She comes flying out of the
11 bathroom with the knife, startles him. He uses his jacket to
12 ward off the knife, and that is also supported by the evidence.
13 This is Defense Exhibit W. This is his jacket laying there on
14 the other side of the bed. The blinds are falling down because
15 the jacket hit them.

16 He tells you about the struggle that they had and how
17 she was holding the knife. If you imagine this as the sharp
18 blade of the knife, the edge of this ruler, she's jabbing the
19 knife at him. He grabs it, she grabs it out of his hand and
20 cuts his hands. You would cut your hands where his hands cut
21 where he said he grabbed it, and the evidence supports that.

22 And Dr. Schiro told you that his hand wounds are most
23 likely a defensive injury. From all the options that there
24 are, Dr. Schiro came in here and told you the most likely
25 option is that they are consistent with defensive injury.

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1 given of the issue of self-defense as raised. Brian's defense
2 is not that he intentionally killed her in self-defense, which
3 would be the normal self-defense. Brian's defense is that he
4 acted in self-defense when she's coming at him with a knife,
5 and that she was killed in an accident during that
6 self-defense. So it's not the usual self-defense. So some of
7 those instructions might be a little confusing, but that is the
8 defense that we are putting forth is that this happened during
9 his response to her attack, but the stab itself was an
10 accident.

11 What Brian told you is actually the only thing that
12 makes sense, given all the evidence. It explains the noises
13 heard by the Tolivers. And the Tolivers cannot be right in
14 their descriptions of time if you want to believe the rest of
15 the State's case because Joyce told you she started hearing
16 noises around 9:00, and she knew that because that's when her
17 stories played. And she was annoyed, her stories were playing,
18 and she couldn't hear them because there's noise going on
19 upstairs.

20 Well, she say Cookie woke up at 10:00, went up
21 shortly thereafter. Cookie said he went up about 10:15, and
22 that does not jibe with the 911 calls. Those 911 calls are
23 made at 11:02. So what's happening for 45 minutes? If you
24 believe the State's evidence, apparently a two hour beating.
25 Is that what they're trying to allege because yes, Victoria has

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1 So he's grabbing her wrists and he gets ahold of both
2 wrists, and he's trying to fight with her, and they're moving
3 around that tiny little area by the bed, and you saw the
4 photographs. It's a tiny area. They fall down on the bed, and
5 from the weight of his arms, the knife goes in. And it goes
6 in, and the way it goes in is the same angle as

7 (indiscernible). It goes in like this. Or actually,
8 the sharp part is to the back. So she's holding it, he has her
9 hand, it would go in just like this, sharp part to the back.
10 It makes sense. And the State cannot disprove it, as is their
11 burden. They have to disprove that.

12 He told you that he didn't realize that the knife
13 went in. He didn't realize it went in. He didn't realize it
14 went out. All he understood in his drunken stupor was that she
15 stopped moving and then the bed started getting wet, and he
16 starts looking for an injury, and he doesn't know what's
17 happening. He doesn't understand it. And he's moving her
18 around the bed trying to find out where is the injury. And he
19 takes the pillowcase off, and he's trying to hold that up to
20 the injury that he does find, and her pants are bloody, so he's
21 taking them off looking for is there a different kind of
22 injury. He doesn't know what's happened. And he is drunk out
23 of his mind, and we all know that.

24 There are a lot of instructions on self-defense, and
25 this is not a classic self-defense. But those instructions are

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1 some bruises, but as you hear from Dr. Benjamin, she can't date
2 any of those bruises. They could be up to three weeks old.
3 She doesn't know.

4 And if you look at the bruises and not the multiple
5 pictures of the same bruises. Some look older. Some look
6 newer, and none of them look like a two hour beating. None of
7 them look like a one hour beating. That would have been some
8 serious damage if it's constant beating going on for one hour.
9 And Victoria had cirrhosis and that affects your bruising
10 ability. And she was also in a drunken stupor herself.

11 We don't know that she's not walking into chairs,
12 walking into tables, bumping into things, that she doesn't have
13 a lot of bruises ordinarily on her feet which she -- when she
14 walks into a wall. Cirrhosis affects your bruising, and you
15 would bruise, according to their own expert, upon less than
16 forceful contact and you would bruise easier.

17 Jimmy Hatchcoos, who lived right next door to Brian
18 and Victoria didn't hear any noises until 10:00 o'clock, and
19 that's when he heard a loud noise outside on the rail, and
20 that's when he went out, and that's when Brian was out there.
21 You would think that Jimmy Hatchcoos would have heard some kind
22 of moaning going on. And with Victoria's bleeding problem, Dr.
23 Benjamin said she would have bled out quickly, it was probably
24 fast. She wouldn't have been up there moaning for an hour or
25 two hours or any length of time.

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ROUGH DRAFT TRANSCRIPT

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1 There's no physical evidence to support another
2 theory. There's in fingerprints. There's nothing. There's no
3 witnesses. The State has alleged an attempt - or death by
4 intentional stabbing, and that's what they have to prove, and
5 they have not done it. They want wanted to show you that Brian
6 had a motive to kill Victoria by calling Cheryl Morris to
7 testify. And I want you to consider instruction 7 when you're
8 thinking about Cheryl Morris' testimony.

9 And that tells you that you can weigh her credibility
10 based upon, among other things, her relationship to the
11 parties, her motives, her feelings. And if you think she's
12 lied about anything, then you can throw out her entire
13 testimony. And I submit to you that she had a motive to lie.

14 Cheryl Morris was a woman scorn. Brian hurt her, and
15 she had a right to be angry, and he's not disputing that. He
16 was not a good guy. He cheated on her, he lied to her. He let
17 her put a car in his name. That's a shameful thing, but that
18 does not make him guilty of murder.

19 But Cheryl Morris is unbelievably upset, and after
20 she hears about Victoria's death, she goes to the police. They
21 don't go to her. She goes to them. She calls them. She says
22 I want to talk to you. She testified at the preliminary
23 hearing, and then we hear her testimony yesterday at trial, and
24 she's telling a story about how when she went to visit Brian,
25 he made some statements to her about what occurred, and it's

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1 from Mr. DeSalvio. She bent to his MINDS counseling with him.
2 He took her to see his young daughters. That's not something
3 you do if you're planning to kill somebody or if you want to
4 kill somebody or you hate somebody. These two people loved
5 each other.

6 Even the State's witness, Jimmy Hatchco, their next
7 door neighbor, said that they were a loving and affectionate
8 couple. That's what he saw the whole time that they were
9 living together for that two months. You saw photographs of
10 their little apartment, Defense Exhibit M. This place was a
11 home. That apartment was nice. It was a home for these two
12 people, and that's where they were planning their future
13 together.

14 And what was Brian saying when Cookie and Todd went
15 in that apartment? He was trying to pick her up. He was
16 saying baby, don't do this to me. Baby, wake up. Wake up. He
17 wasn't responsive to them. He was focused on her. He wants
18 her to get up. He doesn't know what's the matter. He is in a
19 drunken fog.

20 Should he have called for help? Of course. But he
21 told you why he didn't. He didn't tonight leave Victoria. And
22 if this was an intentional thing, don't you think he would have
23 done it in a way to cover it up? That he would have hid some
24 evidence or tried to take off? He wasn't leaving Victoria no
25 matter what because he loved Victoria.

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ROUGH DRAFT TRANSCRIPT

1 not anything he remembers ever telling her about the case, and
2 I'm not sure why she would say it.

3 I mean, she's saying that Victoria was trying to stab
4 him, and then he didn't remember something. And maybe she
5 thinks that helps him now. Maybe she's feeling guilty about
6 saying the things before that he had said he wanted to kill
7 Victoria. I don't know why she did it, but it doesn't make
8 sense, and Brian never told her those things, and I think that
9 her testimony can be discredited.

10 She also told you that Brian preferred Victoria over
11 her because Victoria was submissive. Well, she also said that
12 Victoria called her five times wanting to talk about how she
13 wants to be with Brian and why does Cheryl want to be Brian or
14 whatever the conversation was. But she's yelling at her. I
15 don't think that's submissive. A woman who is calling the
16 girlfriend of her former boyfriend and yelling at her is not a
17 submissive woman.

18 Brian loved Victoria and Victoria loved Brian. And
19 in their sad world, these two fragile and damaged people found
20 each other, and they loved each other. And when they got back
21 together, they did it - Brian did it knowing he was risk his
22 health because of her Hepatitis C. She did it wanting to be
23 with him. And they were looking forward to a future together.
24 They made plans for the future. They start the living
25 together. He took her to meet his union friends. You heard

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1 Nothing makes sense about his reaction other than
2 that he was in a drunken stupor, an alcoholic haze and a
3 severely altered state. Nothing makes sense about it. It's
4 not how a normal person acts. And as far as evidence of his
5 drunkenness, we were handicapped in showing you how severe his
6 drunkenness was because detectives --

7 MR. SMITH: Objection, Judge. It's improper - I
8 think she's going to make an improper argument.

9 MS. PALM: I'm going to say they didn't obtain his
10 blood or breath.

11 THE COURT: All right.

12 MS. PALM: Because they did not obtain his blood or
13 breath sample. They could have. It would have been easy. It
14 was available. They knew how intoxicated he was, and they
15 didn't do it. George Schiro told you that that's a useful and
16 accepted practice in an investigation such as this.

17 Because we don't have it, we can't give you a
18 quantitative analysis. We can't give you a number. We can't
19 ever tell you what his alcohol level was at. But you can see
20 from the video yourself five hours later when they're doing the
21 penis swab, he still can't stand up straight. He's still that
22 intoxicated.

23 We had a lot of the State's witnesses come in here
24 and deny that they noticed any symptoms of intoxication and,
25 you know, maybe one of them smelled a little alcohol, but

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000399

1 violence or aggression. Also, where relevant to expose a State's witness's incompetence to
2 testify, including defects in memory and perception, extrinsic evidence showing Victoria's prior
3 acts of violence is admissible. See Lobato v. State, 120 Nev. 512, 96 P.3d 765 (2004)
4 (holding that impeachment by extrinsic evidence is appropriate where attacking a witness's
5 competence to testify, i.e., attacking defects in perception, memory, communication and ability
6 to understand).

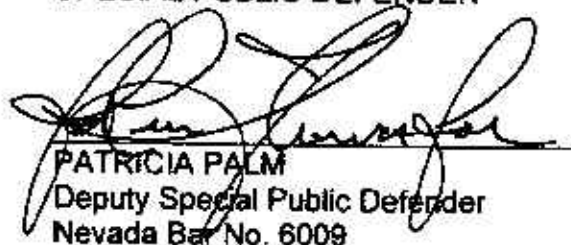
8 CONCLUSION

9 Based upon the foregoing, Defendant Brian O'Keefe respectfully requests that this
10 Honorable Court allow him to present evidence showing his opinion that alleged victim
11 Victoria Whitmarsh had temper problems and could be aggressive or violent, especially when
12 on drugs or alcohol, as well as specific acts of violence known by him, including her
13 brandishing of a knife at him two days earlier, her cutting and self-mutilation and other suicide
14 attempts.
15

16 Dated 20th day of March, 2009.

17
18 DAVID M. SCHIECK

19 SPECIAL PUBLIC DEFENDER

20
21 
22 PATRICIA PALM

23 Deputy Special Public Defender
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28

SPECIAL PUBLIC
DEFENDER

CLARK COUNTY
NEVADA

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RECEIPT OF COPY

RECEIPT of a copy of the foregoing DEFENDANT'S BRIEF ON ADMISSIBILITY OF EVIDENCE OF ALLEGED VICTIM'S HISTORY OF SUICIDE ATTEMPTS, ANGER OUTBURSTS, ANGER MANAGEMENT THERAPY, SELF-MUTILATION (WITH KNIVES AND SCISSORS), AND ERRATIC BEHAVIOR is hereby acknowledged this ____ day of March, 2009.

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FILED IN OPEN COURT

MAR 20 2009

EDWARD A. FRIEDLAND
CLERK OF THE COURT

BY Kristen Brown
KRISTEN BROWN DEPUTY

DISTRICT COURT

CLARK COUNTY, NEVADA

11 THE STATE OF NEVADA,
12
13 Plaintiff,

vs.

14 BRIAN O'KEEFE
15 Defendant

CASE NO. C250630
DEPT. NO. XVII

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

16 DEFENDANT'S PROPOSED JURY INSTRUCTIONS

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 submit the
20 following as the Defendant's Proposed special Jury Instructions in this case

21 DATED this 17th day of March, 2009.

22 
23
24 Randall H. Pike
25 Assistant Special Public Defender
26
27
28

000302

INSTRUCTION NO.

A finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion.

Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt.

Also, if the circumstantial evidence [as to any particular count] permits two reasonable interpretations, one of which points to the defendant's and the other to his innocence, you must adopt that interpretation that points to the defendant's innocence, and reject that interpretation that points to his guilt.

If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

INSTRUCTION NO.

If the evidence in this case is subject to two constructions of interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to innocence, it is your duty, to adopt the interpretation which will admit of the defendant's innocence, and reject that which points to guilt.

You will notice the rule applies only when both of the two possible opposing conclusions appear to you to be reasonable. If, on the other hand, one of the possible conclusions should appear to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and to reject the unreasonable, bearing in mind, however, even if the reasonable deduction points to defendant's guilt, the entire proof must be beyond a reasonable doubt to support a verdict of guilty.

In Crane v. State, 88 Nev. 684, 687; 504 P.2d 12 (1972), the court said it was permissible to give this instruction when the evidence is circumstantial. See Bails v. State, 82 Nev. 95, 97, 545 P.2d 1155 (1976) and cases cited therein.

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INSTRUCTION NO.

You are instructed that at the time of the events contained herein, the Defendant, Brian O'Keefe is irrebuttably presumed to have been intoxicated.

Sanborn v. State, 107 Nev. 399, 812 P.2d 1279 (1991).

Instruction No. _____

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NON-FLIGHT AFTER CRIME ²

The non-flight of a person from the location immediately after the commission of a crime is not sufficient in itself to establish his innocence , but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding whether a defendant is innocent or not guilty. The weight to which this circumstance is entitled is a matter for you to decide.

INSTRUCTION NO. ____

Malice aforethought means the intentional doing of a wrongful act without legal cause or excuse or what the law considers to be adequate provocation. The condition of mind described as malice aforethought may arise from anger, hatred, revenge, or from particular ill will, spite or grudge toward the person killed. It may also arise from any unjustifiable or unlawful motive or purpose to injure another, proceeding from a heart fatally bent on mischief or with reckless disregard of consequences and social duty. Malice aforethought does not imply deliberation or the lapse of any considerable time between the malicious intention to injure another and the actual execution of the intent but denotes an unlawful purpose and design as opposed to accident and mischance.

INSTRUCTION NO. _____

The killing of another person in self-defense is justified and not unlawful when the person who does the killing actually and reasonably believes:

1) That there is imminent danger that the assailant will either kill him or cause him great bodily injury; and

2) That it is absolutely necessary under the circumstances for him to use in self-defense force or means that might cause the death of the other person, for the purpose of avoiding death or great bodily injury to himself.

Object

000308

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2 **BENEFIT OF DOUBT (MANSLAUGHTER)**

3 If you are satisfied beyond a reasonable doubt that the killing was unlawful, but you
4 have a reasonable doubt whether the crime is murder or manslaughter, you must give the
5 defendant the benefit of such doubt and find it to be manslaughter rather than murder.

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INSTRUCTION NO.

MURDER AND VOLUNTARY MANSLAUGHTER DISTINGUISHED

The distinction between murder and voluntary manslaughter is that murder requires malice while voluntary manslaughter does not.

When the act causing the death, though unlawful, is done upon a sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible, the offense is voluntary manslaughter. In such a case (even if an intent to kill exists) the law is that malice, which is an essential element of murder, is absent.

To establish that a killing is murder and not voluntary manslaughter, the burden is on the state to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the death was not done in a heat of passion as defined in these instructions.

Roberts v. State, 102 Nev. 170, 717 P.2d 1115 (1986).

and upon
adv. protest.

000310

1 **MANSLAUGHTER - LESSOR INCLUDED - BENEFIT OF THE DOUBT⁶**

2 If you find the State has established that the defendant has committed murder you shall select
3 the appropriate degree of murder as your verdict. The crime of murder may include the crime of
4 voluntary or involuntary manslaughter. You may find the defendant guilty of voluntary or
5 involuntary manslaughter if:

- 6 1. Some of you are not convinced beyond a reasonable doubt that the defendant is
7 guilty of murder of either the first or second degree, and
8 2. All twelve of you are convinced beyond a reasonable doubt the defendant is
9 guilty of the crime of voluntary or involuntary manslaughter.
10

11 If you are satisfied beyond a reasonable doubt that the killing was unlawful, but you have a
12 reasonable doubt whether the crime is murder or voluntary or involuntary manslaughter, you must
13 give the defendant the benefit of that doubt and return a verdict voluntary or involuntary
14 manslaughter whichever is appropriate based on the facts of this case.
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28 ⁶ *Lisby v. State*, 82 Nev. 183, 414 P.2d 592 (1966).

INSTRUCTION NO.

A person is entitled to use self-defense even though the danger to life or personal security may not have been real, if a person in the circumstances and from the viewpoint of the defendant would reasonably have believed that he was in imminent danger of death or great bodily harm.

Pineda v. State, 120 Nev. 204, 88 P.3d 827 (2004).

000312

INSTRUCTION NO. _____

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2

Good character, when considered in connection with other evidence in the case, may

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generate a reasonable doubt sufficient to justify you in acquitting the defendant.

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000313

1 NCA
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, 8th Floor
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

FILED IN OPEN COURT
MAR 20 2009

EDWARD A. FRIEDLAND
CLERK OF THE COURT

BY KRISTEN BROWN
DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

12 THE STATE OF NEVADA,
13 Plaintiff,

14 vs.

15 BRIAN O'KEEFE,

16 Defendant.

CASE NO. C250630


DEPT. NO. XVII

DEFENDANT'S SUPPLEMENTAL PROPOSED JURY INSTRUCTIONS

19 SEE ATTACHED.

20 DATED this 18th day of March, 2008.

21 SPECIAL PUBLIC DEFENDER
22 DAVID M. SCHIECK

23 
24 RANDY H. PIKE
25 PATRICIA A. PALM
26 330 South Third Street, Ste 800
27 Las Vegas, NV 89155-2316
28 (702) 455-6265
Attorneys for Defendant

000314

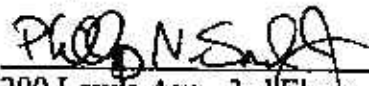
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RECEIPT OF COPY

RECEIPT of a copy of the Defendant's Supplemental Proposed Jury Instructions
is hereby acknowledged.

DATED: _____, 2009.

DISTRICT ATTORNEY'S OFFICE



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

INSTRUCTION NO. _____

The State and police officers were required to provide the defendant's counsel with a "Use of Force Report" prior to trial. You are instructed that this report was not provided to the defendant's counsel prior to trial and that a detective made a false allegation about the existence of this report. You are further instructed that the intentional withholding of favorable evidence by the State and or police officers is an indication of the weakness of the State's case. You must consider the actions of the State and police officer in withholding this evidence in determining whether the State has met its burden of proving the charge against the defendant.

ORIGINAL

FILED

2009 MAR 24 A 11:21

E. J. [Signature]
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 **DEFENDANT'S MOTION TO SETTLE RECORD**

20 **Date of Hearing: _____**
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 move to settle the record as to miscellaneous objections and other matters**
26 **occurring at the trial of this case.**

27 **This Motion is made and based upon the attached Declarations of Patricia Palm and**
28 **JoNell Thomas, counsel for O'Keefe, and any argument to be had at the time of the**

MC

MAR 24 2009

RECEIVED

CLERK OF THE COURT

1 hearing.

2 NOTICE OF MOTION

3 TO: State of Nevada, Plaintiff; and

4 TO: District Attorney's Office, Attorney for Plaintiff.

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

9 POINTS AND AUTHORITIES

10 The trial in this matter was held from March 16, through March 20, 2009. During the
11 trial, the parties addressed several objections and other matters at the bench. Jury
12 Instruction settling was done in chambers. Because of the quick pace of trial and the many
13 off the record discussions, it was necessary to attempt to make a sufficient record during
14 breaks in order to preserve issues. Counsel for O'Keefe fears that not all matters were
15 sufficiently addressed on the record during the final two days of trial. Accordingly, counsel
16 makes this motion in order to ensure that a proper and complete record will be available for
17 any appeal or post-conviction proceedings in this matter.

18 CONCLUSION

19 It is respectfully requested that the Court address these matters at a hearing in
20 order to settle the record as to the same.

21 DATED this 24th day of March 2009.

22
23 Respectfully Submitted:
24 DAVID M. SCHIECK
25 SPECIAL PUBLIC DEFENDER

26 
27 Randall H. Pike
28 Patricia Palm
Attorneys for O'Keefe

1 DECLARATION OF PATRICIA PALM, ESQ.

2 Pursuant to NRS 53.045, PATRICIA PALM, being first duly sworn according to law,
3 deposes and states as follows:

4 1. That I am an attorney duly licensed to practice law in the State of Nevada and a
5 deputy with the Clark County Special Public Defender.

6 2. That I represent Brian O'Keefe in the instant matter, along with my co-counsel,
7 Assistant Special Public Defender, Randall H. Pike.

8 3. That I, along with Randall Pike, served as Brian O'Keefe's counsel during the
9 trial beginning on March 16, 2009.

10 4. During trial, several matters, including objections, were heard at the bench, and
11 defense counsel is unsure whether the following matter was adequately preserved in the
12 record, due to the difficulties in having to review objections and rulings during breaks in
13 order to make a record.

