

MEMBERSHIP ON COMMUNITY BOARDS (Past and Present):

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

STATE BOARD OF PSYCHOLOGICAL EXAMINERS APPOINTMENT:

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

MEDIA APPEARANCES:

Interviews for local television newscasts
Interviews on local radio shows

HONORS AND AWARDS:

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

PRESENTATIONS:

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

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

ORIGINAL

FILED

AUG 02 2010

John J. Williams
CLERK OF COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

BRIAN K. O'KEEFE,

Defendant.

CASE NO: C250630

DEPT NO. XVII

DATE:

TIME:

88C260630
NOTM
Notice of Motion
875-480



**NOTICE OF MOTION AND MOTION BY DEFENDANT O'KEEFE TO
SUPPRESS HIS STATEMENTS TO POLICE, OR, ALTERNATIVELY, TO
PRECLUDE THE STATE FROM INTRODUCING PORTIONS OF HIS
INTERROGATION**

COMES NOW Defendant, Brian K. O'Keefe, by and through his attorney,
Patricia Palm of Palm Law Firm, Ltd., and hereby moves this Honorable Court
for an order suppressing O'Keefe's statements to police during custodial
questioning on the bases of Miranda violation and unknowingly and
involuntarily waiver of Miranda rights. In the event that the Court is not
inclined to grant suppression of O'Keefe's statements during the recorded
interrogation by homicide detectives, O'Keefe seeks a ruling precluding the
State from introducing portions of the interrogation which are unfairly
prejudicial.

This Motion is made and based upon the record in this case, including
the papers and pleadings on file herein, the Constitutions of the United States

FILED

AUG 02 2010


John J. Williams
CLERK OF COURT

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

3 Dated this 2nd day of August, 2010.

4 PALM LAW FIRM, LTD.

5 
6 Patricia Palm, Bar No. 6009
7 1212 Casino Center Blvd.
8 Las Vegas, NV 89104
9 Phone: (702) 386-9113
10 Fax: (702) 386-9114
11 Attorney for Defendant O'Keefe

12 **NOTICE OF MOTION**


13 TO: STATE OF NEVADA, Plaintiff; and

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

15 YOU WILL PLEASE TAKE NOTICE that the undersigned will bring on the
16 above and foregoing **NOTICE OF MOTION AND MOTION BY DEFENDANT**
17 **O'KEEFE TO SUPPRESS HIS STATEMENTS TO POLICE, OR,**
18 **ALTERNATIVELY, TO PRECLUDE THE STATE FROM INTRODUCING**
19 **PORTIONS OF HIS INTERROGATION** on the 12 day of August, 2010, at
20 the hour of 8:15 Am.m., in Department No. XVII of the above-entitled Court, or as
21 soon thereafter as counsel may be heard.

22 DATED this 2nd day of August, 2010.

23 PALM LAW FIRM, LTD.

24 
25 By: PATRICIA PALM
26 Nevada Bar No. 6009
27 1212 Casino Center Blvd.
28 Las Vegas, NV 89104
(702) 386-9113
Attorney for Defendant O'Keefe

1
2 POINTS AND AUTHORITIES
3 PROCEDURAL HISTORY

4 The State charged Defendant Brian K. O'Keefe with murder with use of a
5 deadly weapon. He entered a plea of not guilty and invoked his right to a
6 speedy trial. The State filed a motion to admit evidence of other crimes, which
7 O'Keefe opposed. The Court ruled that the State could introduce evidence of
8 threats to the alleged victim Victoria Whitmarsh that witness Cheryl Morris
9 claims were made by O'Keefe, and his demonstration of proficiency at killing
10 with knives, which Morris claims to have witnessed. The Court further ruled
11 that the State could introduce certified copies of O'Keefe's prior Judgment of
12 Conviction for felony domestic battery, involving Whitmarsh. Further, if
13 O'Keefe testified, then the State could inquire into his other prior felony
14 convictions. Pursuant to the Court's ruling on his prior Judgments of
15 Conviction, the State is permitted to introduce only the details of when O'Keefe
16 was convicted, in which jurisdiction, and the name of the offenses, and with
17 the felony domestic battery, the fact that Whitmarsh had testified as a State's
18 witness in that case. 3/16/09 TT 2-10.

19 The instant case was tried before this Honorable Court beginning March
20 16, 2009. After five days of trial, on March 20, 2009, the jury returned a
21 verdict finding O'Keefe guilty of second degree murder with use of a deadly
22 weapon. On May 5, 2009, this Court sentenced O'Keefe to 10 to 25 years for
23 second-degree murder and a consecutive 96 to 240 months (8 to 20 years) on
24 the deadly weapon enhancement.

25 O'Keefe timely appealed to the Nevada Supreme Court. After briefing, the
26 Court reversed O'Keefe's conviction, agreeing with him that the district court
27 "erred by giving the State's proposed instruction on second-degree murder
28 because it set forth an alternative theory of second-degree murder, the
charging document did not allege this alternate theory, and no evidence

1 supported this theory." The Court explained, "the State's charging document
2 did not allege that O'Keefe killed the victim while he was committing an
3 unlawful act and the evidence presented at trial did not support this theory of
4 second-degree murder." O'Keefe v. State, NSC Docket No. 53859, Order of
5 Reversal and Remand (April 7, 2010). The Court further stated, "The district
6 court's error in giving this instruction was not harmless because it is not clear
7 beyond a reasonable doubt that a rational juror would have found O'Keefe
8 guilty of second-degree murder absent the error." Id. at 2.

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

10 STATEMENT OF FACTS

11 The prior trial testimony in this case showed that Brian O'Keefe and
12 Victoria Whitmarsh met in a treatment facility in 2001. 3/17/09 TT 18,
13 3/19/09 TT 183-84. They dated and co-habitated off and on and had what
14 could be described as a very tumultuous relationship. 3/19/09 TT 186-90. In
15 2004, O'Keefe was convicted of burglary for entering into the couple's joint
16 dwelling with the intent to commit a crime against Whitmarsh. O'Keefe was
17 sentenced to probation. He was later convicted of felony domestic battery
18 against Whitmarsh, and he went to prison in 2006. 3/18/09 TT 139-40,
19 3/19/09 TT 187-88. Whitmarsh testified as a State's witness in the domestic
20 battery case. 3/18/09 TT 139.

21 When O'Keefe was released from prison in 2007, he met and began a
22 relationship with Cheryl Morris. 3/17/09 TT 10, 3/19/09 TT 189. He would
23 often speak to Morris about his previous relationship with Whitmarsh, and
24 even expressed to her that he still had strong feelings for Whitmarsh. 3/17/09
25 TT 13-14, 37. Morris claimed at trial that O'Keefe said he was upset with
26 Whitmarsh because she put him in prison and he said he wanted to "kill the
27 bitch." 3/17/09 TT 14-17. Morris testified that O'Keefe left at one point to be
28 with Whitmarsh, and then telephoned Morris, asking her to move out of their

1 jointly shared apartment so Whitmarsh could move in. 3/17/09 TT 11. Morris
2 testified that Whitmarsh got on the phone with her during that call and told
3 her she had decided to resume her relationship with O'Keefe. The two of them
4 appeared to be a loving couple and were open about their relationship.
5 3/16/09 TT 259, 3/19/09 TT 18-21, 30-36.

6 At about 10:00 p.m. on the evening of the incident, in November 2008, a
7 neighbor who lived in the apartment below O'Keefe and Whitmarsh heard what
8 she described as thumping and crying noises coming from upstairs. 3/16/09
9 TT 185-88. The noise became so loud that it woke her husband, Charles
10 Toliver, who was in bed next to her. Id. at 186-200. Toliver went upstairs to
11 inquire about the noise and found the door to O'Keefe's apartment open. Id. at
12 206-209. He yelled inside to get the occupants' attention, at which time
13 O'Keefe came out of the bedroom and shouted at Toliver to "come get her!" Id.
14 at 209-10. When Toliver entered the bedroom, he saw Whitmarsh lying on the
15 floor next to the bed and saw blood on the bed covers. Id. at 210. O'Keefe was
16 holding her and saying "baby, baby, wake up, don't do me like this." Id. at
17 210, 224. O'Keefe did not stop Toliver from going in the apartment or
18 otherwise fight with him. Id. at 224. Toliver left the apartment immediately
19 and shouted at a neighbor who was outside to call the police. Id. at 213. He
20 also brought Todd Armbruster, another neighbor, back upstairs. Id. at 214.
21 O'Keefe was still holding Whitmarsh and told Armbruster to get the hell out of
22 there. Id. at 215. Armbruster called 911. Id. at 238. He thought that O'Keefe
23 was drunk. Id. at 240, 245.

24 By this time, shortly after 11:00 p.m., police had arrived on the scene.
25 3/16/09 TT 215, 3/17/09 TT 65. When they entered the bedroom, they found
26 Whitmarsh lying on the floor next to the bed and an unarmed O'Keefe cradling
27 her in his arms and stroking her head. 3/17/09 at 87, 96. The police believed
28 Whitmarsh to be dead and ordered O'Keefe to let go of her, but he refused. Id.

1 at 51-52, 60-61, 87. The officers eventually subdued him with a taser gun
2 and carried him out of the bedroom. Id. 88. O'Keefe was acting agitated, id. at
3 73, the officers testified that he had a strong odor of alcohol on him, and he
4 appeared to be extremely intoxicated. Id. at 127-28, 3/18/09 TT 170-76.
5 Much of his speech was incoherent, but at one point he said that Whitmarsh
6 stabbed herself and he also said that she tried to stab him. 3/17/09 TT 56,
7 85, 92. They arrested him and brought him to the homicide offices. 3/17/09
8 TT 177. Subsequent to his arrest, O'Keefe gave a rambling statement indicating
9 he was not aware of Whitmarsh's death or its cause. 3/18/09 TT 133. Police
10 interrogated him at 1:45 a.m., at which time he was crying, raising his voice,
11 talking to himself, and slurring. Detective Wildemann stated that during the
12 interrogation O'Keefe smelled heavily of alcohol, and when police took
13 photographs of him at about 3:55 a.m., they had to hold him upright to steady
14 him. 3/18/09 TT 146-49. Wildemann said it was pretty obvious that O'Keefe
15 had been drinking, however, law enforcement did not obtain a test for his
16 breath or blood alcohol level either before or after the interrogation. Id.

17 Whitmarsh had also been drinking on the date of the incident, and at the
18 time of her death, her blood alcohol content was 0.24. 3/18/09 TT 94, 117.
19 She died of one stab wound to her side and had bruising on the back of her
20 head. Id. at 93, 103. Medical Examiner Dr. Benjamin testified that
21 Whitmarsh's toxicology screen indicated that she was taking Effexor and that
22 drug should not be taken with alcohol. Id. at 109. Whitmarsh had about three
23 times the target dosage of Effexor in her system. 3/19/09 TT 94-96. The
24 combination of Effexor and alcohol could have caused anxiety, confusion and
25 anger. 3/19/09 TT 95-96. Whitmarsh also had Hepatitis C and advanced
26 Cirrhosis of the liver, which is known to cause bruising with only slight
27 pressure to the body. 3/18/09 TT 93-97. Whitmarsh's body displayed multiple
28 bruises at the time Dr. Benjamin examined her and the bruises were different

1 colors, but she could not say that they were associated with Whitmarsh's death
2 or otherwise say how long ago Whitmarsh sustained the bruises. 3/18/09 TT
3 115. DNA belonging to O'Keefe and to Whitmarsh was found on a knife at the
4 scene. 3/18/09 TT 62-67.

5 O'Keefe testified. 3/19/09 TT 177. He acknowledged his problems with
6 alcohol and described his history with Whitmarsh. Id. at 177-93. He disputed
7 Morris's claim that he said he wanted to kill Whitmarsh, but he acknowledged
8 being angry with her. Id. at 190. It was Whitmarsh who called O'Keefe and
9 initiated their renewed relationship. Id. at 191. He was aware that Whitmarsh
10 had Hepatitis C when she moved into his apartment. Id. at 197-98. In
11 November, 2008, Whitmarsh was stressed because of her financial condition.
12 3/20/09 TT 17. A couple of days before the incident at issue here, Whitmarsh
13 confronted O'Keefe with a knife. Id. at 18-19. She had been drinking and was
14 on medication. Id. O'Keefe had not been drinking that night and was able to
15 diffuse the situation. Id. at 19. On November 5, 2008, O'Keefe learned that he
16 would be hired for a new job and had two glasses of wine to celebrate. Id. at
17 21-24. O'Keefe and Whitmarsh went to the Paris Casino where they both had
18 drinks. Id. at 24-25. They returned home, and she was upset and went
19 upstairs while he reclined in the passenger seat of the car for a period of time.
20 Id. at 26-28. He went upstairs and then smoked outside on a balcony while
21 she was in the bathroom. Id. at 29-30. He then went in the bedroom and saw
22 Whitmarsh coming at him with a knife. Id. at 33. He swung his jacket at her
23 and told her to get back. Id. He knew that she was mad at him about a lot of
24 things. Id. He grabbed the knife, she yanked it and cut his hand. Id. at 33.
25 They struggled for a period of time. Id. at 33-36. During the struggle, she held
26 the knife and fell down, he fell on top of her and then he realized that she was
27 bleeding. Id. at 35-37. He was still drunk at this point and was trying to figure
28 out what happened. Id. at 37. He tried to stop the bleeding and panicked. Id.

1 at 39. He tried taking care of Whitmarsh and asked his neighbor to call
2 someone after the neighbor came into his room. Id. at 40. He became agitated
3 when the neighbor brought another neighbor up to look at Whitmarsh, who
4 was partially undressed, rather than calling the paramedics. Id. at 41. O'Keefe
5 denied hitting or slamming Whitmarsh. Id. at 42. He testified that he did not
6 intentionally kill Whitmarsh, but felt responsible because he drank that night
7 and he should not have done so. Id. at 49.

8 ARGUMENT

9 O'Keefe requests a ruling from this Court suppressing his statements to
10 LVMPD Officer Ballejos and his statements during the recorded interrogation
11 by homicide detectives on the grounds that the admission of these statements
12 at trial would violate his Fifth and Fourteenth Amendment rights pursuant to
13 Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966), as well as his rights
14 to a due process and a fair trial under the 14th Amendment, and the similar
15 provisions of Nevada Constitution, article 1, section 8.

16 The Fifth Amendment to the United States Constitution, made applicable
17 to the states through the Fourteenth Amendment provides that "[n]o person . . .
18 shall be compelled in any criminal case to be a witness against himself." U.S.
19 Const. amend. V. "Under the self-incrimination clause of the Fifth Amendment
20 to the United States Constitution, statements made by a suspect during police
21 interrogation are inadmissible unless the suspect received a prior Miranda
22 warning." Boehm v. State, 113 Nev. 910, 912, 944 P.2d 269, 270 (1997). The
23 Nevada Constitution, article 1, section 8, provides even greater protection than
24 the United States Constitution. See id. at 912-13, 944 P.2d at 270-71
25 (concluding that the Nevada Constitution provides greater protection than the
26 federal constitution on the issue of jailhouse informant interrogation).

27 A suspect's statements during a custodial interrogation are not
28 admissible unless Miranda's procedural requirements have been

1 followed. In particular, the subject of a custodial interrogation
2 must be advised of the right to remain silent, the right to consult
3 with and have an attorney present during any interrogation, and
4 police must inform the suspect that any statements made during
the interrogation can be used as evidence against [him].

5 Dewey v. State, 123 Nev. 483, 490, 169 P.3d 1149, 1153 (2007) (citing
6 Miranda, 384 U.S. at 444, 473-74, 86 S. Ct. 1602).

7 Here, when O'Keefe spoke with Ballejos, he was in handcuffs and
8 awaiting transport to the jail. Thus, he was in custody and entitled to be given
9 his Miranda warnings prior to questioning. He was not given Miranda
10 warnings, and the questions regarding his relationship with Whitmarsh and
11 her identity do not qualify as "routine booking questions" exempt from
12 Miranda's warning requirements.

13 As Justice Rose noted in his dissent in Nika v. State, 113 Nev. 1424,
14 951 P.2d 1047 (1997) (Rose, J., dissenting and addressing error sua sponte):

15 [A] well established line of cases has created an exception to the
16 Miranda rule for "routine booking questions" because such
17 questions are not related to the investigation of the case and serve
18 a legitimate administrative need. Pennsylvania v. Muniz, 496 U.S.
19 582, 601, [] (1990), United States v. Booth, 669 F.2d 1231, 1238
20 (9th Cir. 1981); Franks v. State, [] 486 S.E.2d 594, 597 (Ga. 1997).
21 Routine booking questions are limited to biographical data
22 necessary to complete booking or pretrial services." Muniz, 496
23 U.S. at 601 []; see also Franks, 486 S.E.2d at 597 (stating that
24 basic biographical data is limited to a suspect's name, age,
25 address, educational background, marital status, and any other
26 information required to complete an arrest form).

27 Id. at 1446-47, 951 P.2d 1061-62 (citation omitted). Moreover, due to the
28 potential for abuse by police using the guise of seeking objective or neutral
information, the ultimate test for whether questioning constitutes an
interrogation is "whether, in light of all the circumstances, the police should

1 have known that a question was reasonably likely to elicit an incriminating
2 response." Booth, 669 F.2d at 1238.

3 In this case, the questions about Whitmarsh had nothing to do with
4 administrative booking needs. Moreover, Ballejos knew that O'Keefe was
5 extremely intoxicated and possibly mentally ill. See his use of force report
6 attached hereto as Exhibit A, pp. 2, 4 ("Officer assessment of citizen condition:
7 *Mentally Ill/Under the Influence*"; Sgt. Newberry's comment, "O'Keefe appeared
8 to be extremely intoxicated"). He also knew that O'Keefe had just been tased
9 twice with 50,000 volts of electricity and dropped on his head. 3/17/09 TT,
10 135-36, 141-42. O'Keefe's condition created a likelihood that any questioning
11 about Victoria and his relationship to her was reasonably likely to elicit an
12 incriminating response. Further, there was no exigency which could have
13 possibly justified Ballejos's questioning of O'Keefe without Miranda.
14

15 According to Ballejos's own recorded statement, after AMR checked out
16 Whitmarsh, O'Keefe was moved downstairs, and Ballejos continued to try to
17 talk to him. O'Keefe gave his name, and then gave her name "Victoria
18 Whitmarsh" and said they had been dating for several years. Ballejos never got
19 a specific time frame. Ballejos's Voluntary Statement, p 6 (attached hereto as
20 Exh. B). Ballejos noted that it took about thirty (30) minutes to get the last
21 and first names and birthdates from O'Keefe, and that when they asked for her
22 name, he said Veronica, then he changed it to Victoria. Exh. B, at 10.
23 Ballejos himself must have considered his questioning interrogation because in
24 his statement he notes that he took a class in interrogation recently, and he
25 noted that O'Keefe's facial expressions were not appropriate to his statements
26 expressing sadness. Exh. B, at 9.

27 At the preliminary hearing, Ballejos testified that O'Keefe was put on his
28 belly on the catwalk, and Ballejos tried to speak with him there. PHT 34. He

1 was assigned the duty to interview O'Keefe apparently because he is "a C.I.T.
2 officer" and O'Keefe "was very angry." PHT 34-35. He only talked with O'Keefe
3 on the catwalk a few minutes, then O'Keefe was put downstairs, and Ballejos
4 tried to speak to him again. PHT 35. O'Keefe smelled heavily of alcohol. PHT
5 35. O'Keefe gave the name Veronica instead of Victoria. PHT 37.

6 At trial, Ballejos testified that he was asking O'Keefe for information on
7 Victoria's name, date of birth and social for purposes of assisting her if she
8 went to the hospital. O'Keefe was not answering those questions but
9 responded with statements about the officers being mad at him. Then
10 downstairs he "gave false information about Victoria's actual identity . . . he
11 gave two different names Victoria Whitmore, and Victoria Whitmarsh."
12 3/17/09 TT 122-25.

13 According to dispatch records, medical responders found that Victoria
14 was dead about two (2) minutes after O'Keefe was in custody. Thus, there was
15 no medical emergency which could justify any interrogation of O'Keefe, even
16 assuming that Nevada recognized such an exigency exception to Miranda. See
17 911 Dispatch record, Exh. C, pp. 2 (23:13 "subj's been tazed... taking him into
18 custody at this time"; 23:18 (11:18 p.m.) "confirmed 419" (attached hereto).
19 Other records confirm that the medical responders cleared the scene at 23:20
20 (11:20 p.m.) after finding Whitmarsh dead.

21 By the time Ballejos got the above information from O'Keefe, LMVPD
22 officers knew that Whitmarsh was dead. Thus, using an alleged exigency as a
23 guise to continue questioning O'Keefe was improper. A search warrant would
24 be sought and result in recovery of her identification from her wallet inside her
25 purse at the scene. There was no exigency, and even if there were, it would
26 have justified the search of her purse for reliable identification before any
27 questioning of an extremely drunk and dazed defendant. It is interesting to
28

1 note that the State relied heavily on the questionable evidence from Ballejos
2 related to his questioning of O'Keefe to incriminate O'Keefe and show malice.
3 DDA Graham engaged in the following colloquy with Ballejos:

4 Q. In your duties as an officer, is one of your duties trying
5 to gather information about the descendant [sic] or the injured
6 victim at the scene?

7 A Yes

8 Q Okay. And was there anybody there that you knew of
9 that may have that information for you?

10 A Mr. O'Keefe

11 Q Okay. So if trying to gather information, I assume to
12 assist in the medical assistance of Victoria -

13 A Yes

14 Q And in doing so, did you ask the defendant questions to
15 try to gather that information to help assist you in determining
16 who she was?

17 A I did.

18 Q Okay. You indicated, Officer, that he had given you false
19 information at the beginning.

20 A Yes.

21 Q Did you determine at all whether or not he actually knew
22 Victoria?

23 A He stated they were in a dating relationship for several
24 year. [sic]

25 Q . . . What did you do then when you failed in gathering
26 information from *the only person you knew at the scene that was*
27 *able to give you that information?*

28 [Objection sustained]

Q. *After the defendant indicated that he dated her for over
years, it is safe, I assume, to assume that he would be the one
person that could provide all the necessary information on her
medical, on her identity, et cetera?*

[Objection sustained].

3/17/09 TT 126-29.

The evidence which the State relies on to show malice toward Whitmarsh
was illegally obtained in violation of Miranda and its use violates O'Keefe's due

1 process rights under the state and federal constitutions. In addition, this line
2 of questioning by the prosecutor amounts to presentation of false evidence in
3 violation of due process, since the prosecution knows that Whitmarsh was
4 dead and there was no exigency.

5 The defense seeks suppression of all of O'Keefe's statements to Ballejos
6 during the on the scene non-Mirandized questioning and Ballejos's impressions
7 of O'Keefe's demeanor during that questioning.

8 Moreover, as suppression would be meaningless if not respected, O'Keefe
9 requests that Ballejos be admonished prior to his testimony by the Court not to
10 volunteer testimony that is nonresponsive to questions or is otherwise
11 inadmissible. As was noted at the bench prior to his previous trial testimony,
12 during the preliminary hearing, Ballejos volunteered nonresponsive testimony
13 and had to be admonished by the justice court to answer the questions put to
14 him. See PHT at 24 ll. 18-25, 25 ll. 1-16, 34 ll. 5-15, 34 ll. 24 to 35 ll. 7. At
15 the previous trial, the defense requested the State be required to admonish him
16 prior to his testimony. Nevertheless, during his trial testimony, Ballejos again
17 interjected improper responses to questioning. See, e.g., 3/17/09 TT at 113 ll.
18 2-6, 114 ll. 2-6, 116 ll. 9-15, 122 ll. 15-22, 124 ll. 9-13, 124 ll. 15 to 125 ll.
19 125. When defense counsel is forced to constantly object, it appears as though
20 the defense has something to hide and creates the danger of prejudice to the
21 defense. Thus, O'Keefe requests that this Court admonish this particular
22 witness ahead of time to refrain from volunteering information not responsive
23 to the questions asked in order to prevent a due process violation.

24
25 Next, O'Keefe seeks suppression of his recorded interrogation by
26 homicide detectives.¹ Again, at the time of his arrest, the use of force report

27
28 ¹Along with a courtesy copy of this Motion, O'Keefe is submitting to this Court's
chambers for review a copy of the interrogation transcript and video.

1 indicates that police believed that O'Keefe was extremely intoxicated. The 911
2 call by Todd Armbruster who entered the apartment indicates that he shared
3 this impression. The recording of this call was admitted at the previous trial as
4 State's Exhibit 2. 3/16/09 TT at 238. O'Keefe had also been tased and
5 dropped on his head at approximately 2313 (11:13 p.m.). 3/17/10 TT at 101.
6 Thereafter, O'Keefe was put in a vehicle where he fell asleep. He was
7 transported to the homicide offices and a videotape was started while he sat in
8 an interview room. The video started at 1:23 a.m. 3/17/09 TT 135-36, 141-
9 42, 3/18/10 TT 141. The interrogation started at 1:45 a.m.

10 The Miranda warnings were given as follows:

11 Q Detective: "You have, you have the right to remain silent.
12 Anything you say can be used against you in a court of law. You
13 have the right to the presence of an attorney. If you cannot afford
14 an attorney one will be appointed before questioning. Do you
15 understand these rights, Brian? Do you understand what I read
16 you? You been in the system.

17 A Ah, yes I do but you know what, can you give me the charges?
18 What is the offense?

19 Q You're not being charged with anything.

20 [continued conversation off topic]

21 Q Do you understand what I read to you? You haven't even
22 answered that yet.

23 A My Miranda rights?

24 Q Uh huh.

25 A Hum.

26 Q Is that a yes or a no?

27 A I don't know, maybe you should read it to me one more time.
28 No, I understand 'em detective.

1 The interrogation then continued until 2:01 a.m., then broke until 3:06
2 a.m. The resumed interrogation continued until 3:28 a.m. 3/18/09 TT at 141.
3 CSA Dan Ford came to O'Keefe's DNA and clothing at 3:55 a.m. Id. at 142.

4 The video of the interrogation shows that O'Keefe slurred his words
5 throughout the interrogation, his answers were nonsensical and rambling, he
6 talked to himself and rested on the table and side rail during the break, and he
7 had to be steadied and assisted by officers when he changed clothing and put
8 on the jail booties at the conclusion of the interrogation. Detectives must have
9 suspected that O'Keefe might be too intoxicated to fully understand what was
10 happening, since they sought to take advantage of any confusion by lying to
11 him about Whitmarsh being dead until nearly the end of the interrogation.
12 Even assuming he may have been sobering up during the hour-long break
13 detectives decided to take, they did not re-advise him or seek a new waiver
14 before restarting the interview. Even after the break O'Keefe continued to slur
15 his words and to be unsteady on his feet. The interrogation concluded with
16 Detective Wildemann stating. "You might wanna open the door actually, he
17 might be a fucking nut." Interrogation Transcript, p. 34.

18 The Nevada Supreme Court relied on Miranda to recognize that "a heavy
19 burden rests on the government to demonstrate that the defendant knowingly
20 and intelligently waived his privilege against self-incrimination and his right to
21 . . . counsel. . . . This Court has always set high standards of proof for the
22 waiver of constitutional rights [and these high standards apply] to in-custody
23 interrogation." Anderson v. State, 109 Nev. 1129, 1133, 865 P.2d 318, 320
24 (1995) (quoting Miranda, 384 U.S. at 475, 86 S. Ct. 1602 (citation omitted)).

25 A confession is not voluntary unless it is the product of a rational
26 intellect and a free will. Factors considered in determining voluntariness
27 include the age of the accused, his education and intelligence, any advice
28

1 concerning constitutional rights, the length of the detention, the repeated and
2 prolonged nature of any questioning, the use of physical punishment such as
3 deprivation of food and sleep, and prior experience with law enforcement.
4 Passama v. State, 103 Nev. 212, 213-14, 735 P.2d 321, 322 (1987). The validity
5 of a Miranda rights waiver must be determined through an examination of the
6 particular facts and circumstances of each case. Anderson, 109 Nev. at 1133,
7 865 P.2d at 320.

8 "It is a violation of due process to admit into evidence a statement that is
9 involuntary because of *extreme intoxication*, such as where a defendant was so
10 intoxicated that he was unable to understand the meaning of his comments.
11 State v. Hicks, 649 P.2d 267, 275 (1982). Cf. State v. Rivera, 733 P.2d 1090,
12 1097 (Ariz. 1987) (affirming lower court's ruling admitting statements where
13 that court found defendant was not intoxicated to such a degree to make his
14 statements inadmissible, noting that he smelled of alcohol but *walked*
15 *normally, did not have slurred speech, and was coherent* and able to talk);
16 Anderson, 109 Nev. at 1134, 865 P.2d at 320 (upholding finding of knowing
17 and voluntary waiver where defendant stated he understood, agreed to talk,
18 was responsive to questions, *appeared to be coherent and aware of the*
19 *importance of his statements*, and failed to present any evidence that he was
20 intoxicated or medicated to such an extent that he was unable to understand
21 the meaning of his comments); Falcon v. State, 110 Nev. 530, 874 P.2d 772
22 (1994) (concluding that the State met its burden to show valid waiver where
23 defendant was interviewed 11 ½ hours after the crime was reported and 6 ½
24 hours after arrest, *was not observed to be incoherent or incapable of*
25 *understanding the consequences of what was being said to him*, exhibited none
26 of the classic symptoms of intoxication or being under the influence of
27
28

1 controlled substance, sat up straight in his chair and responded to questions
2 with no difficulty).

3 Here, it was obvious that O'Keefe was still extremely intoxicated at the
4 time of his interrogation. He had been at the time of his arrest, according to
5 Ballejos's use of force report. During the interrogation, he was not rational or
6 responsive to the questioning and at times was incoherent. He slurred his
7 words throughout the interrogation and even at the conclusion of it, he had to
8 be steadied on his feet. The totality of evidence in this case, therefore, shows
9 that O'Keefe did not knowingly and voluntarily waive his Miranda rights, as his
10 decision to speak with detectives was not the result of rational intellect and free
11 will.

12 Even if the Court declines to order suppression of the entire recorded
13 interrogation, portions of it must be as they are improper under the rules of
14 evidence and/or are unfairly prejudicial. The following portions are objected to
15 on this basis:

16 A. P.2, question: "You been in the system before, right? You've talked to
17 police officers before? [improper bad act reference]

18 B. P.3, question: "You were combative," "apparently when the officers came
19 in a struggle ensued, okay, and you . . . kind of, ah, combative is what I
20 was told." [relies on hearsay]

21 C. P.4, response: "could it be because they run my prior record with me and
22 my so called fiancé?" . . . "Domestic violences. What do you think?"
23 [improper bad act reference]

24 D. P.6, response: "I got out of prison, . . . I did all my probation things."
25 [same]

26 E. P.10, response: "I went through this crap before. Fuckin' cops." [same]

27 F. P.12, response: "I already went through this." [same]

1 G. P.13, response: "I was with Victoria and we had a lot of shit happen and I
2 went to jail and I went to prison. I fought my cases. I spent three, four
3 years and I got out. . . I did everything the court said. I satisfied.
4 [same]

5 H. P.14, response: "I went to prison," . . . "after a year and the court order
6 was". . . "if you look in my closet, detective, you'd be surprised the
7 reports, everything I filed, fought the ____ Always supreme court."
8 [improper bad act reference]

9 I. P. 14, response: "If you go into . . . my closet in the spare bedroom, . . .
10 and you open up my files that I filed, they done told me I could be an
11 attorney. Anyway, you'll see the documents that I . . . I requested,
12 sequestered and all that. Did all paperwork. Found DNA. Mixture of
13 DNA. However, Mr. O'Keefe ____ there was a mixture of DNA."
14 [improper bad act reference]

15 J. P.15, question: "Brian, Brian, you're talking about a case from ____."
16 [same]

17 K. P.15, response: "Bucky Buchanan and Sally Loehrer are the judge of the
18 district court. ____ told me ____, Susan...I hate her, the fucking
19 prosecutor. Oh, Ross Miller, Secretary of State, now Secretary of State.
20 I was the last case that he lost." [same]

21 L. P.16, response: "The judge and everybody told me be careful of the
22 woman you fuckin look for, or the woman you want to be with. [same]

23 M. P.17 response: "But let's don't forget some factors that might come up.
24 For instance, my last attorney was Bucky Buchanan." [same]

25 N. P.18, question: "Don't order her around." [improper bad act, opinion,
26 comment, invades province of the jury]
27
28

1 O. P.18, question: "you made statements earlier that she stabbed herself,
2 then you made different statements" [based on hearsay]

3 P. P.24, question: "Stop acting ridiculous." [inappropriate vouching, opinion
4 or comment, invades province of jury]

5 Q. P.25, question: "You're being utterly ridiculous." [same]

6 R. P.27, response: "Did time, 22 months in CCDC." [improper bad act]

7 S. P.29, question: "You're being ridiculous." [inappropriate vouching,
8 opinion or comment]

9 T. P.31, question: "Are you really that shocked? You told Charles that she
10 was dead." [based on hearsay].

11 U. P.32, question: "You know what a nor-uh, a rational person goes hey,
12 officers, they walk out, they greet them and they say come in. They're
13 not combative. They're not incoherent. A normal person wants that
14 person helped. They don't have a stand-off in the apartment for 15
15 minutes."

16 Response: "Detective, a standoff in the apartment? This is the way you're
17 being told?"

18 Question: "Yeah." [relies on hearsay, improper vouching, opinion,
19 comment, invades the province of the jury].

20 V. P.33, question: "You do know. You do know. It's time to accept
21 responsibility for what happened in there. Okay?" [inappropriate
22 vouching, opinion or comment, invades province of jury]

23 W. P.24, question: "No neighbor tells us that. No neighbor tells us that you
24 were screaming somebody call. They had to go up and see you." [relies
25 on hearsay]

26 X. P.24, question: "They said you said she's dead. Come and get her, she's
27 dead." [relies on hearsay].
28

1 Y. P.34, question, "You might wanna open the door actually, he might be a
2 fucking nut." [inappropriate vouching, opinion or comment].

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

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

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

15 Additionally, "[a]bsent certain exceptions, evidence of a person's
16 character or a trait of his character is not admissible for the purpose of proving
17 that he acted in conformity therewith on a particular occasion. Further,
18 evidence of other crimes, wrongs or acts is not admissible to prove the
19 character of a person in order to show that he acted in conformity therewith."
20 Taylor v. State, 109 Nev. 849, 853, 858 P.2d 843, 846 (1993).

21 The Nevada Supreme Court recognizes that the use of character evidence
22 to convict a defendant is extremely disfavored in our criminal justice system.
23 Such evidence is likely to be prejudicial and irrelevant and forces the accused
24 to defend against vague and unsubstantiated charges. It may improperly
25 influence the jury and result in the accused's conviction because the jury
26 believes he is a bad person. The use of such evidence to show a propensity to
27 commit the crime charged is clearly prohibited by the law of this state and is
28 commonly regarded as sufficient ground for reversal on appeal. See Taylor,
109 Nev. at 854, 858 P.2d at 847 (citing Berner v. State, 104 Nev. 695, 696-97,

1 765 P.2d 1144, 1145-46 (1988)). Even where other-act evidence is relevant to a
2 permissible purpose and proven by clear and convincing evidence, a court
3 should still exclude it if its probative value is substantially outweighed by the
4 danger of unfair prejudice. Roever v. State, 114 Nev. 867, 872, 963 P.2d 503,
5 505-06 (1998).

6 Although this Court has ruled that O'Keefe's prior conviction is
7 admissible in the State's case in chief (O'Keefe continues to assert his objection
8 to this evidence), the above statements referring to his prior cases are outside
9 the scope of the court's ruling limiting admissibility to the fact of the conviction
10 versus any underlying details. These statements constitute evidence of
11 inadmissible bad acts. Additionally, multiple mentions of the prior conviction
12 compound the prejudice that naturally attaches to the conviction.
13 Furthermore, O'Keefe's statements regarding police, prosecutors and judges in
14 unrelated matters are irrelevant and prejudicial. In the remaining references
15 above highlighted, detectives improperly reference hearsay and/or give
16 opinions on whether O'Keefe is being ridiculous and inappropriately ordering
17 them around, on what a normal or rational person would have done in the
18 same circumstances, on whether he should take responsibility for what
19 happened, and on whether he is a "fucking nut." These references invade the
20 province of the jury and constitute impermissible vouching, opinion or
21 comment on the evidence.

22 ///

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DATED this 2nd day of August, 2010.


Patricia Palm, Bar No. 6009

Patricia Palm, Bar No. 6009
1212 Casino Center Blvd.
Las Vegas, NV 89104
Phone: (702) 386-9113
Fax: (702) 386-9114

EXHIBIT A

001174

Use of force: SA number: WOP2002-0304 Received Nov 04, 2002

Case number: LLV001105003918

Type of service being performed at time of incident: Extraction

Reason for use-of-force: No Entry By Officer

Officer assessment of citizen condition: Mentally Ill/Under Influence

Citizen was injured: No

Citizen was taken to hospital: No

Citizen was charged/arrested in relation to the incident: Yes Charges:

Officer was injured: No

Officer was taken to hospital: No

Involved citizen:

Brian Kerry Olasefo

Resistance(s):

IO-Eratic
CR-Loud/Screaming
IO-Argumentative
IO-Visibly Upset
CR-Silent Refusal

Injuries/conditions:

2F (Front Torso)

Charges against citizen in relation to the incident:

Homicide

Linked address(s):

Home Address: 5001 El Parque W. C/35 Las Vegas NV 89148 -

Officers involved:

PO-2 Jeremiah J Ballinjo [00406]

Officer current info:

Division: CPD
Bureau: BOAC
Sector:

Snapshot - officer information at time of incident:

Badge/ID no:
Division: CPD
Bureau: BOAC

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Section:
Squad: B442
Shift: 3
Rank/Title: PO-2
Age: 31 Years of employment: 4 Years with unit:
In uniform: Off duty: Off duty employed:

Use(s) Of Force:

TASER: Effective
Less-lethal/CED force-related
Accidental discharge: No
Device was displayed only: No
Arc display: No
Direct/drive stun contact: No
of drive stuns: 0
Injury caused: No
Location of injury:
Projectile/probe contact: Yes
air cartridges used: 1
cycles through probes: 2
dart hits: 2
Total # darts fired: 2
Injury caused: No
Darts penetrated subject's skin: Yes
Subject wearing heavy clothing: No
Location of projectile/probe contact: 2F (Front of Torso)

Officer witnesses:

PO-2 Richard A Fontana [06834]

Officer current info:

Division: CPD
Bureau: BCAC
Section:

PO-2 Sean L Taylor [06718]

Officer current info:

Division: ISD
Bureau: F/PROP
Section: FIN

PO-2 Brian Santarossa [06930]

Officer current info:

Division: VPD
Bureau: SEAC
Section:

PO-2 Todd W Conn [06101]

Officer current info:

Division: SOD
Bureau: TRAFF
Section: TRAF

SGT Daniel A Raspberry [04984]

Officer current info:

001176

Division: CPD
Bureau: DCAC
Section:

Summary:

I was operating as a member of Golden Area Command's Problem Solving Unit when details of a call involving a woman who had been stabbed at the listed address. Upon arrival I made contact with the Crisis Intervention Team (CIT) officer, T. Conn. Officer Conn was inside apartment #35 attempting to call out a male, later identified as Brian O'Keefe 03/14/63 from a back bedroom. O'Keefe indicated the injured woman was in the bedroom and needed medical assistance. Officer Conn calmly and repeatedly asked O'Keefe to come out from the bedroom so paramedics could enter the room and render aid to the female. O'Keefe refused and instead called officers into the room in a challenging manner. "I'm not coming out; you come in here!", said O'Keefe. From experience it felt as if O'Keefe was attempting to bait officers into the bedroom possibly lying in wait.

From our position, Officer Conn, Taylor and I could not see deep enough into the room without exposing ourselves. What was observable to me was the bed which had disturbed sheets covered in a dark red material which I believed to be blood.

Sgt. D. Newberry positioned himself at the base of the bedroom doorway to execute a quick peek around the corner assessing the situation. A four man element consisting of Officers Conn, Taylor, Newberry and I entered the room. I was designated as the non-lethal option officer while the others provided lethal cover. The non-lethal option I carried in my plain clothes capacity was a can of Capsicum. Being of no use in this circumstance, I instead took a Electronic Control Device from Officer Conn.

Upon entry into the bedroom I saw an Asian female adult lying on her back with red material which again I believed to be blood on her torso and the floor where she lay. O'Keefe was laying next to the female partially occluding her body with his own. Officer Conn began to give verbal commands to O'Keefe. O'Keefe responded by shouting over Officer Conn's instructions and there was no indication of compliance.

It was my belief the female was in critical need of medical assistance and O'Keefe was jeopardizing our ability to render such aid. On first sight of availability, I announced my intention to discharge the Electronic Control Device (ECD). Working in a confined space, Officer Taylor was able to apply handcuffs to O'Keefe's left wrist during the initial cycle. O'Keefe continued to struggle and refused to surrender his right arm to Officer Taylor. During his struggling, O'Keefe was smothering the female's body and did not acknowledge my warning in which I clarified continued struggling would force me to cycle the ECD a second time.

O'Keefe tensed his body and was covered in the female's blood. Officers could not control his body movements or his free hand unless O'Keefe was brought into compliance. I cycled the ECD a 2nd time which allowed Officer Taylor to handcuff the right hand. O'Keefe tensed his body once again making it difficult to remove him from the bedroom so we could bring medical into the apartment. Officers T. Hetchett and B. Santarossa assisted by grabbing limbs and O'Keefe was carried out onto the catwalk outside the apartment door.

When/where:

Date/time occurred: Nov 05 2008 23:14

Incident location: 5001 El Parque W, C/35 Las Vegas NV 89148 Precinct: U3
County: City of Las Vegas

Status/assignment information:

Status: Completed

Opened: Assigned: Due: Completed: 03/04/2009

Disposition:

Unit assigned: Un-assigned
Handled at field/unit level: No
Investigator assign: Un-assigned

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Supervisor assign: Unassigned
Source of information: Blue Team Routing

Organizational component(s):

Division: CPD
Bureau: BOAC
Squad: 8442
Shift: 3

BlueTeam chain routing

Nov 06, 2008 03:29: Sent from PO-2 Jeremiah J. Ballojos [08406] to SGT Daniel A Newberry [04986]

Instructions:

For Your Review

Reviewed Nov 06, 2008 03:55

Decision: Approved

Reviewer comment:

On 11/5/2008 I was present when Officer Ballojos took the stated actions. I had designated a four man element to enter the room to protect the life of a critically injured woman. Officer Ballojos was designated as the less then lethal officer and he was given officer Connor's ECD. Officer Ballojos deployed the ECD after repeated commands for O'Keefe to move away and let go of the victim. The suspect refused. After the first ECD cycle O'Keefe quickly retracted his right arm and would not surrender it to officers. Officer Ballojos then delivered the second cycle and O'Keefe was taken into custody.

O'Keefe received to small cuts from the barb impact on his left chest and abdomen. The barbs were pulled free while removing O'Keefe from the bedroom and later found on the carpet of the living room. O'Keefe appeared extremely intoxicated and continued to be erratic and emotional in his behavior. O'Keefe was not asked questions due to his involvement in a possible homicide.

Photo's of O'Keefe's injuries and the probe impacts were taken by ID and downloaded into the DIMS system.

The Taser X26, unknown serial number, was taken by homicide and downloaded at the homicide office. The ECD cartridge, unknown serial number, and barbs were left inside the crime scene and impounded by ID as evidence.

After speaking with the officers involved and witnessing the actions of officer Ballojos I feel that the actions taken were the minimal amount of force necessary to take O'Keefe into custody and were within department policy. I feel the actions taken by Officer Ballojos would stand up to the three pronged test of Graham vs. Connor.

Nov 06, 2008 03:53: Sent from SGT Daniel A Newberry [04986] to LT Theodore R Goodgrass [01634]

Instructions:

ECD Incident from Homicide at 5001 El Parque

001178

Reviewed Nov 15, 2008 21:01

Decision: Approved

Reviewer comment:

Approved as Acting Captain

Nov 17, 2008 : Sent from INVSP William G Sylvia [05144] to LT Theodore R Snodgrass [01634]

Instructions:

Lt., There is no Taser Download attached to this report. Please route it back to Sgt. Dan Newberry. He needs to download the Taser report to his computer. Save it in either Microsoft Image Writer (.tif) or Adobe Acrobat (.pdf), whichever his computer has. Then attach it to the UOF report in one of those formats and route it back through the Chain. Thank you. Lily

Reviewed Nov 17, 2008 16:09

Decision: Not approved
See Narrative

Reviewer comment:

Please download the Taser data:

Nov 17, 2008 16:09: Sent from LT Theodore R Snodgrass [01634] to SGT Daniel A Newberry [04956]

Instructions:

Please download the taser data.

Reviewed Feb 25, 2009 14:22

Decision: Approved

Feb 25, 2009 14:22: Sent from SGT Daniel A Newberry [04956] to ANALYST Melissa L Pugh [09804]

Instructions:

here is the one we discussed back in Jan during training. I will forward the email to you with the corrupted data

Reviewed Feb 25, 2009 15:41

Decision: Approved

Entered via BlueTeam by: PO-2 Jeremiah J Bzilejos [06486] on Nov 06, 2008 at 02:36

001179

EXHIBIT B

001180

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT
PAGE 1

EVENT #: 081105-3918

SPECIFIC CRIME: HOMICIDE

DATE OCCURRED: 11-05-08

TIME OCCURRED: 2301 HRS.

LOCATION OF OCCURRENCE: 5001 EL PARQUE, APT. C35

CITY OF LAS VEGAS

CLARK COUNTY

NAME OF PERSON GIVING STATEMENT: OFFICER JEREMIAH BALLEJOS, P#8406

DOB:

SOCIAL SECURITY #:

RACE:

SEX:

HEIGHT:

WEIGHT:

HAIR:

EYES:

WORK SCHEDULE:

DAYS OFF:

HOME ADDRESS:

HOME PHONE:

WORK ADDRESS:

WORK PHONE:

BEST PLACE TO CONTACT:

BEST TIME TO CONTACT:

The following is the transcription of a tape-recorded interview conducted by DETECTIVE T. IVIE, P#6405, LVMPD HOMICIDE SECTION, on 11-06-08 at 0147 hours.

Q. Operator, this is Detective T. Ivie, P#6405. I'm conducting a taped voluntary statement in reference to an attempt murder with deadly weapon which occurred under Event #081106-3918, at approximately 2301 at 5001 El Parque, ah, Las Vegas, Apartment C35, ah, Las Vegas, Nevada 89149. Ah, person giving the statement is Officer J. Ballejos, B-A-L-L-E-J-O-S, P#8406, call sign 8U77. Today's date is 11-06 of '08, approximately 0147 hours. Ah, this statement is given, ah, at

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT

PAGE 2

EVENT #: 081105-3918

STATEMENT OF: OFFICER JEREMIAH BALLEJOS

5001 El Parque, Las Vegas, Nevada 89146. Officer Ballejos, can you say your first and last name for me?

A. Jeremiah Ballejos.

Q. And were you working tonight as a Las Vegas Metropolitan Police Department officer?

A. Yes.

Q. And how were you, how were you working tonight?

A. Ah, as part of, ah, Bolden Area Command's Problem Solving Unit.

Q. And is that a plainclothes capacity?

A. Yes.

Q. All right. Can you tell me about--a little bit about what happened tonight and how you got the call and, and, ah, what actually transpired?

A. Ah, we were just--we started monitoring the call. It came out as a, uh, like a 911 call. Um, somebody was calling for help, saying that there was a person that, ah, was--had been stabbed and was bleeding, uh, inside the apartment. Ah, so we came to see if we could, ah, help out at all. Um, when we showed up here, well we pulled up behind, ah, fire and there were, ah, several marked units already arrived inside the parking lot. Ah, so we just--we went to the location of the apartment. Ah, there were residents standing outside their doors, ah, trying to find out what was going on, and, ah, officers were already inside the apartment, ah, challenging

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LAS VEGAS METROPOLITAN POLICE DEPARTMENT

VOLUNTARY STATEMENT

PAGE 3

EVENT #: 081105-3918

STATEMENT OF: OFFICER JEREMIAH BALLEJOS

somebody that was in a back bedroom, ah, of the apartment. Um, there was a CIT officer, Officer Conn, that was already, ah, had already established communication, ah, with the, the male voice inside the room. Ah, I'm a CIT also so you know in certain situations it's—if we—if you have that opportunity it's always good to have two CIT officers, ah, so you can coach each other or you know bump heads if you get stuck with, you know you run into a wall. Um, so I stacked up behind him and, ah, tried to see what he could see and listen to what was being said, what was going on, and, ah, from his, you know standing behind him what we could see in the deep, from the deep south end of the living room, ah, looking into this bedroom was, ah, what looked like, ah, a lot of blood. Um, the sheets were, you know, just soaked with a, a red substance. Looked like blood to me. And, ah, could hear the voice coming from, ah, deep into the room, so we didn't have a, a, a line of sight on the person or the, the injured person. Officer Conn was telling, ah, this guy that he needed to come out, ah, so we—you know ____ (unintelligible), he needed to come out so the ambulance and could come in and try to take care of the woman that was in there. Um, it seemed...you know they were hesitant, ah, initially because it almost seemed...you could hear it in his voice, the way he was saying well you come in here. Um, like he was trying to bait, ah, bait us to come in. So, ah, Sgt. Newberry, um, he slowly, slowly worked his way to the north side of the living room, where he got to the, ah, door stop and was able to do a quick peek, ah, to see, um,

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LAS VEGAS METROPOLITAN POLICE DEPARTMENT

VOLUNTARY STATEMENT

PAGE 4

EVENT #: 001105-3918

STATEMENT OF: OFFICER JEREMIAH BALLEJOS

the female and the male lying on the floor, ah, deep in the north part of the bedroom. Um, my non-lethal option was OC spray, which wasn't, was of no use in a case like this. Ah, Officer Conn, ah, gave me his taser instead, so we had a lethal option and a non-lethal option when we stacked up and-to go into the room to get this, ah, guy into custody and remove him from the, ah, bedroom so that the ambu-or AMR could get in there and take care of this person. Ah, so we went in. Ah, Officer Conn was with me and Officer Taylor. Ah, those are the two officers I remember being inside the room with me. Um, we enter. Ah, Officer Conn starts giving him verbal commands. Um, he-as Officer Conn's trying to give these verbal command, ah, Brian is...or the, the guy laying on the floor with the victim, um, is shouting back at him, like almost shouting over him. So you can-just gave the impression that whatever, ah, Officer Conn is saying is just-this guy's not hearing, because he's, he's, he's trying to drawned [sic] it out or his, you know his-whatever he's saying is more important. Um, ____ (unintelligible) looking in, ah, he's kind of, ah, the female's laying on her back. Ah, looked like a Fili...ah, well he says she's Filipino but when I saw her she looked like an Asian female, ah, black hair, um, eyes open, mouth agape, um, wearing a black tee shirt. Ah, from about, ah, her mid-her belly or torso, ah, down, ah, all I saw was skin so it didn't appear, you know just at a glance, that she was-had any clothes on. Uh, on her skin I could see, ah, splotches of, of a red substance which I assumed to be blood. Um, he's, ah...that

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the male is laying next to her, uh, on the floor, like partially covering her body with, with his, ah, left knee and his right leg is down touching—in contact with the floor, um, and he's kind of shielding her it almost seems from us. Um, I continue to give him verbal commands. He's not responding. You know he's actually, ah, pulling on her shirt, saying, ah, don't look at her, don't look at her. Um, we're really worried at this point. I'm worried at this point that whatever condition she's in the longer we wait the worse it's gonna be. Ah, so when I see an opportunity to, ah, he exposes his torso, ah, I fire with the, ah, ECD, um, a prong going into his, ah, upper torso, one going into his lower torso. Ah, Officer Taylor steps in, is able to get his, ah, left hand behind his back and in a handcuff, while the, ah, the ECD cycles. Um, but he still has his right hand free. After the cycle completes and he starts a hand around, won't give it up, ah, as more verbal commands are being given, he's warned that, ah, you know he's gonna be tased again. Ah, he's not listening to those commands, ah, won't give his hand up and we still don't have him under control. She's, ah, you know if she's injured she's still bleeding. So, ah, I cycle the, the ECD again to allow Officer Taylor to take control of that hand. He gets both hands handcuffed. Um, Officers, ah, Fonbuena and I don't know the officer's name, step in to the room at that point to grab hold of ankles and, ah, the other two officers grab hold of the arms and he's moved out into the living room, ah, from the bedroom. Get up, ah, he's set down on the carpet where they can get a better hold of him and he's removed

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entirely from the, ah, 'cause where he is, right in that living room, AMR can't move their, ah, all their equipment or themselves. He's just right in the line of, ah, of that main pathway. So he's removed entirely out into the catwalk, ah, put there, down there on his belly. Um, try and get information from him. Ah, his name, her name. Ah, trying to tell him that, you know, we need her birth date and stuff, ah, blood type and all that so the paramedics can work on him. Ah, he's not responding to me at first, did not respond to me at first. Ah, starts crying a little bit and stops and he says well you guys are mad at me, aren't you and I said well what do you mean? He said well I didn't, I didn't do this, man, she tried to stab me. And, ah, you know just kinda left it at that. Um, AMR went up right immediately after we'd gotten him out-out, ah, you know within a couple minutes of after we got him out of the apartment. I don't know what the outcome or when she was pronounced or anything like that. Ah, he was moved downstairs here where I continued to try and talk to him. He, ah, got down here and told me his name was Brian O'Keefe. Her name was Victoria, ah, Whitmarsh and they had been dating for, ah, several years. I never got a specific time frame from him. Um, but that's about it. I don't know what, ah...

Q. Okay. ____ (unintelligible), ah, there's just a few questions. Basically you're on patrol tonight as a unmarked unit. You hear the call come out as, as like a 911 disconnect, 404A, right?

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A. As it—it came out as a 404.

Q. Okay.

A. And—but the details was of a person who had been stabbed, was bleeding.

Q. And that's here at 5001 El Parque?

A. Yes.

Q. Apartment C35?

A. Uh huh.

Q. All right. You get here, there's other patrol officers already here. You arrive here with, ah, Sgt. Newberry and Officer Conn?

A. Ah, Sgt. Newberry and Officer Taylor.

Q. Officer Taylor. Excuse me. At which point you go into the apartment or go up to the apartment, there are other officers already inside the apartment and they're challenging the apartment and there's a male voice that's not complying. Um, at some point you guys do make entry and go into the apartment and into the back bedrooms where you see, ah, can you describe that to me, what you see in that back bedroom a little bit better?

A. Yeah, when we get, ah, up the stairs and to the, ah, the doorway, the door's open. Ah, the living room, ah, all the lights are off and so you're, you're vision is _____ drawn directly or immediately back to this bedroom with the lights on. Ah, white sheets, ah, just soaked in a real, uh, a red material [sic], um, with like I said, uh, I.

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I seen just from experience was just looked like blood to me, ah, lots of blood. Um, and so we, you know we try and cut the pie and get, ah, a best line of sights so you can look deep into the bedroom as you can, uh, from where Officer Conn was when we arrived, but you just had no....we could...had no line of sight of him, just the voice telling us, um, not responding to the request from Officer Conn to come out but, ah, saying well you come in here, you come in here. And it was just creepy the way he was saying it. Uh, you know ____ (unintelligible) like well let's see what we can do to—if we can formulate some type of plan but not—we're not just gonna go walking in there 'cause the, of the, ah, possibilities. But, ah...

Q. Okay. Once you make entry into that back bedroom you see, you know, you take this guy who verbally identified himself later as Brian.

A. Yeah.

Q. Is there anybody else besides him and the female laying there on the floor, is there anybody else in the apartment that you found hiding or anything like that?

A. No.

Q. No one else was located?

A. No.

Q. And then as, basically this, this white male he's un—uncooperative, he, ah, the ECD is used to take him into custody, he's then rushed out, ah, medical comes up and

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you start talking to him and he makes an utterance that you—that officers are mad at him and that the female came at him with a knife.