14 5. During its case, the defense called Detective Clifford Mogg, who is a homicide
15 detective with LVMPD and works with the detectives handling the O'Keefe investigation.
16 Upon objection, after his preliminary testimony, the parties approached the bench. The
17 State objected to Detective Mogg's expected testimony on grounds that he had no
18 knowledge of or participation in the O'Keefe investigation and the evidence was collateral.
19 The defense made a proffer, stating that Detective Mogg would testify that he investigated
20 a homicide in the State v. Franco-Ordonez case, a homicide case from April of 2007, and
21 he arranged for a breath test to be administered to test the breath alcohol level of a murder
22 suspect who claimed to be intoxicated. He would testify regarding whether homicide
23 detectives are trained on whether to obtain breath or blood tests to document alcohol
24 intoxication, how the test was arranged and the means available for obtaining such a test.
25 The defense argued that the testimony was relevant to attack the good faith of the police
26 investigation in O'Keefe's case, since no test was offered or obtained in O'Keefe's case,
27 and Detective Widemann had testified that he never heard of such a test being given in a
28 murder investigation. Therefore, because Detective Mogg's testimony supported the

1 defense theory that the State had not fairly investigated the case and was minimizing the
2 evidence of O'Keefe's intoxication, and that the State's motive was to convict O'Keefe by
3 obstructing the ability of the defense to show evidence of intoxication, it was not collateral
4 evidence under Lobato v. State, 120 Nev. 512, 96 P.3d 765 (2004). The Court ruled that
5 the proffered testimony was irrelevant and collateral evidence, and defense counsel would
6 not be able to inquire on the subject whether such tests had been done in other cases
7 handled by Metro's Homicide Division or training regarding the same. After no more
8 questions from either party, Detective Mogg was excused.

9 6. The parties settled jury instructions in chambers. At the time, defense counsel
10 objected to the State's proposed instruction defining second degree murder, citing
11 Jennings v. State, 116 Nev. 488, 998 P.2d 557 (2000), and argued they had no notice of a
12 second degree felony murder theory and the second paragraph of the State's instruction
13 set forth a felony murder theory. The Court determined that the State's proposed
14 instruction defining second degree felony murder in paragraph #2 would not be given
15 because no such theory had been alleged in the instant case. After the parties returned,
16 made a record of objections, the Court passed out the final instructions just before
17 instructing the jury. When the Court got to the instruction (#18) defining "Murder of the
18 Second Degree", the parties approached the bench, and the Court noted that it understood
19 the jury was not going to be instructed on second degree felony murder. Defense counsel
20 agreed with this understanding, and expressed that the instruction should not be given with
21 the second paragraph. Counsel for the State argued that they simply would not argue the
22 theory to the jury. Defense counsel argued that this solution was not satisfactory because
23 the jury might still understand that they could find the theory from the Court's instruction.
24 The Court overruled defense counsel's objection and determined to give the instruction as

25
26 ...

27 ...

28

1 written, with the State's agreement not to argue a second degree felony murder theory.

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


3 DATED this 24th day of March, 2009.

4
5 
6 PATRICIA PALM
7 DEPUTY SPEC. PUBLIC DEFENDER
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DATED this 24th day of March, 2009.

ch, 2009.


JONELL THOMAS
DEPUTY SPEC. PUBLIC DEFENDER

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FILED

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E. J. 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
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

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 Motion to Settle Record is hereby acknowledged this 24
21 day of March, 2009.

22 DISTRICT ATTORNEY'S OFFICE

23 *[Signature]*
24 200 Lewis Ave., 3rd Floor
25 Las Vegas NV 89155

26 **RECEIVED**
27 MAR 24 2009
28 **CLERK OF THE COURT**

ORIGINAL

37

NCA
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
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(702) 455-6273 fax
rpik@co.clark.nv.us
palm@co.clark.nv.us
Attorneys for O'Keefe

FILED

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Ed. [Signature]
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

BRIAN O'KEEFE #1447732,

Defendant

CASE NO. C250630
DEPT. NO. XVII

LETTERS IN AID OF SENTENCING

Date of Hearing: 5/5/2009
Time of Hearing: 8:00 a.m.

SEE ATTACHED.

Dated: May 4, 2009

Respectfully Submitted:

[Signature]

RANDALL H. PIKE
PATRICIA PALM
330 S. Third St. Ste. 800
Las Vegas, NV 89155
(702) 455-6265

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MAY 04 2009

CLERK OF THE COURT

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RECEIPT OF COPY

RECEIPT of a copy of the foregoing is hereby acknowledged.

DATED: May 4, 2009.

DISTRICT ATTORNEY'S OFFICE


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

000325

Thomas P. O'Keefe Jr.
6675 South Cr. 57
Alvada, Ohio 44802

April 26, 2009

To: Honorable Michael P. Villani Judge of
Eighth Judicial District Court
Regional Justice Center
200 Lewis Avenue
Las Vegas, NV 89155

Dear Judge Villani,

I am the older brother of defendant, Brian K. O'Keefe. I am submitting this letter to you on Brian's behalf. First I would like to mention that I have read about your impressive credentials posted on lasvegascourts.org. With your long term work of knowledge and experience, I will respect your decisions and can only hope that they will be fair. I recognize that you have a Bachelor's degree in Psychology as well as a Minor in Sociology only to mention the least. With that valuable knowledge it is inevitable that you recognize Brian's mental disposition.

For all of my young years growing up with my siblings I have always known Brian to be a sweet loving, and giving person. When Brian reached the age of young adulthood he joined our armed forces as active duty in war. He would never talk to me about what he had to do in the war but I knew he was disturbed and a very different person when he returned home. Your Honor, this is where his life began a downhill spiral that has taken him down to where he is now. He began self medication to cover his pain but it only became an addiction. Matters worsened when our family lost our oldest sibling, our beloved brother Ricky. A lot of pain we all suffered when we lost him. Rick was twenty nine years old.

Brian continued to endure more misfortune, this time from his first wife of three children. He literally cried as he told me he found condoms and large amounts of cash in the pockets from garment while cleaning their closet. I could not imagine the pain this brought yet he continued to cover up his pain and growing depression with self medication. For years he lived this life suffering while in real need of professional help he could not reach on his own. He is lost in a world of denial. Your Honor, I feel I could be the avenue he needed when he begged me asking if he could move to my home and start a new chapter for a better way of life. I was afraid I did not have what he really needed and turned him away. I am so sad and wished now I did something for him. I love my brother and will work at anything to help him in this serious time of need. He told me how much he loved Victoria and I know in my heart he did not intend to hurt this girl. Therefore I don't feel it would be fair to lock him up and toss the key when obviously we can all see that professional help is what he needs. With all of what he has been through, he now has to deal with more pain from this terrible accident.

Your Honor I am asking you to please be lenient and get him the help he needs and not extensive prison years he doesn't need. Your Honor, in behalf of my loving brother I hope that your valuable knowledge and power can lead us in the right direction of healing. This soldier put his life in danger to protect ours. Why can't we do what is needed to help him. This man now has to carry the worst pain yet.

Possibly you can consider who Brian is and understand the devastation he must be feeling in this nightmare of reality.

Thank you for time Judge Michael Villani and I pray for Victoria as well as Brian.

Respectfully

Thomas O'Keefe Jr.

Thomas O'Keefe Jr.

Feb 9, 1959

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2009 MAY -8 A 11:46

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

BRIAN KERRY OKEEFE
#1447732

Defendant.

CASE NO. C250630

DEPT. NO. XVII

JUDGMENT OF CONVICTION
(JURY TRIAL)

The Defendant previously entered a plea of not guilty to the crime of MURDER WITH USE OF A DEADLY WEAPON (OPEN MURDER) (Category A Felony) in violation of NRS 200.010, 200.030, 193.165; and the matter having been tried before a jury and the Defendant having been found guilty of the crime of SECOND DEGREE MURDER WITH USE OF A DEADLY WEAPON (Category A Felony) in violation of NRS 200.010, 200.030, 193.165; thereafter, on the 5TH day of May, 2009, the Defendant was present in court for sentencing with his counsel RANDALL PIKE, Special Deputy Public Defender and PATRICIA PALM, Special Deputy Public Defender, and good cause appearing,

000327

1 THE DEFENDANT IS HEREBY ADJUDGED guilty of said crime as set forth in
2 the jury's verdict and, in addition to the \$25.00 Administrative Assessment Fee, \$150.00
3 DNA Analysis Fee including testing to determine genetic markers, the Defendant is
4 SENTENCED as follows: TO A MAXIMUM of TWENTY-FIVE (25) YEARS with a
5 MINIMUM parole eligibility of TEN (10) YEARS plus a CONSECUTIVE term of TWO
6 HUNDRED FORTY (240) MONTHS MAXIMUM with a MINIMUM parole eligibility of
7 NINETY-SIX (96) MONTHS for the Use of a Deadly Weapon in the Nevada Department
8 of Corrections (NDC), with ONE HUNDRED EIGHTY-ONE (181) DAYS credit for time
9 served.
10
11

12
13 DATED this 8th day of May, 2009.

14
15 

16 MICHAEL VILLANI
17 DISTRICT JUDGE
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CLERK OF COURT

1 REQT
2 DAVID M. SCHIECK
3 SPECIAL PUBLIC DEFENDER
4 Nevada Bar #0824
5 JONELL THOMAS
6 DEPUTY SPECIAL PUBLIC DEFENDER
7 Nevada Bar #4771
8 330 South Third Street, Ste. 800
9 Las Vegas, Nevada 89155-2316
10 (702) 455-6265
11 Fax: 455-6273
12 thomasjn@co.clark.nv.us
13 Attorneys for Defendant

14 DISTRICT COURT
15 CLARK COUNTY, NEVADA

16 ***

17 THE STATE OF NEVADA,
18
19 Plaintiff,

CASE NO. C 250630
DEPT. NO. XVII

20 vs.

21 BRIAN KERRY O'KEEFE,
22
23 Defendant.

24 **REQUEST FOR ROUGH DRAFT TRANSCRIPT**

25 TO: MICHELLE RAMSEY, Court Reporter, Department 17:

26 Defendant, BRIAN ROSE, by and through his attorney, DAVID M. SCHIECK, Special
27 Public Defender, and JONELL THOMAS, Deputy Special Public Defender, requests preparation
28 of a rough draft transcript of certain portions of the proceedings before the district court, as
follows:

Date or dates of proceeding:

DATE	Proceeding	Reporter/Recorder
1/20/2009	Entry of Plea/Trial Setting	Michelle Ramsey
2/10/2009	All Pending Motions	Michelle Ramsey
3/10/2009	All Pending Motions	Michelle Ramsey
3/16/2009	All Pending Motions	Michelle Ramsey
3/17/2009	Trial by Jury	Michelle Ramsey
3/18/2009	Trial by Jury	Michelle Ramsey

CLERK OF THE COURT

MAY 21 2009

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SPECIAL PUBLIC
DEFENDER

CLARK COUNTY
NEVADA

000329

1 3/19/2009 Trial by Jury
2 3/20/2009 Trial by Jury
3 4/7/2009 Deft's Motion to Settle Record
4 5/5/2009 Sentencing

Michelle Ramsey
Michelle Ramsey
Michelle Ramsey
Michelle Ramsey

5 **Portions of the transcript requested:** All proceedings of all hearings, including voir
6 dire, opening statements and closing statements.

7 This notice requests a transcript of only those portions of the district court proceedings
8 which counsel reasonably and in good faith believes are necessary to determine whether
9 appellate issues are present. Voir dire examination of jurors, opening statements and closing
10 arguments of trial counsel, and the reading of jury instructions shall not be transcribed unless
11 specifically requested above.

12 I recognize that I must personally serve a copy of this form on the above named court
13 reporter and opposing counsel.

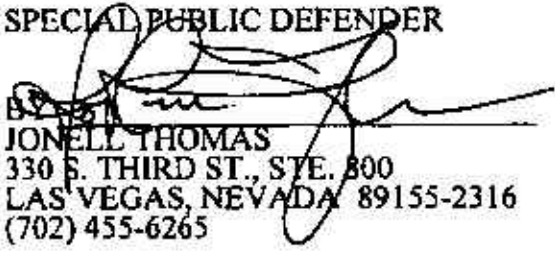
14 That the above named court reporter shall have twenty (20) days from the date of filing
15 the Notice of Appeal, to prepare an original plus three copies at State expense and file in the
16 district court clerk the original rough draft transcript(s) requested herein.

17 Further, pursuant to NRAP 3C(d)(3)(iii), the court reporter shall also deliver copies
18 of the rough draft transcript to the Supreme Court clerk, to appellant's counsel and
19 respondent counsel no more than twenty(20)days after the date of the appellant's request.

20 Dated this 20th day of May, 2009

21 DAVID M. SCHIECK

22 SPECIAL PUBLIC DEFENDER

23 
24 JONELL THOMAS
25 330 S. THIRD ST., STE. 800
26 LAS VEGAS, NEVADA 89155-2316
27 (702) 455-6265
28


CERTIFICATE OF MAILING

The undersigned does hereby certify that on the 21 day of May, 2009, I deposited in the United States Post Office at Las Vegas, Nevada, a copy of the Request for Rough Draft Transcript, postage prepaid, addressed to the following:

District Attorney's Office
200 Lewis Ave., Ste. 800
Las Vegas NV 89155

Nevada Attorney General
100 N. Carson
Carson City, NV 89701-4717

Michelle Ramsey, Court Reporter/Recorder
District Court Department 17
200 Lewis Ave.
Las Vegas NV 89155



An employee of The Special Public
Defender's Office

ORIGINAL

NOAS
DAVID M. SCHIECK
SPECIAL PUBLIC DEFENDER
Nevada Bar #0824
JONELL THOMAS
DEPUTY SPECIAL PUBLIC DEFENDER
Nevada Bar #4771
330 South Third Street, Ste. 800
Las Vegas, Nevada 89155-2316
(702) 455-6265
Fax: 455-6273
thomasjn@co.clark.nv.us
Attorneys for Defendant

FILED

MAY 21 1 49 PM '09

CLERK OF COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

CASE NO. C 250630
DEPT. NO. XVII

vs.

BRIAN KERRY O'KEEFE,
Defendant.

NOTICE OF APPEAL

DATE: N/A
TIME: N/A

TO: THE STATE OF NEVADA, Plaintiff;
TO: Clark County District Attorney, Plaintiff's attorney; and
TO: DEPARTMENT XVII OF THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK:

NOTICE is hereby given that Brian Kerry O'Keefe, appeals to the Nevada Supreme Court

RECEIVED
MAY 21 2009
CLERK OF THE COURT

SPECIAL PUBLIC
DEFENDER

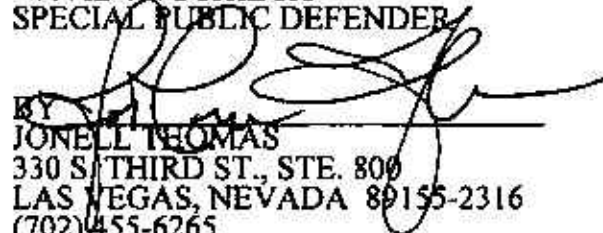
CLARK COUNTY
NEVADA

000332

1 from the judgement of conviction and sentence entered against said Defendant on the 8TH day
2 of May, 2009.

3 DATED this 20 day of May, 2009.

4 DAVID M. SCHIECK
5 SPECIAL PUBLIC DEFENDER

6 BY 
7 JONELL THOMAS
8 330 S. THIRD ST., STE. 800
9 LAS VEGAS, NEVADA 89155-2316
10 (702) 455-6265

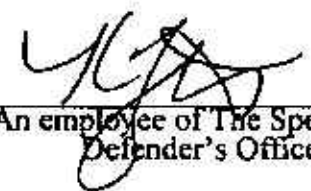
11 **CERTIFICATE OF MAILING**

12 The undersigned does hereby certify that on the 21 day of May, 2009, I deposited in the
13 United States Post Office at Las Vegas, Nevada, a copy of the Notice of Appeal, postage
14 prepaid, addressed to the following:

15 District Attorney's Office
16 200 Lewis Ave., Ste. 800
17 Las Vegas NV 89155

18 Nevada Attorney General
19 100 N. Carson
20 Carson City, NV 89701-4717

21 Brian O'Keefe, No. 1447732
22 Clark County Detention Center
23 330 S. Casino Center Blvd.
24 Las Vegas NV 89101

25 
26 An employee of The Special Public
27 Defender's Office
28

ORIGINAL

FILED

MAY 21 1 49 PM '09

CLERK OF COURT

CAS
DAVID M. SCHIECK
SPECIAL PUBLIC DEFENDER
Nevada Bar #0824
JONELL THOMAS
DEPUTY SPECIAL PUBLIC DEFENDER
Nevada Bar #4771
330 South Third Street, Ste. 800
Las Vegas, Nevada 89155-2316
(702) 455-6265
Fax: 455-6273
thomasjn@co.clark.nv.us
Attorneys for Defendant

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

vs.

BRIAN KERRY O'KEEFE,
Defendant.

CASE NO. C 250630
DEPT. NO. XVII

CASE APPEAL STATEMENT

1. Appellant filing this case appeal statement: BRIAN KERRY O'KEEFE
2. Judge issuing the decision, judgment, or order appealed from: MICHAEL VILLANI
3. All parties to the proceedings in the district court (the use of et al. To denote parties is prohibited): State of Nevada, Plaintiff; Brian O'Keefe, Defendant
4. All parties involved in this appeal (the use of et al. to denote parties is prohibited): Brian O'Keefe, Appellant; The State of Nevada, Respondent.
5. Name, law firm, address, and telephone number of all counsel

...

CLERK OF THE COURT
MAY 21 2009

RECEIVED

SPECIAL PUBLIC
DEFENDER
CLARK COUNTY
NEVADA

000334

1 on appeal and party or parties whom they represent:

2 DAVID M. SCHIECK
3 Clark County, Nevada
4 Special Public Defender
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Las Vegas, Nevada 89155

DAVID ROGER
Clark County, Nevada
District Attorney
Las Vegas, Nevada 89155

5 Counsel for Appellant

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8 Counsel for Respondent

9
10 6. Whether appellant was represented by appointed or retained counsel in the
11 district court: Appointed

12 7. Whether appellant is represented by appointed or retained counsel on appeal:
13 Appointed.

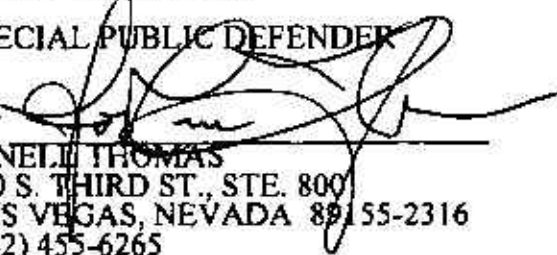
14 8. Whether appellant was granted leave to proceed in forma pauperis, and the
15 date of entry of the district court order granting such leave: Initial Arraignment was January
16 6, 2009

17 9. Date proceedings commenced in the district court (e.g., date complaint,
18 indictment, information, or petition was filed): Information filed December 19, 2008

19 Dated: 5/20/09

20 DAVID M. SCHIECK

21 SPECIAL PUBLIC DEFENDER

22 BY 
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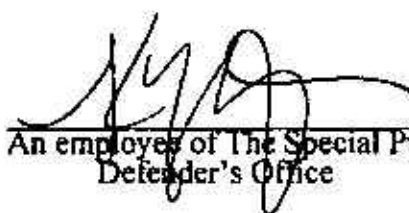
1 **CERTIFICATE OF MAILING**

2 The undersigned does hereby certify that on the 21 day of May, 2009, I deposited in the
3 United States Post Office at Las Vegas, Nevada, a copy of the Case Appeal Statement, postage
4 prepaid, addressed to the following:

5 District Attorney's Office
6 200 Lewis Ave., Ste. 800
7 Las Vegas NV 89155

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11 Brian O'Keefe, No. 1447732
12 Clark County Detention Center
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15 
16 An employee of The Special Public
17 Defender's Office
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ORIGINAL

DISTRICT COURT
CLARK COUNTY, NEVADA

ORIGINAL

THE STATE OF NEVADA,

Plaintiff,

vs.

BRIAN KERRY O'KEEFE,

Defendant.

CASE NO. C-250630

DEPT. NO. 17

TRANSCRIPT OF
PROCEEDINGS

FILED

JUL 10 2009

[Signature]
CLERK OF COURT

BEFORE THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE

TUESDAY MAY 5, 2009

ROUGH DRAFT TRANSCRIPT OF
SENTENCING

APPEARANCES:

FOR THE PLAINTIFF:

PHILLIP SMITH, ESQ.
Deputy District Attorneys

FOR THE DEFENDANT:

RANDALL H. PIKE, ESQ.
PATRICIA A. PALM, ESQ.
Special Public Defenders

COURT RECORDER:

MICHELLE RAMSEY
District Court

TRANSCRIPTION BY:

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

1 LAS VEGAS, NEVADA, TUESDAY, MAY 5, 2009, 5:02 A.M.

2 THE MARSHAL: O'Keefe.

3 THE COURT: C250630, State of Nevada versus Brian

4 O'Keefe. Mr. O'Keefe's present in custody. Mr. Pike, Ms.

5 Palm, Mr. Smith for the State. And the jury returned a verdict

6 on March 20, 2009 accordingly, he's hereby judged guilty of

7 second degree murder with use of a deadly weapon. Any argument

8 by the State?

9 MR. SMITH: Judge, we're basically here to

10 essentially argue the consecutive term because the sentence of

11 10 to life is prescribed by statute. I would just submit

12 respectfully, your Honor, that, you know, the defendant's long

13 history of domestic violence against in victim, coupled with

14 the extensive length of time of his overall criminal history

15 spanning several states dictates your Honor imposing the

16 maximum consecutive term of 8 to 20 years in prison.

17 This obviously was a horrible event. I would note

18 that the defendant apparently has still failed to accept full

19 culpability for this crime, despite the jury telling him that

20 he is culpable. I would note that in the PSI he still

21 maintains that this was an accident. The State submits

22 respectfully that the evidence that came out during the course

23 of the jury trial simply belies that.

24 If there's a person who doesn't deserve to be put

25 away for as long as allowed by law, it's certainly not Mr.

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ROUGH DRAFT TRANSCRIPT

1 range between 1 and 20 years. Next, Mr. O'Keefe disputes on

2 Page 2 that the name Brian Kerry McGill (phonetic) was ever

3 used. I don't know where P&P got that information from. I

4 don't believe that it's validated anywhere that I've seen.

5 Then on page 7 of the PSI the second paragraph states

6 that Mr. O'Keefe was found standing in an open doorway with a

7 knife in his hand. Your Honor heard the evidence in this case.

8 There's no evidence that he was ever holding a knife and that

9 he was seen by anyone, so I'd ask the Court to make that

10 correction.

11 And then as far as page 8 goes and the victim

12 information statement, the PSI is required to adhere to the

13 same terms as a proper victim impact statement. Paragraph 2 of

14 the victim information statement talks about alleged other bad

15 acts. That's entirely improper in a PSI. Mr. O'Keefe did not

16 have any notice of that, and we have no way to counter that.

17 That victim is not here for us to cross-examine, so I would ask

18 the Court to strike the paragraph two of the victim information

19 statement. And that's pursuant to NRS 176.145, which talks

20 about the contents of a PSI, and that they are to address the

21 crime, the person responsible, the impact of the crime and the

22 need for restitution, not other bad acts. Would that Court

23 make that correction?

24 THE COURT: Yes.

25 MS. PALM: Thank you. And as far as the

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ROUGH DRAFT TRANSCRIPT

1 O'Keefe. I would note that his continued history of domestic

2 violence certainly supports the conclusion that he is a

3 recidivist and that in order to protect the community and

4 specifically to protect women, your Honor should keep him away

5 from society for as long as possible.

6 THE COURT: Mr. Smith, was -- I know the previous

7 domestic violence involved the same victim. There was -- there

8 was two or three in the past. Was there a different victim or

9 is it the same one in this case?

10 MR. SMITH: The same victim. There was a couple that

11 involved other victims, but if my memory serves me correctly,

12 there were no less than six prior documented domestic violence

13 incidences where the defendant had attacked Mrs. Wiemarsh.

14 THE COURT: Okay. All right, thank you. Defense.

15 MS. PALM: Thank you, your Honor.

16 THE COURT: Ms. Palm, Mr. Pike.

17 MS. PALM: I would like to make some corrections to

18 what Mr. Smith just said in the PSI and I would ask the Court

19 to mark the original PSI with the corrections because that's

20 the copy that's going to follow Mr. O'Keefe around.

21 First of all, the options are not only 10 to life.

22 You have a choice of 10 to 25 on a second degree murder. So

23 we're talking about two possible sentences here. The PSI also

24 states that the term for the enhancement for use of a deadly

25 weapon is one year to life. That's incorrect. You have a

Page 3

ROUGH DRAFT TRANSCRIPT

1 recommendation in this case goes, again, the recommendation is

2 for a 10 to life on the second degree and then 12 months to

3 life on the enhancement, that would be improper. We're going

4 to be asking for in accordance with the 12 month minimum, that

5 it be a 12 to 3 on the enhancement. And just want to make sure

6 I didn't have any other factual errors to correct.

7 I would note that on the first arrest mentioned on

8 Page 4, Mr. O'Keefe was a juvenile at that time. He was 16

9 years old.

10 THE COURT: And that's on the 2879?

11 MS. PALM: That is correct. And on Page 5, he also

12 disputes that he was ever violated for probation. He did get

13 picked up for probation violation. It was a mix up. He was

14 honorably discharged from both of his probations in the Nevada

15 cases, and he was never charged or violated in either case. So

16 it's not fair to say that those were violations.

17 He did have -- he was -- he was -- because of this

18 case, that would be a proper entry, but anything prior to this

19 case would not be. So that would be the 7105 probation

20 violation, the 1808 probation violation. And those are all the

21 corrections I have. And then Mr. Pike would like to address

22 the Court briefly.

23 THE COURT: All right, Mr. Pike.

24 MR. PIKE: Thank you, your Honor. As the Court heard

25 in reference to this, this was a long and difficult

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ROUGH DRAFT TRANSCRIPT

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1 relationship both for Mrs. Witmarsh and for Brian O'Keefe.
2 Brian having entered into the military at the age of 17
3 distinguished himself as being a bronze star recipient while in
4 battle and thereafter began a long and continuing effects of
5 alcohol.

6 When he and Mrs. Witmarsh first got together it was
7 one of those things where they would separate, they would get
8 back together, and even when they would charge him with
9 felonies, the burglary or those other offenses, it was her
10 that would go visit him in jail. It was her that would wait
11 for him, and it was her that would pick him up when he came
12 back from any time that he was incarcerated.

13 And so too that happened this last time. They had
14 thought they -- Mr. O'Keefe thought they had terminated it, and
15 then it -- as the evidence was presented at the time of the
16 trial, it was Mrs. Witmarsh that recontacted him, reinitiated
17 it -- the relationship, and you saw the long attempts that Mr.
18 O'Keefe had had in controlling his alcohol and the people that
19 came in and said that he was a very different person when he
20 was drinking. And the attempts that they both as a couple had
21 in going through this alcohol treatment program as an attendee
22 and as an individual that came in from the testimony of the
23 counselor that treated Mr. O'Keefe particularly, but also dealt
24 with issue itself with Mrs. Witmarsh.

25 And then also, with her mental condition, her

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ROUGH DRAFT TRANSCRIPT

1 THE COURT: Okay. All right. Anything else?

2 MR. PIKE: Except for -- except for the bad -- or
3 excuse me, except for the juvenile offense and the bad check
4 which was just -- the account did not have enough funds and
5 that was paid off. Everything in his adult life involves Mrs.
6 Witmarsh.

7 THE COURT: All right. Anything else, Mr. Pike?

8 MR. PIKE: And the child support, yeah. The child
9 support.

10 THE COURT: Anything else?

11 MR. PIKE: No.

12 THE COURT: All right. Mr. O'Keefe, do you have
13 anything to say before I impose your sentence?

14 THE DEFENDANT: You made a lot decisions, your Honor,
15 that I must respect but do not agree with. I feel deeply
16 profound that I should be able to freely speak now. I'm not at
17 the trial. I can only hope on appeal more evidence will be
18 looked at the full case. The jury heard part of the story,
19 your Honor.

20 But there will be another day for this to be heard
21 and my (indiscernible) will begin many nights. I loved this
22 woman more than anything, and I did not do what the jury came
23 back with because they did not hear all evidence. I take full
24 responsibility because I shouldn't of drank, and I'm an
25 alcoholic, and I looked for any excuse to drink, and when I got

Page 8

ROUGH DRAFT TRANSCRIPT

1 attempts at suicide and the long mental history that she had,
2 unfortunately, in true -- in true (indiscernible) fashion, this
3 was a tragedy that when they were together occurred and when
4 they were drinking could almost not be avoided. And so based
5 upon that -- upon all the circumstances that involved this and
6 for -- to truly reflect the fact that this was, if a crime at
7 all, was a crime of passion.

8 And I'm certain that the Court isn't going to take
9 (indiscernible) with the fact that Mr. O'Keefe continues to
10 deny his culpability. He testified, and he gave his testimony
11 as to what happened, and unfortunately, the jury did not
12 believe that, but the Court is not going to hold that against
13 him and not punish him or maintaining his good faith and
14 testified to belief.

15 We'd request in accordance with that that the Court
16 sentence him to 10 to 25 term of years along with the
17 enhancement of 1 to 3. And that's reflected in the indication
18 from the 1 year minimum that was recommended in the charge
19 information on the first page by the Department of Parole of
20 Probation.

21 THE COURT: Mr. Pike, just so the Court is clear, the
22 PSI shows two prior domestic violence, one for November 14th,
23 '03 and April 3rd, '04, just so we're clear here. Do both of
24 those involve the victim in this particular case?

25 MR. PIKE: They do, your Honor.

Page 7

ROUGH DRAFT TRANSCRIPT

1 that job, and I told her don't worry about anything else. It
2 was wrong for birthday take her out to celebrate. The new job,
3 don't worry about anything. She was sick. I'm sick.

4 I can then say that the officers that apprehended me
5 should have taken my blood alcohol level. They destroyed it
6 for life. For life. I couldn't respond. I was caught off
7 guard. This is unbelievable. I must and I do respect your
8 decisions. I know it was very hard for you, and I just think I
9 should stop there, but I want to extremely say to the family
10 please believe me, I didn't -- I should have never let her
11 drink. I had no business drinking. I just completed a
12 program. She went with me every night, three nights a week for
13 two months.

14 And like a good alcoholic, you just want to go out
15 there and drink. And I -- I feel so sorry for her daughter and
16 for her sister, Atry (phonetic). We both had a lot of
17 problems, and I just -- I just -- I talk to her all day long in
18 the room. My cellies think I'm crazy, I don't care.

19 I can only believe in the Lord and ask him to take
20 away the pain from the family and myself and my family. I just
21 hope that I'll just have another (indiscernible). I just -- I
22 just thank you for your time, your Honor. I know it was very
23 hard for you. What I a job you must do. I just -- I don't --
24 I'm sorry. That's enough. I can't even think. Forgive me.

25 THE COURT: All right, thank you, sir. Mr. Smith, as

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ROUGH DRAFT TRANSCRIPT

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1 far as the corrections that have been identified by Ms. Palm,
2 do you agree with those corrections?

3 MR. SMITH: I do, Judge. Judge, can I just add one
4 final thing of just a brief sentence?

5 THE COURT: All right, just go ahead. Very brief.

6 MR. SMITH: Judge, you know, this is all about
7 choices, your Honor, and Mr. O'Keefe had the choice not to
8 drink. Mr. O'Keefe had a choice not to beat Victoria Witmarsh
9 for extended period of time that night which was evidenced by
10 the extensive bruising all over her body, and finally, he had a
11 choice not to plunge that knife into her side.

12 MS. PALM: And your Honor, I think we get rebuttal
13 for that.

14 THE COURT: All right, go ahead. Go ahead, Ms. Palm.

15 MS. PALM: Well, the Court will remember there was no
16 evidence as to when any of those bruises occurred. Ms.
17 Witmarsh had extensive liver cirrhosis and bruised easily, and
18 those bruises, I believe the testimony was could have been as
19 long as three weeks old and caused by even minimal contact such
20 as bumping into tables and that type of thing. So I don't
21 think that that's fair argument and in this case.

22 And also, as far as the choice goes, Mr. O'Keefe has
23 a fifth amendment right not to incriminate himself, and it
24 seems like Mr. Smith wants this Court to hold it against him
25 that he has maintained his innocence. He has a right to do so.

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ROUGH DRAFT TRANSCRIPT

1 that will be waived. He's already complied with that. Thank
2 you.

3 MS. PALM: Thank you.

4 MR. SMITH: Thanks, Judge.

5 MR. PIKE: Thank you, your Honor.

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ROUGH DRAFT TRANSCRIPT

1 So I would object to that.

2 THE COURT: All right, just for the record, the
3 correction and my copy of the PSI will be part of the Court's
4 file, and Page 1 I did correct the weapons enhancement
5 statement. I have a line through the alias of Brian Kerry
6 McGill. On Page 4 I've identified that the charge from
7 February 8th, 1979, tampering with a vehicle, trespass, injure
8 property, identified as a juvenile offense. Page 7 I have
9 lined out the allegation in that Mr. O'Keefe was in the doorway
10 with a knife in his hand. And I have stricken from page 8,
11 paragraph 2, under section 9. So the Court have not
12 considering those items.

13 Sir, to a certain extent it sounds like you're still
14 blaming the victim in this case. Whether she was intoxicated,
15 she didn't plunge the knife into you and have the prior
16 offenses involving her. In accordance with the law of the
17 State of Nevada, this Court does now sentence you to
18 confinement with the Nevada Department of Corrections for a
19 maximum term of 25 years, minimum term of 10 years.
20 On the weapons enhancement, maximum term of 240
21 months, minimum term of 96 months as a consecutive for the
22 weapons enhancement. Defendant has received credit for time
23 served in the amount of 181 days. He's also ordered to pay a
24 \$25 administrative assessment fee, \$150 DNA fee. Well,
25 actually, I see that DNA was taken back in June 3rd, 2005, so

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ROUGH DRAFT TRANSCRIPT

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ACKNOWLEDGEMENT

ATTEST: Pursuant to Rule 3C(d) of the Nevada Rules of Appellate Procedure, I acknowledge that this is a rough draft transcript, expeditiously prepared, not proofread, corrected, or certified to be an accurate transcript.

Verbatim Digital Reporting, LLC
Littleton, CO 80120
(303) 798-0890

Julie Lord

JULIE LORD, TRANSCRIBER

7-7-09

DATE

ORIGINAL

DISTRICT COURT
CLARK COUNTY, NEVADA

ORIGINAL

THE STATE OF NEVADA,

Plaintiff,

vs.

BRIAN KERRY O'KEEFE,

Defendant.

CASE NO. C-250630

DEPT. NO. 17

TRANSCRIPT OF
PROCEEDINGS

FILED

JUL 10 2009

E. J. Smith
CLERK OF COURT

BEFORE THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE

TUESDAY, APRIL 7, 2009

ROUGH DRAFT TRANSCRIPT OF
DEFENDANT'S MOTION TO SETTLE RECORD

APPEARANCES:

FOR THE PLAINTIFF:

PHILLIP SMITH, ESQ.
Deputy District Attorneys

FOR THE DEFENDANT:

RANDALL H. PIKE, ESQ.
PATRICIA A. PALM, ESQ.
Special Public Defenders

COURT RECORDER:

MICHELLE RAMSEY
District Court

TRANSCRIPTION BY:

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

CLERK OF THE COURT

JUL 10 2009

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1
2 LAS VEGAS, NEVADA, TUESDAY, APRIL 7, 2009, 9:07 A.M.
3 THE COURT: State of Nevada versus Brian O'Keefe.
4 This is defendant's motion to settle the record, and if I can
5 sort of paraphrase here, it's Mr. Pike's position that on some
6 of the jury instructions that perhaps all of his -- from the
7 arguments of the instructions you wanted to give as well as
8 some that you objected to were not completely stated on the
9 record. Is that correct?
10 MS. PALM: Well, your Honor, it's -- we're settling
11 the record as to the second degree murder instruction which was
12 instruction number 18. It's spelled out in my declaration. I
13 believe as to that instruction we had agreed in chambers that
14 it would not be given as written. And then when the Court got
15 the final instructions to us right before the reading of them,
16 the Court called us up to the bench having realized that it was
17 supposed to be altered to delete the second degree felony
18 murder theory, and the State had indicated, well, we won't
19 argue that theory, and they did not argue it.
20 But it was our position at the bench that that would
21 not correct it because the jury could still find it having been
22 instructed in it. And so we just wanted to make we made a
23 clear rod of that one issue. And if the State doesn't recall
24 that any different, I'll move onto the other issue.
25 MR. SMITH: Well, how the State recalls it, Judge,

Page 2
ROUGH DRAFT TRANSCRIPT

1 THE COURT: Okay.
2 MS. PALM: -- and my contention exactly, your Honor,
3 is that the Court was not going to give that instruction as
4 written. It was a mistake as that it ended up in the final
5 packet, and I don't think it was corrected by the State simple
6 yeah not arguing the second degree felony murder. And I do
7 think that was a second degree felony murder instruction, and
8 so that would be --
9 THE COURT: Okay.
10 MS. PALM: And then as to the other issue, it was
11 Detective Mogg's testimony, and we had -- if the Court recalls
12 that we had called Detective Mogg to testify as a witness. He
13 was not relate today this case, but it was that in 2007 he had
14 another case which actually was my case. It was State versus
15 Francis Bill Franco Ardona (phonetic) was a murder suspect
16 who claimed to be intoxicated, and Detective Mogg arranged for
17 him to have a Beth test for alcohol, and I was going to ask the
18 detective, you know, was that possible to be done, how was it
19 done, what's the training for Metro on that, and did it, in
20 fact, happen in that case, and did you arrange it, and you
21 know, why did you arrange it.
22 And Court ruled on the State's objection that it was
23 collateral and not relevant to this case. Our argument that it
24 was relevant because it showed the bad faith of the State -- or
25 the lack of good faith State investigation and the State's

Page 4
ROUGH DRAFT TRANSCRIPT

1 was that we had a dispute whether or not the language that was
2 contained in the instruction that was ultimately submitted to
3 the jury was, in fact, a felony second degree murder
4 instruction. And it was our understanding that your Honor
5 instructed us not to argue that the defendant committed the
6 homicide in the commission of any felony, and we didn't, and
7 that there wouldn't be a problem.
8 So I just want to make sure that the record's clear
9 we have with the State that it was our contention that the
10 precise language that was submit that in the instruction that
11 actually went to the jury did not rise to the second degree
12 felony murder instruction.
13 THE COURT: I think that was the Court's recollection
14 that I kept the language in over the objection of the defense
15 attorneys, but I did admonish the prosecutor that they were not
16 going to argue felony murder rule on the case, and that's my
17 recollection, they did not in closing.
18 MR. SMITH: And that's correct. Now, if the defense
19 is contending that not with stand being the Court's decision
20 that the language that was actually contained in that
21 instruction, in fact, arose to a second degree felony murder
22 instruction, then I mean, all I can say is the State
23 respectfully disagrees and we can just let an appellate court
24 determine that.
25 MS. PALM: Well --

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ROUGH DRAFT TRANSCRIPT

1 motive most minimize the alcohol intoxication in Mr. O'Keefe at
2 the time of the offense. So the Court overruled our objection
3 to it, and then I had no more questions for Detective Mogg. He
4 stepped down as a witness. I just wanted to make sure our
5 record was clear on that.
6 MR. SMITH: I actually have two replies. If I
7 remember correctly, it was the State's position that the
8 detective in question, which I believe it was Detective Marty
9 Wildemann, simply testified that to his knowledge there was no
10 other case where a homicide detective took a breath test from a
11 suspect or defendant prior to conducting an interview. And it
12 was -- if I recall correctly, it was our position that simply
13 because another detective in an independent case of his own
14 accord decided to take a breath test from a suspect, which
15 clearly was not any part of any established protocol, that they
16 couldn't simply use that to say well, the Government acted in
17 bad faith because Detective Wildemann didn't do in this case.
18 Furthermore, I would suggest that the issue was
19 actually entirely moot because it stands to reason that the
20 reason why they didn't find the defendant guilty of first
21 degree murder was because they bought into the defense's
22 contention that he was too drunk to form the intent.
23 MS. PALM: And your Honor, I'm not arguing the appeal
24 here so it doesn't matter if it's moot or not.
25 THE COURT: All right.

Page 5
ROUGH DRAFT TRANSCRIPT

000343

1 MR. SMITH: Oh, I know. I'm just making a record for
2 --
3 MS. PALM: I'm settling the record.
4 MR. SMITH: I'm just making a record for the law
5 clerk who's ultimately going to get this.
6 THE COURT: All right, well, I think the record is
7 clear in that regard, and, you know, I think that's why the
8 jury did come back with a second as opposed to a first because
9 of alcohol issue. All right, record's clear?
10 MS. PALM: Thank you.
11 MR. SMITH: Thank you, Judge.
12 THE COURT: Thank you very much.
13 MR. SMITH: Have a good day.
14 THE COURT: You too.
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25

Page 6

ROUGH DRAFT TRANSCRIPT

ROUGH DRAFT TRANSCRIPT

000344

ACKNOWLEDGEMENT

ATTEST: Pursuant to Rule 3C(d) of the Nevada Rules of Appellate Procedure, I acknowledge that this is a rough draft transcript, expeditiously prepared, not proofread, corrected, or certified to be an accurate transcript.

Verbatim Digital Reporting, LLC
Littleton, CO 80120
(303) 798-0890

Julie Lord

JULIE LORD, TRANSCRIBER

7-7-09

DATE

FILED

JUL 10 2009

Pl. Atty.
CLERK OF COURT

ORIGINAL

DISTRICT COURT
CLARK COUNTY, NEVADA

ORIGINAL

THE STATE OF NEVADA,
Plaintiff,
vs.

BRIAN KERRY O'KEEFE,
Defendant.