A. Right.

Q. And that they are in some sort of dating relationship for many years and that type of stuff.

A. Yes.

Q. Okay. Is there anything else that you can think of that might be pertinent that I have not asked you or that you may think is pertinent to the, to this investigation?

A. Um, like I said, I thought it was strange that, ah, you know that it kind of...I'd taken this class interviewing _____ (unintelligible) interviewing interrogation and, ah, through that training we just kinda looked at, um, people's facial expressions not matching their, uh, the emotion that they're trying to sell to you and, ah, he seemed like, you know just his facial features were, which were like anger or, ah, you know, he was trying...um, didn't match the emotion of, ah, of sadness that he was trying to portray through his voice and you know it just seemed weird to me that, you know, ah, for somebody that he's in this relationship to—for so long to of killed themselves [sic], um, or he—when we moved him downstairs he basically went, ah, sat in the back of the patrol car and fell asleep. I just thought that was strange. But, um...

Q. And this Brian, this white male, do you know if he was intoxicated or not?

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- A. Ah, he smelled real heavily of, ah, alcohol.
- Q. Did you ever ask him if he had anything to drink?
- A. No, he just...really hard to talk to. Um, and to solicit some of that infor--you know just a small piece of information we got from him, ah, was over, you know, a 30 minute period, to get the first and last name, birth dates. Ah, when we asked, when we actually asked, ah, what the females name was, the first name he gave us was Veronica, um, and then you know later, ah, when we tried to confirm it he said well okay, it's Victoria.
- Q. Is there anything else you can think ____ (unintelligible)?
- A. No, no.
- Q. Operator, this concludes this taped voluntary statement. Again, today's date is November 6, 2008, approximately 0203 hours. Thank you.

THIS VOLUNTARY STATEMENT WAS COMPLETED AT 5001 EI PARQUE, ON THE 6th DAY OF NOVEMBER, 2008 AT 0203 HOURS.

TI:sd
08V1276

001190

EXHIBIT C

001191

HEREBY CERTIFY that this is a full,
true and correct copy of the original
on file with the Las Vegas Metropolitan
Police Department.

EVENT SEARCH

RESEARCH ASSISTANT, Communications Bureau

EVT : L4V081105003916
LOC : CASA SALVATORE
ADDR: 5001 EL PARQUE AVE
CADD: APT 2
MAP : 0252158
P/U : 104
DATE: 08/11/05
911 : Y

TYPE: 420
BLDG: C
XST : 2001 S UNICATON BLVD
CRIM: ROBIN/NBR
S/B : U3
OFF1: 6683
INTT: 21:01:34
CLER: 21:21:58

PR1 : 0
APT : 35
CITY : LV
CPHON: 7621401
SEA : J210
OFF2 :
ARRA : 12
DISP : L

23:02:2971 EU	IN FRM.	TO-LV8480	28	LV8480
23:02:2975 CM	2ND HAND F/ ANOTHER NBR... FEM LAYING INS APT & BLOOD EVERYWHERE... UNK NS		28	LV8480
23:02:2985 CM	AT OCC'D... LL		28	LV8480
23:02:2995 CM	Original Location : CASA SALVATORE		28	LV8480
23:01:1587 CM	28// NBR FOUND DOOR WIDE OPEN & FEM LAYING ON GROUND INS// UNK LOC OF N		28	LV8480
23:03:1555 CM	BR NOW 2103HRS		28	LV8480
23:03:1931 US 104	USAS5001 EL PARQUE AVE	404	22	LV8363
23:03:1948 US 106	USAS5001 EL PARQUE AVE	404	22	LV8363
23:03:1970 EV 104	PU FRM-	TO-LV/104	22	LV8363
23:03:2122 US 104	USAS5001 EL PARQUE AVE	404	00	LV8363
23:03:4058 US 706	USAS5001 EL PARQUE AVE	404	22	LV8363
23:03:4153 US 706	USAS5001 EL PARQUE AVE	404	00	LV8250
23:03:4765 CM	706 NBR CODE /2303HRS		22	LV8363
23:03:5584 EU 104	CA FRM-16:07:29N,115:12:27W	TO-APT 2	28	LV8480
23:03:5598 US 101	USAS5001 EL PARQUE AVE	404	22	LV8363
23:04:0065 CM	101 NBR CODE /2303HRS		22	LV8363
23:04:0190 CM	28// NBR "GREG" STILL INS APT., NFI/NFU	2304HRS	28	LV8480
23:04:0427 EU 104	BI FRM-	TO-C	28	LV8480
23:04:0869 EU 104	CM FRM-CRICKET 658-882-9201	TO-ROBIN/NBR	28	LV8480
23:04:1122 US 703	USAS5001 EL PARQUE AVE	404	22	LV8363
23:04:2107 US 106	USAS5001 EL PARQUE AVE	404	00	LV12996
23:04:2834 EU 104	PA FRM-N	TO-Y	28	LV8480
23:04:4527 CM	28// NBR NBR/HOLDING SHIRT 2304HRS		28	LV8480
23:04:4802 US 103	USAS5001 EL PARQUE AVE	404	22	LV8363
23:05:1169 US 103	USAS5001 EL PARQUE AVE	404	22	LV8363
23:05:2344 CM	103 NBR CODE /2305HRS		22	LV8363
23:05:2807 US 106	USAS5001 EL PARQUE AVE	404	22	LV8363
23:05:3017 CM	28/ NBR PREV FOR APT 2305HRS		28	LV8480
23:05:4288 US 706	USAS5001 EL PARQUE AVE	404	00	LV8250
23:05:4587 CM	43/ NBR F/ ANOT MALE IN COMPLEX, NBR TOLD THIS PR IS 417 RELATED,	2305	43	LV7287
23:05:4596 CM	NBR		43	LV7287
23:06:0144 US 101	USAS5001 EL PARQUE AVE	404	00	LV8101
23:06:0521 US 102	USAS5001 EL PARQUE AVE	404	22	LV8363
23:06:0524 EV 102	USAS5001 EL PARQUE AVE	404	22	LV8363
23:06:2127 CM	43/ 16 BROWN MALE/FEM INSIDE PER NBR BEEN 415'G F/ AT LEAST 30 MINS		43	LV7287
23:06:2383 CM	1034 CHED ARVR /2306HRS		22	LV8363

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23:06:5067 CM	3055/ MALE INSIDE TELLING XFXO TO COME OUT OF BEDROOM /2306HRS		22	LV8363
23:06:5322 CM	43/ THIS PR ADV'D SUBJ LIVES IN APT 18 BRIAN, EXTREMELY 408, WOULD NOT L		43	LV7287
23:06:5331 CM	RY NERS INTO APT TO CHK ON FEM 2306HRS		43	LV7287
23:07:0606 CM	43/ OFCRS W/ FEM, MALE PR HUNG UP 2307HRS		43	LV7287
23:07:0943 US 718	USARS001 EL PARQUE AVE	404	22	LV8363
23:07:1178 US 718	USARS001 EL PARQUE AVE	404	22	LV8363
23:07:2102 US 103	USARS001 EL PARQUE AVE	404	00	LV13016
23:07:3382 US 104	USARS001 EL PARQUE AVE	404	00	LV6683
23:07:4243 CM	706 MALE IS BARRICADED // GIVING VERBAL COMMANDS TO HIM NOW /2307HRS		22	LV8363
23:07:4458 US 718	USARS001 EL PARQUE AVE	404	00	LV6234
23:07:5471 US 765	USARS001 EL PARQUE AVE	404	22	LV8363
23:08:0461 CM	765/ SHUT DOWN ANY UNIT ROLLING CODE /2308HRS		23	LV8363
23:08:4537 US 106	USARS001 EL PARQUE AVE	404	00	LV12586
23:09:1950 CM	3055/ MALE ADVG FEM STABBED HERSELF BUT HE'S NOT COOPERATING WITH UNITS		22	LV8363
23:09:1958 CM	/2309HRS		22	LV8363
23:09:4173 CM	765/ SUBJ INSIDE CLAIMING THAT FEM STABBED HERSELF AND THAT SHE IS 419 A		22	LV8363
23:09:4382 CM	T THIS TIME /2309HRS		22	LV8363
23:09:4728 US 104	USARS001 EL PARQUE AVE	404	22	LV8363
23:09:5144 US 3044	USARS001 EL PARQUE AVE	404	22	LV8363
23:10:0073 CM	102 HAS ENR CODE # 2307HRS		22	LV8363
23:10:0618 CM	104 SHUT DOWN CODE @ 2307HRS		22	LV8363
23:10:1123 US 719	USARS001 EL PARQUE AVE	404	22	LV8363
23:10:5757 CM	27 / FD ADV'D REQ C/4 FOR MED 2310HRS		27	LV9461
23:11:0615 CM	22/SUPR ADV'D OF POSS 419 UPDATE /2311HRS		22	LV8363
23:11:2714 CM	102 ENR FOR CIT IF NEEDED VIA AN 2308HRS		22	LV8363
23:11:2235 US 30	USARS001 EL PARQUE AVE	404	22	LV8363
23:11:3674 US 105	USARS001 EL PARQUE AVE	404	22	LV8363
23:12:1792 US 105	USARS001 EL PARQUE AVE	404	00	LV9312
23:13:0238 US 30	USARS001 EL PARQUE AVE	404	00	LV9837
23:13:2605 CM	703/ SUBJ'S BEEN TAIED...TAKING HIM INTO CUSTODY AT THIS TIME /2313HRS		22	LV8363
23:13:4196 CM	13/367WC/DOC NOTPAGED 2315 HRS		13	LV6157
23:13:5442 CM	703 NEED MED TO EXPEDITE //KEEP RED FOR NOW /2313HRS		22	LV8363
23:14:5211 US 8077	USARS001 EL PARQUE AVE	404	22	LV8363
23:15:0217 CM	8077 C/4 TO LIFT RED // STANDING BY FOR MEDICAL /2314HRS		22	LV8363
23:15:1767 US VC31	USARS001 EL PARQUE AVE	404	31	LV7478
23:15:3132 US 738	USARS001 EL PARQUE AVE	404	00	LV6234
23:15:4757 US 724	USARS001 EL PARQUE AVE	404	22	LV8363
23:16:1658 US AIR4	USARS001 EL PARQUE AVE	404	12	LV9740
23:16:1665 US 80	USARS001 EL PARQUE AVE	404	43	LV7287
23:16:1673 DP AIR4	USARS001 EL PARQUE AVE	404	212	LV9740
23:16:1678 DP 80	USARS001 EL PARQUE AVE	404	242	LV7287
23:17:3723 CM	719/ ADV MC THAT HAD TO TAKE GUSD THAT WAS WITH FEM AND APPROX 800 MAY GO		22	LV8363
23:17:3731 CM	419 ... STILL WAITING ON MED /2317HRS		22	LV8363
23:17:5287 US AIR4	USCL	404	22	LV8363
23:17:5301 DP AIR4	USCL	404	222	LV8363
23:18:3436 CM	765/ CONF'D 419 /420 /2318HRS		22	LV8363
23:18:5220 CM	22/SUPR ADV'D VIA GROUP AM OF UPDATE /2318HRS		22	LV8363
23:19:0401 US 724	USARS001 EL PARQUE AVE	404	00	LV6236
23:20:1193 US 367WC	USARS001 EL PARQUE AVE	404	00	LV6236
23:21:4091 US 367WC	USARS001 EL PARQUE AVE	404	00	LV6236
23:22:1515 CM	REQ ID 2322			

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RESEARCH ASSISTANT, Communications Bureau

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23:22:2308 CM	102 STARTING INCIDENT LOG /2322HRS		22	LV8363
23:23:0770 CM	823/367MC VC MC AND PIO CASSELL NOTEPAGED 2323		23	LV8364
23:23:4918 US 1M4	USAR5001 EL PARQUE AVE	404	22	LV8363
23:23:5226 US 3U55	USAR5001 EL PARQUE AVE	404	22	LV8363
23:23:5238 US 3U66	USAR5001 EL PARQUE AVE	404	22	LV8363
23:24:0706 US 1M4	USCL	404	00	LV9660
23:25:1320 US MC1	USAR5001 EL PARQUE AVE	404	22	LV8363
23:25:3624 US MCS	USAR5001 EL PARQUE AVE	404	22	LV8363
23:25:4486 US MC2	USAR5001 EL PARQUE AVE	404	22	LV8363
23:26:1749 US 1U5	UR	404	22	LV8363
23:26:2578 US 3U66	USCL	404	22	LV8363
23:26:5704 CM	13/ BILL CASSELL PIO ACK LL 2326 HRS	404	00	LV8363
23:27:5623 US MC3	USAR5001 EL PARQUE AVE	404	13	LV6157
23:28:4126 US MCS	USAR5001 EL PARQUE AVE	404	00	LV2395
23:28:5505 US 367MC	USERUnit Transferred to LVBA	404	00	LV6817
23:29:1191 US MC2	USAR5001 EL PARQUE AVE	404	22	LV8363
23:29:1330 US VC12	USAR5001 EL PARQUE AVE	404	00	LV8315
23:30:1087 US 367MC	USAR5001 EL PARQUE AVE	404	00	LV8335
23:30:3701 US 567MC	USAR5001 EL PARQUE AVE	404	00	LV4926
23:31:0450 US 1U2	USAR5001 EL PARQUE AVE	404	22	LV8363
23:31:0466 DP 1U2	USAR5001 EL PARQUE AVE	404	22	LV8363
23:31:4801 US 9U	USAR5001 EL PARQUE AVE	404	22	LV8363
23:31:4812 DP 8U	USAR5001 EL PARQUE AVE	404	22	LV8363
23:31:5192 US 765	USCL	404	22	LV8363
23:32:0540 US 7U3	USAR5001 EL PARQUE AVE	404	22	LV8363
23:32:5397 US 3U44	USCL	404	00	LV9635
23:35:5866 CM	724/ STAGING AREA/CP IS SOUTH PLOT OF 5001 EL PARQUE AVE /2335HRS	404	22	LV8363
23:41:5929 US 1U	UR	404	22	LV8363
23:43:2969 US 672VC	USAR5001 EL PARQUE AVE	404	46	LV8477
23:44:2794 US MC5	USAR5001 EL PARQUE AVE	404	00	LV6817
23:44:2912 US MCS	USAR5001 EL PARQUE AVE	404	00	LV6817
23:44:3389 US MC2	USAR5001 EL PARQUE AVE	404	00	LV7585
23:45:0700 US 367MC	USAR5001 EL PARQUE AVE	404	00	LV4926
23:55:5116 US 672VC	USAR5001 EL PARQUE AVE	404	22	LV8363
23:57:2777 US MC1	USAR5001 EL PARQUE AVE	404	22	LV8363
00:02:5835 CM	22/SGT SHOENAKER ACK LL 0002 HRS		13	LV6157
00:08:2635 US VC12	USAR5001 EL PARQUE AVE	404	00	LV8335
00:12:2946 US 567MC	USCL	404	00	LV4040
00:13:0930 US MC2	USCL	404	00	LV7585
00:14:0051 US C18	USAR5001 EL PARQUE AVE	404	35	LV3767
00:14:0062 DP C18	USAR5001 EL PARQUE AVE	404	235	LV3767
00:14:1090 US 315H	USAR5001 EL PARQUE AVE	404	15	LV3767
00:18:0000 US 503H	USAR5001 EL PARQUE AVE	404	35	LV3264
00:18:2246 US C18	USAR5001 EL PARQUE AVE	404	22	LV8363
00:18:2265 DP C18	USAR5001 EL PARQUE AVE	404	222	LV8363
00:20:1630 US HD3	USAR5001 EL PARQUE AVE	404	01	LV8681
00:22:0632 US CS5	USAR5001 EL PARQUE AVE	404	35	LV9264
00:22:5625 US H19	USAR5001 EL PARQUE AVE	404	35	LV9264
00:23:0323 US U12	USAR5001 EL PARQUE AVE	404	15	LV5512
00:23:3886 US H08	USAR5001 EL PARQUE AVE	404	35	LV9264
00:23:5378 US H08	USAR5001 EL PARQUE AVE	404	22	LV8363

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RESEARCH ASSISTANT, Communications Bureau

001194

00:23:5769 US C95 USAR5001 EL PARQUE AVE
 00:24:0016 US H23 USAR5001 EL PARQUE AVE
 00:27:4577 US VC14 USAR5001 EL PARQUE AVE
 00:27:4603 US VC15 USAR5001 EL PARQUE AVE
 00:27:4854 US VC14 USCL
 00:27:4962 US VC15 USCL
 00:28:1220 US C95 USAR5001 EL PARQUE AVE
 00:29:0443 US 501H USAR5001 EL PARQUE AVE
 00:29:5773 US VC11 USAR5001 EL PARQUE AVE
 00:29:5916 US VC11 USCL
 00:32:1397 US 718 USCL
 00:34:1728 US C18 USAR5001 EL PARQUE AVE
 00:34:1737 DP C18 USAR5001 EL PARQUE AVE
 00:34:2425 US H12 USAR5001 EL PARQUE AVE
 00:36:1839 US H26 USAR5001 EL PARQUE AVE
 00:38:4512 US H19 USAR5001 EL PARQUE AVE
 00:39:4746 US H23 USAR5001 EL PARQUE AVE
 00:42:4593 US H08 USAR5001 EL PARQUE AVE
 00:43:3411 US 102 UK
 00:43:3427 DP 102 UK
 00:44:5516 US C95 USAR5001 EL PARQUE AVE
 00:50:4755 US H26 USAR5001 EL PARQUE AVE
 00:55:3983 US 115H USAR5001 EL PARQUE AVE
 00:57:0468 US VC12 USCL
 01:00:5296 US MCS USCL
 01:07:5417 US 724 USCL
 01:08:5250 US 106 USARBUREAU
 01:11:5709 US 106 USARBUREAU
 01:12:0972 US 106 USAC420 OFFICE
 01:12:0982 US 706 USAC420 OFFICE
 01:25:0644 US 8079 USAR5001 EL PARQUE AVE
 01:26:1051 US 672VC USCL
 01:31:2022 US MC1 USCL
 01:31:2024 US MC1 D FBM
 01:31:2031 CM H-UNIT8
 01:31:2037 US MC1 TVCL404 420
 01:58:1333 US 1055 USARBAC
 02:02:4474 US 80 USCL
 02:03:4487 DP 80 USCL
 02:07:1882 US 1055 USCL
 02:21:5095 US 8077 USARBAC
 02:21:5109 US 719 USARBAC
 02:21:5113 US 8079 USARBAC
 02:32:1060 US 115H USCL
 02:41:4016 US 703 USCL
 02:50:2619 US 103 USCL
 03:03:0312 US 367MC USCL
 03:35:2756 US 8079 USCL
 03:35:4299 US 8077 USCL
 04:10:0265 US C40 USAR5001 EL PARQUE AVE
 04:57:0525 US C40 USCL

TO-C

404 22 LV8361
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I HEREBY CERTIFY that this is a full,
 true and correct copy of the original
 on file with the Las Vegas Metropolitan
 Police Department.

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05:09:4192 US 106	USCBODC			
05:01:0938 US 706	USCBODC	404		00 LV12994
05:10:1423 US 719	USCL	404		00 LV8250
05:10:1436 US 719	D FRM-	404		06 LV7811
05:11:2894 US 106	USABODC		TO-K	I 06 LV7811
05:29:4492 US 706	USCL	404		00 LV12996
05:51:0906 CM	106 VIA AM REP HAZMAT TO CLEAN HIS VEH AT BOLDEN 421C BLOC	404		00 LV8250
05:51:3263 CM	ABSOLUTE DISCON RMR ETA 30 0551HRS			32 LV2357
05:53:4807 CM	21//CORRECTION 106 REQ HAZMAT AT BAC AT 0700 FOR HIS VEH...ABSOLUTE DISC			22 LV2357
05:53:4816 CM	ON ADV'D OF 0700 TIME 0551HRS			22 LV2357
05:55:5005 US 106	USCL			22 LV2357
05:59:5017 US 106	D FRM-	404		00 LV12996
06:21:5303 US 503H	USACOFFICE		TO-A	I 00 LV12996
06:22:4813 US 101	USCL	404		35 LV4258
06:57:5210 CM	REQ DAY RELIEF	404		00 LV8101
07:09:5448 US 2U11	USAS5001 EL PARQUE AVE			22 LV4803
07:09:5466 DP 2U11	USAS5001 EL PARQUE AVE	420		22 LV4803
07:11:4190 US B19	USCL	420		232 LV4803
07:25:4676 US 2U13	USAS5001 EL PARQUE AVE	404		35 LV4258
07:25:4696 DP 2U13	USAS5001 EL PARQUE AVE	420		00 LV9490
07:29:5558 EU 104	D FRM-	420		200 LV9490
07:29:5564 CM	HOMOCIDE		TO-L	I 00 LV6683
07:29:5623 US 104	USCL			00 LV6683
07:30:1361 US 2U13	USCL	404		00 LV6683
07:34:1374 DP 2U13	USCL	420		00 LV9490
07:36:2031 US H26	USCL	420		200 LV9490
07:48:2913 US CFS	USCL	404		35 LV4258
08:25:1574 US C18	USCL	404		00 LV2711
08:25:1593 DP C18	USCL	404		35 LV7288
11:12:2506 US H23	USCL	404		235 LV7288
12:18:0573 CM	CR AT OFFC	404		35 LV4803
14:09:5925 EU 104	AR FRM-BA		TO-L2	35 LV4803
16:48:4410 US H12	USCL			22 LV9261
19:02:2797 US H08	USCL	404		35 LV7275
22:23:5836 US 503H	USCL	404		35 LV8358
		404		18 LV8623

I HEREBY CERTIFY that this is a full,
true and correct copy of the original
on file with the Las Vegas Metropolitan
Police Department.

RESEARCH ASSISTANT, Communications Bureau

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DECLARATION OF RESEARCH ASSISTANT, CUSTODIAN OF RECORDS CONCERNING
LAS VEGAS METROPOLITAN POLICE DEPARTMENT RECORDINGS OF EMERGENCY
"911" CALLS (TAPE AND COMPUTERIZED MATERIALS)

I, Leslie Loretto, hereby declare under the penalty of perjury:

1. That I am an employee of the Las Vegas Metropolitan Police Department, Las Vegas, Nevada and in such capacity, I act as the Custodian of Records for the records and recordings of 911 calls made to the Las Vegas Metropolitan Police Department.

2. That all calls made to 911 are recorded by the Las Vegas Metropolitan Police Department onto DVDs and into computerized records which materials are maintained for approximately one year.

3. That I have examined the recordings made by the Las Vegas Metropolitan Police Department and that I have discovered that on November 5, 2008 a call was made in reference to an event at 5001 El Parque Ave at or near 2301 hours.

4. That I have made an exact, true, accurate and complete reproduction of the above described call to 911 onto a CD and have printed an exact, true, accurate, and complete reproduction of the computerized information concerning this call. That I have written the Event Number 081105003918 onto that CD. I then sealed that CD into an envelope, attached this declaration and the computerized information concerning that call to that envelope and wrote my name and the same Event Number on the outside of that envelope.

5. That the original recording of the call (DVD and computer entries) by the Las Vegas Metropolitan Police Department was made at the time the call was received by the Las Vegas Metropolitan Police Department and that the recording was made by a person with knowledge in the course of a regularly conducted business activity of the Declarant or of the office of the Declarant.

6. That such recording of the 911 calls made to the Las Vegas Metropolitan Police Department are a regular practice of the Las Vegas Metropolitan Police Department and are part of the activities of the Las Vegas Metropolitan Police Department and the recording of the 911 calls are matters observed pursuant to a duty imposed by law.

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

Executed on: November 19, 2008

Signature: 

CUSTODIAN OF RECORDS

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DECLARATION OF RESEARCH ASSISTANT, CUSTODIAN OF RECORDS CONCERNING
LAS VEGAS METROPOLITAN POLICE DEPARTMENT RECORDINGS OF RADIO TRAFFIC
(TAPE AND COMPUTERIZED MATERIALS)

I, Leslie Loretto, hereby declare under the penalty of perjury:

1. That I am an employee of the Las Vegas Metropolitan Police Department, Las Vegas, Nevada and in such capacity, I act as the Custodian of Records for the records and recordings of 911 and 311 calls made to and radio tapes recorded by the Las Vegas Metropolitan Police Department.

2. That all calls made to 911 are recorded by the Las Vegas Metropolitan Police Department onto DVDs and into computerized records which materials are maintained for approximately one year.

3. That I have examined the recordings made by the Las Vegas Metropolitan Police Department and that I have discovered that on November 5, 2008 radio traffic was given in reference to an event at 5001 El Parque Ave at or near 2301 hours.

4. That I have made an exact, true, accurate and complete reproduction of the above described radio traffic onto a CD and have printed an exact, true, accurate, and complete reproduction of the computerized information concerning this call. That I have written the Event Number 081105003918 onto that CD. I then sealed that CD into an envelope, attached this declaration and the computerized information concerning that radio traffic to that envelope and wrote my name and the same Event Number on the outside of that envelope.

5. That the original recording of the radio traffic (DVD and computer entries) by the Las Vegas Metropolitan Police Department was made at the time the call was received by the Las Vegas Metropolitan Police Department and that the recording was made by a person with knowledge in the course of a regularly conducted business activity of the Declarant or of the office of the Declarant.

6. That such recording of the radio traffic transmitted on the Las Vegas Metropolitan Police Department radio channels are a regular practice of the Las Vegas Metropolitan Police Department and are part of the activities of the Las Vegas Metropolitan Police Department and the recording of the radio traffic are matters observed pursuant to a duty imposed by law.

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

Executed on: November 19, 2008

Signature: 

CUSTODIAN OF RECORDS

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ORIGINAL

FILED

AUG 02 2010

John J. McCon
CLERK OF COURT

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Email: Patricia.palm@palmfirm.com
Attorney for Brian O'Keefe

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

VS.

BRIAN K. O'KEEFE,

Defendant.

CASE NO: C250630

DEPT NO. XVII

DATE:

TIME:

08C250630
NOTM
Notice of Motion
875638



**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**

COMES NOW Defendant, Brian K. O'Keefe, by and through his attorney,
Patricia Palm of Palm Law Firm, Ltd., and hereby moves this Honorable Court
for an order allowing O'Keefe to present evidence that in at least one other
recent homicide case, LVMPD Homicide Detectives did obtain blood/breath
alcohol testing of the murder suspect.

This Motion is made and based upon the record in this case, including
the papers and pleadings on file herein, the Constitutions of the United States
and the State of Nevada, the points and authorities set forth below, and any
argument of

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FILED

AUG 02 2010

John J. McCon
CLERK OF COURT

001199

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

3 Dated this 20th day of July, 2010.

4 PALM LAW OFFICE

5 

6 Patricia Palm, Bar No. 6009
7 1212 Casino Center Blvd.
8 Las Vegas, NV 89104
9 Phone: (702) 386-9113
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POINTS AND AUTHORITIES
PROCEDURAL HISTORY

The State charged Defendant Brian K. O'Keefe with murder with use of a deadly weapon. He entered a plea of not guilty and invoked his right to a speedy trial. The State filed a motion to admit evidence of other crimes, which O'Keefe opposed. The Court ruled that the State could introduce evidence of threats to the alleged victim Victoria Whitmarsh, which witness Cheryl Morris claims were made by O'Keefe, and his claim of proficiency at killing with knives, which Morris claims to have witnessed. The Court further ruled that the State could introduce certified copies of the prior Judgment of Conviction for felony domestic battery, which involved Whitmarsh. Further, if O'Keefe testified, then the State could inquire into his other prior felony convictions. Pursuant to the Court's ruling on his prior Judgments of Conviction, the State is permitted to introduce only the details of when O'Keefe was convicted, in which jurisdiction, and the name of the offenses, and with the felony domestic battery, the fact that Whitmarsh had testified against him in that case. 3/16/09 TT 2-10.