CASE NO. C-250630

DEPT. NO. 17

TRANSCRIPT OF
PROCEEDINGS

BEFORE THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE

TUESDAY, MARCH 10, 2009

ROUGH DRAFT TRANSCRIPT OF
ALL PENDING MOTIONS

APPEARANCES:

FOR THE PLAINTIFF:

PHILLIP SMITH, ESQ.
STEPHANIE GRAHAM, ESQ.
Deputy District Attorneys

FOR THE DEFENDANT:

RANDALL H. PIKE, ESQ.
PATRICIA A. PALM, ESQ.
Special Public Defenders

COURT RECORDER:

MICHELLE RAMSEY
District Court

TRANSCRIPTION BY:

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(303) 798-0890

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CLERK OF THE COURT

JUL 10 2009

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1 LAS VEGAS, NEVADA, TUESDAY, MARCH 10, 2009, 8:25 A.M.
 2 THE COURT: Mr. O'Keefe is present in custody with
 3 Mr. Pike, Ms. Palm. And who do we have?
 4 MR. SMITH: Phil Smith for the State.
 5 THE COURT: Phil Smith.
 6 MR. SMITH: For the State of Nevada, Judge.
 7 THE COURT: All right. And it's a calendar call and
 8 also there's a motion.
 9 MR. PIKE: That's correct, your Honor. As far as the
 10 calendar call, the defense is ready. We have -- we anticipate
 11 approximately five witnesses that are not also endorsed by the
 12 State. We have one out-of-state witness who is one of the
 13 experts that we have two experts.
 14 I have provided draft proposed jury instructions to
 15 the Court as well as to Counsel via e-mail. I'll file the hard
 16 copies this week. We have met with the DA and reviewed all of
 17 the reports that have been generated in this. We've exchanged
 18 reciprocal discovery, so we've accomplished that.
 19 In addition, I do have a signed stipulation and order
 20 to waive a jury penalty hearing in the event that the jury was
 21 to come back with a first degree verdict. I prepared that. I
 22 don't know if the State has authorization to do that or not,
 23 but we do have that. Although, procedurally because my
 24 arguments for the motion deal with informing a jury of

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1 THE CLERK: Yes.
 2 (Off the record colloquy).
 3 MR. SMITH: And Judge, I'll have my instructions to
 4 you probably later on this afternoon.
 5 THE COURT: All right.
 6 MR. SMITH: I think the only other out standing
 7 matter is is their motion that's on for today.
 8 THE COURT: Okay.
 9 MR. PIKE: Right.
 10 THE COURT: Go ahead, Mr. Pike.
 11 MR. PIKE: Thank you, your Honor. I contacted
 12 counsel for State, and because of the time in which this was
 13 filed, I have no opposition to them filing a response
 14 (Indiscernible) day. This is something that I
 15 haven't found that's been considered by the courts in the State
 16 of Nevada, although it's something that certainly is timely and
 17 something that is coming to the forefront more and more.
 18 Particularly, where we have juries that don't
 19 understand jury instructions many times, and where juries do
 20 not understand the import of their decisions because they don't
 21 know the penalties. If we were to ask the members of the
 22 audience here today and ask them well, what is the penalty for
 23 first degree murder, I don't think that there are ten people in
 24 here that would tell you that that's 20 years, a mandatory 20
 25 years.

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1 potential penalties, the determination to file that, I guess,
 2 is something that we would like to withhold until after the
 3 jury is seated in the case. So for calendar call, that's where
 4 we're at.
 5 THE COURT: Okay.
 6 MR. PIKE: The defense is at.
 7 THE COURT: Is the State ready?
 8 MR. SMITH: Yes, Judge.
 9 THE COURT: All right.
 10 MR. PIKE: We anticipate that the trial would last
 11 four days?
 12 MR. SMITH: Three or four, I would imagine.
 13 THE COURT: All right, we'll start Monday at 10:00.
 14 THE CLERK: Sounds good.
 15 THE COURT: All right.
 16 MR. PIKE: Thank you.
 17 THE COURT: Thank you.
 18 THE CLERK: So that's on March 16th at 10:00 a.m.
 19 MR. PIKE: Thank you.
 20 THE CLERK: We also have evidentiary hearing at 9:30
 21 so --
 22 THE COURT: All right.
 23 MR. PIKE: Okay, thank you.
 24 THE CLERK: (Indiscernible).
 25 MR. SMITH: So you want us here at 9:30.

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1 And if you were to ask them second degree murder, I
 2 dare say that many people would say well, that's only a two to
 3 three year sentence. The fact is is that we are no -- juries
 4 have been stripped of their historic importance as being the
 5 conscious of the community because they have -- the knowledge
 6 -- the normal knowledge that the juries have as far as
 7 potential penalties and the community input and absence from
 8 the community no longer exist.
 9 And with the mandatory penalties being a form of a
 10 determinate sentence, they have been universally criticized
 11 because they're incapable of choosing -- excuse me, incapable
 12 of achieving consistent just sentencing. What happens is with
 13 these mandatory penalties, they're taking the jurisdiction or
 14 the discretion away from the court. They're taking it away
 15 from the jury, and then the -- so deliberately deny the jury
 16 the knowledge of what they are doing, they are creating a
 17 negative of just individualized justice. They're creating just
 18 a mandatory sacrifice, a mandatory harsh penalty that is
 19 applied to the point where you cannot even say that it -- well,
 20 it's over broad. Constitutionally over broad, and it affects
 21 everyone within the system.
 22 So they take -- they've taken too much control away
 23 from the courts and from the juries. The legislature has
 24 rested this control away from the court, and they -- by doing
 25 this, they have effectively not only changed the dynamics

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1 within the court, but they've done so in an unconstitutional
2 manner.

3 If you're going through and thinking that by
4 informing the jury, we're kind of blurring the line of what a
5 jury and a judge should be doing, well that's already been
6 done. The legislature by coming in and saying that these are
7 the mandatory penalties, has basically set up a paradigm where
8 it now becomes mandatory to inform the jury of their
9 consequences.

10 We have had -- and your Honor, is aware of this. You
11 have to call witnesses in at the time of trial to convince a
12 jury that life without the possibility of parole means life
13 without the possibility of parole. Or death while
14 incarcerated. If we don't tell them that, the jury believes
15 that they're going to get out seven years.

16 If we tell them the mandatory minimums are 20 years,
17 juries still don't want to believe that. We have to call
18 experts to come in and convince the juries that these harsh
19 penalties are real because they are so harsh and they are so --
20 and there's no getting around them that unless you convince a
21 jury of these things, they just simply don't believe it. It's
22 outside of their (indiscernible) knowledge that any first
23 degree murder carries -- with a weapon carries with it 40 years
24 before that person can see the outside of a prison cell.

25 And then if you go to that same jury group of

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1 things are done and because of the sheer volume of the
2 information, the sheer number of crimes, the sheer magnitude of
3 the penalties, they no longer have that knowledge, that right,
4 and that ability to perform the function which a jury should
5 do.

6 While the legislature has done this and has bound the
7 courts and the juries, it now becomes the only remedy as to
8 inform the jury of the mandatory sentences so that the jury may
9 exercise its high (indiscernible) conscience for which it was
10 established and do what it is meant to do, which is justice.
11 It's not a question of are they going to commit jury
12 nullification because that isn't where you get reversals on
13 information the juries may get the sentencing.

14 Where you get the reversals is where the State comes
15 in and says well, they're looking for a verdict to keep
16 somebody in prison, where the suggestion that the parole board
17 or pardons board may allow somebody to withdraw a portion of
18 sentence or may amend it down to life with the possibility of
19 parole. That's where the problem of informing juries about the
20 potential penalties occur.

21 Here where all I'm asking is to have the jury inform
22 the potentially the same sentence is available both by -- for a
23 conviction of second degree and first degree, and I think
24 constitutionally we've reached the point where we have to tell
25 them that because they no longer do it, and the statutes are

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1 prospective jurors and tell them, but if you convict them of
2 second degree murder, that still carries with it the same
3 potential sentence of life in prison that a first degree murder
4 carries. The only option is that you then have a parole
5 committee that may or may not ever allow that person to see the
6 light of day.

7 So in -- by creating these mandatory minimum
8 penalties and then not giving the jury the information
9 particularly where the end sentence for second degree and first
10 degree are the same, the jury has been diminished. The court
11 has been diminished and the legislature has unconstitutionally
12 taken that away.

13 We have the right to trial. It's something that was
14 considered such a (indiscernible) against the oppression of the
15 government, of the legislature, of the king and remember, it
16 wasn't even the king that could tell the jury to

17 (indiscernible) and they could stand against the
18 king. It's the same thing that the jury has to be able to do
19 here, and think can't do that without the knowledge because
20 they don't know what the penalty is.

21 Juries back when this right to a jury trial was
22 intruded within the Constitutions, they knew what it meant.
23 They knew that people were going to be executed. They knew
24 approximately how long they were going to be in prison, and
25 they -- and because the legislature, and because of the way

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1 not that clear even to some counsel that are -- do not
2 regularly handle murder cases.

3 THE COURT: Wouldn't that lead to a compromised
4 verdict by the jury?

5 MR. PIKE: Certainly it could, and juries compromise
6 all the time. That is the deliberative process that they do.
7 I think it's first degree, I think it's a voluntary
8 manslaughter. Well, then they work. They compromise. They
9 bind their collective intelligence and emotion together and say
10 this is what is right. You've convinced me. It's
11 collaboration. It's not nullification and it's not a true
12 compromise, and that may happen.

13 But if that does happen, then that is the justice
14 that the jury is dock, and that's their higher calling is to do
15 justice.

16 THE COURT: All right. State.

17 MR. SMITH: Judge, you know, I've read Mr. Pike's
18 motion, and I must say it's very well written and has a
19 historical chronicle of like the U.S. Constitution and jurors
20 back in the 15th century. But what they're asking, your Honor,
21 to do is basically assure that if the State obtains a
22 conviction on this case, that there's going to be reversible
23 error, and there's no doubt about that.

24 As recently as 2003, in *Weber v. State* (phonetic) --
25 excuse me, *Meier v. State* (phonetic), and the title is 119

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1 Nevada 554, the supreme court specifically said that one of the
2 ways that a juror can commit misconduct is to discuss
3 sentencing period. That's exactly what Mr. Pike is asking
4 your Honor to do.

5 Furthermore, the plea of their motion is completely
6 contrary to all statutory and case precedent in this state, and
7 he's basically asking you to do something that's never been
8 done before, at least not in the past 3 or 400 years in Nevada
9 or any other state of the union, for that matter.

10 I would suggest that your Honor simply follow what's
11 already been long established in statutory and case authority,
12 do not inform the jury as to what the penalty for a second
13 degree murder conviction is. And if Mr. Pike wants to appeal
14 that with the supreme court, let them decide that now we're
15 going to change our minds and let it be okay for a jury to know
16 what a sentencing penalty is.

17 Other than that, Judge, I mean there's really nothing
18 that merits granting this motion unless your Honor wants to
19 guarantee reversible error.

20 THE COURT: Anything else, Mr. Pike.

21 MR. PIKE: In response there, basically by bringing
22 this motion, we're ensuring that this is not an issue if it is
23 granted because we're bringing it. We're the ones asking for
24 it, and, you know, you got to be careful what you ask for
25 because if you get what you ask for, the supreme court says

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1 it's invited error, and it's not going to benefit you.

2 Three and 400 years the magna carta still is the
3 magna carta, and Shakespeare's still Shakespeare. What is good
4 is good, and it continues on through the centuries.

5 THE COURT: Mr. Pike, I have a lot of faith in the
6 jury system, and in a deliberative process, and so I think it
7 would be your job and your job to present the best case for
8 your client, and so I'm going to deny your motion. All right.

9 MR. PIKE: Very much.

10 THE COURT: Thank you.

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INSTRUCTION NO. 5

The Defendant is presumed innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every material element of the crime charged and that the Defendant is the person who committed the offense.

A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.

If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a verdict of not guilty.

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INSTRUCTION NO. 6

The evidence which you are to consider in this case consists of the testimony of the witnesses, the exhibits, and any facts admitted or agreed to by counsel.

There are two types of evidence; direct and circumstantial. Direct evidence is the testimony of a person who claims to have personal knowledge of the commission of the crime which has been charged, such as an eyewitness. Circumstantial evidence is the proof of a chain of facts and circumstances which tend to show whether the Defendant is guilty or not guilty. The law makes no distinction between the weight to be given either direct or circumstantial evidence. Therefore, all of the evidence in the case, including the circumstantial evidence, should be considered by you in arriving at your verdict.

Statements, arguments and opinions of counsel are not evidence in the case. However, if the attorneys stipulate to the existence of a fact, you must accept the stipulation as evidence and regard that fact as proved.

You must not speculate to be true any insinuations suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

You must disregard any evidence to which an objection was sustained by the court and any evidence ordered stricken by the court.

Anything you may have seen or heard outside the courtroom is not evidence and must also be disregarded.

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INSTRUCTION NO. 7

The credibility or believability of a witness should be determined by his manner upon the stand, his relationship to the parties, his fears, motives, interests or feelings, his opportunity to have observed the matter to which he testified, the reasonableness of his statements and the strength or weakness of his recollections.

If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of his testimony which is not proved by other evidence.

INSTRUCTION NO. 8

The fact a person has been convicted of a felony, may only be considered by you for the purpose of determining the credibility of that person. The fact of such a conviction does not necessarily destroy or impair the person's credibility. It is one of the circumstances that you may take into consideration in weighing the testimony of such a person.

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Evidence that the defendant committed offenses other than that for which he is on trial, if believed, was not received and may not be considered by you to prove that he is a person of bad character or to prove that he has a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of proving the Defendant's motive or intent. You must weigh this evidence in the same manner as you do all other evidence in the case.

A witness who has special knowledge, skill, experience, training or education in a particular science, profession or occupation is an expert witness. An expert witness may give his opinion as to any matter in which he is skilled.

You should consider such expert opinion and weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if, in your judgment, the reasons given for it are unsound.

INSTRUCTION NO. VI

Although you are to consider only the evidence in the case in reaching a verdict, you must bring to the consideration of the evidence your everyday common sense and judgment as reasonable men and women. Thus, you are not limited solely to what you see and hear as the witnesses testify. You may draw reasonable inferences from the evidence which you feel are justified in the light of common experience, keeping in mind that such inferences should not be based on speculation or guess.

A verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law.

In this case the defendant is accused in an Amended Information alleging an open charge of murder. This charge includes and encompasses murder of the first degree, murder of the second degree, voluntary manslaughter and involuntary manslaughter.

The jury must decide if the defendant is guilty of any offense and, if so, of which offense.

INSTRUCTION NO. 13

Murder is the unlawful killing of a human being, with malice aforethought, either express or implied. The unlawful killing may be effected by various means.

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INSTRUCTION NO. 14

Malice as applied to murder does not necessarily import ill will toward the victim, but signifies general malignant recklessness of others' lives and safety or disregard of social duty.

Express malice is that deliberate intention unlawfully to take away the life of another, which is manifested by external circumstances capable of proof.

Malice may be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

1
2 Murder of the first degree is murder which is perpetrated by means of any kind of
3 willful, deliberate, and premeditated killing. All three elements--willfulness, deliberation,
4 and premeditation--must be proven beyond a reasonable doubt before an accused can be
5 convicted of first-degree murder.

6 Willfulness is the intent to kill. There need be no appreciable space of time between
7 formation of the intent to kill and the act of killing.

8 Deliberation is the process of determining upon a course of action to kill as a result of
9 thought, including weighing the reasons for and against the action and considering the
10 consequences of the action.

11 A deliberate determination may be arrived at in a short period of time. But in all cases
12 the determination must not be formed in passion, or if formed in passion, it must be carried
13 out after there has been time for the passion to subside and deliberation to occur. A mere
14 unconsidered and rash impulse is not deliberate, even though it includes the intent to kill.

15 Premeditation is a design, a determination to kill, distinctly formed in the mind by the
16 time of the killing.

17 Premeditation need not be for a day, an hour, or even a minute. It may be as
18 instantaneous as successive thoughts of the mind. For if the jury believes from the evidence
19 that the act constituting the killing has been preceded by and has been the result of
20 premeditation, no matter how rapidly the act follows the premeditation, it is premeditated.

21 The law does not undertake to measure in units of time the length of the period during
22 which the thought must be pondered before it can ripen into an intent to kill which is truly
23 deliberate and premeditated. The time will vary with different individuals and under varying
24 circumstances.

25 The true test is not the duration of time, but rather the extent of the reflection. A cold,
26 calculated judgment and decision may be arrived at in a short period of time, but a mere
27 unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation
28 and premeditation as will fix an unlawful killing as murder of the first degree.

A Murder which is not Murder in the First Degree is Murder in the Second Degree.

The distinguishing feature between First and Second Degree Murder is the presence or absence of premeditation and deliberation. If the unlawful killing is done with malice, but without deliberation and premeditation, that is, without the willful, deliberate and premeditated intent to take life which is an essential element of First Degree Murder, then the offense is Murder of the Second Degree.

In practical application this means that the unlawful killing of a human being with malice aforethought, but without a deliberately formed and premeditated intent to kill, is Murder of the Second Degree.

If you believe from the evidence beyond a reasonable doubt that the defendant is guilty of Murder, and there is in your minds a reasonable doubt as to which of the two degrees he is guilty, he must be convicted of the lesser offense which is Murder of the Second Degree.

Should you find that the defendant did not commit Murder of either the First or Second Degree but believe beyond a reasonable doubt that he is responsible for the homicide, you must determine if that killing was manslaughter.

Murder of the Second Degree is murder which is:

- 1) An unlawful killing of a human being with malice aforethought, but without deliberation and premeditation, or
- 2) Where an involuntary killing occurs in the commission of an unlawful act, the natural consequences of which are dangerous to life, which act is intentionally performed by a person who knows that his conduct endangers the life of another, even though the person has not specifically formed an intention to kill.

Malice aforethought means the intentional doing of a wrongful act without legal cause or excuse or what the law considers adequate provocation. It is not confined to murder committed with settled design and premeditation but extends to all cases of homicide. The condition of mind described as malice aforethought may arise, not alone from anger, hatred, revenge or from particular ill will, spite or grudge toward the person killed, but may result from any unjustifiable or unlawful motive or purpose to injure another, which proceeds from a heart fatally bent on mischief or with reckless disregard of consequences and social duty. Malice aforethought does not imply deliberation or the lapse of any considerable time between the malicious intention to injure another and the actual execution of the intent but denotes rather an unlawful purpose and design in contradistinction to accident and mischance.

The crime of Manslaughter is the unlawful killing of a human being without malice aforethought. It is not divided into degrees but is of two kinds, namely, Voluntary Manslaughter and Involuntary Manslaughter.

Voluntary Manslaughter is the unlawful killing of a human being, without malice aforethought and without deliberation or premeditation. It is a killing upon a sudden quarrel or heat of passion, caused by a provocation sufficient to make the passion irresistible.

The provocation required for Voluntary Manslaughter must either consist of a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing.

For the sudden, violent impulse of passion to be irresistible resulting in a killing, which is Voluntary Manslaughter, there must not have been an interval between the assault or provocation and the killing sufficient for the voice of reason and humanity to be heard; for, if there should appear to have been sufficient time for a cool head to prevail and the voice of reason to be heard, the killing shall be attributed to deliberate revenge and determined by you to be murder. The law assigns no fixed period of time for such an interval but leaves its determination to the jury under the facts and circumstances of the case.

1
2 The heat of passion which will reduce a Murder to Voluntary Manslaughter must be
3 such an irresistible passion as naturally would be aroused in the mind of an ordinarily
4 reasonable person in the same circumstances. A defendant is not permitted to set up his own
5 standard of conduct and to justify or excuse himself because his passions were aroused
6 unless the circumstances in which he was placed and the facts that confronted him were such
7 as also would have aroused the irresistible passion of the ordinarily reasonable man if
8 likewise situated. The basic inquiry is whether or not, at the time of the killing, the reason of
9 the accused was obscured or disturbed by passion to such an extent as would cause the
10 ordinarily reasonable person of average disposition to act rashly and without deliberation and
11 reflection and from such passion rather than from judgment.
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INSTRUCTION NO. 23

The intention to kill may be ascertained or deduced from the facts and circumstances of the killing, such as the use of a weapon calculated to produce death, the manner of its use, and the attendant circumstances characterizing the act.

Involuntary Manslaughter is the killing of a human being, without any intent to do so, in the commission of an unlawful act or a lawful act which probably might produce such a consequence in an unlawful manner; but where the involuntary killing occurs in the commission of an unlawful act, which, in its consequences, naturally tends to destroy the life of a human being.

INSTRUCTION NO. 25

"Deadly weapon" means any instrument which, if used in the ordinary manner contemplated by its design and construction, will or is likely to cause substantial bodily harm or death; or any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death.

"Substantial bodily harm" means:

- 1) Bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ; or
- 2) Prolonged physical pain.

1
2 If a person unlawfully inflicts upon another person a physical injury which is a
3 proximate cause of the latter's death, such conduct of the former constitutes an unlawful
4 homicide even though the injury thus inflicted was not the only cause of the death, and
5 although the person thus injured had been already enfeebled by disease, injury, physical
6 condition or other cause and although it is probably that a person in sound physical condition
7 thus injured would not have died from the injury.
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By proximate cause is meant a direct cause, that is, a cause which, by direct and natural sequence, produced the death in question. To say it differently, the proximate cause of a thing is that cause which produces it and without which it would not have happened. A proximate cause is a real cause, as opposed to a remote cause.

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2 If a person unlawfully inflicts upon another person a physical injury which is a
3 proximate cause of the latter's death, such conduct of the former constitutes an unlawful
4 homicide even though the injury thus inflicted was not the only cause of the death, and
5 although the person thus injured had been already enfeebled by disease, injury, physical
6 condition or other cause and although it is probably that a person in sound physical condition
7 thus injured would not have died from the injury.
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If a person premeditates and deliberates upon the crime of Murder and forms a specific intent to commit that crime and thereafter becomes intoxicated, then such intoxication will not serve as a defense in order to reduce the degree of the murder.

If an intoxicated person has the capacity to form the intent to take life, and conceives and executes such intent, it is no ground for reducing the degree of his crime that he was induced to conceive it, or to conceive it more suddenly by reason of his intoxication.

If, however, you were to find that the defendant committed murder, and that at the time of the offense the defendant was so intoxicated that he completely lacked the capacity to deliberate and premeditate, then you must return a verdict of Second Degree Murder.

If the evidence shows that the defendant was voluntarily intoxicated when allegedly he committed the lesser included offenses of voluntary and involuntary manslaughter, his intoxication is not a defense to such lesser included charges.

Intoxication of a person is voluntary if it results from his willing partaking of any intoxicating liquor, drug or other substance when he knows that it is capable of an intoxicating effect.