The instant case was tried before this Honorable Court beginning March 16, 2009. O'Keefe was prohibited from introducing evidence regarding Whitmarsh's mental health condition which caused her to be erratic, have uncontrolled anger, attempt suicide by overdosing and cutting herself with knives and scissors when stressed, and required anger management therapy. After five days of trial, on March 20, 2009, the jury returned a verdict finding O'Keefe guilty of second degree murder with use of a deadly weapon. On May 5, 2009, this Court sentenced O'Keefe to 10 to 25 years for second-degree murder and a consecutive 96 to 240 months (8 to 20 years) on the deadly weapon enhancement.

O'Keefe timely appealed to the Nevada Supreme Court. After briefing, the Court reversed O'Keefe's conviction, agreeing with him that the district court "erred by giving the State's proposed instruction on second-degree murder because it set forth an alternative theory of second-degree murder, the charging document did not allege this alternate theory, and no evidence supported this theory." The Court explained, "the

1 State's charging document did not allege that O'Keefe killed the victim while he was
2 committing an unlawful act and the evidence presented at trial did not support this
3 theory of second-degree murder." O'Keefe v. State, NSC Docket No. 53859, Order of
4 Reversal and Remand (April 7, 2010). The Court further stated, "The district court's
5 error in giving this instruction was not harmless because it is not clear beyond a
6 reasonable doubt that a rational juror would have found O'Keefe guilty of second-
7 degree murder absent the error." Id. at 2. Having reversed on this ground, the Court
8 declined to address O'Keefe's remaining contentions, which included a contention that
9 the district court erred by refusing O'Keefe's request to present evidence of Whitmarsh's
10 prior suicide attempts, anger outbursts, anger management therapy, self-mutilation, and
11 erratic behavior.

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

13 STATEMENT OF FACTS

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

23 When O'Keefe was released from prison in 2007, he met and began a
24 relationship with Cheryl Morris. 3/17/09 TT 10, 3/19/09 TT 189. He would often speak
25 to Morris about his previous relationship with Whitmarsh, and even expressed to her
26 that he still had strong feelings for Whitmarsh. 3/17/09 TT 13-14, 37. Morris claimed at
27 trial that O'Keefe said he was upset with Whitmarsh because she put him in prison and
28 he said he wanted to "kill the bitch." 3/17/09 TT 14-17. Morris testified that O'Keefe left
at one point to be with Whitmarsh, and then telephoned Morris, asking her to move out

1 of their jointly shared apartment so Whitmarsh could move in. 3/17/09 TT 11. Morris
2 testified that Whitmarsh got on the phone with her during that call and told her she had
3 decided to resume her relationship with O'Keefe. The two of them appeared to be a
4 loving couple and were open about their relationship. 3/16/09 TT 259, 3/19/09 TT 18-
5 21, 30-36.

6 At about 10:00 p.m. on the evening of the incident, in November 2008, a
7 neighbor who lived in the apartment below O'Keefe and Whitmarsh heard what she
8 described as thumping and crying noises coming from upstairs. 3/16/09 TT 185-88.
9 The noise became so loud that it woke her husband, Charles Toliver, who was in bed
10 next to her. Id. at 186-200. Toliver went upstairs to inquire about the noise and found
11 the door to O'Keefe's apartment open. Id. at 206-209. He yelled inside to get the
12 occupants' attention, at which time O'Keefe came out of the bedroom and shouted at
13 Toliver to "come get her!" Id. at 209-10. When Toliver entered the bedroom, he saw
14 Whitmarsh lying on the floor next to the bed and saw blood on the bed covers. Id. at
15 210. O'Keefe was holding her and saying "baby, baby, wake up, don't do me like this."
16 Id. at 210, 224. O'Keefe did not stop Toliver from going in the apartment or otherwise
17 fight with him. Id. at 224. Toliver left the apartment immediately and shouted at a
18 neighbor who was outside to call the police. Id. at 213. He also brought Todd
19 Armbruster, another neighbor, back upstairs. Id. at 214. O'Keefe was still holding
20 Whitmarsh and told Armbruster to get the hell out of there. Id. at 215. Armbruster
21 called 911. Id. at 238. He thought that O'Keefe was drunk. Id. at 240, 245.

22 By this time, shortly after 11:00 p.m., police had arrived on the scene. 3/16/09
23 TT 215, 3/17/09 TT 65. When they entered the bedroom, they found Whitmarsh lying on
24 the floor next to the bed and an unarmed O'Keefe cradling her in his arms and stroking
25 her head. 3/17/09 at 87, 96. The police believed Whitmarsh to be dead and ordered
26 O'Keefe to let go of her, but he refused. Id. at 51-52, 60-61, 87. The officers
27 eventually subdued him with a taser gun and carried him out of the bedroom. Id. 88.
28 O'Keefe was acting agitated, id. at 73, the officers testified that he had a strong odor of
alcohol on him, and he appeared to be extremely intoxicated. Id. at 127-28, 3/18/09 TT

1 170-76. Much of his speech was incoherent, but at one point he said that Whitmarsh
2 stabbed herself and he also said that she tried to stab him. 3/17/09 TT 56, 85, 92.
3 They arrested him and brought him to the homicide offices. 3/17/09 TT 177.
4 Subsequent to his arrest, O'Keefe gave a rambling statement indicating he was not
5 aware of Whitmarsh's death or its cause. 3/18/09 TT 133. Police interviewed him at
6 1:20 a.m., at which time he was crying, raising his voice, talking to himself, and slurring.
7 Detective Wildemann stated that during the interview O'Keefe smelled heavily of
8 alcohol, and when police took photographs of him at about 3:55 a.m., they had to hold
9 him upright to steady him. 3/18/09 TT 146-49. Wildemann said it was pretty obvious
10 that O'Keefe had been drinking, however, law enforcement did not obtain a test for his
11 breath or blood alcohol level either before or after the interview. Id.

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

26 O'Keefe testified. 3/19/09 TT 177. He acknowledged his problems with alcohol
27 and described his history with Whitmarsh. Id. at 177-93. He disputed Morris's claim
28 that he said he wanted to kill Whitmarsh, but he acknowledged being angry with her. Id.
at 190. It was Whitmarsh who called O'Keefe and initiated their renewed relationship.

1 Id. at 191. He was aware that Whitmarsh had Hepatitis C when she moved into his
2 apartment. Id. at 197-98. In November, 2008, Whitmarsh was stressed because of her
3 financial condition. 3/20/09 TT 17. A couple of days before the incident at issue here,
4 Whitmarsh confronted O'Keefe with a knife. Id. at 18-19. She had been drinking and
5 was on medication. Id. O'Keefe had not been drinking that night and was able to
6 diffuse the situation. Id. at 19. On November 5, 2009, O'Keefe learned that he would
7 be hired for a new job and had two glasses of wine to celebrate. Id. at 21-24. O'Keefe
8 and Whitmarsh went to the Paris Casino where they both had drinks. Id. at 24-25.
9 They returned home, and she was upset and went upstairs while he reclined in the
10 passenger seat of the car for a period of time. Id. at 26-28. He went upstairs and then
11 smoked outside on a balcony while she was in the bathroom. Id. at 29-30. He then
12 went in the bedroom and saw Whitmarsh coming at him with a knife. Id. at 33. He
13 swung his jacket at her and told her to get back. Id. He knew that she was mad at him
14 about a lot of things. Id. He grabbed the knife, she yanked it and cut his hand. Id. at
15 33. They struggled for a period of time. Id. at 33-36. During the struggle, she held the
16 knife and fell down, he fell on top of her and then he realized that she was bleeding. Id.
17 at 35-37. He was still drunk at this point and was trying to figure out what happened.
18 Id. at 37. He tried to stop the bleeding and panicked. Id. at 39. He tried taking care of
19 Whitmarsh and asked his neighbor to call someone after the neighbor came into his
20 room. Id. at 40. He became agitated when the neighbor brought another neighbor up
21 to look at Whitmarsh, who was partially undressed, rather than calling the paramedics.
22 Id. at 41. O'Keefe denied hitting or slamming Whitmarsh. Id. at 42. He testified that he
23 did not intentionally kill Whitmarsh, but felt responsible because he drank that night and
24 he should not have done so. Id. at 49.

25 During trial, the State objected to the admission of any testimony concerning
26 Whitmarsh's suicide attempts and to admission of documents concerning Whitmarsh's
27 medical history. 3/19/09 TT 81. O'Keefe's counsel submitted points and authorities as
28 to the admissibility of evidence showing that Whitmarsh had a history of suicide
attempts by overdose and cutting herself, depression, panic disorder, anger outbursts,

1 and incidents with self-mutilation by cutting. See Defense Proposed Exhibit B (on file
2 with this Court); 2 ROA 265. The Court found that Whitmarsh's attempted suicides
3 were not acts of violence and found that the testimony and evidence from the medical
4 records were not admissible. 3/20/09 TT 7-8. The Court also prohibited admission of
5 evidence concerning her anger management classes. Id.

6 7 ARGUMENT

8
9 O'Keefe has a fundamental federal and state constitutional right to present
10 evidence in his defense pertaining to the alleged victim Whitmarsh's mental
11 health condition and history and its manifestations through conduct, including
12 her pattern of suicidal behavior and anger control problems, in support of his
13 claims regarding the sequence of events and his innocent actions during the
14 incident leading to Whitmarsh's death.

15 O'Keefe renews his request to present evidence in his defense, by way of expert
16 testimony summarizing Whitmarsh's mental health history and condition and its
17 manifestations through conduct, by admission of portions from medical records
18 documenting the same,¹ and by way of his own testimony regarding his knowledge of
19 Whitmarsh's mental health condition and its manifestations.

20 Having been Whitmarsh's partner on and off since 2001, O'Keefe was well aware
21 at the time of the incident of her mental health history, which included multiple suicide
22 attempts, both by overdose and cutting herself with knives or scissors, was aware that
23 she self-mutilated, was aware that she had uncontrollable anger outbursts and
24 problems when stressed over relationship issues and when abusing drugs or alcohol,
25 and that she was attending anger management counseling.

26 This evidence supports O'Keefe's testimony regarding the events leading up to
27 Whitmarsh's death and his innocent response to her aggression, and as such it is
28 relevant and highly probative on the issues of whether Whitmarsh was alone in the

¹The State has previously stipulated to the authenticity of these records, which are on file with the Court as Defendant's Proposed Exhibit B from the prior trial.

1 apartment and having a fit of anger when the neighbors heard banging noises (as
2 O'Keefe contends that she must have been and which would explain the lack of fresh
3 bruising as would be consistent with the State's prolonged-abuse theory of the case);
4 whether she had taken the kitchen knife into the bathroom of the master bedroom when
5 she was alone in the apartment (as O'Keefe contends she may have been preparing to
6 harm him, self-mutilate, or commit suicide by overdose and cutting, which is consistent
7 with the facts that she had three times her prescription dose of Effexor in her system
8 and had an apparent injury on her hand); whether she was holding the knife when
9 O'Keefe entered the bedroom (O'Keefe contends that she was holding the knife and
10 surprised him); and whether she charged at O'Keefe in anger (as she has a
11 documented history of anger control problems, which may have been exacerbated by
12 the mixture of Effexor and alcohol in her system).

13 The evidence related to Whitmarsh's mental health history is also corroborative
14 evidence of O'Keefe's state of mind and whether he believed Whitmarsh was going to
15 harm him when she came at him with the knife -- he knew she was unstable and
16 dangerous when upset, especially when under the influence of alcohol and drugs.

17 The medical records from which O'Keefe seeks to admit excerpts and upon
18 which his expert will rely show as follows:

19
20 **October 2001 Admission to Montevista Hospital (when Whitmarsh and Brian met)**

21 Whitmarsh was admitted October 31, 2001 *after she cut both wrists*
22 *with a knife in what she reported was her fourth suicide attempt.* She
23 was on the medications Celexa, Xanax and Vistaril. She was diagnosed
with Major Depressive Episode, Panic Disorder with Agoraphobia.

24 **May 2002 Admission to Montevista Hospital**

25 Whitmarsh was admitted on May 21, 2002 because she'd been using
26 Xanax, Lortab, Oxycotin; she was blacking out and unable to function at
27 work; withdrawal was severe; consequences of use included severe
28 dysfunction in her relationship with husband from whom she is separated;
psychiatric history was reported as follows: *"She has severe anxiety and
depression; she was suicidal and hospitalized at Montevista Hospital in
October of 2001 for an overdose and cutting her wrist. She also*

1 overdosed in 1983 and was hospitalized." Her diagnosis was opiate
2 dependence, continuous, xanax dependence continuous, major
3 depression, recurrent.

4 **September 2006 Admission Montevista Hospital (this admission was during**
5 **Brian's incarceration)**

6 Whitmarsh was admitted September 26, 2006. She was diagnosed as
7 Bipolar, Dep; Polysub dep; liver cirrhosis w/ascites; Hep C; underweight;
8 gerd; social; marital. The Report of Dr. Allgower states "took lethal dose
9 of Xanax requiring intubation/mechanical ventilation h/o depression, also
10 has self-inflicted wrist lac." Form by Dr. Slagle states: "Ms Whitmarsh has
11 made at least 3 suicide attempts. Recent attempt could have been fatal."
12 Report by Dr. Ajayi states that Whitmarsh's suicide attempt resulted in
13 admission to ICU. She had been transferred from St. Rose where she
14 had been in ICU from 9/24/06 - 9/26/06, **she overdosed on Xanax and**
15 **friend's morphine after an argument with her estranged husband.**
16 Diagnosis at St. Rose was Bipolar Disorder type II, depressed vs recurrent
17 major depression and borderline personality traits. She reported 2
18 previous suicide attempts (1983 OD on pain meds after fight with
19 husband) and (OD on pills and cutting wrists in 2001). "She has been
20 self-mutilating for the past 15 years and stated that she cuts herself
21 when she is angry and the last time she cut her left wrist was with a
22 pair of scissors on September 22, 2006. She complained of irritability,
23 mood swings, difficulty sleeping at night because of racing thoughts, poor
24 appetite, anxiety, . . . She also reports episodic euphoria, anger outbursts
25 and decreased need for sleep. She reports ongoing conflict with her
26 estranged husband and her sister and her 21 year old daughter." Dr.
27 Slagle documented poor impulse control, and that her 2001 admission to
28 Montevista was because "she was angry, screaming and "went
berserk" after an argument with her husband and overdosed on pills
and cut her wrist." Drug and alcohol abuse history: She has a history of
abusing Xanax back to at least 2001; history 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 included 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.

1
2 Chart notes further show that Whitmarsh "admits to a history of self-
3 mutilation. Most recently, she stabbed herself on her hands, August 22,
4 2006, "because I am not happy [with] myself."

5 And "pt denies wanting to kill self, but does state when angry she will self-
6 mutilate and take pills to cope [with] emotional pain. Admits to "taking
7 the pills because I was mad [with] my husband."

8 Southern Nevada Adult Mental Health October 2007 Admission (This admission
9 was after Brian's release from incarceration but while the couple was separated)

10 Whitmarsh took an overdose of pills in an apparent suicide attempt.

11 (Emphasis added).

12 Whitmarsh's records demonstrate a pattern of self-mutilation by cutting and
13 suicide attempts by overdosing and cutting during angry or berserk reactions to fights
14 with her husband and when she was not even in a relationship with O'Keefe. The
15 evidence supports O'Keefe's explanation for why it was Whitmarsh, and not he, who
16 brought the knife into the bedroom. However, a jury deprived of this evidence, and
17 knowing of O'Keefe's prior felony domestic battery conviction involving Whitmarsh, is
18 likely to unfairly assume that O'Keefe retrieved the knife from the kitchen to harm
19 Whitmarsh or that if Whitmarsh did bring the knife into the bedroom, she was doing so
20 to protect herself.

21 O'Keefe must be allowed to present this crucial evidence, as it corroborates his
22 claim of self-defense/accident, i.e., that Whitmarsh was out of control and he was
23 defending himself, and during the struggle for the knife, the accident occurred leading to
24 Whitmarsh's death. This Court has already ruled, pursuant to the State's bad acts
25 motion, that the State may introduce evidence that O'Keefe was convicted of felony
26 domestic battery involving Whitmarsh as relevant to his motive and intent.

27 The State also presented evidence at the previous trial to show that Whitmarsh
28 was "very meek" and submissive. 3/17/09 TT 15, 40. The State was also quick to point
out during the previous trial that Whitmarsh had a wound on her hand, when a defense

1 expert opined that she had no defensive wounds. 3/19/09 TT 156. O'Keefe must be
2 allowed to rebut that evidence with evidence that Whitmarsh had a history of cutting
3 herself and suffered from uncontrollable anger and suicidal tendencies.

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

13 It is unclear in Nevada whether evidence of an alleged victim's prior mental
14 health history including suicide attempts and anger control issues comes under the test
15 for character evidence or whether it is simply subject to a probative-value-versus-unfair-
16 prejudice test.

17 Other states' courts considering the admissibility of evidence pertaining to
18 alleged victims' mental health conditions have determined that the evidence is not
19 restricted by the rules pertaining to character evidence. Instead, the evidence is
20 deemed to be admissible so long as relevant to a material issue. See State v. Stanley,
21 37 P.3d 85, 90 (N.M. 2001) (collecting cases and noting that a clear majority of courts
22 hold that evidence of suicide attempts by a victim in a homicide case is admissible to
23 show the victim's state of mind); People v. Salcido, 246 Cal.App.2d 450, 458-60
24 (Cal.App. 5th Dist. 1966) (same); State v. Jaeger, 973 P.2d 404, 407-08 (Utah 1999)
25 (medical records, containing statements that the victim had previously attempted
26 suicide, were admissible when introduced in a case where defendant claimed the victim
27 committed suicide).

28 In Stanley, The New Mexico Supreme Court concluded that it is not appropriate
to consider such evidence as "character evidence" subject to the rule preventing

1 evidence of a person's character or a trait of character from being admitted for the
2 purpose of proving conformity. That court reasoned that the evidence is related to
3 mental illness and its specific manifestations and not character. 37 P.3d at 375.
4 Further, since the main purpose of the evidence rules is to search for the truth, a finding
5 of relevancy and the careful application of the probative-value-versus-unfair-prejudice
6 balancing test is sufficient to prevent the misuse of this evidence. Id. at 375-76. Where
7 a deceased person has a pattern of suicidal or violent behavior prior to the incident
8 leading to his death, that evidence is relevant to the alleged victim's state of mind and
9 causation in a murder trial. 37 P.3d at 372-73. In Stanley, the court concluded that the
10 alleged victim's pattern of suicide attempts and violent or suicidal behavior dating back
11 to 1987, i.e., 11 years prior to the death in question, should have been admitted at trial.
12 Id. at 374. The court determined that evidence that a deceased person suffered from
13 mental illness and had attempted suicide in the past "is not the type of evidence that
14 has the unusual propensity to prejudice, confuse, inflame or mislead the fact finder." Id.
15 Finally, the court recognized that a defendant has a "fundamental right to present
16 evidence negating the State's evidence on causation and the fact finder should [be]
17 given the opportunity to consider such evidence and determine what weight, if any, to
18 give to it in light of the other evidence." Id. at 374.

19 Similarly, in Salcido, the California Court of Appeals determined that hospital
20 records showing the victim of an alleged murder had been treated for a suicide attempt
21 are relevant to whether death was brought about by criminal agency. 246 Cal.App.2d at
22 458. The court stated that "in a murder case it is the victim's inclination or propensity to
23 commit suicide under emotional stress that is relevant and any competent evidence
24 which logically and reasonably tends to show this is admissible unless objectionable
25 under some other rule of exclusion." Id. at 459-60. The Court further recognized that
26 even a remote suicide attempt, when considered in light of several similar attempts, has
27 evidentiary value. Id.

28 NRS 48.015 defines "relevant evidence" as "evidence having any tendency to
make the existence of any fact that is of consequence to the determination of the action

1 more or less probable than it would be without the evidence." Pursuant to that statute,
2 relevant evidence is admissible, however, it may be excluded its probative value is
3 *substantially outweighed* by the danger of unfair prejudice, of confusion of the issues, of
4 misleading the jury, or by considerations of undue delay, waste of time or needless
5 presentation of cumulative evidence. NRS 48.035. Here the evidence sought to be
6 introduced is relevant on all of the issues set forth above, i.e., Whitmarsh's state of
7 mind, O'Keefe's state of mind, whether there is an innocent explanation for the banging
8 noises the neighbors heard, whether O'Keefe's claim that Whitmarsh had the knife is
9 likely to be true, and whether O'Keefe's claim that Whitmarsh was in an uncontrolled fit
10 of anger so that he was defending himself from her when an accident caused her death
11 is likely to be true. Indeed, the probative value here is even greater because the jury
12 will be aware of O'Keefe's prior conviction for felony domestic battery and will likely tend
13 to disbelieve his claim that Whitmarsh brought the knife into the bedroom and was the
14 aggressor. There is no unfair prejudice to the State by allowing the jury to hear this
15 evidence and determine for itself the weight to give it.

16 On the other hand, even if the evidence in question constitutes "character
17 evidence," it is admissible as it tends to show that Whitmarsh was the likely aggressor in
18 the conflict leading to her death.

19 NRS 48.045(1)(b) provides that "[e]vidence of a person's character or a trait of
20 his character is not admissible for the purpose of proving that he acted in conformity
21 therewith on a particular occasion, except: . . . [e]vidence of the character or a trait of
22 character of the victim of the crime offered by an accused . . . and similar evidence
23 offered by the prosecution to rebut such evidence." Additionally, NRS 48.055(1) states,
24 "In all cases in which evidence of character or a trait of character of a person is
25 admissible, proof may be made by testimony as to reputation or in the form of an
26 opinion. On cross-examination, inquiry may be made into specific instances of
27 conduct."

28 The Nevada Supreme Court has interpreted these statutes to require that an
accused, who claims he acted in self-defense, be permitted to present evidence of the

1 character of an alleged victim *regardless of the accused's knowledge of the victim's*
2 *character* when it tends to prove the victim was the likely aggressor. Petty v. State, 116
3 Nev. 321, 326-27, 997 P.2d 800, 802-03 (2000). Proof may be established by
4 testimony as to reputation or in the form of an opinion. Id. *An opinion as to violent*
5 *character may even be based on knowledge of only one incident of violence.* For
6 instance, in Petty, the Court held that the district court erred by excluding testimony
7 from a probation officer and police officer regarding their opinions as to the violent
8 character of the victim, even though the police officer's opinion was based upon only
9 one violent incident. Id. Based upon the foregoing authorities, Brian O'Keefe is entitled
10 to present evidence in the form of his is opinion or reputation testimony as to
11 Whitmarsh's erratic character and problems with anger control which caused her to act
12 irrationally and dangerously and to overdose and cut herself with knives and scissors.

13 Furthermore, at the time of the incident in question, Brian O'Keefe was aware of
14 Whitmarsh's aggressive and erratic character and uncontrollable anger wherein she
15 turned to pills and cutting instruments. The Nevada Supreme Court has held that if the
16 accused, who is claiming he acted in self-defense, is aware of specific acts of violence
17 by an alleged victim, then evidence as to those specific acts is admissible to show the
18 accused's state of mind at the time of the allege crime. Id. at 326-27, 997 P.2d at 803;
19 see also Burgeon v. State, 102 Nev. 43, 45-46, 714 P.2d 576, 578 (1986); Sanborn v.
20 State, 107 Nev. 399, 812 P.2d 1279 (1991). In Daniel v. State, 119 Nev. 498, 78 P.3d
21 890 (2003), the Nevada Supreme Court explained as follows:

22 [A] defendant should be allowed to produce supporting evidence to prove
23 the particular acts of which the accused claims knowledge, thereby
24 proving the reasonableness of the accused's knowledge and
25 apprehension of the victim and the credibility of his assertions about his
26 state of mind. . . . The self-serving 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.

27 Id. at 516, 78 P.3d at 32 (citing State v. Daniels, 465 N.W.2d 633, 636 (Wis. 1991)).

28 The admission of evidence of a victim's specific violent acts, *regardless of its*
source, is within the sound and reasonable discretion of the trial court and is limited to

1 the purpose of establishing what the defendant believed about the character of the
2 victim. Daniel, 119 Nev. at 516, 78 P.3d at 32. In sum, not only may a defendant
3 present evidence regarding specific acts by victims where the accused is aware of such
4 acts, *but the defendant may also present corroborating evidence to prove the particular*
5 *acts of which the accused claims knowledge. "[W]hen a defendant claims self-defense*
6 *and knew of relevant specific acts by a victim, evidence of the acts can be presented*
7 *through the defendant's own testimony, through cross-examination of a surviving victim,*
8 *and through extrinsic proof."* Id. at 516, 78 P.3d at 32-33. Therefore, because Brian
9 O'Keefe was aware of Whitmarsh's prior acts of violence, including violence to herself
10 by cutting/overdosing, and her anger control problems, he is entitled to present not only
11 his own testimony but any additional corroborating evidence to establish those prior
12 acts.

13 Additionally, to the extent that the State may again seek to admit evidence of
14 Whitmarsh's character of peacefulness, as it did during the previous trial by introducing
15 evidence that Whitmarsh was meek and submissive, O'Keefe has a right to confront
16 and cross-examine the State's witnesses as to their knowledge of Whitmarsh's angry
17 fits wherein she screamed, went berserk, lost control, overdosed, and used cutting
18 instruments to do violence upon herself. See State v. Sella, 41 Nev. 113, 168 P. 278
19 (1917); U.S. Const. Amend VI; Nev. Const. art. 1, sec. 8. Indeed, NRS 48.055(1)
20 specifically provides that when proof by testimony as to reputation or in the form of an
21 opinion has been given, "on cross-examination, inquiry may be made into specific
22 instances of conduct."


23 24 CONCLUSION

25 Based on the foregoing, Brian O'Keefe moves this Court for a ruling permitting
26 him to present expert testimony summarizing Whitmarsh's mental health history and
27 condition and its manifestations, evidence from the medical record documentation
28 discussed herein, and his own testimony showing that she had a pattern of prior suicide
attempts through overdose of pills and cutting, and a history of anger outbursts, anger

1 management therapy, self-mutilation, and erratic behavior. All of this evidence
2 corroborates and supports his claim that he reasonably believed Whitmarsh's state of
3 mind was such that she attempting to cause him serious injury at the time of the
4 incident, his claim that she was the aggressor, and his explanation of the circumstances
5 leading to Whitmarsh's accidental death.

6 DATED this 20th day of July, 2010.

7 PALM LAW FIRM, LTD.
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CLARK COUNTY DISTRICT ATTORNEY

By: _____

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CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,
Plaintiff,

vs.

BRIAN K. O'KEEFE,
Defendant

Case No.: C250630

Dept. No.: XVII

CAC250630
Notice of Expert Witnesses
872685



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

DATE:

TIME:

TO: THE STATE OF NEVADA, PLAINTIFF, and

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

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

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

RECEIVED

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CLERK OF THE COURT

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

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

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

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

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

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

4 (CV and report previously provided).

5 Dated this 29th day of July, 2010.

7 PALM LAW FIRM, LTD.

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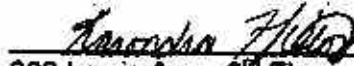
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13 (702) 386-9113
14 Attorney for Defendant O'Keefe

15 RECEIPT OF COPY

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

18 DATED: July 29, 2010.

19 DISTRICT ATTORNEY'S OFFICE

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22 Las Vegas, NV 89155
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HOME PAGE

**GEORGE SCHIRO, MS, F-ABC
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EDUCATION

Master of Science, Industrial Chemistry - Forensic Science

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

University of Central Florida, Orlando, FL.

Bachelor of Science, Microbiology

Including three hours of credit in Genetics

Louisiana State University, Baton Rouge, La.

PROFESSIONAL CERTIFICATION

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

PROFESSIONAL TRAINING ATTENDED

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

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

La. State Police Training Academy, Baton Rouge, LA

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

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

PROFESSIONAL EXPERIENCE

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

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

1988 - 2001

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

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

1984 - 1988

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

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

PROFESSIONAL PAPERS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARTICLES PUBLISHED

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

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

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

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

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

TRAINING CONDUCTED

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

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

PROFESSIONAL ORGANIZATIONS

International Society for Forensic Genetics

International Association of Bloodstain Pattern Analysts (Full Member)

AAFS (Fellow)

American Board of Criminalistics (Molecular Biology Fellow)

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

AFDAA (Chairperson 2004-2005, Fellow)

Association for Crime Scene Reconstruction

SAFS

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

LASCI

OTHER ACCOMPLISHMENTS

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

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

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

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

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

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

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

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

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

Formerly a columnist for *Southern Lawman Magazine*.