1
2 Nevada law provides that "no act committed by a person while in a state of voluntary
3 intoxication is less criminal by reason of his having been in such condition." This is true
4 even when the intoxication is so extreme as to make the person unconscious of what he is
5 doing or to create temporary insanity.

6 This provision of the law means that if the evidence shows that the defendant was
7 insane or voluntarily intoxicated when he allegedly committed the offense charged, his
8 insanity or intoxication is not a defense to such charge. Temporary insanity produced by
9 intoxication does not destroy responsibility, when the party, when sane and responsible,
10 made himself voluntarily intoxicated; and drunkenness forms no defense whatsoever to the
11 fact of guilt, for, when a crime is committed by a party while in a fit of intoxication, the law
12 will not allow him to avail himself of his own gross vice and misconduct to shelter himself
13 from the legal consequences of such crime. Evidence of drunkenness can only be considered
14 by the jury for the purpose of determining the degree of the crime, and for this purpose, it
15 must be received with great caution.
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The killing of another person in self-defense is justified and not unlawful when the person who does the killing actually and reasonably believes:

1) That there is imminent danger that the assailant will either kill him or cause him great bodily injury; and

2) That it is absolutely necessary under the circumstances for him to use in self-defense force or means that might cause the death of the other person, for the purpose of avoiding death or great bodily injury to himself.

INSTRUCTION NO. 35

A bare fear of death or great bodily injury is not sufficient to justify a killing. To justify taking the life of another in self-defense, the circumstances must be sufficient to excite the fears of a reasonable person placed in a similar situation. The person killing must act under the influence of those fears alone and not in revenge.

The right of self-defense is not available to an original aggressor, that is a person who has sought a quarrel with the design to force a deadly issue and thus through his fraud, contrivance or fault, to create a real or apparent necessity for making a felonious assault.

However, where a person without voluntarily seeking, provoking, inviting, or willingly engaging in a difficulty of his own free will, is attacked by an assailant, he has the right to stand his ground and need not retreat when faced with the threat of deadly force.

INSTRUCTION NO. 37

When acting in self-defense, a person may only use the amount of force that is reasonably necessary to defend themselves.

000282

INSTRUCTION NO. 38

An honest but unreasonable belief in the necessity for self-defense does not negate malice and does not reduce the offense from murder to manslaughter.

000283

Actual danger is not necessary to justify a killing in self-defense. A person has a right to defend from apparent danger to the same extent as he would from actual danger. The person killing is justified if:

- 1) He is confronted by the appearance of imminent danger which arouses in his mind an honest belief and fear that he is about to be killed or suffer great bodily injury; and
- 2) He acts solely upon these appearances and his fear and actual beliefs; and
- 3) A reasonable person in a similar situation would believe himself to be in like danger.

The killing is justified even if it develops afterward that the person killing was mistaken about the extent of the danger.

1
2 If evidence of self-defense is present, the State must prove beyond a reasonable doubt
3 that the defendant did not act in self-defense. If you find that the State has failed to prove
4 beyond a reasonable doubt that the defendant did not act in self-defense, you must find the
5 defendant not guilty.
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INSTRUCTION NO. 41

In your deliberation you may not discuss or consider the subject of punishment, as that is a matter which lies solely with the court. Your duty is confined to the determination of the guilt of the Defendant.

If, during your deliberation, you should desire to be further informed on any point of law or hear again portions of the testimony, you must reduce your request to writing signed by the foreperson. The officer will then return you to court where the information sought will be given you in the presence of, and after notice to, the district attorney and the Defendant and his counsel.

Playbacks of testimony are time-consuming and are not encouraged unless you deem it a necessity. Should you require a playback, you must carefully describe the testimony to be read back so that the court reporter can arrange his/her notes. Remember, the court is not at liberty to supplement the evidence.

When you retire to consider your verdict, you must select one of your number to act as foreperson who will preside over your deliberation and will be your spokesperson here in court.

During your deliberation, you will have all the exhibits which were admitted into evidence, these written instructions and forms of verdict.

Your verdict must be unanimous. As soon as you have agreed upon a verdict, have it signed and dated by your foreperson and then return with it to this room.



DISTRICT COURT JUDGE

1 VER

2 DISTRICT COURT

3 CLARK COUNTY, NEVADA

FILED IN OPEN COURT
MAR 20 2009 @ 7:15 AM

EDWARD A. FRIEDLAND
CLERK OF THE COURT

4 THE STATE OF NEVADA,
5 Plaintiff,

BY *Kristen Brown*

CASE NO: C250630

DEPUT

6 -vs-

DEPT NO: XVII

KRISTEN BROWN

7 BRIAN KERRY O'KEEFE,
8 Defendant,

9
10 VERDICT

11 We, the jury in the above entitled case, find the Defendant BRIAN KERRY
12 O'KEEFE, as follows:

13 COUNT 1 - MURDER WITH USE OF A DEADLY WEAPON (OPEN MURDER)

14 (please check the appropriate box, select only one)

15 ☐ Guilty of FIRST DEGREE MURDER WITH USE OF A DEADLY
WEAPON

16 ☐ Guilty of FIRST DEGREE MURDER

17 ☒ Guilty of SECOND DEGREE MURDER WITH USE OF A DEADLY
WEAPON

18 ☐ Guilty of SECOND DEGREE MURDER

19 ☐ Guilty of VOLUNTARY MANSLAUGHTER WITH USE OF A
DEADLY WEAPON

20 ☐ Guilty of VOLUNTARY MANSLAUGHTER

21 ☐ Guilty of INVOLUNTARY MANSLAUGHTER WITH USE OF A
DEADLY WEAPON

22 ☐ Guilty of INVOLUNTARY MANSLAUGHTER

23 ☐ Not Guilty

24
25
26
27
28
Kristen Brown
FOREPERSON
03/20/09

000289

ORIGINAL

1 NCA
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
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13 (702) 455-6265
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16 palmpa@co.clark.nv.us
17 Attorneys for O'Keefe

FILED IN OPEN COURT

MAR 20 2009

EDWARD A. FRIEDLAND
CLERK OF THE COURT

BY Kristen Brown
KRISTEN BROWN DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

12 THE STATE OF NEVADA,

13 Plaintiff,

14 vs.

15 BRIAN O'KEEFE,

16 Defendant.

CASE NO. C250630


DEPT. NO. XVII

DEFENDANT'S SUPPLEMENTAL PROPOSED JURY INSTRUCTIONS

19 SEE ATTACHED.

20 DATED this 18th day of March, 2008.

21 SPECIAL PUBLIC DEFENDER
22 DAVID M. SCHIECK

23 
24 RANDY H. PIKE
25 PATRICIA A. PALM
26 330 South Third Street, Ste 800
27 Las Vegas, NV 89155-2316
28 (702) 455-6265
Attorneys for Defendant

000290


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RECEIPT OF COPY

RECEIPT of a copy of the Defendant's Supplemental Proposed Jury Instructions
is hereby acknowledged.

DATED: _____, 2009.

DISTRICT ATTORNEY'S OFFICE



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

1
2 The State and police officers were required to provide the defendant's counsel
3 with a "Use of Force Report" prior to trial. You are instructed that this report was not
4 provided to the defendant's counsel prior to trial and that a detective made a false
5 allegation about the existence of this report. You are further instructed that the
6 intentional withholding of favorable evidence by the State and or police officers is an
7 indication of the weakness of the State's case. You must consider the actions of the
8 State and police officer in withholding this evidence in determining whether the State
9 has met its burden of proving the charge against the defendant.
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ORIGINAL

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17 Attorney for O'Keefe

FILED IN OPEN COURT

MAR 20 2009

EDWARD A. FRIEDLAND
CLERK OF THE COURT

BY Kristen Brown
KRISTEN BROWN DEPUTY

DISTRICT COURT

CLARK COUNTY, NEVADA

12 THE STATE OF NEVADA,
13
14 vs. Plaintiff,

CASE NO. C250630
DEPT. NO. XVII

15 BRIAN O'KEEFE
16 Defendant

17 **DEFENDANT'S BRIEF ON ADMISSIBILITY OF EVIDENCE OF**
18 **ALLEGED VICTIM'S HISTORY OF SUICIDE ATTEMPTS, ANGER**
19 **OUTBURSTS, ANGER MANAGEMENT THERAPY, SELF-MUTILATION**
20 **(WITH KNIVES AND SCISSORS), AND ERRATIC BEHAVIOR**

21 DATE: 3/20/2009
22 TIME: 8:00 A.M.

23 COMES NOW, Defendant BRIAN O'KEEFE, by and through his attorneys DAVID M.
24 SCHIECK, SPECIAL PUBLIC DEFENDER, and PATRICIA PALM, Deputy Special Public
25 Defender, and hereby submits this brief in support of a defense request to question O'Keefe,
26 and admit corroborating evidence on the issues of the alleged victim's history of suicide
27 attempts, anger outbursts, anger management therapy, self-mutilation (with knives and
28 scissors), and erratic behavior.

1 This brief is based upon the Fifth, Sixth and Fourteenth Amendments to the United
2 States Constitution, the Constitution of the State of Nevada, article 1, section 8, NRS
3 48.045(1), NRS 48.055(1), NRS 50.095, and NRS 51.069(1), the following Points and
4 Authorities, all papers and pleadings on file herein, and the attached Declaration of Counsel.
5

6 POINTS AND AUTHORITIES
7

8 To show that any act by Brian O'Keefe which may have contributed to the death of
9 Victoria Whitmarsh was made in self-defense, Brian O'Keefe intends to offer opinion and
10 reputation testimony at trial to show that Victoria had a character for aggression, and, as
11 appropriate, evidence to show that she committed specific violent acts when he became
12 intoxicated.
13

14 Brian O'Keefe is expected to continue testifying tomorrow and will state that at the time
15 of the incident in question, he was extremely intoxicated, as was Victoria. He will further testify
16 that Victoria surprised him by coming at him with a knife, as she had done two days earlier.
17 He grabbed the knife blade to prevent her stabbing him and she pulled it away, cutting his
18 hand. He then grabbed her arms in an effort to control her movement so she could not stab
19 him, and because of their drunken states, they fell onto the bed. She accidentally received
20 the stab wound as a result of falling onto the bed.
21

22 Brian will further testify that, as her partner on and off since 2001, he was aware at the
23 time of the incident of her mental health history, which included multiple suicide attempts, both
24 by overdose and cutting herself with knives or scissors. He was aware that she self-mutilated.
25 He was aware that she had uncontrollable anger outbursts, and problems when stressed and
26 when abusing drugs or alcohol and that she was attending anger management counseling.
27 In addition, two nights before the incident for which Brian is now on trial, Victoria came at
28

1 Brian when he was reclining. She was yelling and brandishing a knife at him; however, as he
2 was sober at the time, he was able to calm her down and diffuse the situation.

3 Furthermore, Brian has provided the State with Victoria's medical records, which
4 corroborate his claims as to her aggression and anger problems and her anger management
5 treatment. Those records show as follows:
6

7
8 **October 2001 Admission to Montevista Hospital**

9 Victoria was admitted October 31, 2001; she cut both wrists with a knife in what
10 she reported was her fourth suicide attempt. She was on the medications Celexa,
11 Xanax and Vistaril. She was diagnosed with Major Depressive Episode, Panic Disorder
12 with Agoraphobia. It was during this hospitalization that she and Brian met.

13
14 **May 2002 Admission to Montevista Hospital**

15 Victoria was admitted on May 21, 2002 because she'd been using Xanax, Lortab,
16 Oxycotin; she was blacking out and unable to function at work; withdrawal was severe;
17 consequences of use included severe dysfunction in her relationship with husband from
18 whom she is separated; psychiatric history: was reported as follows: severe anxiety and
19 depression; she was hospitalized in October 2001 for OD and cutting her wrist; she
20 also overdosed in 1983 and was hospitalized; diagnosis was opiate dependence,
21 continuous, xanax dependence continuous, major depression, recurrent.

22
23 **September 2006 Admission Montevista Hospital (this admission was during Brian's
24 Incarceration)**

25 Victoria was admitted September 26, 2006. She was diagnosed as Bipolar, Dep;
26 Polysub dep; liver cirrhosis w/ascites; Hep C; underweight; gerd; social; marital. The
27 Report of Dr. Allgower states "took lethal dose of Xanax requiring intubation/mechanical
28 ventilation h/o depression, also has self-inflicted wrist lac." Form by Dr. Slagle: Ms
Whitmarsh has made at least 3 suicide attempts. Recent attempt could have been fatal."
Report by Dr. Ajayi stated: suicide attempt resulted in admission to ICU. Had been
transferred from St. Rose where ICU from 9/24/06 - 9/26/06, OD on Xanax and friend's
morphine after argument with estranged husband. Diagnosis at St. Rose was
Bipolar Disorder type II, depressed vs recurrent major depression and borderline
personality traits. She reported 2 previous suicide attempts (1983 OD on pain meds
after fight with husband) and (OD on pills and cutting wrists in 2001). She has been
self-mutilating for the pasts 15 years and stated that she cuts herself when she is
angry an the last time she cut her left wrist was with a pair of scissors on September

22, 2006. She complained of irritability, mood swings, difficulty sleeping at night because of racing thoughts, poor appetite, anxiety, . . . She also reports episodic euphoria, anger outbursts and decreased need for sleep. She reports ongoing conflict with her estranged husband and her sister and her 21 year old daughter. Dr. Slagle documented poor impulse control, and that her 2001 admission to Montevista was because "she was angry, screaming and "went beserk" after an argument with her husband and overdosed on pills and cut her wrist." Drug and alcohol abuse hx: hx of abusing Xanax back to at least 2001; hx of dependence on Lortab, Percocet, and Oxycotin dating back to 2002. Inpatient Detox at Montevista in May 2002 followed by inpatient rehab through June 2002. Most recently admitted for detox from Percocet and Lortab at Valley Hospital in August 2006. Her diagnosis was: bipolar disorder, type II, depressed, benzodiazepine dependence, opiate dependence, hx of alcohol dependence in sustained full remission; borderline personality traits.... Hep C, Liver Cirrhosis.... Her treatment plan cont'd: includes anger management.

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

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

These records show that in October, Victoria took an overdose of pills in an apparent suicide attempt.

Brian will seek to admit portions of the records from the 2001, 2002, and 2006 hospitalizations as corroborative evidence of his knowledge about Victoria and his state of mind regarding whether she was mentally capable and likely to cause him great bodily harm when she came at him with a knife. Additionally, he was aware of and had the opinion that Victoria could be irrational and had a temper problem that caused her to be aggressive and violent, especially when she was under the influence of alcohol or drugs.

The Fifth, Sixth and Fourteenth Amendments to the United States Constitution, as well as the Nevada Constitution, article 1, section 8, protect a criminal defendant's right to a fair trial, at which he may confront and cross-examine witnesses and present evidence in his defense. See Nev. Const., art. 1, sec. 8 (providing that all parties be entitled to appear and

1 defend in person and that "[n]o person shall be deprived of life, liberty, or property, without due
2 process of law"); U.S. Const., amends. V and XIV (providing that a criminal defendant is
3 entitled to due process of law); U.S. Const., amend VI (providing that "[i]n all criminal
4 prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against
5 him"); Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065 (1965) (recognizing that the right of
6 confrontation requires that a criminal defendant be given an opportunity to cross-examine the
7 witnesses against him); Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 1045
8 (1973) (stating that "the rights to confront and cross-examine witnesses and to call witnesses
9 in one's own behalf have long been recognized as essential to due process").
10

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

21 The Nevada Supreme Court has interpreted these statutes to require that an accused,
22 who claims he acted in self-defense, be permitted to present evidence of the character of an
23 alleged victim *regardless of the accused's knowledge of the victim's character* when it tends
24 to prove the victim was the likely aggressor. Petty v. State, 116 Nev. 321, 326-27, 997 P.2d
25 800, 802-03 (2000). Proof may be established by testimony as to reputation or in the form of
26 an opinion. Id. *An opinion as to violent character may even be based on knowledge of*
27
28

1 **only one incident of violence.** For instance, in Petty, the Court held that the district court
2 erred by excluding testimony from a probation officer and police officer regarding their opinions
3 as to the violent character of the victim, even though the police officer's opinion was based
4 upon only one violent incident. Id. Based upon the foregoing authorities, Brian O'Keefe is
5 entitled to present evidence in the form of his opinion or reputation testimony as to Victoria's
6 aggressive character and problems with anger control.
7

8 The defense contends that attempts to commit suicide, especially when those attempts
9 are made with knives or other cutting instruments, and acts of self-mutilation with cutting
10 instruments constitute acts of aggression or violence.
11

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

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

26 Id. at 516, 78 P.3d at 32 (citing State v. Daniels, 465 N.W.2d 633, 636 (Wis. 1991)).
27
28

1 The admission of evidence of a victim's specific violent acts, *regardless of its source*,
2 is within the sound and reasonable discretion of the trial court and is limited to the purpose of
3 establishing what the defendant believed about the character of the victim. Daniel, 119 Nev.
4 at 516, 78 P.3d at 32.

5
6 In sum, not only may a defendant present evidence regarding specific acts by victims
7 where the accused is aware of such acts, *but the defendant may also present corroborating*
8 *evidence to prove the particular acts of which the accused claims knowledge. "[W]hen a*
9 *defendant claims self-defense and knew of relevant specific acts by a victim, evidence of the*
10 *acts can be presented through the defendant's own testimony, through cross-examination of*
11 *a surviving victim, and through extrinsic proof."* Id. at 516, 78 P.3d at 32-33. Therefore,
12 because Brian O'Keefe was aware of Victoria's prior acts of violence, he is entitled to present
13 not only his own testimony but any additional corroborating evidence to establish those prior
14 acts. Brian O'Keefe wishes to present the aforementioned medical records and will submit
15 these to the Court as a proposed exhibit.
16

17
18 Additionally, to the extent that the State may seek to admit rebuttal evidence of an
19 alleged victim's character of peacefulness, an accused has a right to confront and cross-
20 examine the State's witnesses as to their knowledge of specific acts of violence by the
21 accused. See State v. Sella, 41 Nev. 113, 168 P. 278 (1917); U.S. Const. Amend VI; Nev.
22 Const. art. 1, sec. 8. Indeed, NRS 48.055(1) specifically provides that when proof by
23 testimony as to reputation or in the form of an opinion has been given, "on cross-examination,
24 inquiry may be made into specific instances of conduct." Therefore, if the State intends to
25 present any evidence to show Victoria's character of peacefulness, Brian O'Keefe is entitled
26 to cross-examine the State's witnesses as to their knowledge of her specific prior acts of
27
28

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

2
3 BRIAN K. O'KEEFE,
4 Appellant,
5 vs.
6 THE STATE OF NEVADA
7 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

8 **APPELLANT'S APPENDIX – VOLUME II – PAGES 0200-0399**

9 MATTHEW D. CARLING
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11 Cedar City, Utah 84720
12 (702) 419-7330 (Office)
13 Attorney for Appellant

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Carson City, Nevada 89701-4717
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O'Keefe, Brian

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"Evidentiary Hearing Request" (Amended 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 10/03/14	4995-5007
"Reply" to State's Response and Motion to Dismiss to Defendant's Pro Per Petition for Writ of Habeas Corpus Pursuant to NRS 34.360 filed on 10/27/14	5052-5061
"True Pretrial Detainee's" Reply to State's Opposition(s) Admitting the State has a Jurisdictional Defect by the Aung of a Notice of Appeal Which Divests Jurisdiction of the Matter Appealed; i.e., O'Keefe's Pretrial Habeas Matter Appealed to the 9 th Circuit on the Subject Matter of the Amended Information Already Named a Double Jeopardy Violation filed on 10/01/14	4989-4994
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	Notice of Appeal filed on 10/21/15	5552-5553
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1	Notice of Appeal filed on 11/21/14	5067-5069
2	Notice of Change of Address filed on 06/06/14	4864-4865
3	Notice of Defendant's Expert Witness filed on 02/20/09	0180-0195
4	Notice of Defendant's Witnesses filed on 03/06/09	0224-0227
5	Notice of Entry of Findings of Fact, Conclusion of Law and Order filed on 10/06/15	5537-5546
6	Notice of Expert Witnesses filed on 03/05/09	0222-0223
7	Notice of Motion and Motion by Defendant O'Keefe for a Reasonable Bail filed on 09/24/10	1441-1451
8	Notice of Motion and Motion by Defendant O'Keefe for Discovery filed on 08/02/10	1211-1219
9	Notice of Motion and Motion by Defendant O'Keefe 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 08/02/10	1220-1239
10	Notice of Motion and Motion by Defendant O'Keefe to Admit Evidence Pertaining to the Alleged Victim's Mental Health Condition and History, Including Prior Suicide Attempts, Anger Outbursts, Anger Management Therapy, Self-Mutilation and Erratic Behavior filed on 07/21/10	1064-1081
11	Notice of Motion and Motion by Defendant O'Keefe to Admit Evidence Pertaining to the Alleged Victim's Mental Health Condition and History, Including Prior Suicide Attempts, Anger Outbursts, Anger Management Therapy, Self-Mutilation and Erratic Behavior filed on 07/21/10	1099-1116
12	Notice of Motion and Motion by Defendant O'Keefe to Admit Evidence Showing LVMPD Homicide Detectives Have Preserved Blood/Breath Alcohol Evidence in Another Recent Case filed on 08/02/10	1199-1210
13	Notice of Motion and Motion by Defendant O'Keefe to Dismiss on Grounds of Double Jeopardy Bar and Speedy Trial Violation and, Alternatively, to Preclude State's New Expert Witness, Evidence and Argument Relating to the Dynamics or Effects of Domestic Violence and Abuse filed on 01/07/11	2785-2811
14	Notice of Motion and Motion by Defendant O'Keefe to Preclude Expert Testimony filed on 08/16/10	1284-1291
15	Notice of Motion and Motion by Defendant O'Keefe to Preclude the State from Introducing at Trial Other Act or Character Evidence and Other Evidence Which is Unfairly Prejudicial or Would Violate his Constitutional Rights filed on 07/21/10	1047-1063
16	Notice of Motion and Motion by Defendant O'Keefe to Preclude the State from Introducing at Trial Other Act or Character Evidence and Other Evidence Which is Unfairly Prejudicial or Would Violate his Constitutional Rights filed on 07/21/10	1082-1098
17	Notice of Motion and Motion by defendant O'Keefe to Preclude the State from Introducing at Trial Improper Evidence and Argument filed on 01/03/11	1682-2755
18	Notice of Motion and motion by Defendant O'Keefe to Suppress his	