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

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

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

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

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

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July 27, 2010

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

Case No.: FSR 3-09

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

Client Case No.: C250630, Brian O'Keefe

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

Case Documentation Received and Examined By: George Schiro

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

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

Specimens Examined: Case documentation, photographs, and a DVD

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

Results:

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

CONCLUSIONS:

1. Toxicology

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

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

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

2. Improper Evidence Collection

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

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

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

² *Ibid.*, pp. 323-324.

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

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

⁵ *Ibid.* p. 24.

⁶ *Ibid.*

⁷ *Ibid.*

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

3. Mr. O'Keefe's wounds

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

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

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

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

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

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

¹⁰ *Ibid.*

¹¹ *Ibid.*

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

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

4. Other notes of interest

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

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

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

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

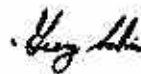
Ms. Whitmarsh's pants were removed after they were saturated with blood and then placed in bathroom.

Shoeprints were deposited after stepping in blood.

5. The possibility of an accidental stabbing

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

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



George Schiro, MS, F-ABC
Forensic Scientist

¹³ *Ibid.*

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Pre-medical Education:

\$ Yale University - B.A. 1976 Anthropology

Medical Education:

\$ Dartmouth Medical School - M.D. June, 1980

Hospital Training:

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

Past Employment:

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

Current Employment:

\$ Chief Medical Examiner
Office of the Medical Examiner - State of Utah

\$ Adjunct Associate Professor of Pathology
University of Utah School of Medicine

Certification:

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

Licensure:

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

Honors and Awards:

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

Professional Society Memberships:

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

Committees and Consultancies:

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

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

Presentations:

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

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SLC, UT., October 1997

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

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

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

Publications:

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

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

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

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

\$ Andrews, J.M., Sweeney, E.S., and Grey, T.C. AHelp, I'm Freezing to Death@ ASCP Forensic Pathology Check Sample. F.P. 90-5 (Accepted April 8, 1988).

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

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

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

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

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

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

Seminars and other training activities:

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

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

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Other Activities:

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

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Las Vegas, Nevada 89106
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E-Mail: mortpsych501@AOL.COM

LICENSURE:

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

AREAS OF SPECIALIZATION:

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

PROFESSIONAL CREDENTIALS & CERTIFICATIONS:

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

PROFESSIONAL CREDENTIALS:

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

EDUCATIONAL HISTORY:

Post Graduate Certificate of Specialization in Clinical Neuropsychology

The Fielding Institute, Santa Barbara, California

Dates Attended: February, 1996 - January, 1998

Major: Clinical Neuropsychology

Course Work: 40 semester units

2000 hour practicum

200 hours of clinical case supervision

Date Certificate Conferred: January 24, 1998

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

Major: Professional Psychology

Minor: Clinical Psychodiagnostics

Dates Attended: 1976 - 1978

Date Degree Conferred: June 11, 1978

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

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

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

INTERNSHIPS:

Predoctoral Internship (2500 hours)

1976 - 1978

- Clark County Juvenile Court
Las Vegas, Nevada

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

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

- CareUnit Program
Lake Mead Hospital
North Las Vegas, Nevada

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

Postdoctoral Internship (2500 hours)

1978 - 1980

- Jean Hanna Clark Rehabilitation Center
Las Vegas, Nevada

Supervisor: Verdun Trione, Ed.D.

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

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

School Psychology Internship (700 hours)

1971

• Pasadena Unified School District
Pasadena, California

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

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

1972

• Clark County Juvenile Court
Las Vegas, Nevada

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

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

PROFESSIONAL EXPERIENCE:

1989 - Present

Private Psychology Practice

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

Clinical Assessments:

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

Forensic Assessments:

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

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Clinical Treatment:

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

Clinical Consultation/Conferencing With:

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

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

Hospital practice

Health South Rehabilitation Hospitals

- Head trauma
- Post-surgical rehabilitation
- Spinal cord injuries
- Cerebrovascular accidents

Medical/Surgical Hospitals (UMC, Valley, Humana, Mountain View, Desert Springs, and Summerlin)

- Post-surgical recovery
- Trauma recovery

Fountain Ridge Alcoholism Center

- Substance abuse/dependence detoxification process
- Full range of psychological disorders

Montevista Psychiatric Hospital

- Adult Inpatient
- Adult Outpatient

Forensic Practice

Clark County Public Defender

- Capital Murder
- Competency to stand trial and assist counsel
- Sexual dangerousness

Clark County Special Public Defender

- Capital Murder
- Death penalty mitigation

Clark County District Attorney

- Sexual abuse
- Domestic violence
- Capital murder

Defense and Plaintiff's Attorneys

- Traumatic brain injuries
- Motor vehicle accidents
- Slip and falls
- Toxic exposure
- Competency to manage one's own affairs

Clark County Family Court

- Child custody
- Parental fitness
- Parent-child reunification
- Special Master/Coparenting Coordinator

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

1995 - 2002

Psychology Director

NovaCare Pain and Rehabilitation Center

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

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

1995 - present

Post Job Offer Psychological Evaluator

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

Served the following police departments:

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

1990 - 1995

Co-Owner/Psychology Director

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

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

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

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

1985 - 1994

Owner/Consultant

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

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

1978 - 1989

Chief Psychologist

Jean Hanna Clark Rehabilitation Center
Las Vegas, Nevada

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

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

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

1971 - 1978

Chief Psychologist

Clark County Juvenile Court
Las Vegas, Nevada

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

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

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

1969 - 1971

Adult Education Instructor

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

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

1968 - 1969

Employment Counselor

Department of Employment
East Los Angeles, California

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

1967 - 1968

High School Teacher/Coach

Black-Foxe School, Los Angeles, California

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

SUPPLEMENTARY EMPLOYMENT HISTORY:

Media Consulting:

2002 - Present

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

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Part-Time College Teaching:

1976 - 1984

Park College School for Community Education:
Parkville, Missouri

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

1978 - 1989

Nova University
Las Vegas, Nevada

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

1973 - 1976

Clark County Community College
Las Vegas, Nevada

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

1978 - 1979

New College/Stoner Chiropractic Foundation
Las Vegas, Nevada

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

1977

College of Great Falls, Montana
Great Falls, Montana

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

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1972 - 1986

University of Nevada, Las Vegas
Las Vegas, Nevada

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

1986 - 1990

Golden Gate University
San Francisco, California

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

Training and Consultation Services:

Provided educational seminars and organizational consulting for the following clients:

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

PROFESSIONAL MEMBERSHIPS/ACTIVITIES:

- Member - American Psychological Association

Division memberships:

- Counseling Psychology
- Clinical Neuropsychology
- Psychologists in Independent Practice
- Family Psychology

- Nevada State Psychology Association:

- 1991 - 1992: Treasurer and Executive Committee Member,
- 2001 - 2002: President elect and Executive Committee member,
- 2002 - 2003: President and Executive Committee member,
- 2003 - 2004: Past President and Executive Committee member.

- The American Pain Society
- International Association for the Study of Pain
- Society for Behavioral Medicine
- International Neuropsychology Society
- National Academy of Neuropsychology
- Coalition of Clinical Practitioners in Neuropsychology (Charter Member)

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

PUBLICATIONS:

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

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

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

6 **STATEMENT OF FACTS**

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

16 When O'Keefe was released from prison in 2007, he met and began a
17 relationship with Cheryl Morris. 3/17/09 TT 10, 3/19/09 TT 189. He would often speak
18 to Morris about his previous relationship with Whitmarsh, and even expressed to her
19 that he still had strong feelings for Whitmarsh. 3/17/09 TT 13-14, 37. Morris claimed at
20 trial that O'Keefe said he was upset with Whitmarsh because she put him in prison and
21 he said he wanted to "kill the bitch." 3/17/09 TT 14-17. Morris testified that O'Keefe left
22 at one point to be with Whitmarsh, and then telephoned Morris, asking her to move out
23 of their jointly shared apartment so Whitmarsh could move in. 3/17/09 TT 11. Morris
24 testified that Whitmarsh got on the phone with her during that call and told her she had
25 decided to resume her relationship with O'Keefe. The two of them appeared to be a
26 loving couple and were open about their relationship. 3/16/09 TT 259, 3/19/09 TT 18-
27 21, 30-36.

28 At about 10:00 p.m. on the evening of the incident, in November 2008, a
neighbor who lived in the apartment below O'Keefe and Whitmarsh heard what she

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

15 By this time, shortly after 11:00 p.m., police had arrived on the scene. 3/16/09
16 TT 215, 3/17/09 TT 65. When they entered the bedroom, they found Whitmarsh lying on
17 the floor next to the bed and an unarmed O'Keefe cradling her in his arms and stroking
18 her head. 3/17/09 at 87, 96. The police believed Whitmarsh to be dead and ordered
19 O'Keefe to let go of her, but he refused. Id. at 51-52, 60-61, 87. The officers
20 eventually subdued him with a taser gun and carried him out of the bedroom. Id. 88.
21 O'Keefe was acting agitated, id. at 73, the officers testified that he had a strong odor of
22 alcohol on him, and he appeared to be extremely intoxicated. Id. at 127-28, 3/18/09 TT
23 170-76. Much of his speech was incoherent, but at one point he said that Whitmarsh
24 stabbed herself and he also said that she tried to stab him. 3/17/09 TT 56, 85, 92.
25 They arrested him and brought him to the homicide offices. 3/17/09 TT 177.
26 Subsequent to his arrest, O'Keefe gave a rambling statement indicating he was not
27 aware of Whitmarsh's death or its cause. 3/18/09 TT 133. Police interviewed him at
28 1:20 a.m., at which time he was crying, raising his voice, talking to himself, and slurring.
Detective Wildemann stated that during the interview O'Keefe smelled heavily of

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

5 Whitmarsh had also been drinking on the date of the incident, and at the time of
6 her death, her blood alcohol content was 0.24. 3/18/09 TT 94, 117. She died of one
7 stab wound to her side and had bruising on the back of her head. Id. at 93, 103.
8 Medical Examiner Dr. Benjamin testified that Whitmarsh's toxicology screen indicated
9 that she was taking Effexor and that drug should not be taken with alcohol. Id. at 109.
10 Whitmarsh had about three times the target dosage of Effexor in her system. 3/19/09
11 TT 94-96. The combination of Effexor and alcohol could have caused anxiety,
12 confusion and anger. 3/19/09 TT 95-96. Whitmarsh also had Hepatitis C and advanced
13 Cirrhosis of the liver, which is known to cause bruising with only slight pressure to the
14 body. 3/18/09 TT 93-97. Whitmarsh's body displayed multiple bruises at the time Dr.
15 Benjamin examined her and the bruises were different colors, but she could not say that
16 they were associated with Whitmarsh's death or otherwise say how long ago Whitmarsh
17 sustained the bruises. 3/18/09 TT 115. DNA belonging to O'Keefe and to Whitmarsh
18 was found on a knife at the scene. 3/18/09 TT 82-87.

19 O'Keefe testified. 3/19/09 TT 177. He acknowledged his problems with alcohol
20 and described his history with Whitmarsh. Id. at 177-93. He disputed Morris's claim
21 that he said he wanted to kill Whitmarsh, but he acknowledged being angry with her. Id.
22 at 190. It was Whitmarsh who called O'Keefe and initiated their renewed relationship.
23 Id. at 191. He was aware that Whitmarsh had Hepatitis C when she moved into his
24 apartment. Id. at 197-98. In November, 2008, Whitmarsh was stressed because of her
25 financial condition. 3/20/09 TT 17. A couple of days before the incident at issue here,
26 Whitmarsh confronted O'Keefe with a knife. Id. at 18-19. She had been drinking and
27 was on medication. Id. O'Keefe had not been drinking that night and was able to
28 diffuse the situation. Id. at 19. On November 5, 2009, O'Keefe learned that he would
be hired for a new job and had two glasses of wine to celebrate. Id. at 21-24. O'Keefe

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

18 19 ARGUMENT

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

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

1 cross-examine the witnesses against him); Chambers v. Mississippi, 410 U.S. 284, 294
2 (1973) (stating that "the rights to confront and cross-examine witnesses and to call
3 witnesses in one's own behalf have long been recognized as essential to due process").

4 NRS 48.015 provides that "relevant evidence" means evidence having any
5 tendency to make the existence of any fact that is of consequence to the determination
6 of the action more or less probable than it would be without the evidence." NRS
7 48.025(2) recognizes that "[e]vidence which is not relevant is not admissible."

8 Moreover, NRS 48.035 provides in part that:

9
10 1. Although relevant, evidence is not admissible if its probative value is
11 substantially outweighed by the danger of unfair prejudice, of confusion of
12 the issues or of misleading the jury.

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

16 Additionally, "[a]bsent certain exceptions, evidence of a person's character or a
17 trait of his character is not admissible for the purpose of proving that he acted in
18 conformity therewith on a particular occasion. Further, evidence of other crimes,
19 wrongs or acts is not admissible to prove the character of a person in order to show that
20 he acted in conformity therewith." Taylor v. State, 109 Nev. 849, 853, 858 P.2d 843,
21 846 (1993). If the State wishes to prove that character or other act evidence is
22 admissible under NRS 48.045(2), for the purpose of establishing proof of motive,
23 opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or
24 accident, the State must prove how these exceptions to the general rule "specifically
25 relate to the facts of this case. A mere recitation of the statute is not sufficient
26 justification for the admission of prior acts." Id. at 854, 858 P.2d at 846. In addition, the
27 State "may not present character evidence as rebuttal to a defense which the accused
28 has not yet presented." Id. at 854, 858 P.2d at 847; Roeper v. State, 114 Nev. 867,
871, 963 P.2d 503, 505 (1998) ("[T]he bad character testimony should never have been

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

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

11 Taylor, 114 Nev. at 854, 858 P.2d at 846 (quoting McCormick on Evidence § 190 at 452
12 n. 54 (Edward W. Cleary, 2d ed 1972) (quoting Lord Summer in Thompson v. The King,
13 App. Cas. 221, 232 (1918))). Prior to admitting such evidence, the State must first bring
14 a "Petrocelli" motion and request a hearing to determine if "(1) the incident is relevant to
15 the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the
16 probative value of the evidence is not substantially outweighed by the danger of unfair
17 prejudice." Roever, 114 Nev. at 872, 963 P.2d at 505-06 (citing Tinch v. State, 113
18 Nev. 1170, 1178, 946 P.2d 1061, 1064-65 (1997); (Petrocelli v. State, 101 Nev. 46, 692
19 P.2d 503 (1985)). However, even if the other-act evidence is relevant to a permissible
20 purpose and proven by clear and convincing evidence, a court should still exclude it if
21 its probative value is substantially outweighed by the danger of unfair prejudice. Id. at
22 872, 963 P.2d at 505-06 (citing Tinch, 113 Nev. at 1178, 946 P.2d at 1064-65.

23 The Nevada Supreme Court recognizes that the use of character evidence to
24 convict a defendant is extremely disfavored in our criminal justice system. Such
25 evidence is likely to be prejudicial and irrelevant and forces the accused to defend
26 against vague and unsubstantiated charges. It may improperly influence the jury and
27 result in the accused's conviction because the jury believes he is a bad person. The use
28 of such evidence to show a propensity to commit the crime charged is clearly prohibited
by the law of this state and is commonly regarded as sufficient ground for reversal on

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

3
4 A. The State should be precluded from introducing evidence showing that
5 O'Keefe had claimed to Cheryl Morris that he could kill anyone with a knife and
6 had demonstrated how he would kill with knives.

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

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

19 Whether this evidence is treated as other bad act evidence or not, it is irrelevant
20 and unfairly prejudicial. The alleged victim in this case was killed by a puncture type
21 stab wound under her armpit that went directionally from front to back and downward.
22 3/18/09 TT 103, 118. Therefore, nothing close to the gutting or upward sternum area
23 slicing about which Morris contended O'Keefe had bragged occurred here. The State
24 has shown no relevance, i.e., the evidence makes no fact of consequence more or less
25 probable. Moreover, the evidence tends to show that O'Keefe acted consistent with a
26 character trait of being capable of killing with knives and that he is a killer. Thus, the
27 evidence is highly inflammatory and unfairly prejudicial and must be excluded in order to
28 protect O'Keefe's constitutional right to a fair trial.

///

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

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

10
11 C. The State should be precluded from introducing any evidence of a sexual
12 assault allegation related to O'Keefe's prior burglary conviction.

13 During the prior trial, the State agreed that it would not introduce any evidence
14 related to the sexual assault allegation, of which O'Keefe was acquitted in C202793.
15 3/16/09 TT 10. Because of the irrelevant and extreme prejudicial nature of this
16 evidence, O'Keefe requests a ruling precluding the State from introducing the sexual
17 assault allegation during the retrial.

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

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

25 ///

26 ///

27 ///

28 ///

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

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

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

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

22
23 F. The State should be precluded from introducing any reference to racial
24 slurs allegedly made by O'Keefe.

25 During the previous trial, the State introduced testimony from transportation
26 officer Hutcherson that O'Keefe told him to "turn that nigger music off" and said "I don't
27 listen to nigger music." 3/17/09 TT 179, 251. This testimony came as a surprise to the
28 defense, and was the basis for a motion for mistrial. The State offered an additional
reason as to why it believed the testimony to be relevant:

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

5 3/18/09 TT 2-8.

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

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

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

23 During the testimony of Joyce Tolliver, she was permitted to testify over defense
24 hearsay objection that her husband, Charles, returned from O'Keefe's apartment and
25 said, "baby, he done killed that girl." 3/16/09 TT 186-99. The Court admitted the
26 statement as an excited utterance.

27 However, the excited utterance hearsay exception is justified by the concept that
28 a witness, having just witnessed a startling event, is likely to truthfully describe it while
still under the stress of excitement. See State v. Rivera, 578 P.2d 1373, 1375 (Ariz.

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

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

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

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

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

13
14 I. The State should be precluded from introducing evidence that a prior trial
15 conviction or reversal occurred in this case.

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

1 reh'g. 114 Nev. 100, 952 P.2d 431 (1998). Here, O'Keefe should not be further
2 burdened by the violation of his rights during the previous trial, and to allow the fact of
3 the previous trial, conviction, or appeal into evidence would taint his right to a fair retrial.
4

5
6 CONCLUSION

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

10 DATED this 21st day of July, 2010.

11 PALM LAW FIRM, LTD.
12

13 
14 Patricia Palm, Bar No. 6009
15 1212 Casino Center Blvd.
16 Las Vegas, NV 89104
17 Phone: (702) 386-9113
18 Fax: (702) 386-9114
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RECEIPT OF COPY

I, the undersigned, acknowledge that on this _____ day of _____
2010, I received a true copy of the foregoing NOTICE OF MOTION AND MOTION BY
DEFENDANT O'KEEFE TO PRECLUDE THE STATE FROM INTRODUCING AT
TRIAL OTHER ACT OR CHARACTER EVIDENCE AND OTHER EVIDENCE WHICH
IS UNFAIRLY PREJUDICIAL OR WOULD VIOLATE HIS CONSTITUTIONAL
RIGHTS.

CLARK COUNTY DISTRICT ATTORNEY

By: _____

ORIGINAL

73

001
PALM LAW FIRM, LTD.
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Phone: (702) 386-9113
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Email: Patricia.palm@palmfirm.com
Attorney for Brian O'Keefe

FILED

JUL 21 2010

CLERK OF COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

BRIAN K. O'KEEFE,

Defendant.

CASE NO: C250630

DEPT. NO: XVII

DATE:

TIME:

C250630
NOTM
Notice of Motion
884385



**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**

COMES NOW Defendant Brian K. O'Keefe, by and through his attorney, Patricia Palm of Palm Law Firm, Ltd., and hereby moves this Honorable Court for an order allowing him to introduce evidence of the alleged victim's mental health condition and history, including prior suicide attempts, anger outbursts, anger management therapy, self-mutilation, and erratic behavior.

This Motion is made and based upon the record in this case, including the papers and pleadings on file herein, the Constitutions of the United States and the State of Nevada, the points and authorities set forth below, and any argument of counsel at the

///

RECEIVED

JUL 21 2010

CLERK OF THE COURT

901064

1 time of the hearing on this Motion.

2 Dated this 21st day of July, 2010.

3 PALM LAW FIRM, LTD.

4 

5 Patricia Palm, Bar No. 6009
6 1212 Casino Center Blvd.
7 Las Vegas, NV 89104
8 Phone: (702) 386-9113
9 Fax: (702) 386-9114
10 Attorney for Defendant O'Keefe

11 **NOTICE OF MOTION**

12 TO: STATE OF NEVADA, Plaintiff, and

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

14 YOU WILL PLEASE TAKE NOTICE that the undersigned will bring on the above
15 and foregoing MOTION BY DEFENDANT O'KEEFE TO ADMIT EVIDENCE
16 PERTAINING TO THE ALLEGED VICTIM'S MENTAL HEALTH CONDITION AND
17 HISTORY, INCLUDING PRIOR SUICIDE ATTEMPTS, ANGER OUTBURSTS, ANGER
18 MANAGEMENT THERAPY, SELF-MUTILATION AND ERRATIC BEHAVIOR on the
19 3 day of Aug, 2010, at the hour of 8:15 a.m., in Department No. XVII of the
20 above-entitled Court, or as soon thereafter as
21 counsel may be heard.

22 DATED this 21st day of July, 2010.

23 PALM LAW FIRM, LTD.

24 

25 By: PATRICIA PALM
26 Nevada Bar No. 6009
27 1212 Casino Center Blvd.
28 Las Vegas, NV 89104
(702) 386-9113
Attorney for Defendant O'Keefe

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POINTS AND AUTHORITIES
PROCEDURAL HISTORY

The State charged Defendant Brian K. O'Keefe with murder with use of a deadly weapon. He entered a plea of not guilty and invoked his right to a speedy trial. The State filed a motion to admit evidence of other crimes, which O'Keefe opposed. The Court ruled that the State could introduce evidence of threats to the alleged victim Victoria Whitmarsh, which witness Cheryl Morris claims were made by O'Keefe, and his claim of proficiency at killing with knives, which Morris claims to have witnessed. The Court further ruled that the State could introduce certified copies of the prior Judgment of Conviction for felony domestic battery, which involved Whitmarsh. Further, if O'Keefe testified, then the State could inquire into his other prior felony convictions. Pursuant to the Court's ruling on his prior Judgments of Conviction, the State is permitted to introduce only the details of when O'Keefe was convicted, in which jurisdiction, and the name of the offenses, and with the felony domestic battery, the fact that Whitmarsh had testified against him in that case. 3/16/09 TT 2-10.

The instant case was tried before this Honorable Court beginning March 16, 2008. O'Keefe was prohibited from introducing evidence regarding Whitmarsh's mental health condition which caused her to be erratic, have uncontrolled anger, attempt suicide by overdosing and cutting herself with knives and scissors when stressed, and required anger management therapy. After five days of trial, on March 20, 2009, the jury returned a verdict finding O'Keefe guilty of second degree murder with use of a deadly weapon. On May 5, 2009, this Court sentenced O'Keefe to 10 to 25 years for second-degree murder and a consecutive 96 to 240 months (8 to 20 years) on the deadly weapon enhancement.

O'Keefe timely appealed to the Nevada Supreme Court. After briefing, the Court reversed O'Keefe's conviction, agreeing with him that the district court "erred by giving the State's proposed instruction on second-degree murder because it set forth an alternative theory of second-degree murder, the charging document did not allege this alternate theory, and no evidence supported this theory." The Court explained, "the

1 State's charging document did not allege that O'Keefe killed the victim while he was
2 committing an unlawful act and the evidence presented at trial did not support this
3 theory of second-degree murder." O'Keefe v. State, NSC Docket No. 53859, Order of
4 Reversal and Remand (April 7, 2010). The Court further stated, "The district court's
5 error in giving this instruction was not harmless because it is not clear beyond a
6 reasonable doubt that a rational juror would have found O'Keefe guilty of second-
7 degree murder absent the error." Id. at 2. Having reversed on this ground, the Court
8 declined to address O'Keefe's remaining contentions, which included a contention that
9 the district court erred by refusing O'Keefe's request to present evidence of Whitmarsh's
10 prior suicide attempts, anger outbursts, anger management therapy, self-mutilation, and
11 erratic behavior.

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

13 STATEMENT OF FACTS

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

23 When O'Keefe was released from prison in 2007, he met and began a
24 relationship with Cheryl Morris. 3/17/09 TT 10, 3/19/09 TT 189. He would often speak
25 to Morris about his previous relationship with Whitmarsh, and even expressed to her
26 that he still had strong feelings for Whitmarsh. 3/17/09 TT 13-14, 37. Morris claimed at
27 trial that O'Keefe said he was upset with Whitmarsh because she put him in prison and
28 he said he wanted to "kill the bitch." 3/17/09 TT 14-17. Morris testified that O'Keefe left
at one point to be with Whitmarsh, and then telephoned Morris, asking her to move out

1 of their jointly shared apartment so Whitmarsh could move in. 3/17/09 TT 11. Morris
2 testified that Whitmarsh got on the phone with her during that call and told her she had
3 decided to resume her relationship with O'Keefe. The two of them appeared to be a
4 loving couple and were open about their relationship. 3/16/09 TT 259, 3/19/09 TT 18-
5 21, 30-36.

6 At about 10:00 p.m. on the evening of the incident, in November 2008, a
7 neighbor who lived in the apartment below O'Keefe and Whitmarsh heard what she
8 described as thumping and crying noises coming from upstairs. 3/16/09 TT 185-88.
9 The noise became so loud that it woke her husband, Charles Toliver, who was in bed
10 next to her. Id. at 188-200. Toliver went upstairs to inquire about the noise and found
11 the door to O'Keefe's apartment open. Id. at 206-209. He yelled inside to get the
12 occupants' attention, at which time O'Keefe came out of the bedroom and shouted at
13 Toliver to "come get her!" Id. at 209-10. When Toliver entered the bedroom, he saw
14 Whitmarsh lying on the floor next to the bed and saw blood on the bed covers. Id. at
15 210. O'Keefe was holding her and saying "baby, baby, wake up, don't do me like this."
16 Id. at 210, 224. O'Keefe did not stop Toliver from going in the apartment or otherwise
17 fight with him. Id. at 224. Toliver left the apartment immediately and shouted at a
18 neighbor who was outside to call the police. Id. at 213. He also brought Todd
19 Armbruster, another neighbor, back upstairs. Id. at 214. O'Keefe was still holding
20 Whitmarsh and told Armbruster to get the hell out of there. Id. at 215. Armbruster
21 called 911. Id. at 238. He thought that O'Keefe was drunk. Id. at 240, 245.

22 By this time, shortly after 11:00 p.m., police had arrived on the scene. 3/16/09
23 TT 215, 3/17/09 TT 65. When they entered the bedroom, they found Whitmarsh lying on
24 the floor next to the bed and an unarmed O'Keefe cradling her in his arms and stroking
25 her head. 3/17/09 at 87, 98. The police believed Whitmarsh to be dead and ordered
26 O'Keefe to let go of her, but he refused. Id. at 51-52, 60-61, 87. The officers
27 eventually subdued him with a taser gun and carried him out of the bedroom. Id. 88.
28 O'Keefe was acting agitated, id. at 73, the officers testified that he had a strong odor of
alcohol on him, and he appeared to be extremely intoxicated. Id. at 127-28, 3/16/09 TT

1 170-76. Much of his speech was incoherent, but at one point he said that Whitmarsh
2 stabbed herself and he also said that she tried to stab him. 3/17/09 TT 56, 85, 92.
3 They arrested him and brought him to the homicide offices. 3/17/09 TT 177.
4 Subsequent to his arrest, O'Keefe gave a rambling statement indicating he was not
5 aware of Whitmarsh's death or its cause. 3/18/09 TT 133. Police interviewed him at
6 1:20 a.m., at which time he was crying, raising his voice, talking to himself, and slurring.
7 Detective Wildemann stated that during the interview O'Keefe smelled heavily of
8 alcohol, and when police took photographs of him at about 3:55 a.m., they had to hold
9 him upright to steady him. 3/18/09 TT 146-49. Wildemann said it was pretty obvious
10 that O'Keefe had been drinking, however, law enforcement did not obtain a test for his
11 breath or blood alcohol level either before or after the interview. Id.

12 Whitmarsh had also been drinking on the date of the incident, and at the time of
13 her death, her blood alcohol content was 0.24. 3/18/09 TT 84, 117. She died of one
14 stab wound to her side and had bruising on the back of her head. Id. at 93, 103.
15 Medical Examiner Dr. Benjamin testified that Whitmarsh's toxicology screen indicated
16 that she was taking Effexor and that drug should not be taken with alcohol. Id. at 109.
17 Whitmarsh had about three times the target dosage of Effexor in her system. 3/19/09
18 TT 94-96. The combination of Effexor and alcohol could have caused anxiety,
19 confusion and anger. 3/19/09 TT 95-96. Whitmarsh also had Hepatitis C and advanced
20 Cirrhosis of the liver, which is known to cause bruising with only slight pressure to the
21 body. 3/18/09 TT 93-97. Whitmarsh's body displayed multiple bruises at the time Dr.
22 Benjamin examined her and the bruises were different colors, but she could not say that
23 they were associated with Whitmarsh's death or otherwise say how long ago Whitmarsh
24 sustained the bruises. 3/18/09 TT 115. DNA belonging to O'Keefe and to Whitmarsh
25 was found on a knife at the scene. 3/18/09 TT 62-67.

26 O'Keefe testified. 3/19/09 TT 177. He acknowledged his problems with alcohol
27 and described his history with Whitmarsh. Id. at 177-93. He disputed Morris's claim
28 that he said he wanted to kill Whitmarsh, but he acknowledged being angry with her. Id.
at 190. It was Whitmarsh who called O'Keefe and initiated their renewed relationship.

1 Id. at 191. He was aware that Whitmarsh had Hepatitis C when she moved into his
2 apartment. Id. at 197-98. In November, 2008, Whitmarsh was stressed because of her
3 financial condition. 3/20/09 TT 17. A couple of days before the incident at issue here,
4 Whitmarsh confronted O'Keefe with a knife. Id. at 18-19. She had been drinking and
5 was on medication. Id. O'Keefe had not been drinking that night and was able to
6 diffuse the situation. Id. at 19. On November 5, 2009, O'Keefe learned that he would
7 be hired for a new job and had two glasses of wine to celebrate. Id. at 21-24. O'Keefe
8 and Whitmarsh went to the Paris Casino where they both had drinks. Id. at 24-25.
9 They returned home, and she was upset and went upstairs while he reclined in the
10 passenger seat of the car for a period of time. Id. at 26-28. He went upstairs and then
11 smoked outside on a balcony while she was in the bathroom. Id. at 29-30. He then
12 went in the bedroom and saw Whitmarsh coming at him with a knife. Id. at 33. He
13 swung his jacket at her and told her to get back. Id. He knew that she was mad at him
14 about a lot of things. Id. He grabbed the knife, she yanked it and cut his hand. Id. at
15 33. They struggled for a period of time. Id. at 33-36. During the struggle, she held the
16 knife and fell down, he fell on top of her and then he realized that she was bleeding. Id.
17 at 35-37. He was still drunk at this point and was trying to figure out what happened.
18 Id. at 37. He tried to stop the bleeding and panicked. Id. at 39. He tried taking care of
19 Whitmarsh and asked his neighbor to call someone after the neighbor came into his
20 room. Id. at 40. He became agitated when the neighbor brought another neighbor up
21 to look at Whitmarsh, who was partially undressed, rather than calling the paramedics.
22 Id. at 41. O'Keefe denied hitting or slamming Whitmarsh. Id. at 42. He testified that he
23 did not intentionally kill Whitmarsh, but felt responsible because he drank that night and
24 he should not have done so. Id. at 49.

25 During trial, the State objected to the admission of any testimony concerning
26 Whitmarsh's suicide attempts and to admission of documents concerning Whitmarsh's
27 medical history. 3/19/09 TT 81. O'Keefe's counsel submitted points and authorities as
28 to the admissibility of evidence showing that Whitmarsh had a history of suicide
attempts by overdose and cutting herself, depression, panic disorder, anger outbursts.

1 and incidents with self-mutilation by cutting. See Defense Proposed Exhibit B (on file
2 with this Court); 2 ROA 265. The Court found that Whitmarsh's attempted suicides
3 were not acts of violence and found that the testimony and evidence from the medical
4 records were not admissible. 3/20/09 TT 7-8. The Court also prohibited admission of
5 evidence concerning her anger management classes. Id.

6 7 ARGUMENT

8
9 O'Keefe has a fundamental federal and state constitutional right to present
10 evidence in his defense pertaining to the alleged victim Whitmarsh's mental
11 health condition and history and its manifestations through conduct, including
12 her pattern of suicidal behavior and anger control problems, in support of his
13 claims regarding the sequence of events and his innocent actions during the
14 incident leading to Whitmarsh's death.

15 O'Keefe renews his request to present evidence in his defense, by way of expert
16 testimony summarizing Whitmarsh's mental health history and condition and its
17 manifestations through conduct, by admission of portions from medical records
18 documenting the same,¹ and by way of his own testimony regarding his knowledge of
19 Whitmarsh's mental health condition and its manifestations.

20 Having been Whitmarsh's partner on and off since 2001, O'Keefe was well aware
21 at the time of the incident of her mental health history, which included multiple suicide
22 attempts, both by overdose and cutting herself with knives or scissors, was aware that
23 she self-mutilated, was aware that she had uncontrollable anger outbursts and
24 problems when stressed over relationship issues and when abusing drugs or alcohol,
25 and that she was attending anger management counseling.

26 This evidence supports O'Keefe's testimony regarding the events leading up to
27 Whitmarsh's death and his innocent response to her aggression, and as such it is
28 relevant and highly probative on the issues of whether Whitmarsh was alone in the

¹The State has previously stipulated to the authenticity of these records, which are on
file with the Court as Defendant's Proposed Exhibit B from the prior trial.

1 apartment and having a fit of anger when the neighbors heard banging noises (as
2 O'Keefe contends that she must have been and which would explain the lack of fresh
3 bruising as would be consistent with the State's prolonged-abuse theory of the case);
4 whether she had taken the kitchen knife into the bathroom of the master bedroom when
5 she was alone in the apartment (as O'Keefe contends she may have been preparing to
6 harm him, self-mutilate, or commit suicide by overdose and cutting, which is consistent
7 with the facts that she had three times her prescription dose of Effexor in her system
8 and had an apparent injury on her hand); whether she was holding the knife when
9 O'Keefe entered the bedroom (O'Keefe contends that she was holding the knife and
10 surprised him); and whether she charged at O'Keefe in anger (as she has a
11 documented history of anger control problems, which may have been exacerbated by
12 the mixture of Effexor and alcohol in her system).

13 The evidence related to Whitmarsh's mental health history is also corroborative
14 evidence of O'Keefe's state of mind and whether he believed Whitmarsh was going to
15 harm him when she came at him with the knife — he knew she was unstable and
16 dangerous when upset, especially when under the influence of alcohol and drugs.

17 The medical records from which O'Keefe seeks to admit excerpts and upon
18 which his expert will rely show as follows:

19
20 **October 2001 Admission to Montevista Hospital (when Whitmarsh and Brian met)**

21 Whitmarsh was admitted October 31, 2001 *after she cut both wrists*
22 *with a knife in what she reported was her fourth suicide attempt.* She
23 was on the medications Celexa, Xanax and Vistaril. She was diagnosed
with Major Depressive Episode, Panic Disorder with Agoraphobia.

24 **May 2002 Admission to Montevista Hospital**

25 Whitmarsh was admitted on May 21, 2002 because she'd been using
26 Xanax, Lortab, Oxycotin; she was blacking out and unable to function at
27 work; withdrawal was severe; consequences of use included severe
28 dysfunction in her relationship with husband from whom she is separated;
psychiatric history was reported as follows: *"She has severe anxiety and
depression; she was suicidal and hospitalized at Montevista Hospital in
October of 2001 for an overdose and cutting her wrist. She also*

1 overdosed in 1983 and was hospitalized." Her diagnosis was opiate
2 dependence, continuous, xanax dependence continuous, major
3 depression, recurrent.

4 **September 2006 Admission Montevista Hospital (this admission was during**
5 **Brian's incarceration)**

6 Whitmarsh was admitted September 26, 2006. She was diagnosed as
7 Bipolar, Dep; Polysub dep; liver cirrhosis w/ascites; Hep C; underweight;
8 gerd; social; marital. The Report of Dr. Allgower states "took lethal dose
9 of Xanax requiring intubation/mechanical ventilation h/o depression, also
10 has self-inflicted wrist lac." Form by Dr. Stagle states: "Ms Whitmarsh has
11 made at least 3 suicide attempts. Recent attempt could have been fatal." Report by Dr. Ajayi states that Whitmarsh's suicide attempt resulted in
12 admission to ICU. She had been transferred from St. Rose where she
13 had been in ICU from 9/24/06 - 9/26/06, **she overdosed on Xanax and**
14 **friend's morphine after an argument with her estranged husband.** Diagnosis at St. Rose was Bipolar Disorder type II, depressed vs recurrent
15 major depression and borderline personality traits. She reported 2
16 previous suicide attempts (1983 OD on pain meds after fight with
17 husband) and (OD on pills and cutting wrists in 2001). "She has been
18 self-mutilating for the past 15 years and stated that she cuts herself
19 when she is angry and the last time she cut her left wrist was with a
20 pair of scissors on September 22, 2006. She complained of irritability,
21 mood swings, difficulty sleeping at night because of racing thoughts, poor
22 appetite, anxiety, . . . She also reports episodic euphoria, anger outbursts
23 and decreased need for sleep. She reports ongoing conflict with her
24 estranged husband and her sister and her 21 year old daughter." Dr.
25 Stagle documented poor impulse control, and that her 2001 admission to
26 Montevista was because "she was angry, screaming and "went
27 berserk" after an argument with her husband and overdosed on pills
28 and cut her wrist." Drug and alcohol abuse history: She has a history of
abusing Xanax back to at least 2001; history 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 included 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.

1
2 *Chart notes further show that Whitmarsh "admits to a history of self-*
3 *mutilation. Most recently, she stabbed herself on her hands, August 22,*
4 *2006, "because I am not happy [with] myself."*

5 *And "pt denies wanting to kill self, but does state when angry she will self-*
6 *mutilate and take pills to cope [with] emotional pain. Admits to "taking*
7 *the pills because I was mad [with] my husband."*

8 **Southern Nevada Adult Mental Health October 2007 Admission (This admission**
9 **was after Brian's release from incarceration but while the couple was separated)**

10 Whitmarsh took an overdose of pills in an apparent suicide attempt.

11 (Emphasis added).

12 Whitmarsh's records demonstrate a pattern of self-mutilation by cutting and
13 suicide attempts by overdosing and cutting during angry or berserk reactions to fights
14 with her husband and when she was not even in a relationship with O'Keefe. The
15 evidence supports O'Keefe's explanation for why it was Whitmarsh, and not he, who
16 brought the knife into the bedroom. However, a jury deprived of this evidence, and
17 knowing of O'Keefe's prior felony domestic battery conviction involving Whitmarsh, is
18 likely to unfairly assume that O'Keefe retrieved the knife from the kitchen to harm
19 Whitmarsh or that if Whitmarsh did bring the knife into the bedroom, she was doing so
20 to protect herself.

21 O'Keefe must be allowed to present this crucial evidence, as it corroborates his
22 claim of self-defense/accident, i.e., that Whitmarsh was out of control and he was
23 defending himself, and during the struggle for the knife, the accident occurred leading to
24 Whitmarsh's death. This Court has already ruled, pursuant to the State's bad acts
25 motion, that the State may introduce evidence that O'Keefe was convicted of felony
26 domestic battery involving Whitmarsh as relevant to his motive and intent.

27 The State also presented evidence at the previous trial to show that Whitmarsh
28 was "very meek" and submissive. 3/17/09 TT 15, 40. The State was also quick to point
out during the previous trial that Whitmarsh had a wound on her hand, when a defense

1 expert opined that she had no defensive wounds. 3/19/09 TT 156. O'Keefe must be
2 allowed to rebut that evidence with evidence that Whitmarsh had a history of cutting
3 herself and suffered from uncontrollable anger and suicidal tendencies.

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

13 It is unclear in Nevada whether evidence of an alleged victim's prior mental
14 health history including suicide attempts and anger control issues comes under the test
15 for character evidence or whether it is simply subject to a probative-value-versus-unfair-
16 prejudice test.

17 Other states' courts considering the admissibility of evidence pertaining to
18 alleged victims' mental health conditions have determined that the evidence is not
19 restricted by the rules pertaining to character evidence. Instead, the evidence is
20 deemed to be admissible so long as relevant to a material issue. See State v. Stanley,
21 37 P.3d 85, 90 (N.M. 2001) (collecting cases and noting that a clear majority of courts
22 hold that evidence of suicide attempts by a victim in a homicide case is admissible to
23 show the victim's state of mind); People v. Salcido, 246 Cal.App.2d 450, 458-60
24 (Cal.App. 5th Dist. 1966) (same); State v. Jeeger, 973 P.2d 404, 407-08 (Utah 1999)
25 (medical records, containing statements that the victim had previously attempted
26 suicide, were admissible when introduced in a case where defendant claimed the victim
27 committed suicide).

28 In Stanley, The New Mexico Supreme Court concluded that it is not appropriate
29 to consider such evidence as "character evidence" subject to the rule preventing

1 evidence of a person's character or a trait of character from being admitted for the
2 purpose of proving conformity. That court reasoned that the evidence is related to
3 mental illness and its specific manifestations and not character. 37 P.3d at 375.
4 Further, since the main purpose of the evidence rules is to search for the truth, a finding
5 of relevancy and the careful application of the probative-value-versus-unfair-prejudice
6 balancing test is sufficient to prevent the misuse of this evidence. Id. at 375-76. Where
7 a deceased person has a pattern of suicidal or violent behavior prior to the incident
8 leading to his death, that evidence is relevant to the alleged victim's state of mind and
9 causation in a murder trial. 37 P.3d at 372-73. In Stanley, the court concluded that the
10 alleged victim's pattern of suicide attempts and violent or suicidal behavior dating back
11 to 1987, i.e., 11 years prior to the death in question, should have been admitted at trial.
12 Id. at 374. The court determined that evidence that a deceased person suffered from
13 mental illness and had attempted suicide in the past "is not the type of evidence that
14 has the unusual propensity to prejudice, confuse, inflame or mislead the fact finder." Id.
15 Finally, the court recognized that a defendant has a "fundamental right to present
16 evidence negating the State's evidence on causation and the fact finder should [be]
17 given the opportunity to consider such evidence and determine what weight, if any, to
18 give to it in light of the other evidence." Id. at 374.

19 Similarly, in Saicido, the California Court of Appeals determined that hospital
20 records showing the victim of an alleged murder had been treated for a suicide attempt
21 are relevant to whether death was brought about by criminal agency. 246 Cal.App.2d at
22 458. The court stated that "in a murder case it is the victim's inclination or propensity to
23 commit suicide under emotional stress that is relevant and any competent evidence
24 which logically and reasonably tends to show this is admissible unless objectionable
25 under some other rule of exclusion." Id. at 459-60. The Court further recognized that
26 even a remote suicide attempt, when considered in light of several similar attempts, has
27 evidentiary value. Id.

28 NRS 48.015 defines "relevant evidence" as "evidence having any tendency to
make the existence of any fact that is of consequence to the determination of the action

1 more or less probable than it would be without the evidence.* Pursuant to that statute,
2 relevant evidence is admissible, however, it may be excluded its probative value is
3 *substantially outweighed* by the danger of unfair prejudice, of confusion of the issues, of
4 misleading the jury, or by considerations of undue delay, waste of time or needless
5 presentation of cumulative evidence. NRS 48.035. Here the evidence sought to be
6 introduced is relevant on all of the issues set forth above, i.e., Whitmarsh's state of
7 mind, O'Keefe's state of mind, whether there is an innocent explanation for the banging
8 noises the neighbors heard, whether O'Keefe's claim that Whitmarsh had the knife is
9 likely to be true, and whether O'Keefe's claim that Whitmarsh was in an uncontrolled fit
10 of anger so that he was defending himself from her when an accident caused her death
11 is likely to be true. Indeed, the probative value here is even greater because the jury
12 will be aware of O'Keefe's prior conviction for felony domestic battery and will likely tend
13 to disbelieve his claim that Whitmarsh brought the knife into the bedroom and was the
14 aggressor. There is no unfair prejudice to the State by allowing the jury to hear this
15 evidence and determine for itself the weight to give it.

16 On the other hand, even if the evidence in question constitutes "character
17 evidence," it is admissible as it tends to show that Whitmarsh was the likely aggressor in
18 the conflict leading to her death.

19 NRS 48.045(1)(b) provides that "[e]vidence of a person's character or a trait of
20 his character is not admissible for the purpose of proving that he acted in conformity
21 therewith on a particular occasion, except: . . . [e]vidence of the character or a trait of
22 character of the victim of the crime offered by an accused . . . and similar evidence
23 offered by the prosecution to rebut such evidence." Additionally, NRS 48.055(1) states,
24 "In all cases in which evidence of character or a trait of character of a person is
25 admissible, proof may be made by testimony as to reputation or in the form of an
26 opinion. On cross-examination, inquiry may be made into specific instances of
27 conduct."

28 The Nevada Supreme Court has interpreted these statutes to require that an
accused, who claims he acted in self-defense, be permitted to present evidence of the

1 character of an alleged victim regardless of the accused's knowledge of the victim's
2 character when it tends to prove the victim was the likely aggressor. Petty v. State, 116
3 Nev. 321, 326-27, 997 P.2d 800, 802-03 (2000). Proof may be established by
4 testimony as to reputation or in the form of an opinion. Id. An opinion as to violent
5 character may even be based on knowledge of only one incident of violence. For
6 instance, in Petty, the Court held that the district court erred by excluding testimony
7 from a probation officer and police officer regarding their opinions as to the violent
8 character of the victim, even though the police officer's opinion was based upon only
9 one violent incident. Id. Based upon the foregoing authorities, Brian O'Keefe is entitled
10 to present evidence in the form of his opinion or reputation testimony as to
11 Whitmarsh's erratic character and problems with anger control which caused her to act
12 irrationally and dangerously and to overdose and cut herself with knives and scissors.

13 Furthermore, at the time of the incident in question, Brian O'Keefe was aware of
14 Whitmarsh's aggressive and erratic character and uncontrollable anger wherein she
15 turned to pills and cutting instruments. The Nevada Supreme Court has held that if the
16 accused, who is claiming he acted in self-defense, is aware of specific acts of violence
17 by an alleged victim, then evidence as to those specific acts is admissible to show the
18 accused's state of mind at the time of the alleged crime. Id. at 326-27, 997 P.2d at 803;
19 see also Burgeon v. State, 102 Nev. 43, 45-46, 714 P.2d 576, 578 (1986); Sanborn v.
20 State, 107 Nev. 399, 812 P.2d 1279 (1991). In Daniel v. State, 119 Nev. 498, 78 P.3d
21 890 (2003), the Nevada Supreme Court explained as follows:

22 [A] defendant should be allowed to produce supporting evidence to prove
23 the particular acts of which the accused claims knowledge, thereby
24 proving the reasonableness of the accused's knowledge and
25 apprehension of the victim and the credibility of his assertions about his
26 state of mind. . . . The self-serving 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.

27 Id. at 516, 78 P.3d at 32 (citing State v. Daniels, 465 N.W.2d 633, 636 (Wis. 1991)).

28 The admission of evidence of a victim's specific violent acts, regardless of its
source, is within the sound and reasonable discretion of the trial court and is limited to

1 the purpose of establishing what the defendant believed about the character of the
2 victim. Daniel, 119 Nev. at 516, 78 P.3d at 32. In sum, not only may a defendant
3 present evidence regarding specific acts by victims where the accused is aware of such
4 acts, but the defendant may also present corroborating evidence to prove the particular
5 acts of which the accused claims knowledge. "[W]hen a defendant claims self-defense
6 and knew of relevant specific acts by a victim, evidence of the acts can be presented
7 through the defendant's own testimony, through cross-examination of a surviving victim,
8 and through extrinsic proof." Id. at 516, 78 P.3d at 32-33. Therefore, because Brian
9 O'Keefe was aware of Whitmarsh's prior acts of violence, including violence to herself
10 by cutting/overdosing, and her anger control problems, he is entitled to present not only
11 his own testimony but any additional corroborating evidence to establish those prior
12 acts.

13 Additionally, to the extent that the State may again seek to admit evidence of
14 Whitmarsh's character of peacefulness, as it did during the previous trial by introducing
15 evidence that Whitmarsh was meek and submissive, O'Keefe has a right to confront
16 and cross-examine the State's witnesses as to their knowledge of Whitmarsh's angry
17 fits wherein she screamed, went berserk, lost control, overdosed, and used cutting
18 instruments to do violence upon herself. See State v. Sella, 41 Nev. 113, 168 P. 278
19 (1917); U.S. Const. Amend VI; Nev. Const. art. 1, sec. 8. Indeed, NRS 48.055(1)
20 specifically provides that when proof by testimony as to reputation or in the form of an
21 opinion has been given, "on cross-examination, inquiry may be made into specific
22 instances of conduct."

23 24 CONCLUSION

25 Based on the foregoing, Brian O'Keefe moves this Court for a ruling permitting
26 him to present expert testimony summarizing Whitmarsh's mental health history and
27 condition and its manifestations, evidence from the medical record documentation
28 discussed herein, and his own testimony showing that she had a pattern of prior suicide
attempts through overdose of pills and cutting, and a history of anger outbursts, anger

1 management therapy, self-mutilation, and erratic behavior. All of this evidence
2 corroborates and supports his claim that he reasonably believed Whitmarsh's state of
3 mind was such that she attempting to cause him serious injury at the time of the
4 incident, his claim that she was the aggressor, and his explanation of the circumstances
5 leading to Whitmarsh's accidental death.

6 DATED this 21st day of July, 2010.

7 PALM LAW FIRM, LTD.
8

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10 

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16 Attorney for Defendant O'Keefe
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RECEIPT OF COPY

I, the undersigned, acknowledge that on this _____ day of _____
2010, I received a true copy of the foregoing 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.

CLARK COUNTY DISTRICT ATTORNEY

By: _____

ORIGINAL

FILED

JUL 21 2010

Office of the Clerk of Court

001
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Attorney for Brian O'Keefe

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

BRIAN K. O'KEEFE,

Defendant.

CASE NO.: C250630

DATE:

TIME:

08C250630
NOTM
Notice of Motion
064398



**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**

TO: THE STATE OF NEVADA, Plaintiff and

TO: DISTRICT ATTORNEY'S OFFICE, its counsel:

PLEASE TAKE NOTICE that on the above date and time, or as soon thereafter
as counsel can be heard, Defendant Brian K. O'Keefe, by and through his attorney,
Patricia Palm of Palm Law Firm, Ltd., will move the Court for an order precluding the
State from introducing other act or character evidence and other evidence which is
unfairly prejudicial or would violate his constitutional rights.

This Motion is made and based upon the record in this case, including the papers
and pleadings on file herein, the Constitutions of the United States and the State of

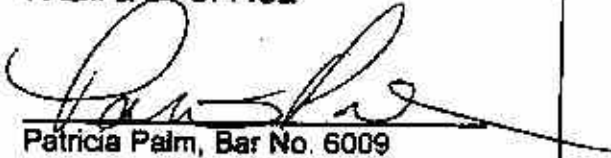
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1 Nevada, the points and authorities set forth below, and any argument of counsel at the
2 time of the hearing on this Motion.
3

4 Dated this 20th day of July, 2010.
5

6 PALM LAW OFFICE

7 
8

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2 POINTS AND AUTHORITIES
3 PROCEDURAL HISTORY

4 The State charged Defendant Brian K. O'Keefe with murder with use of a deadly
5 weapon. He entered a plea of not guilty and invoked his right to a speedy trial. The
6 State filed a motion to admit evidence of other crimes, which O'Keefe opposed. The
7 Court ruled that the State could introduce evidence of threats to the alleged victim
8 Victoria Whitmarsh that witness Cheryl Morris claims were made by O'Keefe, and his
9 demonstration of proficiency at killing with knives, which Morris claims to have
10 witnessed. The Court further ruled that the State could introduce certified copies of
11 O'Keefe's prior Judgment of Conviction for felony domestic battery, involving
12 Whitmarsh. Further, if O'Keefe testified, then the State could inquire into his other prior
13 felony convictions. Pursuant to the Court's ruling on his prior Judgments of Conviction,
14 the State is permitted to introduce only the details of when O'Keefe was convicted, in
15 which jurisdiction, and the name of the offenses, and with the felony domestic battery,
16 the fact that Whitmarsh had testified against him in that case. 3/16/09 TT 2-10.

17 The instant case was tried before this Honorable Court beginning March 16,
18 2009. After five days of trial, on March 20, 2009, the jury returned a verdict finding
19 O'Keefe guilty of second degree murder with use of a deadly weapon. On May 5, 2009,
20 this Court sentenced O'Keefe to 10 to 25 years for second-degree murder and a
21 consecutive 96 to 240 months (8 to 20 years) on the deadly weapon enhancement.

22 O'Keefe timely appealed to the Nevada Supreme Court. After briefing, the Court
23 reversed O'Keefe's conviction, agreeing with him that the district court "erred by giving
24 the State's proposed instruction on second-degree murder because it set forth an
25 alternate theory of second-degree murder, the charging document did not allege this
26 alternate theory, and no evidence supported this theory." The Court explained, "the
27 State's charging document did not allege that O'Keefe killed the victim while he was
28 committing an unlawful act and the evidence presented at trial did not support this
theory of second-degree murder." O'Keefe v. State, NSC Docket No. 53859, Order of

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

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

6 STATEMENT OF FACTS

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

16 When O'Keefe was released from prison in 2007, he met and began a
17 relationship with Cheryl Morris. 3/17/09 TT 10, 3/19/09 TT 189. He would often speak
18 to Morris about his previous relationship with Whitmarsh, and even expressed to her
19 that he still had strong feelings for Whitmarsh. 3/17/09 TT 13-14, 37. Morris claimed at
20 trial that O'Keefe said he was upset with Whitmarsh because she put him in prison and
21 he said he wanted to "kill the bitch." 3/17/09 TT 14-17. Morris testified that O'Keefe left
22 at one point to be with Whitmarsh, and then telephoned Morris, asking her to move out
23 of their jointly shared apartment so Whitmarsh could move in. 3/17/09 TT 11. Morris
24 testified that Whitmarsh got on the phone with her during that call and told her she had
25 decided to resume her relationship with O'Keefe. The two of them appeared to be a
26 loving couple and were open about their relationship. 3/16/09 TT 259, 3/19/09 TT 18-
27 21, 30-36.