1	Statements to Police, or, Alternatively, to Preclude the State from	
2	Introducing Portions of his Interrogation filed on 08/02/10	1152-1198
3	Notice of Motion and Motion for Leave of Court to File Motion for	
4	Rehearing – Pursuant to EDCR, Rule 2.24 filed on 08/29/14	4914-4921
5	Notice of Motion and Motion in Limine to Admit Evidence of Other Bad	
6	Acts Pursuant to NRS 48.045 and Evidence of Domestic Violence	
7	Pursuant to 48.061 filed on 01/06/11	2762-2784
8	Notice of Motion and Motion to Admit Evidence of Other Crimes filed on	
9	02/02/09	0150-0165
10	Notice of Motion and Motion to Admit Evidence of Polygraph	
11	Examination Results filed on 03/29/12	3412-3415
12	Notice of Motion and Motion to Dismiss based Upon Violation(s) of the	
13	Fifth Amendment Component of the Double Jeopardy Clause,	
14	Constitutional Collateral Estoppel and, Alternatively, Claiming Res	
15	Judicata, Enforceable by the Fourteenth Amendment Upon the States	
16	Precluding State's Theory of Prosecution by Unlawful Intentional	
17	Stabbing with Knife, the Alleged Battery Act Described in the Amended	
18	Information filed on 03/16/12	3201-3224
19	Notice of Motion and Motion to Seal Records filed on 03/22/12	3416-3429
20	Notice of Motion and Motion to Waive Filing Fees for Petition for Writ of	
21	Mandamus filed on 12/06/13	4695-4697
22	Notice of Motion and Motion to Withdraw as Attorney of Record filed on	
23	09/23/15	5517-5519
24	Notice of Motion and Motion to Withdraw as Attorney of Record filed on	
25	09/29/15	5525-5527
26	Notice of Motion filed on 01/13/14	4721
27	Notice of Motion filed on 01/21/14	4748
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29	Notice of Motion filed on 02/24/14	4810
30	Notice of Motion filed on 03/04/14	4833
31	Notice of Motion filed on 06/08/15	5154-5160
32	Notice of Motion filed on 07/23/14	4890
33	Notice of Motion filed on 08/29/14	4922
34	Notice of Motion filed on 09/15/14	4953
35	Notice of Witness and/or Expert Witnesses filed on 02/03/09	0166-0167
36	Notice of Witnesses and/or Expert Witnesses filed on 02/17/09	0178-0179
37	NV Supreme Court Clerks Certificate/ Judgment Affirmed filed on	
38	02/06/15	5072-5081
39	NV Supreme Court Clerks Certificate/Judgment Affirmed filed on	
40	07/26/13	4653-4661
41	NV Supreme Court Clerks Certificate/Judgment Dismissed filed on	
42	06/18/14	4866-4870
43	NV Supreme Court Clerks Certificate/Judgment Dismissed filed on	
44	03/12/15	5089-5093
45	NV Supreme Court Clerks Certificate/Judgment Dismissed filed on	

1	09/28/15	5520-5524
2	NV Supreme Court Clerks Certificate/Judgment Dismissed filed on 10/29/14	5062-5066
3	O'Keefe's Reply to State's Opposition to Motion to Admit Evidence Showing LVMPD Homicide Detectives have Preserved Blood/Breath Alcohol Evidence in Another Recent Case filed on 08/13/10	1256-1265
4	Opposition to State's Motion to Admit Evidence of Other Bad Acts filed on 02/06/09	0169-0172
5	Order Authorizing Contact Visit filed on 03/04/09	0219-0220
6	Order Authorizing Contact Visit filed on 08/12/10	1253-1254
7	Order Denying Defendant's Ex Parte Motion to Extend Prison Copywork Limit filed on 08/13/15	5486-5488
8	Order Denying Defendant's Ex-Parte Motion for Reimbursement of Incidental Costs Declaring Defendant Ingigent and Granting Forma pauperis filed on 03/11/14	4840-4842
9	Order Denying Defendant's Motion for Relief From Judgment Based on Lack of Jurisdiction for U.S. Court of Appeals had not Issues any Remand, Mandare or Remittature filed on 09/04/14	4927-4929
10	Order Denying Defendant's Motion to Dismiss filed on 04/11/12	3434-3435
11	Order Denying Defendant's Motion to Seal Recoreds and Defendant's Motion to Admit Evidence of Plygraph Examination filed on 05/24/12	3448-3449
12	Order Denying Defendant's Petition for Writ of Mandamus or in the Alternative Writ of Coram Nobis; Order Denying Defendant's Motion to Waive Filing Fees for Petition for Writ of Mandamus; Order Denying Defendant's Motion to Appoint Counsel filed on 01/28/14	4761-4763
13	Order Denying Defendant's Pro Per Motion for Judicial Notice- The State's Failure to File and Serve Response in Opposition filed on 04/01/14	4855-4857
14	Order Denying Defendant's Pro Per Motion for Leave to File Supplemental Petition Addressing all Claims in the First Instance Required by Statute for Judicial Economy with Affidavit filed on 07/15/15	5464-5466
15	Order Denying Defendant's Pro Per Motion to Modify and/or Correct Illegal Sentence filed on 03/25/14	4852-4854
16	Order Denying Defendant's Pro Per Motion to Withdraw Counsel for Conflict and Failure to Present Claims When I.A.C. Claims Must be Raised Per Statute in the First Petition Pursuant to Chapter 34 filed on 07/15/15	5461-5463
17	Order Denying Matthew D. Carling's Motion to Withdraw as Attorney of Record for Defendant filed on 11/19/15	5574-5575
18	Order Denying Motion to Disqualify filed on 10/06/14	5037-5040
19	Order filed on 01/30/09	0149
20	Order filed on 11/06/10	1462-1463
21	Order for Petition for Writ of Habeas Corpus filed on 10/15/14	5051
22	Order for Production of Inmate Brian O'Keefe filed on 05/26/10	1032-1033
23	Order for Return of Fees filed on 11/10/11	3183
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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
27		
28		

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	Request 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

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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

1 **REFUSAL TO INFORM THE JURY OF MANDATORY MINIMUM**
2 **INCARCERATION OF A CONVICTION OF SECOND DEGREE MURDER**
3 **WOULD VIOLATE THE DEFENDANT'S CONSTITUTIONAL RIGHTS**

4 In the present case, Defendant respectfully requests that the jury be informed of
5 not only the penalties that it will be forced to choose amongst if they return a verdict of
6 first degree murder, but also the ten-year mandatory minimum and the possibility of life
7 imprisonment should they convict him of second degree murder. Effectively, "life with
8 the possibility of parole" is the same potential sentence for first and second degree
9 murder, the only difference is when the defendant **MAY** be granted parole. A brief
10 historical review demonstrates the right of the jury in this case under the Sixth
11 Amendment of the Constitution to know the sentencing impact of its decision -- a right
12 shared by the defendant. In construing the Sixth Amendment courts are engaged
13 in a conversation across four centuries -- the eighteenth, nineteenth, twentieth, and
14 twenty-first -- about the meaning of this grand constitutional provision. See Essay, *The*
15 *Role of Judges in a Government Of, By, and For the People*, 30 Cardozo L. Rev.
16 (forthcoming 2008) ("Justice Breyer's nuanced view of the need for flexibility in
17 interpreting the Constitution makes him a 'member' of the American Metaphysical Club,
18 allowing for a more pragmatic and effective administration of justice than a stiff and
19 abstract approach" (citing Stephen Breyer, *Active Liberty: Interpreting our Democratic*
20 *Constitution* (2006)).

21 A majority of the Supreme Court now favors another method. Under Justice
22
23
24
25 Scalia and the Court's approach to the Sixth Amendment, judges must look to criminal
26 practices of the Thirteen Colonies and England in 1791, when the amendment was
27

1 adopted. Judges today must largely put aside the caveats of Professor Julius Goebel,
2 Jr. and other historians about difficulties in understanding the vagaries of colonial
3 practice. See, e.g., *United States v. Khan*, 325 F. Supp. 2d 218, 226 (E.D.N.Y. 2004)
4 ("The Constitution requires that we apply 1780 jury practice in our courts. Yet any
5 attempt to fully understand and apply eighteenth-century rules for juries in twenty-first
6 century federal sentencing is bound to be somewhat chimerical."); Essay, *The Role of*
7 *Judges*, *supra* (criticizing some of the historiography of Supreme Court originalism).
8 Reception of British law before and at the time of the Declaration of Independence
9 makes contemporary English practice particularly important in construing the Sixth
10 Amendment. See, e.g., Julius Goebel, Jr., *Cases and Materials on the Development of*
11 *Legal Institutions* 298-329 (7th ed. 1946).

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13
14
15 In interpreting and extrapolating from the requirements under the current direction
16 of the United States Supreme Court it appears fairly clear, from a review of legal and
17 historical scholarship on eighteenth-century colonial and English criminal practice, that
18 the petit juries of the Colonies and then the United States would have been aware of
19 any harsh sentence imposed mandatorily upon a finding of guilt of a particular crime.
20 This is never more clear than in the use of the extensive voir dire currently in use in
21 most death penalty cases). The same sources indicate that it is equally apparent that a
22 jury so apprised would have been expected to deliver a verdict of not guilty or of guilty
23 of a lesser crime had it believed the punishment excessive for the crime actually
24 charged and proved.
25
26
27

1 **The Sixth Amendment requires a fully informed jury**

2 The Sixth Amendment was adopted in 1791 as one of the first matters of
3 business of the new republic, guaranteeing the right of a defendant "[i]n all criminal
4 prosecutions . . . [to] trial, by an impartial jury of the State and district wherein the crime
5 shall have been committed." U.S. Const. amend. VI. It was then understood that the jury
6 had the power to refuse to convict even if the facts and law indicated guilt. In later years
7 this fundamental power of the jury -- and the right of the accused -- has been termed the
8 power to "nullify." The negative connotations of this characterization of the jury's power
9 and responsibility ignore history and the meaning of the Sixth Amendment.
10

11 When a jury refuses to convict on the basis of what it thinks is an unjust law as
12 applied, a misconceived prosecution, or an excessive penalty, it is performing exactly its
13 role imposed by the Sixth Amendment. These powers of the jury were exercised
14 consistently by jurors before, and for many years after, the Sixth Amendment was
15 adopted. See, e.g., Appendix A, *infra*; Jeffrey Abramson, We, The Jury: The Jury
16 System and the Ideal of Democracy 30-31, 63-64, 67-77 (1994); The Complete
17 Juryman: Or, a Compendium of the Laws Relating to Jurors 194-202, 246-47 (1752);
18 Clay S. Conrad, Jury Nullification: The Evolution of a Doctrine 13-63 (1998); William L.
19 Dwyer, In the Hands of the People: The Trial Jury's Origins, Triumphs, Troubles, and
20 Future in American Democracy 62-72 (1st ed. 2002); The English-mans Right: A
21 Dialogue Between a Barrister at Law and a Jury-Man 10-35 (1680); Norman J. Finkel,
22 Commonsense Justice: Jurors' Notions of the Law 24-31 (1995); Thomas Andrew
23 Green, Verdict According to Conscience: Perspectives on the English Criminal Trial
24 Jury 1200-1800, at 153-99 (1985); John Hostettler, The Criminal Jury Old and New:
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1 Jury Power From Early Times to the Present Day 30-32, 48, 70-72, 92-103, 112-14,
2 121, 133-34 (2004); Larry D. Kramer, The People Themselves: Popular
3 Constitutionalism and Judicial Review 28-29 (2004); Leonard W. Levy, The Palladium of
4 Justice: Origins of Trial by Jury 68-105 (1st ed. 1999).

5 Introduced by James Madison as a promised quid pro quo for approval of the
6 Constitution by the people of the States, the Sixth Amendment's right to a jury trial in
7 criminal cases solidified and ratified the primary power of the petit jury as one of
8 essential institutions upon which the people's liberties would depend. It was expected to
9 limit the kind of governmental overreaching that led to the Revolutionary War. See, e.g.,
10 Abramson, *supra*, at 28-29, 32 (1994); Kramer, *supra*, at 29-34, 70, 157; Shannon C.
11 Stimson, The American Revolution in the Law: Anglo-American Jurisprudence Before
12 John Marshall 142-43 (1990). For the Framers, there would have been no need to go
13 back before the Magna Carta for support in the "courts of conscience." See, e.g.,
14 Andrew J. Parmenter, Nullifying the Jury: "The Judicial Oligarchy" Declares War on Jury
15 Nullification, 46 Washburn L.J. 379, 380 (2007). They could look to recent and
16 contemporary juries, such as those in the well-known trials of Lilburne, William Penn,
17 and Zenger, which had refused to convict when authorities insisted that the law required
18 them to do so.

19 In the mid-seventeenth century, Colonel John Lilburne had been repeatedly
20 acquitted in England of the crime of distributing pamphlets critical of the British
21 government. See The Trial of Lieutenant-Colonel John Lilburne, in 4 Cobbett's
22 Collection of State Trials 1270, 1320, 1466 (Old Bailey 1649). In his second trial he
23 asked the jury to acquit if it found capital punishment too severe. It responded by finding
24

1 him "not guilty of any crime worthy of death," thus directly involving itself in the issue of
2 punishment. *Id.* at 197. Lilburne was released and even financially compensated.

3 The Quakers, William Penn and William Mead, were prosecuted in London in
4 1670 for preaching to an unlawful assembly and for breach of the peace. *Trial of Penn*
5 *and Mead*, in 6 Cobbett's Collection of State Trials 950 (London, T.C. Hausard 1810).
6 After the jury acquitted Mead of all charges and found Penn not guilty of disturbing the
7 peace, it was deprived of food, water and heat. Despite these coercive tactics, the jury
8 still refused to find guilt, and was fined. Some jurors, including a man named Bushell,
9 refused to pay; they were imprisoned, until ordered released by the Chief Justice on the
10 ground that the jury in effect determines the law when deciding by general verdict.
11 *Bushell's Case*, 124 Eng. Rep. 1606, 1012-13 (1670).
12

13 One of the most famous of the colonial cases in which juries frustrated the crown
14 and its judges was the *Trial of John Peter Zenger*. See T.B. Howell, *The Trial of Mr.*
15 *John Peter Zenger* in 17 A Collection of State Trials 675 (1735). In 1735, a jury
16 acquitted Zenger after his counsel argued that truth was enough basis to refuse to
17 convict even though the jury had been charged to the contrary. Anti-monarchist writings
18 are sprinkled with encomiums for the Zenger and other defiant juries. See Parmenter,
19 *supra*, at 384 nn.53-61 and accompanying text. For other like cases, see, e.g., Leonard
20 W. Levy, *The Palladium of Justice: Origins of Trial by Jury* 55 ff. (1999). The right to trial
21 by jury incorporated in the Constitution by the Sixth Amendment was thus envisaged as
22 a check against overreaching by the new federal government.
23
24

25 This history applies to the instant case because these cases demonstrate the
26 power of colonial and British jurors which depended in large measure upon the fact that
27

1 they were from the vicinage, were well-informed and self-confident property owners,
2 see, e.g., Randolph A. Jonakait, The American Jury System 107-08 (2003), and knew the
3 essentials of the local criminal law and its punishments. See, e.g., Abramson, *supra*, at
4 22-29, 32, 34-35 ("[J]urors did not even need to rely on a judge's instructions to know
5 the common law of the land"); Neil Vidmar & Valerie P. Hans, American Juries: The
6 Verdict 49 (2007) (noting that John Adams "remarked that the common law was known
7 by everyone and 'imbibed with the Nurses Milk and first Air' and that, accordingly, "[i]n
8 many cases judges gave the jury no instructions on the law" (quoting 1 The Legal
9 Papers of John Adams 230 (L. Kinvin Wroth & Hillier B. Zobel eds., 1965)))

11 Juries often used their power not to convict. As Blackstone notes in his
12 commentaries, it was extensively exercised when the punishments that would be
13 expected to follow from conviction were deemed excessive. See, e.g., 4 William M.
14 Blackstone, Commentaries on the Laws of England *342-44 (1769) (noting with
15 approval that juries often found the value of stolen goods to be less than twelvepence in
16 order to avoid the mandatory death penalty for theft of goods worth more than
17 twelvepence, calling such practice "pious perjury"); Conrad, *supra*, at 20; Dwyer, *supra*,
18 at 49; Green, *supra*, at 28-29, 35-44; Leon Radzinowicz, A History of English Criminal
19 Law and Its Administration from 1750: The Movement for Reform 1750-1833, at 93-97
20 (1948) (discussing elimination of capital charges by "pious perjury"). Exercise of the
21 power to reduce the sentence presupposed a knowledge of the expected punishment.

24 It is not strange that jurors should, in the second half of the eighteenth century,
25 know details of criminal law and punishment – matters of punishment of which many of
26 our present jurors do not know and are deliberately kept from knowing. Criminal law
27

1 then was much simpler than today, now requiring tomes of highly abstruse, convoluted
2 definitions and extraordinary combinations of statutory prison maximums and
3 minimums, fines, restitutions, forfeitures, probationary terms, treatment for mental
4 health and other problems in and out of prison, sentencing guidelines, caselaw and
5 local practice. It would have been inconceivable, for example, that a Nevada Jury in the
6 late 1800's would not know that conviction required a ten-year minimum term of prison
7 and a potential life sentence .
8

9
10 Modern courts cannot ignore the former predominant jury power to control
11 sentences, and the matter is being reviewed throughout the legal community. See ,
12 e.g., Barbara J. Shapiro, *Beyond Reasonable Doubt and Probable Cause: Historical*
13 *Perspectives on the Anglo-American Law of Evidence* (1991); Lance Cassak & Milton
14 Heumann, *Old Wine in New Bottles: A Reconsideration of Informing Jurors About*
15 *Punishment in Determinate – and Mandatory – Sentencing Cases*, 4 Rutgers J. L. &
16 Pub. Pol'y 411, 420-37 (2007) (modern federal cases narrowing the scope of jury
17 discretion must be revisited in view of recent Supreme Court cases); Teresa L.
18 Conaway, Carol L. Mutz, & Joann M. Ross, *Jury Nullification: A Selective Annotated*
19 *Bibliography*, 39 Val. U. L. Rev. 393 (2004) (articles, some books, cases and state
20 constitutions); Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 Yale
21 L. J. 170, 170-92 (1964) (at the outset of the nineteenth century the jury was regarded
22 as a mainstay of liberty and an integral part of democratic government, but outmoded by
23 the end of the century); Parmenter, *supra*, at 380-97 (tracing history of the nullification
24 doctrine from the Magna Carta to O.J. Simpson and beyond); Arie M. Rubenstein, Note,
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26
27

1 *Verdicts of Conscience: Nullification and the Modern Jury Trial*, 106 Colum. L. Rev. 959,
2 967-72 (2006); Steve J. Shone, *Lysander Spooner: Jury Nullification and Magna Carta*,
3 22 Quinnipiac L. Rev. 651, 669 (2004) (endorsing powerful "theoretical arguments" for
4 jury nullification over "the more modern attempts to find precedents or constitutional
5 authority for the practice in the extensive, but somewhat repetitive law journal
6 literature."). See also generally *State v. Poulin*, 277 A.2d 493 (Me. 1971);
7 *Commonwealth v. Feaser*, 1999 PA Super 1, 723 A.2d 197 (Pa. Super. Ct. 1999); *State*
8 *v. Findlay*, 171 Vt. 594, 765 A.2d 483, 488-89 (Vt. 2000).

10
11 In reviewing the involvement of juries in criminal adjudications, the Court in
12 United States v. Polizzi, 549 F. Supp. 2d 308, 323 (E.D.N.Y. 2008) the Court found that
13 the American petit jury is no longer a "mere factfinder" Indeed,
14

15
16 From the time the right to trial by jury was embedded in the Constitution as a
17 guarantee to criminal defendants through the Sixth Amendment in 1791, it has been
18 expected to bring to court much of the wisdom and consensus of the local community.
19 See Part IV, *infra*. It has, when jurors deemed it necessary, stood as a guardian of the
20 individual against the sometime cruel overreaching of government and its menials.
21 Much of our modern procedural "reforms" have been designed to limit the jury's reach
22 and power, increasingly shifting control to judges; these efforts have attempted
23 unconstitutionally to transform the jury into a simple factfinder from its grander historical
24 position under the Constitution as representative of the people in the courts.