28 At about 10:00 p.m. on the evening of the incident, in November 2008, a
neighbor who lived in the apartment below O'Keefe and Whitmarsh heard what she

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

15 By this time, shortly after 11:00 p.m., police had arrived on the scene. 3/16/09
16 TT 215, 3/17/09 TT 65. When they entered the bedroom, they found Whitmarsh lying on
17 the floor next to the bed and an unarmed O'Keefe cradling her in his arms and stroking
18 her head. 3/17/09 at 87, 96. The police believed Whitmarsh to be dead and ordered
19 O'Keefe to let go of her, but he refused. Id. at 51-52, 60-61, 87. The officers
20 eventually subdued him with a taser gun and carried him out of the bedroom. Id. 88.
21 O'Keefe was acting agitated, id. at 73, the officers testified that he had a strong odor of
22 alcohol on him, and he appeared to be extremely intoxicated. Id. at 127-28, 3/18/09 TT
23 170-76. Much of his speech was incoherent, but at one point he said that Whitmarsh
24 stabbed herself and he also said that she tried to stab him. 3/17/09 TT 56, 85, 92.
25 They arrested him and brought him to the homicide offices. 3/17/09 TT 177.
26 Subsequent to his arrest, O'Keefe gave a rambling statement indicating he was not
27 aware of Whitmarsh's death or its cause. 3/18/09 TT 133. Police interviewed him at
28 1:20 a.m., at which time he was crying, raising his voice, talking to himself, and slurring.
Detective Wildemann stated that during the interview O'Keefe smelled heavily of

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

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

19 O'Keefe testified. 3/19/09 TT 177. He acknowledged his problems with alcohol
20 and described his history with Whitmarsh. Id. at 177-93. He disputed Morris's claim
21 that he said he wanted to kill Whitmarsh, but he acknowledged being angry with her. Id.
22 at 190. It was Whitmarsh who called O'Keefe and initiated their renewed relationship.
23 Id. at 191. He was aware that Whitmarsh had Hepatitis C when she moved into his
24 apartment. Id. at 197-98. In November, 2008, Whitmarsh was stressed because of her
25 financial condition. 3/20/09 TT 17. A couple of days before the incident at issue here,
26 Whitmarsh confronted O'Keefe with a knife. Id. at 18-19. She had been drinking and
27 was on medication. Id. O'Keefe had not been drinking that night and was able to
28 diffuse the situation. Id. at 19. On November 5, 2009, O'Keefe learned that he would
29 be hired for a new job and had two glasses of wine to celebrate. Id. at 21-24. O'Keefe

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

18 19 ARGUMENT

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

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

1 cross-examine the witnesses against him); Chambers v. Mississippi, 410 U.S. 284, 294
2 (1973) (stating that "the rights to confront and cross-examine witnesses and to call
3 witnesses in one's own behalf have long been recognized as essential to due process").

4 NRS 48.015 provides that "relevant evidence" means evidence having any
5 tendency to make the existence of any fact that is of consequence to the determination
6 of the action more or less probable than it would be without the evidence." NRS
7 48.025(2) recognizes that "[e]vidence which is not relevant is not admissible."

8 Moreover, NRS 48.035 provides in part that:

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

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

15 Additionally, "[a]bsent certain exceptions, evidence of a person's character or a
16 trait of his character is not admissible for the purpose of proving that he acted in
17 conformity therewith on a particular occasion. Further, evidence of other crimes,
18 wrongs or acts is not admissible to prove the character of a person in order to show that
19 he acted in conformity therewith." Taylor v. State, 109 Nev. 849, 853, 858 P.2d 843,
20 846 (1993). If the State wishes to prove that character or other act evidence is
21 admissible under NRS 48.045(2), for the purpose of establishing proof of motive,
22 opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or
23 accident, the State must prove how these exceptions to the general rule "specifically
24 relate to the facts of this case. A mere recitation of the statute is not sufficient
25 justification for the admission of prior acts." Id. at 854, 858 P.2d at 846. In addition, the
26 State "may not present character evidence as rebuttal to a defense which the accused
27 has not yet presented." Id. at 854, 858 P.2d at 847; Roever v. State, 114 Nev. 867,
28 871, 963 P.2d 503, 505 (1998) ("[T]he bad character testimony should never have been

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

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

11 Taylor, 114 Nev. at 854, 858 P.2d at 846 (quoting McCormick on Evidence § 190 at 452
12 n. 54 (Edward W. Cleary, 2d ed 1972) (quoting Lord Summer in Thompson v. The King,
13 App. Cas. 221, 232 (1918))). Prior to admitting such evidence, the State must first bring
14 a "Petrocelli" motion and request a hearing to determine if "(1) the incident is relevant to
15 the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the
16 probative value of the evidence is not substantially outweighed by the danger of unfair
17 prejudice." Roever, 114 Nev. at 872, 963 P.2d at 505-06 (citing Tinch v. State, 113
18 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997); (Petrocelli v. State, 101 Nev. 46, 692
19 P.2d 503 (1985)). However, even if the other-act evidence is relevant to a permissible
20 purpose and proven by clear and convincing evidence, a court should still exclude it if
21 its probative value is substantially outweighed by the danger of unfair prejudice. Id. at
22 872, 963 P.2d at 505-06 (citing Tinch, 113 Nev. at 1176, 946 P.2d at 1064-65.

23 The Nevada Supreme Court recognizes that the use of character evidence to
24 convict a defendant is extremely disfavored in our criminal justice system. Such
25 evidence is likely to be prejudicial and irrelevant and forces the accused to defend
26 against vague and unsubstantiated charges. It may improperly influence the jury and
27 result in the accused's conviction because the jury believes he is a bad person. The use
28 of such evidence to show a propensity to commit the crime charged is clearly prohibited
by the law of this state and is commonly regarded as sufficient ground for reversal on

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

3
4 A. The State should be precluded from introducing evidence showing that
5 O'Keefe had claimed to Cheryl Morris that he could kill anyone with a knife and
6 had demonstrated how he would kill with knives.

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

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

19 Whether this evidence is treated as other bad act evidence or not, it is irrelevant
20 and unfairly prejudicial. The alleged victim in this case was killed by a puncture type
21 stab wound under her armpit that went directionally from front to back and downward.
22 3/18/09 TT 103, 118. Therefore, nothing close to the gutting or upward sternum area
23 slicing about which Morris contended O'Keefe had bragged occurred here. The State
24 has shown no relevance, i.e., the evidence makes no fact of consequence more or less
25 probable. Moreover, the evidence tends to show that O'Keefe acted consistent with a
26 character trait of being capable of killing with knives and that he is a killer. Thus, the
27 evidence is highly inflammatory and unfairly prejudicial and must be excluded in order to
28 protect O'Keefe's constitutional right to a fair trial.

///

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

4 During the prior trial, the parties agreed that when the State introduced in its
5 case-in-chief the copy of a certified Judgment of Conviction to show the felony domestic
6 battery in C207835, the reference to a concurrent sentence would be redacted. 3/16/09
7 TT 122. Because of the irrelevant and prejudicial nature of this evidence, and out of an
8 abundance of caution, O'Keefe requests a ruling requiring the same redaction for this
9 trial.

10
11 **C. The State should be precluded from introducing any evidence of a sexual**
12 **assault allegation related to O'Keefe's prior burglary conviction.**

13 During the prior trial, the State agreed that it would not introduce any evidence
14 related to the sexual assault allegation, of which O'Keefe was acquitted in C202793.
15 3/16/09 TT 10. Because of the irrelevant and extreme prejudicial nature of this
16 evidence, O'Keefe requests a ruling precluding the State from introducing the sexual
17 assault allegation during the retrial.

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

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

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

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

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

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

22
23 F. The State should be precluded from introducing any reference to racial
24 slurs allegedly made by O'Keefe.

25 During the previous trial, the State introduced testimony from transportation
26 officer Hutcherson that O'Keefe told him to "turn that nigger music off" and said "I don't
27 listen to nigger music." 3/17/09 TT 179, 251. This testimony came as a surprise to the
28 defense, and was the basis for a motion for mistrial. The State offered an additional
reason as to why it believed the testimony to be relevant:

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

5 3/18/09 TT 2-8.

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

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

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

23 During the testimony of Joyce Tolliver, she was permitted to testify over defense
24 hearsay objection that her husband, Charles, returned from O'Keefe's apartment and
25 said, "baby, he done killed that girl." 3/16/09 TT 196-98. The Court admitted the
26 statement as an excited utterance.

27 However, the excited utterance hearsay exception is justified by the concept that
28 a witness, having just witnessed a startling event, is likely to truthfully describe it while
still under the stress of excitement. See State v. Rivera, 578 P.2d 1373, 1375 (Ariz.

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

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

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

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

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

13
14 **I. The State should be precluded from introducing evidence that a prior trial**
15 **conviction or reversal occurred in this case.**

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

1 reh'g, 114 Nev. 100, 952 P.2d 431 (1998). Here, O'Keefe should not be further
2 burdened by the violation of his rights during the previous trial, and to allow the fact of
3 the previous trial, conviction, or appeal into evidence would taint his right to a fair retrial.
4
5

6 CONCLUSION

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

10 DATED this 20th day of July, 2010.

11 PALM LAW FIRM, LTD.
12

13 
14

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RECEIPT OF COPY

I, the undersigned, acknowledge that on the _____ day of _____
2010, I received a true copy of the foregoing NOTICE OF MOTION AND MOTION BY
DEFENDANT O'KEEFE TO PRECLUDE THE STATE FROM INTRODUCING AT
TRIAL OTHER ACT OR CHARACTER EVIDENCE AND OTHER EVIDENCE WHICH
IS UNFAIRLY PREJUDICIAL OR WOULD VIOLATE HIS CONSTITUTIONAL
RIGHTS.

CLARK COUNTY DISTRICT ATTORNEY

By: _____

ORIGINAL

81

001
PALM LAW FIRM, LTD.
PATRICIA PALM, ESQ.
NEVADA BAR NO. 6009
1212 CASINO CENTER BLVD.
LAS VEGAS, NV 89104
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Attorney for Brian O'Keefe

FILED
JUL 21 2010
CLERK OF COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

BRIAN K. O'KEEFE,

Defendant.

CASE NO.: C250630

DATE:

TIME:

08C250630
NOTICE
Notice of Motion
884421



**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**

TO: THE STATE OF NEVADA, Plaintiff and

TO: DISTRICT ATTORNEY'S OFFICE, its counsel:

PLEASE TAKE NOTICE that on the above date and time, or as soon thereafter as counsel can be heard, Defendant Brian K. O'Keefe, by and through his attorney, Patricia Palm of Palm Law Firm, Ltd., will move the Court for an order allowing him to introduce evidence of the alleged victim's mental health condition and history, including prior suicide attempts, anger outbursts, anger management therapy, self-mutilation, and erratic behavior.

This Motion is made and based upon the record in this case, including the papers and pleadings on file herein, the Constitutions of the United States and the State of

001099

RECEIVED

JUL 21 2010

CLERK OF THE COURT

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

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

Supreme Court No.:

District Court Case No.: 08C250630

Electronically Filed
Dec 01 2015 10:52 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

6
7 **APPELLANT'S APPENDIX – VOLUME VI – PAGES 1000-1199**

8
9 **MATTHEW D. CARLING**
51 East 400 North, Bldg. #1
10 Cedar City, Utah 84720
(702) 419-7330 (Office)
11 Attorney for Appellant

STEVEN B. WOLFSON
Clark County District Attorney
200 Lewis Avenue, 3rd Floor
Las Vegas, Nevada 89155
Counsel for Respondent

12 **CATHERINE CORTEZ MASTO**
Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
Counsel for Respondent

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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 Prsuant 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 Diveste 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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1 MR. PIKE: Based upon -- it's information that is
2 he's basing his opinion on whether to call for medical help.
3 Present sense impression of Brian O'Keefe, excited utterance
4 (indiscernible).

5 MR. SMITH: Well, Judge it's still his statement; and
6 it's offered -- it would -- we presume it would be offered for
7 the truth --

8 THE COURT: I'm going to sustain the objection.

9 BY MR. PIKE:

10 Q Without saying what he said -- well, without saying
11 what Brian said, you heard him talking to Victoria?

12 A Yes.

13 Q And then you went and called for an ambulance. Now,
14 the -- and the entire time that you went up there, Brian didn't
15 try and keep you out of the apartment?

16 A Other than take a swing at me and tell me to get the
17 hell out.

18 Q Right. Didn't come at you with a weapon?

19 A No.

20 Q Didn't try and lock door?

21 A No.

22 Q Didn't try and close any doors on you?

23 A No.

24 Q Didn't try and shove you out of the apartment?

25 A No.

1 Q Other than the swing, he wasn't swearing at you,
2 wasn't yelling at you? When you came up towards the apartment,
3 you didn't hear any yelling or screaming --

4 A No.

5 Q -- or fighting or anything at all, did you?

6 A No.

7 Q And then when you left the apartment, Brian didn't
8 try and run out of the apartment?

9 A No.

10 Q He didn't try and leave the scene.

11 A No.

12 Q He didn't try and break away or leave that apartment
13 or leave Victoria, did he?

14 A No.

15 MR. PIKE: Have I in further questions.

16 THE COURT: Any redirect.

17 MR. SMITH: Briefly.

18 REDIRECT EXAMINATION

19 BY MR. SMITH:

20 Q Mr. Armbruster, how long did it take the police to
21 arrive from the time you left the apartment?

22 A It seemed like just a couple minutes.

23 Q So was it pretty quick?

24 A Pretty quick.

25 Q Okay. Now, while you were inside the apartment,

1 after Mr. O'Keefe took a swing at you, were you asked to call
2 for medical assistance or anything?

3 A No.

4 Q Okay.

5 MR. SMITH: No further questions.

6 THE COURT: Any further cross, Mr. Pike?

7 MR. PIKE: Thank you.

8 RECROSS-EXAMINATION

9 BY MR. PIKE:

10 Q And as Brian -- as you saw Brian during that period
11 of time, and you saw him get up from where he was looking at
12 Victoria, he appeared to be stumbling and not very steady on
13 his feet, didn't he?

14 A Yeah.

15 MR. PIKE: No further questions.

16 THE COURT: Anything further?

17 MR. SMITH: Nothing, Judge. Thank you.

18 THE COURT: Any questions from the jurors? All
19 right, no. Sir, you're instructed not to discuss your
20 testimony with any other witness involved in this case until
21 this matter is finally resolved. Thank you for your time, sir.

22 THE WITNESS: All right.

23 THE COURT: Do we have a witness that will take a
24 short amount of time or --

25 MR. SMITH: We do actually have a short witness.

1 THE COURT: All right.

2 MR. PIKE: You're Honor, we'll also relieve this
3 witness from --

4 THE COURT: Okay.

5 MR. PIKE: -- the defense subpoena.

6 THE COURT: All right.

7 MR. PIKE: So this is your -- all of your
8 appearances.

9 THE WITNESS: Okay.

10 MR. PIKE: Thanks.

11 THE COURT: All right, next witness.

12 MR. SMITH: State's next witness, Judge, is Jimmy
13 Hathcox.

14 THE MARSHAL: Mr. Hathcox, if you'll remain standing,
15 please. Raise your right hand and face the clerk.

16 JIMMY HATHCOX, STATE'S WITNESS, SWORN

17 THE CLERK: Please be seated. Will you please state
18 your name and spell it for the record.

19 THE WITNESS: Jimmy Hathcox, H-a-t-h-c-o-x.

20 THE CLERK: Thank you.

21 THE COURT: Go ahead, Counsel.

22 MR. SMITH: Thank you, Judge.

23 DIRECT EXAMINATION

24 BY MR. SMITH:

25 Q Mr. Hathcox, where do you presently reside?

1 A 5001 El Parque, Apartment 36.

2 Q How long you been living there?

3 A About a year.

4 Q Is Apartment 36 next to Apartment 35?

5 A Yes.

6 Q Are you familiar with the occupants of Apartment 35
7 back on November 5th, 2008?

8 A Yes.

9 Q And who resided there?

10 A Brian O'Keefe and his girlfriend.

11 Q Okay, do you see Brian O'Keefe present in court
12 today?

13 A Yes, I do.

14 Q Now, will you identify for the record what he's
15 wearing.

16 A Right here.

17 THE COURT: He's on the far left?

18 THE WITNESS: Yeah, I see him right here.

19 MR. PIKE: We'll stipulate to the identity, your
20 Honor. Thank you.

21 THE COURT: Record reflect identification of the
22 defendant.

23 MR. SMITH: Thank you, Judge.

24 BY MR. SMITH:

25 Q And the -- you you said his girlfriend. Would that

1 be a female occupant?

2 A Yes.

3 Q I'm showing you what's been admitted as State's
4 Exhibit 4. Is that a photograph of the female occupant?

5 A Yes, sir, it looks like her.

6 Q Let's see if I can focus it. Is that a picture of
7 her?

8 A Yes, it looks like her.

9 Q Now I want to draw your attention, sir, to
10 approximately 10:00 o'clock p.m. on November 5th, 2008.
11 Anything unusual happen?

12 A I heard some noises over there, and I heard a --
13 well, what are you referring to exactly? I mean, I --

14 Q Let's start with the noises. You say you hear noises
15 at 10:00 o'clock p.m.?

16 A Yeah. Yeah, I heard -- I heard noises coming out of
17 apartment. I don't remember the exact time. It was around
18 there, yeah.

19 Q Okay. Do you remember writing a handwritten
20 statement?

21 A Um-h'm.

22 Q Pursuant to the police arriving afterwards?

23 A Right.

24 Q Would looking at your handwritten statement refresh
25 your recollection as to what time you began hearing noises

1 coming from the apartment?

2 A Yeah, it was probably -- it was probably around
3 10:00. It was probably around 10:00 I heard some noises, some
4 thumping noises coming out of there. And then a little bit
5 after that I heard a loud bang on the rail outside, and I
6 opened up the door and looked, and when I looked out I saw
7 Brian going into his apartment because I was looking out of
8 mine. I looked at him, he looked at me, he had kind of a weird
9 look on his face. I just closed the door. And then probably
10 about 15 minutes later I heard Cookie from down stairs yelling
11 call the cops, and I went to my door, and when I got to my
12 door, Cookie and Todd were there.

13 And Todd had went into the apartment, and I said --
14 and then I didn't -- so I just kind of basically turned around
15 and went back into my apartment --

16 Q Okay, let --

17 A -- at that point.

18 Q -- me ask you this. Going back to the time when you
19 opened your door and you look out and you exchange a look with
20 the defendant, Brian O'Keefe --

21 A Right.

22 Q -- and then he goes back into his apartment? Is that
23 a yes?

24 A Yes.

25 Q Did you continue to hear anything coming from his

1 apartment?

2 A Yeah, I kept hearing a little bit some noises over
3 there.

4 Q Okay. And then at some point you just testified
5 Cookie comes out?

6 A Cookie apparently had heard the noise from down
7 stairs and went up there, and he walked in and saw what he saw,
8 and came out and was yelling call the police. That's when I
9 went out my front door and looked in, but I didn't go in the
10 apartment.

11 Q Okay. Now, can you describe that look you saw on the
12 defendant?

13 A It was a look like I ain't never seen on his face
14 before. It was a --

15 Q Okay.

16 A -- scary looking look to me. I just closed the door
17 and said h'm, you know.

18 Q Okay. Now, let me ask you this, throughout the time
19 that they had resided in Apartment No. 35, how many occasions
20 would you say you saw Victoria Witmarsh?

21 A I've seen them together almost everyday.

22 Q Okay. Can you describe her stature, her body
23 composition?

24 A Her size, you mean?

25 Q Yes, sir.

1 A She was a small girl. Probably around five foot,
2 five foot, one, real thin, frail like. Kind of, you know, just
3 small girl.

4 Q Okay. Do you recall giving a recorded statement to
5 the police regarding the incidents of that night?

6 A Yes.

7 Q Do you recall telling the police that she was
8 actually a little bitty thing?

9 A Yes, she is. Shows a little bitty thing, yeah.

10 Q Okay.

11 MR. SMITH: No further question, Judge.

12 THE COURT: Cross.

13 CROSS-EXAMINATION

14 BY MR. PIKE:

15 Q Good afternoon, sir.

16 A How you doing?

17 Q I'm showing you Defendant's Exhibit No. G, which has
18 been admitted into evidence. And do you recognize those
19 apartments?

20 A Um-h'm.

21 Q Is that a yes?

22 A Yes.

23 Q I'm sorry, we're recording it --

24 A Okay, yes, yes.

25 Q -- so yes, I do that. And your apartment would be

1 36.

2 A Right.

3 Q This apartment?

4 A Right.

5 Q And evening that -- of the events that we're talking
6 about, the door was open when you came out and when you heard
7 the noise on the guardrail out here?

8 A No, when I heard the noise on the rail, the door was
9 closed. He was going in, and I just opened my door and kind of
10 looked out, and I saw him, and he saw me, and I just kind of
11 closed my door and went back in.

12 Q And went in, and then you didn't come back out until
13 you heard Cookie.

14 A Right.

15 Q All right. Now, you'd been able to see Mr. O'Keefe
16 and the Victoria coming in and out of the apartment and also
17 you'd seen prior to Victoria moving in there, you saw Brian
18 with a Cheryl Morris. Do you remember Cheryl?

19 A Yes.

20 Q And during the time that you saw them out there, I'll
21 represent to you that there are other witnesses that indicated
22 that there was some chairs kind of out on the balcony down
23 towards the end there.

24 A Yeah, there were.

25 Q And the building kind of ends right there --

1 A Right.

2 Q -- doesn't it?

3 A Right.

4 Q So it's almost like a little patio that has access
5 from your apartment and from Brian and Victoria's apartment?

6 A Right.

7 Q And there's chairs out there and you'd seen Brian
8 there with Cheryl, and you'd seen them out there drinking
9 before.

10 A Right.

11 Q And when Cheryl moved away did it seem to you that
12 Brian's drinking got worse?

13 A Maybe a little -- maybe --

14 MR. SMITH: Judge, I'm going to make an objection.
15 I'm going to make an objection to the relevance.

16 MR. PIKE: Intoxication is at issue in --

17 THE COURT: Overrule the objection.

18 BY MR. PIKE:

19 Q Did it appear to you that he had been drinking more?

20 A Maybe a little bit more, yeah.

21 Q All right. And you saw the interaction between
22 Victoria and Brian when they'd come up the stairs and go into
23 their apartment, and you'd seen them on their day-to-day
24 travels to and from their apartment.

25 A Yes.

1 Q During that period of time did they appear to be a
2 couple?

3 A Yes.

4 Q They were open about their relationship?

5 A Yes.

6 Q She had moved in?

7 A Yes.

8 Q And they appeared to be a loving couple?

9 A Yes.

10 MR. PIKE: No further questions.

11 THE COURT: Redirect?

12 MR. SMITH: Briefly, Judge.

13 REDIRECT EXAMINATION

14 BY MR. SMITH:

15 Q Mr. Hathcox, your observation of Mr. O'Keefe that
16 night, would you describe it that in your opinion you thought
17 he was angry at any point?

18 A He said -- he had a -- he had a look on his face that
19 night when I looked at him that I hadn't actually seen on his
20 face before. It looked -- he looked pissed, yeah.

21 Q Okay.

22 MR. SMITH: No further questions.

23 THE COURT: Any further cross?

24 RECROSS-EXAMINATION

25 BY MR. PIKE:

1 Q Prior to the time that you heard Cookie yelling, and
2 you didn't hear noise for like an hour?

3 A Well, did I hear noise, yeah, before I heard Cookie
4 yelling, yes.

5 Q But was it for a short period of time or for a longer
6 period of time?

7 A What do you mean?

8 Q About how long did it last? Maybe ten minutes?
9 Maybe five minutes? Maybe an hour?

10 A Well, the first noises I heard probably lasted 20
11 minutes or so, you know, on and off.

12 MR. PIKE: Okay. No further questions.

13 MR. SMITH: Just briefly.

14 THE COURT: Yes.

15 FURTHER REDIRECT EXAMINATION

16 BY MR. SMITH:

17 Q And, sir, I just want to make sure the record's
18 clear. It's your testimony that the noises began, to your
19 recollection, approximately 10:00 o'clock p.m.?

20 A Yes, sir.

21 Q Okay.

22 MR. SMITH: No further questions.

23 THE COURT: Any questions by the jurors? Yes, write
24 down your question and your juror number, please. Counsel
25 approach.

1 (Off-record bench conference).

2 THE COURT: Ladies and gentlemen, I had mentioned
3 before that certain questions would be reviewed by the Court as
4 well as the attorneys, and we're not legally able to ask this
5 particular question. All right, thank you, sir, for your time.
6 You're instructed not to discuss your testimony today with any
7 other witness involved in this case until this matter is
8 finally resolved. Thank you for your time, sir.

9 THE WITNESS: Thank you.

10 THE COURT: All right, ladies and gentlemen, it's
11 just six minutes after 5:00. We're going to end -- we're going
12 to take a recess for the evening at this point. Every morning
13 I have a motion calendar. Tomorrow I have a criminal calendar
14 and Mondays and Wednesdays are my civil calendar. Tuesday,
15 Thursdays are my criminal calendar. And I should be done about
16 9:15. I just got to sort of change gears here before we start
17 the trial. So if we can have everyone back at 9:30.

18 Sometimes cases go a little bit longer, but we
19 endeavor to start promptly at 9:30, but hopefully we're not any
20 later than 9:30. But please bear with us if we're a few
21 minutes late because like I said, I have about 19 matters I
22 have to resolve tomorrow morning before this case resumes
23 again.

24 So we'll you back at 9:30. During this evening
25 recess it is your duty not to converse among yourselves or with

1 anyone else on any subject connected with the trial or to read,
2 watch or -- excuse me. You're not to converse among yourselves
3 or with anyone else on any subject connected with the trial or
4 to read, watch or listen to any report over commentary on the
5 trial by any person connected with the trial or by any medium
6 of information, including without limitation, newspaper,
7 television, radio or the Internet.

8 You're not to form or express an opinion on any
9 subject connected with this case until in matter is finally
10 submitted to you. We'll see you back at 9:30 tomorrow morning.

11 (Jury recessed at 5:08 p.m.)

12 (Outside the presence of the jury)

13 THE COURT: All right, anything we need to resolve
14 before I leave the bench?

15 MS. GRAHAM: Should we resolve the photos because --

16 MR. SMITH: Yeah, we should because we probably want
17 to start getting into that stuff tomorrow.

18 THE COURT: Oh, have you those photos? Well, let's
19 -- you know what, let's -- can you guys stick around for a few
20 minutes? Do you have the numbers of the photos that are in
21 dispute? For the record, we're outside the presence of the
22 jury.

23 Okay, there was Proposed Exhibit 32. Ms. Palm or Mr.
24 Pike, are you familiar with --

25 MS. PALM: Randy. Mr. Pike.

1 MR. PIKE: Yes.

2 THE COURT: -- Proposed 32?

3 MR. PIKE: Yes.

4 THE COURT: Do you have an objection to that one?

5 MR. PIKE: I do. The ones that have been separated
6 apart I have objections on. Maybe if we came up to the bench,
7 we can go through them with the Court, and --

8 THE COURT: All right.

9 MR. PIKE: -- I can identify my objection.

10 THE COURT: That's 32.

11 MR. PIKE: 32. I objected. It shows the autopsy
12 photograph with bruising on the left arm in relationship to the
13 case. It -- again, the bruising, as I've indicated, the doctor
14 testified at the time of the preliminary hearing, was
15 occasioned by her cirrhosis and she cannot identify them as
16 contemporaneous with or associated with this event.

17 THE COURT: All right, Mr. Smith.

18 MR. SMITH: And Judge, that -- it's the State's
19 position that that's not what the medical examiner testified
20 to. What the medical examiner testified to is that a person
21 who suffers from cirrhosis, granted they may bruise easier than
22 a person who does not suffer from cirrhosis. That being said,
23 any argument based on that would go to the weight of that
24 evidence and not the admissibility, especially when now we have
25 evidence that there was a struggle this took place in this

1 apartment for at least an hour.

2 We should be able to put in these pictures that
3 corroborate our theory of the case that this was not just
4 simply the defendant stabbing her in a fit of -- or at a sudden
5 heat of the moment or that this was a quick incident, but
6 rather that this was a long drawn out affair.

7 Furthermore, it's certainly probative because it
8 helps to counter any claim that the defendant is going to make
9 that this was self-defense.

10 THE COURT: Mr. Pike, was the testimony of the doctor
11 that although someone can bruise easier, that this is
12 specifically related to cirrhosis of the liver only?

13 MR. PIKE: It -- she just testified that cirrhosis of
14 the liver would cause someone to bruise more easily. If the
15 Court's concerned about whether or not these could be tied into
16 this event, then I think that at the time that the ME comes in,
17 there should be a proffer with her present as to whether or not
18 she can identify the time frame as to this.

19 Insofar as a struggle that has been suggested, there
20 is nothing in the photographs of the apartment to show that
21 anything is disturbed, that there was anything to indicate that
22 there was a fight, anything other than slammed doors, banging
23 on walls. But as far as a physical altercation, we don't have
24 any evidence of that yet. Just loud noises.

25 THE COURT: You're saying you object to all which

1 would be 32 through 38.