25
26 The Polizzi Court took great care in noting that recent Supreme Court
27 developments stress "originalism" -- that is to say, the meaning at the time the relevant
28 constitutional language was adopted. The approach has been applied to sentencing in a
29 series of Supreme Court cases reviving the original meaning of the Sixth Amendment
30 guarantee of trial by jury in criminal cases and the right of a defendant to be confronted

1 with opposing witnesses. The development is based upon what is believed to be
2 colonial practice immediately preceding adoption of the Sixth Amendment, and the
3 reception of then current British practice.
4

5 Taking this "originalism", the Court utilized an extrapolation of the recently
6 emphasized constitutional principle requiring a jury finding of the facts needed to
7 enhance a sentence requires courts to recognize that colonial and British juries in
8 the late eighteenth century had power to control the finding of guilt in order to
9 affect the sentence. The Court specifically found that, "[I]n exercising its
10 extensive discretion, the jury was expected to be aware of and understand
11 the sentence that would follow from its decision. That jury power to know
12 and act may not be eviscerated", (emphasis added). The Court specifically
13 finding that it was done by failing to advise the jury of the mandatory minimum
14 sentence required on conviction of one of the counts.
15

16 The Court was disparaged of much of modern civil and criminal procedural rule-
17 making that has been devoted to controlling juries, to the denigration of
18 originalism by the Supreme Court in sentencing and confrontation which requires
19 enforcement of a basic element of the Sixth Amendment as originally
20 understood: the jury of the "vicinage" or locality, being aware of the sentencing
21 implications of a finding of guilt, had the frequently exercised power to refuse to
22 follow the law as construed by the court, and could acquit or downgrade the
23 crime in order to avoid a sentence it deemed excessive.
24

25 The complexity of modern United States criminal law and the general
26

1 public's lack of detailed knowledge of statutory provisions including the
2 consequences of statutory minimums require that, "in the few cases where
3 necessary, the jury be informed of such matters as the required minimum term of
4 incarceration that will follow from its verdict so that it can exercise its
5 constitutionally mandated historic role." (id.).
6

7 While some cases have rejected this view, out of fear of "nullification", the
8 Courts in those cases have not, in the opinion of the above court followed the
9 Sixth Amendment as it must be interpreted after recent Supreme Court originalist
10 holdings. Consideration of jury power contemporaneous with the Sixth
11 Amendment's adoption leads to the conclusion that this court would be
12 committing constitutional error if it denies the defendant's request to inform the
13 jury of the statutory mandatory ten year minimum applicable to the possible
14 counts in that case
15

16 The Polizi Court felt that this ruling on what the jury is entitled to know
17 about sentencing is limited to that small group of cases where the jury would not
18 be expected to know of the applicable harsh mandatory minimum.(id) Indeed
19 the lengthy minimum sentences for a conviction of second degree murder is
20 something that would not be within the general ken and knowledge of the
21 average juror. It would appear that this would be particularly appropriate in
22 cases such as the present case in which the jury is being informed about the
23 possible sentences it would be required to impose if the conviction is one for first
24 degree murder.
25
26
27

1 Trial as a Sentencing Proceeding

2 The sentencing practices of the later seventeenth and eighteenth centuries
3 were a powerful source of pressure on the defendant to speak at his trial. Our
4 modern expectation is that sentencing will occur in a separate post-verdict
5 phase, after the trial has determined guilt. Furthermore, in jury-tried cases, we
6 expect the judge, not the jury, to exercise whatever sentencing discretion the law
7 might bestow. In early modern times, however, *these divisions of function in*
8 *sentencing matters between trial and post-trial, and between jury and judge,*
9 *were less distinct. The trial jury exercised an important role in what was*
10 *functionally the choice of sanction through its power to manipulate the verdict by*
11 *convicting on a charge that carried a lesser penalty. (A vestige of this power to*
12 *mitigate the sentence survives in modern practice, when the jury convicts of a*
13 *lesser included offense, or when it convicts on fewer than all the counts that are*
14 *charged and proved).*

17 It was the development of alternatives to the death penalty in the
18 eighteenth century, especially the system of transportation to the New World for
19 a term of penal servitude that allowed partial verdict to burgeon. Transportation
20 became the sanction for offenses that fell within the rubric of benefit of clergy,
21 giving the jury an effective choice between convicting an offender in a manner
22 that would lead to the imposition of capital punishment or in a way that would
23 result in transportation. For example, if the jury convicted a defendant of burglary,
24 the punishment was death; but if, on the same facts, the jury convicted of the
25 partial verdicts involved transportation: When the jury valued stolen goods at less
26
27

1 than a shilling (invariably at 10d.), the offence became petty rather than grand
2 larceny, for which the common sanction was whipping. In a sample of London
3 cases from the Old Bailey in the 1750s juries returned partial verdicts in nearly a
4 quarter of the cases. For a few offenses, like picking pockets, the juries all but
5 invariably downvalued, expressing a social consensus that the capital sanction
6 was virtually never appropriate. At the opposite end of the spectrum were a few
7 property crimes, especially highway robbery and gang-style burglary that were
8 regarded as so menacing that juries virtually never mitigated the capital sanction.
9 Across the broad range of property crimes, however, jury discretion held sway. In
10 deciding whether to return verdicts of mitigation, juries distinguished, first,
11 according to the seriousness of the offenses, and second, according to the
12 conduct and character of the accused.
13

14
15 *The jury's power to mitigate sanctions profoundly affected the purpose of*
16 *the criminal trial for those many offenses in which the jury might return a partial*
17 *verdict. Because the main purpose of defending such a case was to present the*
18 *jury with a sympathetic view of the offender and of the circumstances of the*
19 *crime that would encourage a verdict of mitigation, the criminal defendant*
20 *labored under an enormous practical compulsion to speak in his own defense. By*
21 *structuring sentencing as an incident of the trial, the procedure foreclosed the*
22 *defendant from participating in what was in function his sentencing hearing*
23 *unless he spoke about the circumstances of the offense. To be sure, character*
24 *witnesses could and did carry some of this burden for the defendant in some*
25 *cases; it was not impossible to remain silent and still obtain jury leniency. But it*
26
27

1 was a grave risk that few defendants had the stomach to undertake. Thus, the
2 same factors that caused the procedure to prefer trials over guilty pleas also
3 induced criminal defendants at trial to speak to their knowledge of the events.

4 The modern system of post-verdict judicial sentencing arose in response to many
5 factors. The movement to revise the substantive criminal law by consolidating and
6 rationalizing the categories of offenses invited the grading of sentences according to
7 severity. This development was deeply connected to the appearance of imprisonment
8 as the routine punishment for cases of serious crime. The older sanctions, death and
9 transportation, had lent themselves to jury manipulation, because they came as "either-
10 or" choices. Because the new sanction of imprisonment for a term of years was all but
11 infinitely divisible, it invited the concept of the sentencing range, which transferred to the
12 judge the power to tailor the sentence to the particular offender.
13
14

15 With the advent of mandatory minimum sentences, however, Juries today
16 again face -- albeit often unknowingly -- "either-or" choices similar to those facing
17 the British and colonial juries of 1791. To fully exercise their historical function,
18 juries today must understand the two "eithers"; they cannot rely on the court to
19 mitigate because it is bound by the statutory minimum term of imprisonment.
20 That the eighteenth-century practice of the jury's right to decide the law -- or to
21 decide how the law applies to particular defendants in light of the severity of
22 punishment -- was incorporated into the Sixth Amendment's right to "trial by jury"
23 is illustrated by the 1794 Supreme Court case, *Georgia v. Brailsford*, 3 U.S. 1, 1
24 L. Ed. 483, 3 Dall. 1 (1794). The jury, sitting in original jurisdiction because the
25
26
27

1 State of Georgia was a party, see U.S. Const. art. III, § 2, was charged as follows
2 by Chief Justice John Jay:

3 It may not be amiss, here, Gentlemen, to remind you of the
4 good old rule, that on questions of fact, it is the province of the jury,
5 on questions of law, it is the province of the court to decide. But it
6 must be observed that *by the same law, which recognizes this*
7 *reasonable distribution of jurisdiction, you have nevertheless a right*
8 *to take upon yourselves to judge of both, and to determine the law*
9 *as well as the fact in controversy.* On this, and on every other
10 occasion, however, we have no doubt, you will pay that respect,
11 which is due to the opinion of the court: For, as on the one hand, it
12 is presumed, that juries are the best judges of facts; it is, on the
13 other hand, presumable, that the court are the best judges of law.
14 *But still both objects are lawfully, within your power of decision.*

15 3 U.S. at 4 (emphasis added). With justices who had been instrumental in
16 framing the Constitution, the Supreme Court of 1794 accepted the jury's power
17 and right to decide both the facts and the law of a case -- and to be so instructed
18 by a judge. *Brailsford's* ruling was attenuated in the late nineteenth century.

19 Two major Supreme Court Justices' opinions in the nineteenth century have
20 language relied upon by subsequent courts as restricting the Sixth Amendment's jury
21 discretion and right to know the effect of its decision. They are Justice Story's in the
22 Circuit Court of the District of Massachusetts, *United States v. Battiste*, 24 F. Cas. 1042,
23 F. Cas. No. 14545 (C.C.D. Mass. 1835) and the first Justice Harlan's in *Sparf v. United*
24 *States*, 156 U.S. 51, 15 S. Ct. 273, 39 L. Ed. 343 (1895). *Battiste* is distinguishable
25 from modern anti-nullification cases because Justice Story's statement was made in the
26 context of preventing a conviction unfounded under the statute as he construed it, not to
27 prevent the jury from refusing to convict a person technically guilty. Justice Harlan's,
28 sixty years later, contains a long and learned analysis. It restricts the effect of the

1 historical Sixth Amendment by preventing the jury from finding the lesser of the crimes
2 of murder or manslaughter — the difference between death or life for the prisoner.

3 Whatever the judicial system's evaluation of modern juries and their proper role,
4 the Supreme Court has recently instructed us that in matters of sentencing as well as
5 hearsay, it is necessary to go back to the practice as it existed in 1791 to construe the
6 meaning of constitutional provisions such as the Sixth Amendment. Justice Gray
7 dissenting in *Sparf* seems to have hit both the modern and ancient marks exactly.
8 Judges are forcefully reminded in *Crawford v. Washington*, reevaluating the
9 constitutional right of confrontation and the limits on the use of "testimonial" hearsay,
10 that no matter how long and firm a precedential line of Supreme Court cases, if analysis
11 shows it was ill-based historically it must be abandoned. 541 U.S. 36, 124 S. Ct. 1354,
12 158 L. Ed. 2d 177 (2004)
13
14

15 Since the late nineteenth century, jury power has increasingly been suppressed
16 in favor of judicial control in both civil and criminal trials through case law and
17 amendments to the statutes and rules governing the trial process. This trend —
18 especially since the 1990s — is so strong that one commentator considers it "war." See
19 Andrew J. Parmenter, *Nullifying the Jury, The Judicial Oligarchy Declares War on Jury*
20 *Nullification*, 46 Washburn L.J. 379 (2007). That the courts of three out of the four states
21 that grant juries the power in criminal cases to decide both law and fact "have
22 eviscerated any literal translation of these constitutional provisions" is one such
23 example. *Id.* at 391; see Ga. Const, art. I, § 1, para. x1(a) (1998); Ind. Const, art. I, § 19
24 (1999) ("In all criminal cases whatever, the jury shall have the right to determine the law
25 and the facts."); Md. Code Ann., Const, art. 23, Declaration of Rights (same).
26
27

1 Those who would limit the powers historically exercised by juries must
2 now consider the Supreme Court's *Booker-Apprendi* line of sentencing decisions,
3 see *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621
4 (2005); *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d
5 435 (2000), and its reinvigoration of the Confrontation Clause in *Crawford v.*
6 *Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). These
7 decisions bear on the question of whether juries should be informed of the
8 sentences that would result from guilty verdicts. They emphatically reaffirm three
9 propositions that support the argument that juries can be trusted with this
10 information. First, the right to a jury trial is a fundamental constitutional right; it
11 provides a check on the courts, executive, and legislature equivalent to that of
12 the voter on elected officials. Second, the Supreme Court, in interpreting the
13 Sixth Amendment, relies on criminal practice the Court believes existed in the
14 late eighteenth century. Third, the Supreme Court is willing to overturn long-
15 established federal law, with some measure of reasoned disregard for the
16 consequences of doing so, when it determines that precedent impinges on the
17 powers historically exercised by juries (or, in *Crawford*, the historical scope of
18 the confrontation right). These three principles make it inappropriate to cavalierly
19 and without analysis treat jurors' power to refuse to convict (or to be informed of
20 mandatory minimums) as improper.

21 Perhaps the most evocative of the recent Supreme Court writings
22 concerning the jury is an opinion by Justice Scalia in a non-sentencing case,
23 *Neder v. United States*, 527 U.S. 1, 10, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35
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1 (1999) (holding that harmless error rule applies to failure to submit issue of
2 materiality to the jury). In that opinion, Justice Scalia called juries the "spinal
3 column of American democracy." *Id.* at 30 (Scalia, J., concurring in part and
4 dissenting in part). He continued:

5 Perhaps the Court is so enamored of judges in general, and federal
6 judges in particular, that it forgets that they (we) are officers of the Government,
7 and hence proper objects of that healthy suspicion of the power of government
8 which possessed the Framers and is embodied in the Constitution. Who knows?
9 – 20 years of appointments of federal judges by oppressive administrations
10 might produce judges willing to enforce oppressive criminal laws, and to interpret
11 criminal laws oppressively – at least in the view of the citizens in some vicinages
12 where criminal prosecutions must be brought. And so the people reserved the
13 function of determining criminal guilt *to themselves*, sitting as jurors. It is not
14 within the power of us Justices to cancel that reservation.

15 *Id.* at 32 (emphasis in original); see *Blakely*, 542 U.S. at 307 (addressing "the plausibility
16 of the claim that the Framers would have left definition of the scope of jury power up to
17 judges' intuitive sense of how far is too far," the Court found "that claim not plausible at
18 all, because the very reason the Framers put a jury-trial guarantee in the Constitution is
19 that they were unwilling to trust government to mark out the role of the jury."). These
20 passages confirm that the modern Supreme Court attributes great value to defendants'
21 Sixth Amendment right to trial by a jury -- with power to prevent sentences it deems
22 excessive.

23 Recent sentencing opinions show that the Supreme Court is willing to strike down
24 precedents and statutes that impinge on the historical functions of the jury. The opinions
25 do so in the teeth of arguments that pro-jury doctrines could have adverse
26 consequences, such as reducing the efficiency of adjudicatory process, creating unfair
27 sentencing disparities, and throwing the federal criminal courts into disarray. A similar

1 tale is told by *Crawford* and the current interpretation of the Confrontation Clause of the
2 Constitution

3 These cases demonstrate that the Supreme Court holds the jury right in
4 such high esteem that it was willing to invalidate widespread accepted
5 sentencing practice, even though critics portended that dire consequences would
6 result. In response to Justice Breyer's dissenting argument in *Apprendi* that the
7 majority's solution would be unworkable, Justice Scalia noted that it was
8 constitutionally required:
9

10 I feel the need to say a few words in response to Justice Breyer's
11 dissent. It sketches an admirably fair and efficient scheme of criminal
12 justice designed for a society that is prepared to leave criminal justice to
13 the State. (Judges, it is sometimes necessary to remind ourselves, are
14 part of the State — and an increasingly bureaucratic part of it, at that.) The
15 founders of the American Republic were not prepared to leave it to the
16 State, which is why the jury-trial guarantee was one of the least
17 controversial provisions of the Bill of Rights. It has never been efficient;
18 but it has always been free

16 CONCLUSION

17
18 To ensure that the accused is judged by prevailing community mores in
19 connection with "the penal system," a jury applies its own judgment regarding the
20 defendant's culpability to determine whether the acts in question fit both society's
21 definition of the crime and the socially-approved punishment. As the *Gilliam*
22 opinion declared, the jury is not a mere factfinder:
23

24 *Without full knowledge of the nature of the crime, the jury cannot*
25 *speak for the people or exert their authority. If an element of the crime is*
26 *conceded and stripped away from the jury's consideration, the jurors*
27 *become no more than factfinders. The jury must know why it is convicting*
or acquitting the defendant, because that is simply how our judicial system
is designed to work.

1 Indeed, the jury is becoming more and more involved in the trial process—
2 even to the extent that they are statutorily entitled to ask questions of witnesses,
3
4 Wherefore Defendant respectfully submits that the jury in instant case be
5 informed as to the mandatory minimums and/or sentences as they exist in the
6 present case.

7 DATED this 4th day of ^{March} February, 2009.
8

9
10 

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11 DISTRICT COURT
12 CLARK COUNTY, NEVADA

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

CASE NO. C250630
DEPT. NO. XVII

19 ORDER AUTHORIZING CONTACT VISIT

20 DATE: N/A
21 TIME: N/A

22 Based upon the request of Defendant, BRIAN O'KEEFE, by and through his attorneys,
23 DAVID M. SCHIECK, Special Public Defender, RANDY H. PIKE, Deputy Special Public
24 Defender, and PATRICIA A. PALM, Deputy Special Public Defender, the Court being fully
25 advised in the premises, and good cause appearing therefor;

26 IT IS HEREBY ORDERED that Bob Jukich is authorized to make a contact visit in the
27 presence of Clark County Detention Center personnel with Defendant, BRIAN O'KEEFE, ID
28 No. 1447732, at the Clark County Detention Center for the sole purpose of cutting Defendant's

CLERK OF THE COURT

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DEPT. 17 ON

SPECIAL PUBLIC
DEFENDER
CLARK COUNTY
NEVADA

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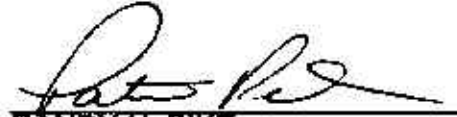
1 hair. Mr. Jukich is authorized to bring with him whatever barber tools he will need in that
2 regard.

3 IT IS SO ORDERED this 4 day of March, 2009.
4

5 
6 DISTRICT COURT JUDGE

7 Respectfully submitted by:
8

9 DAVID M. SCHIECK
10 SPECIAL PUBLIC DEFENDER

11 
12 RANDY H. PIKE
13 PATRICIA A. PALM
14 330 S. Third St., Ste. 800
15 Las Vegas NV 89155
16 Attorneys for Defendant
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FILED

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E. J. [Signature]
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
10 Nevada Bar No. 6009
11 330 South Third Street, 8th Floor
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

11 DISTRICT COURT
12 CLARK COUNTY, NEVADA

14 THE STATE OF NEVADA,

15 Plaintiff,

16 vs.

17 BRIAN O'KEEFE,

18 Defendant.

CASE NO. C250630

DEPT. NO. XVII

19 RECEIPT OF COPY

20 DATE OF HEARING: 3-10-09

21 TIME OF HEARING: 8:00 am

22 RECEIPT of a copy of Defendant's Motion to Require the Court to Advise the
23 Prospective Jurors as to the Mandatory Sentences Required if the Defendant is Convicted
24 of Second Degree Murder is hereby acknowledged.

25 Dated: 3.4.09

DISTRICT ATTORNEY OFFICE

26 *Eileen Monville*
27 200 Lewis Ave. 3rd Floor
28 Las Vegas, NV 89155

SPECIAL PUBLIC
DEFENDER

CLARK COUNTY
NEVADA

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CLERK OF THE COURT


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 K. O'KEEFE,**
13 **#1447732**

14 **Defendant.**

CASE NO: C250630

DEPT NO: III

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

17 **TO: BRIAN K. O'KEEFE, Defendant; and**

18 **TO: 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 **EDWARD GUENTHER, is a Latent Print Examiner with the Las Vegas Metropolitan**
22 **Police Department. He is an expert in the area of latent print examination and comparison**
23 **and will give scientific opinions related thereto. He will testify regarding the collection and**
24 **analysis of various latent prints he performed in the case.**


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

27 **///**

28 **///**

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

4 BY



5 DAVID ROGER
6 DISTRICT ATTORNEY
7 Nevada Bar #002781

8 CERTIFICATE OF FACSIMILE TRANSMISSION
9

10 I hereby certify that service of NOTICE OF EXPERT WITNESSES, was made this
11 day of March, 2009, by facsimile transmission to:
12

13 SPECIAL PUBLIC DEFENDER
14 RANDY H. PIKE
15 FAX # (702) 455-6273

16 /s/ T. Schessler
17 Secretary for the District Attorney's
18 Office
19
20
21
22
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27
28

ORIGINAL

FILED

2009 MAR -6 A 8 15

CLERK OF THE COURT

1 NOTC
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. 9451
11 330 S. Third Street, Ste. 800
12 Las Vegas, NV 89155
13 (702) 455-6265
14 (702) 455-6273 fax
15 rpike@co.clark.nv.us
16 palmpa@co.clark.nv.us
17 Attorneys for O'Keefe

10 DISTRICT COURT
11 CLARK COUNTY, NEVADA
12

13 THE STATE OF NEVADA,
14
15 Plaintiff,

CASE NO. C 250630
DEPT. NO. XVII

16 vs.

17 BRIAN O'KEEFE #1447732

18 Defendant.
19

20 NOTICE OF DEFENDANT'S WITNESSES
21 [NRS 174.234(1)(b)]

22 DATE OF HEARING:
23 TIME OF HEARING:

24 TO: THE STATE OF NEVADA, Plaintiff, and

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

26 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the Defendant, BRIAN
27 O'KEEFE, by and through his attorneys, DAVID M. SCHIECK, Special Public Defender,
28 RANDALL H. PIKE, Assistant Special Public Defender, and PATRICIA PALM, Deputy Special
Public Defender intend to call the following witnesses in its case in chief.

RECEIVED

MAR 06 2009
CLERK OF THE COURT

	<u>NAME</u>	<u>ADDRESS</u>
2	ARMBRUSTER, TODD	5001 OBANNON DR. #34, LV NV
3	BALLEJOS, JEREMIAH	LVMPD #8406
4	BENJAMIN, JACQUELINE DR.	ME 0081
5	BLASKO, KEITH	LVMPD #2995
6	BUNN, CHRISTOPHER	LVMPD #4407
7	BURGER, TRACY	5055 W. Patrick Lane #101, LV NV
8	COLLINS, CHELSEA	LVMPD #8255
9	CONN, TODD	LVMPD #8101
10	COR SOUTHERN NEVADA ADULT MENTAL HEALTH SERVICES	10367 W. Centennial Rd. #100, Littleton, CO
11	CUSTODIAN OF RECORDS	CCDC
12	CUSTODIAN OF RECORDS	MONTEVISTA HOSPITAL
13	CUSTODIAN OF RECORDS	LVMPD COMMUNICATIONS
14	CUSTODIAN OF RECORDS	LVMPD RECORDS
15	DESALVIO, LOUIS	4211 E. BONANZA RD., LV NV
16	FORD, DANIEL	LVMPD #4244
17	FONBUENA, RICHARD	LVMPD #6834
18	HATHCOX, JIMMY	5001 EL PARQUE AVE. #C-36, LV NV
19	HUTCHERSON, CHRISTOPHER	LVMPD #12996
20	IBEW PLUS CREDIT UNION	1900 S. JONES BLVD., LV NV
21	IVIE, TRAVIS	LVMPD #8405
22	KYGER, TERESA	LVMPD #4191
23	KOLACZ, ROBIN	5001 EL PARQUE AVE. #C-38, LV NV
24	LOWREY-KNEPP, ELAINE	DISTRICT ATTORNEY INVESTIGATOR
25	MALDONADO, JOCELYN	LVMPD #6920
26	MOGG, CLIFFORD	LVMPD #5096
27	MORRIS, CHERYL	UNKNOWN
28		

1 MURPHY, KATE LVMPD #9756
2 NEWBERRY, DANIEL LVMPD #4956
3 O'KELLEY, DEAN LVMPD #4209
4 PAISANO, ROBERT 1201 N. DECATUR #111, LV NV
5 PAZOS, EDUARDO LVMPD #6817
6 RAETZ, DEAN LVMPD #4234
7 SANTAROSSA, BRIAN LVMPD #6930
8 SHOEMAKER, RUSSELL LVMPD #2096
9 TAYLOR, SEAN LVMPD #8718
10 TINIO, NORMA 2992 ORCHARD MESA, HENDERSON, NV
11 TOLIVER, CHARLES 5001 EL PARQUE #29, LV NV
12 TOLIVER, JOYCE 5001 EL PARQUE #C-29, LV NV
13 WIDLEMANN, MARTIN LVMPD #3516
14 WILSON, ROBERT LVMPD #3826
15 **MITIGATION WITNESSES IF PENALTY PHASE:**
16 ALSTON, NATALIE SGT. 4500 W. SILVERADO RANCH BL., LV NV
17 O'KEEFE, LIZBETH 4308 W. LAKE MEAD #101, LV NV
18 O'KEEFE, SHAWN 416 BLUE RIVER DR., LV NV
19 O'KEEFE, THOMAS P. 416 BLUE RIVER DR., LV NV
20 O'KEEFE, PATRICIA 416 BLUE RIVER DR., LV NV
21 PEREZ, JOSEPH INVESTIGATOR, SPECIAL PUBLIC
DEFENDER OFFICE

22 DATED this 5th day of March, 2009.
23
24
25
26
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28

DAVID M. SCHIECK
SPECIAL PUBLIC DEFENDER


RANDALL H. PIKE
PATRICIA PALM
Attorneys for O'Keefe

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RECEIPT OF COPY

RECEIPT OF COPY of the foregoing **NOTICE OF WITNESSES** is hereby
acknowledged this 06 day of March, 2009.

DISTRICT ATTORNEY OFFICE



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


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

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: XVII

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

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

17 TO: SPECIAL DEPUTY PUBLIC DEFENDER, Counsel of Record:

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

20 NAME

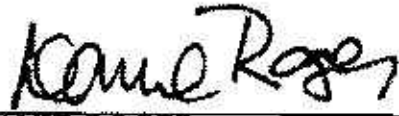
ADDRESS

21 TODD LARSON

UNKNOWN

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

26 BY


27 DAVID ROGER
28 DISTRICT ATTORNEY
Nevada Bar #002781

1 CERTIFICATE OF FACSIMILE TRANSMISSION

2 I hereby certify that service of NOTICE OF WITNESS, was made this 10th day of
3 March, 2009, by facsimile transmission to:

4
5 PUBLIC DEFENDER
FAX #(702) 455-5112

6
7 /s/ Terry Schessler
Secretary for the District Attorney's Office
8
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ORIGINAL

1 **ORDR**

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 89155-2211**
10 **(702) 671-2500**
11 **Attorney for Plaintiff**

FILED

MAR 10 2 25 PM '09

Earl Smith
CLERK OF THE COURT

7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

9 **THE STATE OF NEVADA,**

10 **Plaintiff,**

11 **-vs-**

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

14 **Defendant.**

Case No. C250630

Dept No. XVII

15 **ORDER REQUIRING MATERIAL WITNESS TO POST**
16 **BAIL OR BE COMMITTED TO CUSTODY**

17 **STATE OF NEVADA** }
18 **COUNTY OF CLARK** } ss:

19 **TO: Any Sheriff, Constable, Marshal,**
20 **Policeman or Peace Officer in**
21 **the State of Nevada**

22 **An ex parte application upon sworn affidavit having been presented to this Court**
23 **pursuant to NRS 178.494, wherein it appears that the testimony of CHERYL MORRIS,**
24 **ID#1211403 is material to the jury trial in the above-entitled matter, and it further appearing**
25 **to the Court by the way of affidavit that the attendance of said witness in the jury trial of this**
matter by subpoena is impracticable;

YOU ARE THEREFORE commanded forthwith to place said witness in your
immediate custody for the purpose of said witness posting bail with the above entitled court
in the amount of \$10,000.00 in order to secure the attendance of said witness CHERYL

CLERK OF THE COURT

MAR 10 2009

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1 MORRIS, ID#1211403 before the Court on the 16th day of March, 2009, at 10:00 a.m., in
2 the jury trial of the above entitled matter.

3 IT IS FURTHER ORDERED and directed that if said witness CHERYL MORRIS,
4 ID#1211403 fails to post bail in the sum of \$10,000.00 to secure her attendance as a witness
5 in the jury trial in the above-stated matter as above provided, then you are further
6 commanded to deliver said witness into the custody of the Sheriff of Clark County pending
7 final disposition of the jury trial in the above-entitled matter or until further Order of this
8 Court.

9 YOU ARE FURTHER ORDERED to direct the Sheriff of the County of Clark, State
10 of Nevada, to make the said CHERYL MORRIS, ID#1211403 available in custody in the
11 Eighth Judicial District Court of the State of Nevada, in and for the County of Clark at 10:00
12 a.m. on the 16th day of March, 2009, for the testimony in the captioned matter and further
13 disposition by this Court.

14 You are further ordered that if the said CHERYL MORRIS is incarcerated pursuant to
15 this order, she shall be brought before me or in my absence another Judge of the Eighth
16 Judicial District Court within 72 hours after the beginning of her detention for the purpose of
17 determining whether the bail previously set should be modified and whether the detention of
18 the material witness should continue and in addition so that a schedule for the periodic
19 review of whether the amount of bail required should be modified and whether detention
20 should continue.

21 DATED this 10 day of March, 2009.

22
23 
24 DISTRICT JUDGE

1 EXPT
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 89155-2211
10 (702) 671-2500
11 Attorney for Plaintiff

5
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FILED
MAR 10 2:27 PM '09
E. J. Smith
CLERK OF THE COURT

7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

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

Case No. C250630
Dept No. XVII

15 EX PARTE APPLICATION FOR ORDER REQUIRING
16 MATERIAL WITNESS TO POST BAIL

17 COMES NOW, DAVID ROGER, Clark County District Attorney, by and through
18 PHILLIP N. SMITH, JR., Deputy District Attorney, and makes application to the above-
19 entitled Court that an Order be entered herein requiring CHERYL MORRIS, ID#1211403 be
20 taken into immediate custody as a material witness for the purpose of posting bail for her
21 appearance in the jury trial of the above-entitled matter for the said reason of attempting to
22 avoid testifying before the Eighth Judicial District Court.

23 Further application is made that the Court set bail in the amount of \$10,000.00 and if
24 the said witness fails to post bail in the amount of \$10,000.00 for her appearance as a witness
25 in this matter that the Court further direct and order that said witness be delivered into the
26 custody of the Sheriff of Clark County, pending final disposition of the jury trial in the above
27 entitled matter on or until further Order of this Court.

28 This application is made pursuant to the provision of NRS 178.494 and is based upon

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MAR 10 2009
CLERK OF THE COURT

1 Affidavits attached hereto which are incorporated herein by this reference.

2 DATED this 10th day of March, 2009.

3
4 DAVID ROGER
DISTRICT ATTORNEY
5 Nevada Bar #002781

6
7 BY Phillip N. Smith, Jr.
8 PHILLIP N. SMITH, JR.
Deputy District Attorney
9 Nevada Bar #0010233
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AFFIDAVIT

STATE OF NEVADA)
COUNTY OF CLARK } ss:

PHILLIP N. SMITH, JR., being first duly sworn deposes and says:

That he is employed in the Office of the Clark County District Attorney, State of Nevada and is engaged in the prosecution of criminal matters and has been so employed for the period of two (2) years.

This matter has been set for jury trial, said hearing to commence at or about 10:00 a.m. on the 16th day of March, 2009 in said Court.

Your affiant will advise the Court that one CHERYL MORRIS, ID#1211403 of Las Vegas, Clark County, Nevada, is in fact a material witness in the above-captioned matter.

Your affiant will further advise the Court on information and belief that said witness is avoiding testifying before the Eighth Judicial District Court in which she is a material and essential witness.

Your affiant will further advise the Court that on March 4, 2009, Elaine Knepp from the District Attorney's office was able to make contact with CHERYL MORRIS via telephone whereupon CHERYL MORRIS indicated that she presently resided out of state in Arizona, that her husband presently still resided in Las Vegas, and that she was leaving Arizona to go to Colorado on March 16, 2009 and not returning until the middle of April 2009. Your affiant advised Elaine Knepp to contact CHERYL MORRIS again and advise her that her presence would only be needed for one day and that the State of Nevada would subsidize her travel arrangements. Elaine Knepp called CHERYL MORRIS and left a voicemail asking for a return call. To date, CHERYL MORRIS has made no such contact.

Your affiant will further advise the Court that on March 4 and March 5, 2009, your affiant personally called CHERYL MORRIS, and left a voicemail on each occasion asking CHERYL MORRIS to return your affiant's phone call so that arrangements could be made

1 to secure her testimony. On March 5, 2009, your affiant used a different phone number to
2 call CHERYL MORRIS in an attempt to preclude CHERYL MORRIS's "caller ID" from
3 revealing that the call was from the District Attorney's Office. Your affiant left a phone
4 message; within a few minutes, the phone rang back and when your affiant identified himself
5 as the "District Attorney's Office," the caller hung up. It is your affiant's belief that the
6 phone call was from CHERYL MORRIS.

7 Your affiant will further advise the Court that on March 6 and March 9, 2009, Elaine
8 Knepp again called CHERYL MORRIS and left a message instructing CHERYL MORRIS
9 to contact the District Attorney's Office in order to arrange a time to secure her testimony.
10 To date, CHERYL MORRIS has made no such contact.

11 Your affiant will further advise the Court that on March 9, 2009, your affiant
12 personally called CHERYL MORRIS, and left a voicemail asking CHERYL MORRIS to
13 return your affiant's phone call immediately so that arrangements could be made to secure
14 her testimony. Your affiant further advised that a failure to return the phone call would be
15 construed as CHERYL MORRIS avoiding testifying in this matter and that your affiant
16 would have no other choice but to resort to other means (including securing a warrant) in
17 order to ensure her attendance.

18 Your affiant will further advise the Court that on March 9, 2009, Elaine Knepp
19 performed a records search of the Clark County Assessor's database and discerned that
20 property under the registered ownership of "Cheryl and Christopher Morris" is presently
21 located at 3417 Jordan Lane, North Las Vegas, Nevada 89032. The deed was recorded on
22 October 11, 2006.

23 THEREFORE, your affiant would respectfully pray that this Honorable Court under the
24 authority of NRS 178.494 issue an Order directing that any police officer of this State shall
25 forthwith take the said CHERYL MORRIS, ID#1211403 into custody and forthwith convey
26 her to the jail of the County of Clark, State of Nevada, for incarceration to insure her
27 presence before the Eighth Judicial District Court.

28 ///

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

Executed on 3-10-09
(Date)

Phillip N. Smith
(Signature)


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**

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: XVII

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

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

17 **TO: SPECIAL Deputy Public Defender, Counsel of Record:**

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

20 **NAME**


ADDRESS

21 **WHITMARSH, DAVID**

7648 CELESTIAL GLOW, LVNV 89123

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

26 **BY**


27 **DAVID ROGER**
28 **DISTRICT ATTORNEY**
Nevada Bar #002781

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CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of SUPPLEMENTAL NOTICE OF WITNESSES, was made this 11th day of March, 2009, by facsimile transmission to:

SPECIAL PUBLIC DEFENDER
FAX # (702) 455-6273

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

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DISTRICT COURT 2009 MAR 16 P 5:38

CLARK COUNTY, NEVADA

CLERK OF THE COURT

STATE OF NEVADA

Plaintiff(s).

CASE NO. C250630

DEPT. NO. XVII

-VS-

OKEEFE, BRIAN KERRY

Defendant(s).

JURY

1. JUSTIN DETTRE

9. JAMES MCCALDIN

2. JODY MONTOYA

10. MARIE PINILLOS

4. JUDY CHELINI

11. JOSE VAZQUEZ

6. KIRK LIVERNASH

12. HARLEY MCFATE

7. DAWN FRALEY

13. ROBERT CLARK

8. ARACELI MURRIETA

14. MARTIN VILLASENOR

ALTERNATES

3. JAMES ERAL

5. NANCY MIROLOCK

1 TRAN

FILED IN OPEN COURT
MAR 18 2009

2
3 ORIGINAL

EDWARD A. FRIEDLAND
CLERK OF THE COURT

4 BY

Kristen Brown

DEPUTY

5 DISTRICT COURT

KRISTEN BROWN

6 CLARK COUNTY, NEVADA

7
8 THE STATE OF NEVADA,

9 Plaintiff,

10 vs.

CASE NO. C250630

DEPT. XVII

11 BRIAN KERRY O'KEEFE,

12 Defendant.

13
14 BEFORE THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE

15 TUESDAY, MARCH 17, 2009

16 RECORDER'S PARTIAL TRANSCRIPT
17 OF THE JURY TRIAL - DAY 2

18 APPEARANCES:

19
20 For the State:

PHILLIP SMITH, ESQ.,
STEPHANIE GRAHAM, ESQ.,
Deputy District Attorneys

21
22 For the Defendant:

RANDALL H. PIKE, ESQ.,
PATRICIA PALM, ESQ.,
Deputy Special Public Defenders

23
24
25 RECORDED BY: MICHELLE L. RAMSEY, COURT RECORDER

1 LAS VEGAS, NEVADA; TUESDAY, MARCH 17, 2009

2
3 [Prior proceedings - Not transcribed]

4 [Partial testimony of Officer Brian Santarossa

5 on Cross-Examination from 11:09:31 a.m. - 11:09:50 a.m.]

6 BY MS. PALM:

7 Q: Did you get close enough to Mr. O'Keefe to observe whether he was
8 intoxicated or not?

9 A: I got close enough to a point, but I can't remember if he was
10 intoxicated or not.

11 Q: You just don't recall --

12 A: I don't recall.

13 Q: -- if he had any signs?

14 A: I don't.

15 Q: So you wouldn't dispute it if other Officers said that he was?

16 A: No, ma'am, I wouldn't.

17
18 [Prior proceedings - Not transcribed]

19 [Partial testimony of Officer Brian Santarossa

20 on Cross-Examination from 11:11:47 a.m. - 11:12:26 a.m.]

21 BY MS. PALM:

22 Q: As a patrol officer you have training regarding driving under the
23 influence arrest?

24 A: Yes, ma'am.

25 Q: Okay. Do you have a PBT machine in your vehicle?

1 A: No, ma'am.
2 Q: Can you describe for me what that machine is?
3 A: It stands for Portable Breathalyzer Test; it's a test which measures
4 the blood alcohol content and the subject's breathe.
5 Q: Are those commonly in Metro vehicles?
6 A: No, ma'am.
7 Q: Okay, so to have a PBT on the scene you would have to call for one?
8 A: Yes, ma'am.
9 Q: And when the Detectives assume control of the investigation, they
10 didn't direct you to take a PBT of Mr. O'Keefe; did they?
11 A: No, ma'am.

12
13 [Prior proceedings - Not transcribed]

14 [Partial testimony of Officer Brian Santarossa

15 on Redirect Examination from 11:14:20 a.m. - 11:14:40 a.m.]

16 BY MS. GRAHAM:

17 Q: With regard to the breathalyzer testing, have you responded to major
18 crime scenes like this before?
19 A: Yes, ma'am.
20 Q: Would it be protocol to take a breathalyzer test that somebody's
21 agitated and suspected of murdering somebody?
22 A: No, ma'am.

23
24 [Prior proceedings - Not transcribed]

25 [Partial testimony of Officer Jeremiah Ballejos

1 on Direct Examination from 1:43:41 p.m. - 1:44:00 p.m.]

2 BY MS. GRAHAM:

3 Q: What was his demeanor while you were trying to gather this
4 information to help assist Victoria?

5 A: Wouldn't make eye contact. Had kind of an aloof state. You could
6 smell alcohol on his breath and clothes.

7 Q: Okay. He was aloof. What did his face look like?

8
9 [Prior proceedings - Not transcribed]

10 [Partial testimony of Officer Jeremiah Ballejos

11 on Cross Examination from 2:03:41 p.m. - 2:03:52 p.m.]

12 BY MS. PALM:

13 Q: Do you recall testifying at the Preliminary Hearing that Mr. O'Keefe's
14 smelled real heavily of alcohol?

15 A: Yes.

16 Q: And do you recall that he actually fell asleep in the back of the patrol
17 car?

18 A: He did.

19
20 [Prior proceedings - Not transcribed]

21 [Partial testimony of Officer Christopher Hutcherson

22 on Cross Examination from 3:11:03 p.m. - 3:11:15 p.m.]

23 BY MS. PALM:

24 Q: Did it appear to you that Mr. O'Keefe was intoxicated?

25 A: Yes, ma'am. I can smell alcohol coming from him.


1 Q: Okay. And would you agree with the statement that he was
2 obviously intoxicated?

3 A: Yes, ma'am.

4 [Proceedings continued - Not transcribed]
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21 ATTEST: I hereby certify that I have truly and correctly transcribed the audio/video
22 proceedings in the above-entitled case to the best of my ability.

23 
24 _____
25 Michelle Ramsey
Court Recorder/Transcriber

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ORIGINAL

FILED IN OPEN COURT
MAR 19 2009

EDWARD A. FRIEDLAND
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

BY

Kristen Brown

DEPUTY

KRISTEN BROWN

STATE OF NEVADA

Plaintiff(s),

CASE NO. C250630

DEPT. NO. XVII

-VS-

OKEEFE, BRIAN KERRY

Defendant(s).

AMENDED JURY

1. JUSTIN DETTRE

8. ARACELI MURRIETA

2. JODY MONTOYA

9. JAMES MCCALDIN

3. JAMES ERAL

10. MARIE PINILLOS

4. JUDY CHELINI

11. JOSE VAZQUEZ

6. KIRK LIVERNASH

13. ROBERT CLARK

7. DAWN FRALEY

14. MARTIN VILLASENOR

ALTERNATE

5. NANCY MIROLOCK

1 INST

FILED IN OPEN COURT

MAR 20 2009 @ 2:15pm

EDWARD A. FRIEDLAND
CLERK OF THE COURT

BY

Kristen Brown

DISTRICT COURT
CLARK COUNTY, NEVADA

KRISTEN BROWN DEPUTY

8 THE STATE OF NEVADA,

9 Plaintiff,

10 -vs-

11 BRIAN KERRY O'KEEFE,

12 Defendant.

CASE NO: C250630

DEPT NO: XVII

13 INSTRUCTIONS TO THE JURY (INSTRUCTION NO. I)

14 MEMBERS OF THE JURY:

15 It is now my duty as judge to instruct you in the law that applies to this case. It is
16 your duty as jurors to follow these instructions and to apply the rules of law to the facts as
17 you find them from the evidence.

18 You must not be concerned with the wisdom of any rule of law stated in these
19 instructions. Regardless of any opinion you may have as to what the law ought to be, it
20 would be a violation of your oath to base a verdict upon any other view of the law than that
21 given in the instructions of the Court.

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INSTRUCTION NO. 2

If, in these instructions, any rule, direction or idea is repeated or stated in different ways, no emphasis thereon is intended by me and none may be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

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An Information is a formal method of accusing a person of a crime but is not evidence of his guilt.

In this case, it is charged in an Amended Information that on or about the 5th day of November, 2008, the Defendant committed the offense of MURDER WITH USE OF A DEADLY WEAPON (OPEN MURDER) (Felony - NRS 200.010, 200.030, 193.165) in the following manner, to-wit: 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.

It is the duty of the jury to apply the rules of law contained in these instructions to the facts of the case and determine whether or not the Defendant is guilty of the offense charged.

INSTRUCTION NO. 4

To constitute the crime charged, there must exist a union or joint operation of an act forbidden by law and an intent to do the act.

The intent with which an act is done is shown by the facts and circumstances surrounding the case.

Do not confuse intent with motive. Motive is what prompts a person to act. Intent refers only to the state of mind with which the act is done.

Motive is not an element of the crime charged and the State is not required to prove a motive on the part of the Defendant in order to convict. However, you may consider evidence of motive or lack of motive as a circumstance in the case.