2 MR. PIKE: It's ostensibly all of them.

3 MR. SMITH: All much them.

4 MR. PIKE: All of them.

5 THE COURT: Okay. Well, I think I'll just hear from
6 the medical examiner. You can just show the photographs before
7 they're -- you know, before you show them to the jury and then
8 see if she -- you know, that they can state this is strictly
9 related to a medical condition, I mean, in and of itself, or if
10 this is consistent with someone being grabbed or punched or
11 pushed, et cetera.

12 MR. SMITH: Well, is what she's going to say is that
13 it could be consistent with a person being battered, you it
14 could also be consistent with a person bruising easier due to
15 them having --

16 THE COURT: Okay.

17 MR. SMITH: -- cirrhosis. So means the threshold of
18 its admissibility, and it would just -- it's the State's
19 position that it would fall on Mr. Pike and Ms. Palm to argue
20 the weight of that evidence --

21 THE COURT: Right.

22 MR. SMITH: -- but not the admissibility itself.

23 THE COURT: Well, right now I'm just not -- I'm not
24 admitting the evidence --

25 MR. SMITH: Okay.

1 THE COURT: -- because we need to have --

2 MR. SMITH: Sure.

3 THE COURT: -- the foundation.

4 MR. SMITH: Well, we wouldn't show it to any --

5 THE COURT: Right.

6 MR. SMITH: -- of these witnesses.

7 THE COURT: Okay.

8 MR. SMITH: It would be the coroner.

9 THE COURT: Right.

10 MR. PIKE: But the remainder of the photographs of
11 the scene, of the area and the other photographs --

12 THE COURT: Okay, let's go over those, then. 44.

13 MR. PIKE: It's the same thing, your Honor, the
14 bruising that was there.

15 THE COURT: Is this strictly the bruising objection
16 versus any other objection that as long as it's related to --

17 MR. PIKE: Right.

18 THE COURT: Well, we'll see what the medical examiner
19 has to say. I thought there were some photographs that someone
20 may have said was overly gruesome or --

21 MR. SMITH: Yeah, are you talking about the one --

22 MR. PIKE: There's --

23 MR. SMITH: -- of the --

24 MR. PIKE: There's some that have blood on the -- the
25 bruising on her body can be shown without showing the entire

1 body laid out on the gurney, so --

2 THE COURT: Well, I haven't seen a quote, gruesome
3 photograph yet. Do you have -- is it in this stack? I've gone
4 through all the stacks, and all the other ones just show
5 bruising. And this is in No. 60?

6 MR. SMITH: Judge, that's not too gruesome. I've
7 certainly seen worse.

8 MR. PIKE: Well, we're in a horrible profession to
9 say what is gruesome and what isn't.

10 THE COURT: We had a bad one in a civil case couple
11 weeks back, so --

12 MR. PIKE: Oh, okay.

13 THE COURT: Now, I mean, I'm just -- like I say, I'm
14 going to wait for the medical examiner. But No. 60 just does
15 not seem overly gruesome. I mean, it's --

16 MR. PIKE: And I'm just -- and out of an abundance of
17 caution, just so long as they bear -- if they can meet the
18 threshold that they show relevant injuries that are potentially
19 relevant to this case. And Counsel's correctly stated the
20 burden that he has, and we can -- we'll address that with the
21 coroner --

22 THE COURT: All right.

23 MR. PIKE: -- when she testifies.

24 THE COURT: There's really nothing I can do right at
25 this point until we hear the coroner. Anything else?

1 MR. PIKE: The remainder of the photographs can be
2 admitted other than --

3 THE COURT: Okay.

4 MR. PIKE: -- the State's.

5 THE COURT: Can you tell the clerk which numbers so
6 she knows.

7 MS. PALM: Did you guys look at ours?

8 MR. SMITH: No.

9 THE COURT: All right.

10 MS. PALM: (Indiscernible).

11 THE COURT: Yeah, we're off the record.

12 (Court recessed at 5:15 p.m. until Tuesday,

13 March 17, 2009, at 9:30 a.m.)
14
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INDEX

<u>NAME</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
<u>STATE'S WITNESSES:</u>				
Joyce Toliver	210	220	224	228
Charles Edward Toliver	229	246	258	260, 262
Todd Armbruster	264	271	278	279
Jimmy Hathcox	280	285	288, 289	288

* * * * *

EXHIBITS

<u>DESCRIPTION:</u>	<u>ADMITTED</u>
---------------------	-----------------

STATE'S EXHIBITS:

Exhibits 2 and 3 (911 recordings)	267
Exhibit 4 (photo)	212
Exhibit 6 (photo)	236

DEFENDANT'S EXHIBITS:

Exhibit G (photo)	272
Exhibit H (photo)	246
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CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

Verbatim Digital Reporting, LLC
Littleton, CO 80120
(303) 915-1677

Julie Lord

JULIE LORD, TRANSCRIBER

10-8-09

DATE

IN THE SUPREME COURT OF THE STATE OF NEVADA

FILED

MAY 06 2010

BRIAN KERRY O'KEEFE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 53859

John J. [Signature]
CLERK OF COURT

District Court Case No. C250630

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Tracie Lindeman, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows: "ORDER the judgment of conviction REVERSED AND REMAND this matter to the district court for proceedings consistent with this order."

Judgment, as quoted above, entered this 7th day of April, 2010.

IN WITNESS WHEREOF, I have subscribed my name and affixed
the seal of the Supreme Court at my Office in Carson City,
Nevada, this 3rd day of May, 2010.

Tracie Lindeman, Supreme Court Clerk

By: Deputy Clerk

A. Ingersoll

001023

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN KERRY O'KEEFE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53859

FILED

APR 07 2010

TRACIE K. LINDSEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of one count of second-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Appellant Brian Kerry O'Keefe contends that the district court erred by giving the State's proposed instruction on second-degree murder because it set forth an alternative theory of second-degree murder, the charging document did not allege this alternate theory, and no evidence supported this theory. We agree. "The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error. An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (internal quotation marks and footnote omitted). Here, the district court abused its discretion when it instructed the jury that second-degree murder includes involuntary killings that occur in the commission of an unlawful act because the State's charging document did not allege that O'Keefe killed the victim while he was

committing an unlawful act and the evidence presented at trial did not support this theory of second-degree murder. Cf., Jennings v. State, 116 Nev. 488, 490, 998 P.2d 557, 559 (2000) (adding an additional theory of murder at the close of the case violates the Sixth Amendment and NRS 173.075(1)). The district court's error in giving this instruction was not harmless because it is not clear beyond a reasonable doubt that a rational juror would have found O'Keefe guilty of second-degree murder absent the error. See Neder v. United States, 527 U.S. 1, 18-19 (1999); Wegner v. State, 116 Nev. 1149, 1155-56, 14 P.3d 25, 30 (2000), overruled on other grounds by Rosas v. State, 122 Nev. 1258, 147 P.3d 1101 (2006). Because we conclude that the judgment of conviction must be reversed and the case remanded for a new trial, we need not reach O'Keefe's remaining contentions. Accordingly, we

ORDER the judgment of conviction REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

Cherry, J.
Cherry

Saitta, J.
Saitta

Gibbons, J.
Gibbons

cc: Hon. Michael Villani, District Judge
Special Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

Document is
original on file

May 3, 2010

A. Ingersoll

001026

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN KERRY O'KEEFE,
Appellant,

Supreme Court No. 53859

vs.

THE STATE OF NEVADA,
Respondent.

District Court Case No. C250630

REMITTITUR

TO: Steven D. Grierson, Clark District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.

Receipt for Remittitur.

DATE: May 3, 2010

Tracie Lindeman, Clerk of Court

By: _____

Deputy Clerk

A. Ingersoll

cc (without enclosures):

Hon. Michael Villani, District Judge

Attorney General/Carson City

Clark County District Attorney

Special Public Defender

RECEIPT FOR REMITTITUR

Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the
REMITTITUR issued in the above-entitled cause, on MAY 06 2010

HEATHER LOFQUIST

Deputy District Court Clerk

001027

10-09147.

0001

DAVID M. SCHIECK
SPECIAL PUBLIC DEFENDER
Nevada Bar #0824
RANDALL H. PIKE
Assistant Special Public Defender
Nevada Bar #1940
MICHAEL W. HYTE,
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Attorneys for Brian O'Keefe

FILED

MAY 24 2010

John B. Johnson
CLERK OF COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff

vs.

BRIAN O'KEEFE, ID# 1447732,
Defendant.

CASE NO. C 250630
DEPT. NO. 17

MOTION FOR JUDICIAL RULING

DATE: June 10, 2010
TIME: 8:15 AM

COMES NOW, BRIAN O'KEEFE, by and through his attorneys DAVID M. SCHIECK, Special Public Defender and RANDALL H. PIKE, Assistant Special Public Defender, and MICHAEL W. HYTE, Deputy Special Public Defender, and moves this Court to issue a ruling to the Defense regarding its obligation to provide the deceased's medical records to the Defendant in light of HIPPA requirements. This Motion is made and based on the pleadings of file herein, the Affidavit attached hereto, and any argument of counsel at the time of hearing of the motion.

NOTICE OF MOTION

TO: THE STATE OF NEVADA, Plaintiff; and
TO: DISTRICT ATTORNEY'S OFFICE, Plaintiff's attorneys:

RECEIVED

MAY 24 2010

CLERK OF THE COURT

1 YOU WILL PLEASE TAKE NOTICE that the undersigned will bring the foregoing
2 Motion on for hearing before the above-entitled Court on the 10th day of June, 2010, at the hour
3 of 8:15 AM

4 **STATEMENT OF FACTS**

5 The defendant has requested that he receive a copy of the deceased's medical records regarding
6 her treatment at various mental health facilities. At the first trial, Defense counsel filed a Petty
7 brief to admit her records which are believed to be relevant to her state of mind at the time of
8 her death. The relevant portions of the medical records are outlined in that motion. The Motion
9 was denied by the Court.

10 **POINTS AND AUTHORITIES**

11 The *Standards for Privacy of Individually Identifiable Health Information* ("Privacy Rule")
12 establishes, for the first time, a set of national standards for the protection of certain health
13 information. The U.S. Department of Health and Human Services ("HHS") issued the Privacy
14 Rule to implement the requirement of the Health Insurance Portability and Accountability Act
15 of 1996 ("HIPAA"). 1 The Privacy Rule standards address the use and disclosure of
16 individuals' health information—called "protected health information" by organizations subject
17 to the Privacy Rule — called "covered entities," as well as standards for individuals' privacy
18 rights to understand and control how their health information is used. Within HHS, the Office
19 for Civil Rights ("OCR") has responsibility for implementing and enforcing the Privacy Rule
20 with respect to voluntary compliance activities and civil money penalties. The Special Public
21 Defender is concerned that it falls within the definition of "Business Associates" and that
22 dissemination is controlled by either HIPAA unless ordered by the Court. In general, a business
23 associate is a person or organization, other than a member of a covered entity's workforce, that
24 performs certain functions or activities on behalf of, or provides certain services to, a covered
25 entity that involve the use or disclosure of individually identifiable health information. Business
26 associate functions or activities on behalf of a covered entity include claims processing, data
27
28

1 analysis, utilization review, and billing. Business associate services to a covered entity are
2 limited to legal, actuarial, accounting, consulting, data aggregation, management,
3 administrative, accreditation, or financial services. However, persons or organizations are not
4 considered business associates if their functions or services do not involve the use or disclosure
5 of protected health information, and where any access to protected health information by such
6 persons would be incidental, if at all. A covered entity can be the business associate of another
7 covered entity.
8

9
10 It is the policy of the Special Public Defender's Office to only allow client's access to
11 discovery that is redacted of addresses, telephone numbers, social security numbers and any
12 other items that would be considered personal information (Credit card numbers, any account
13 numbers, etc.). However, given the sensitivity of psychiatric records and in light of the Court's
14 previous ruling that these records are inadmissible, the disclosure of the complete records
15 would be required by Court Order. (It is only through this method that the records can even be
16 subject to subpoena.).
17

18 CONCLUSION

19 Wherefore, it is requested that the Court either enter an Order allowing the records (as redacted
20 above) to be supplied to the Defendant or rule that the requirements of HIPAA preclude such
21 dissemination.
22

23 DATED this 27th of May, 2010.

24 SUBMITTED BY:

25 DAVID M. SCHIECK
26 SPECIAL PUBLIC DEFENDER

27 RANDALL H. PIKE
28 MICHAEL H. HYTE
330 S. Third Street, Suite #800
Las Vegas, Nevada 89155
Attorneys for O'KEEFE

1 **ROC**
2 **DAVID M. SCHIECK**
3 **SPECIAL PUBLIC DEFENDER**
4 Nevada Bar #0824
5 **RANDALL H. PIKE**
6 **Assistant Special Public Defender**
7 Nevada Bar #1940
8 **MICHAEL W. HYTE**
9 **Deputy Special Public Defender**
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14 (702) 455-6273 fax
15 E-MAIL: rpike@co.clark.nv.us
16 E-MAIL: mhyte@co.clark.nv.us
17 Attorneys for Brian O'Keefe

MAY 24 4 01 PM '10

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

12 **THE STATE OF NEVADA,**
13 **Plaintiff**

CASE NO. C 250630
DEPT. NO. 17

14 vs.

15 **BRIAN O'KEEFE, ID# 1447732,**
16 **Defendant.**

17 **RECEIPT OF COPY**

18 **DATE OF HEARING: June 10, 2010**
19 **TIME OF HEARING: 8:15 a.m.**

20 **RECEIPT of a copy of Motion for Judicial Ruling is hereby acknowledged.**

21 Dated: 5/24/10

22 **DISTRICT ATTORNEY'S OFFICE**

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

26 **RECEIVED**

27 **MAY 24 2010**

28 **CLERK OF THE COURT**

● ORIGINAL ●

VB

OPI

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

STEPHANIE A. GRAHAM
Deputy District Attorney
Nevada Bar #0010058
200 Lewis Avenue
Las Vegas, Nevada, 89155-2211
(702) 671-2500
Attorney for Plaintiff

FILED

MAY 26 1 21 PM '10

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

BRIAN O'KEEFE, aka,
Brian Kerry O'keefe,

Defendant.

Case No. C250630

Dept No. XVII

ORDER FOR PRODUCTION OF INMATE
BRIAN O'KEEFE, BAC # 129208

DATE OF HEARING: 06/10/2010

TIME OF HEARING: 8:15 AM

TO: Dwight W. Neven, Warden, High Desert State Prison

TO: DOUGLAS C. GILLESPIE, Sheriff of Clark County, Nevada

Upon the ex parte application of THE STATE OF NEVADA, Plaintiff, by DAVID ROGER, District Attorney, through STEPHANIE A. GRAHAM, Deputy District Attorney, and good cause appearing therefor,

IT IS HEREBY ORDERED that Dwight W. Neven, Warden of High Desert State Prison shall be, and is, hereby directed to produce BRIAN O'KEEFE, Defendant in Case No. C250630, on a charge of MURDER WITH USE OF A DEADLY WEAPON (Felony - NRS

CLERK OF THE COURT

MAY 26 2010

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DEPT. 17 ON

MAY 20 2010

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001032

1 200.010, 200.030, 193.165) wherein THE STATE OF NEVADA is the Plaintiff, inasmuch
2 as the said Defendant is currently incarcerated in the High Desert State Prison located in
3 Indian Springs, Nevada, and his presence will be required in Las Vegas, Nevada,
4 commencing on 06/10/2010, at the hour of 8:15 o'clock AM and continuing until completion
5 of the prosecution's case against the said Defendant.

6 IT IS FURTHER ORDERED that DOUGLAS C. GILLESPIE, Sheriff of Clark
7 County, Nevada, shall accept and retain custody of the said Defendant in the Clark County
8 Detention Center, Las Vegas, Nevada, pending completion of said matter in Clark County,
9 or until the further Order of this Court; or in the alternative shall make all arrangements for
10 the transportation of the said Defendant to and from the Nevada Department of Corrections
11 facility which are necessary to insure the Defendant's appearance in Clark County pending
12 completion of said matter, or until further Order of this Court.

13 DATED this 21 day of May, 2010.

14 
15 DISTRICT JUDGE
16 

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

20 BY 

21 STEPHANIE A. GRAHAM
22 Deputy District Attorney
23 Nevada Bar #0010058
24
25
26
27
28

ORIGINAL

FILED

1 SUB

2 Patricia Palm

3 Nevada Bar No. 6009

4 PALM LAW FIRM, LTD.

5 1212 Casino Center Boulevard

6 Las Vegas, NV 89104

7 (702) 386-9113

8 (702) 386-9114 (facsimile)

9 Patricia.palm@law@gmail.com

10 Attorney for Defendant

JUN 29 10 38 AM '10

CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

11 THE STATE OF NEVADA,

Plaintiff,

Case No.: C250630

Dept. No.: XVII

v.

12 BRIAN K. O'KEEFE,

Defendant.

SUBSTITUTION OF ATTORNEY

13 PATRICIA PALM, of PALM LAW FIRM, LTD., is hereby substituted as attorney for
14 the Defendant, BRIAN K. O'KEEFE, in the above-entitled action, in place of and instead of
15 DAVID M. SCHIECK, CLARK COUNTY SPECIAL PUBLIC DEFENDER.

16 DATED this 29 day of JUNE, 2010.

17 
18 BRIAN K. O'KEEFE, Defendant

21 RECEIVED
22 JUN 28 2010
23 CLERK OF THE COURT
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001034

1 I hereby consent to the above and foregoing substitution.

2
3 DATED this 29th day of June, 2010.

4 CLARK COUNTY SPECIAL
5 PUBLIC DEFENDER

6 By: 

7 DAVID M. SCHIECK, Bar No. 824
8 330 S. Third Street, 8th Floor
9 Las Vegas, NV 89155
(702) 455-6273

10 I hereby accept the above foregoing substitution as attorney for the Defendant, BRIAN
11 K. O'KEEFE.

12 DATED: 6/29/10

13 PALM LAW FIRM, LTD.

14 By: 

15 PATRICIA PALM
16 Nevada Bar No. 6009
17 1212 Casino Center Boulevard
18 Las Vegas, NV 89104
(702) 386-9113
Attorney for Defendant

19
20 **RECEIPT OF COPY**

21 I, the undersigned, acknowledge that on the 29th day of June, 2010,

22 I received a true copy of the foregoing SUBSTITUTION OF ATTORNEY.

23
24 CLARK COUNTY SPECIAL
25 PUBLIC DEFENDER'S OFFICE

26 By: 

0301

50

FILED

JUN 30 8 21 AM '10

Ann A. Lichner
CLERK OF THE COURT

0001
PATRICIA PALM
State Bar No. 6009
PALM LAW FIRM, LTD.
1212 Casino Center Blvd.
Las Vegas, NV 89104
Office: (702) 386-9113
Fax: (702) 386-9114
Patricia.palm@palmlaw.com
Attorney for Defendant

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

BRIAN K. O'KEEFE,

Defendant.

CASE NO. C250630
DEPT. NO. XVII

RECEIPT OF COPY

RECEIPT OF COPY of Defendant Brian K. O'Keefe's Substitution of Attorney filed June 29, 2010 is hereby acknowledged.

DATED: 6/30, 2010.

DISTRICT ATTORNEY'S OFFICE

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

RECEIVED
JUN 30 2010
CLERK OF THE COURT

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FILED

JUN 30 8 21 AM '10

Ann L. Lamm
CLERK OF THE COURT

MOT
PATRICIA PALM, ESQ.
Nevada Bar No. 6009
PALM LAW FIRM, LTD.
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Las Vegas, NV 89104
Phone: (702) 386-9113
Fax: (702) 386-9114
Email: patricia.palm@palmfirm.com
Attorney for Defendant: Brian K. O'Keefe

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
vs.
BRIAN K. O'KEEFE,
Defendant

CASE NO. C250630
DEPT. NO. XVII

DATE OF HEARING: N/A
TIME OF HEARING: N/A

EX PARTE MOTION FOR DEFENSE COSTS

COMES NOW, Defendant BRIAN K. O'KEEFE, by and through his attorney, PATRICIA PALM, ESQ. of PALM LAW FIRM, LTD., and respectfully submits the following Motion requesting a finding of indigence and an order for defense costs.

This Motion is based upon the following Points and Authorities, Declaration of Counsel, papers on file, and any argument as may be heard.

...

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RECEIVED

JUN 30 2010

CLERK OF THE COURT

1 Dated: June 30, 2010.

2 By: PALM LAW FIRM, LTD.

3 

4 Patricia Palm, Esq.
5 Nevada State Bar No. 6009
6 1212 Casino Center Boulevard
7 Las Vegas, NV 89104
8 (702) 386-9113; (fax) (702) 386-
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POINTS AND AUTHORITIES

FACTS

On or about November 5, 2008, Defendant, Brian O'Keefe, was arrested and booked into the Clark County Detention Center for the crime of murder. Since the time of O'Keefe's arrest, he has maintained his innocence and has remained in custody and without any income.

On November 10, 2008, the Clark County Public Defender was appointed to represent O'Keefe. On November 12, 2008, the Clark County Special Public Defender was appointed as replacement counsel, due to a conflict. At all times since, the Clark County Special Public Defender's Office had represented O'Keefe. In doing so, it was necessary to utilize staff investigators and to retain several expert witnesses on O'Keefe's behalf. The case went to jury trial before this Honorable Court in March, 2009. The jury returned a verdict of guilty on second degree murder with use of a deadly weapon. O'Keefe was sentenced to 10 to 25 years in prison for the second degree murder and 96 to 240 months on the deadly weapon enhancement. The Judgment of Conviction was filed on May 8, 2009. O'Keefe appealed to the Nevada Supreme Court, and the Court reversed O'Keefe's conviction and remanded the matter for further proceedings. See O'Keefe v. State, NSC Docket No. 53859, Order (April 7, 2010). The matter is now pending retrial before this Court on August 23, 2010.

Because O'Keefe and his family desired that he would have counsel of his choosing to act as trial counsel in the retrial of this matter, O'Keefe's family agreed to pay the fee to retain this counsel, Patricia Palm, of Palm Law Firm, Ltd.. A Substitution of Attorney was filed on June 29, 2010. However, O'Keefe's family is unwilling and/or

1 unable to pay for any of the other costs associated with his defense, including costs
2 associated with retaining an investigator, hiring defense experts, witness travel and
3 other incidental costs necessary to a proper defense. O'Keefe has completely
4 exhausted all of his family's goodwill and has no funds available to pay the non-attorney
5 related costs associated with his defense of this case.
6

7 In order to properly defend this case, it will be necessary to continue to work with
8 an investigator and to retain expert witnesses. Due to the serious nature of this case,
9 counsel needs investigative services to aid in serving subpoenas and locating and re-
10 interviewing potential witnesses. Additionally, as with the prior trial, the retention of
11 several expert witnesses will likely be necessary in order to effectively defend the case.
12 O'Keefe has no resources to pay for these vital services.
13

14 Counsel for O'Keefe has agreed to a discounted fee to represent him through
15 trial. However, that fee does not include any costs associated with the defense, such as
16 investigator, expert witness, travel or other incidental costs. Accordingly, counsel
17 hereby requests that the Court declare Brian O'Keefe indigent and grant the use of
18 public funds for incidental expenses related to his defense, including the hiring of an
19 investigator and expert witnesses, as may be approved by the Office of Appointed
20 Counsel upon application of O'Keefe, in order to prepare and present an adequate
21 defense.
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ISSUE

Brian O'Keefe is indigent, and, therefore, the State is obligated to pay for his necessary defense costs.

ARGUMENT

The Nevada Supreme Court has previously determined that even though defense counsel was privately retained by defendant's family, where the defendant was indigent, the State was legally obligated to pay for reasonable defense services. Widdis v. District Court, 114 Nev. 1224, 968 P.2d 1165 (1998).

Pursuant to Widdis, the decision on whether to grant defense costs turns on two factors: first, the defendant must be indigent. In the instant case, Brian O'Keefe has been previously found to be indigent and eligible for the services of the Public Defender and the Special Public Defender. Brian O'Keefe has been in custody and unemployed since his arrest in this case, and he has no assets.

Second, costs must be paid by the State when they are reasonable and necessary to the defense case. In the instant case, it has previously been determined to be reasonable and necessary to use public funds for the defense investigation performed by the Special Public Defender as well as to retain expert witnesses for trial. Here, the retention of an investigator is necessary to obtain further specifics regarding the facts of this case, various witnesses, as well as information regarding the prosecution's witnesses. An investigator will also be necessary to assist with the service of any subpoenas. In addition, witnesses previously used and determined to be necessary to the defense included experts to address the crime scene investigation.

1 substance abuse, and medical aspects of the case. The same types of witnesses will
2 be necessary during the retrial of this matter.

3
4 This motion is timely as it is made immediately upon the retention of this
5 counsel's services, and is necessary due to O'Keefe's indigence and his upcoming trial
6 date of August 23, 2010.

7 **WHEREFORE**, Defendant, BRIAN K. O'KEEFE, respectfully requests that the
8 Court find Mr. O'Keefe to be indigent and Order that the State cover defense costs in
9 this case, subject to the approval by the Office of Appointed Counsel of such costs as
10 reasonable and necessary to the defense of this case.
11

12 DATED: June 30, 2010.

13 **PALM LAW FIRM, LTD.**

14
15 By: 

16 Patricia Palm, Esq.
17 Nevada State Bar No. 6009
18 1212 Casino Center Boulevard
19 Las Vegas, NV 89104
20 (702) 386-9113; Fax (702) 386-9114
21
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ORIGINAL

FILED

JUL 1 8 51 AM '10

CLERK COURT

1 **ORDER**
2 **PATRICIA PALM, ESQ.**
3 **Nevada Bar No. 6009**
4 **PALM LAW FIRM, LTD.**
5 **1212 Casino Center Blvd.**
6 **Las Vegas, NV 89104**
7 **Phone: (702) 386-9113**
8 **Fax: (702) 386-9114**
9 **Email: patricia.palmlaw@gmail.com**
10 **Attorney for Defendant: Brian K. O'Keefe**

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

10 **THE STATE OF NEVADA,**

11 **Plaintiff,**

12 **vs.**

13 **BRIAN K. O'KEEFE,**

14 **Defendant**

CASE NO. C250630
DEPT. NO. XVII

ORDER GRANTING
EX PARTE MOTION
FOR DEFENSE COSTS

17
18 This matter having come at the ex parte request of counsel for the Defendant,
19 Patricia Palm, Esq., of Palm Law Firm, Ltd., the matter having been fully reviewed, and
20 good cause appearing therefor, Brian K. O'Keefe is determined to be indigent, and

21 **IT IS HEREBY ORDERED** that the State of Nevada, County of Clark, provide
22 funding for the investigation and defense of this case, including investigative, expert
23 witness, and other incidental costs, subject to the approval of the Office of Appointed
24 Counsel of such costs as reasonable and necessary to the effective defense of

25
26 **CLERK OF THE COURT**

RECEIVED

RECEIVED BY
DEPT. 17 ON

JUN 20 2010


001044

C250630
St v. O'Keefe

1 of Defendant in this matter.

2 DATED this 30 day of June, 2010.

3
4
5 SUBMITTED BY:

6 
7

8 PATRICIA PALM, ESQ.
9 PALM LAW FIRM, LTD.
10 1212 Casino Center Blvd.
11 Las Vegas, NV 89104
12 Attorney for Defendant
13
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27
28


DISTRICT COURT JUDGE EE

ORIGINAL

1 ROC
2 DAVID M. SCHIECK
3 SPECIAL PUBLIC DEFENDER
4 Nevada Bar No. 0824
5 RANDALL H. PIKE
6 Assistant Special Public Defender
7 Nevada Bar No. 1940
8 MICHAEL W. HYTE
9 Deputy Special Public Defender
10 Nevada Bar No. 10088
11 330 S. Third Street,
12 Las Vegas, Nevada 89155-2316
13 (702) 455-8265
14 (702) 455-6273 fax
15 rpike@co.clark.nv.us
16 mhyte@co.clark.nv.us
17 Attorneys for O'KEEFE

FILED

JUL 1 3 29 PM '10

CLERK COURT

10 DISTRICT COURT
11 CLARK COUNTY, NEVADA

13 THE STATE OF NEVADA,
14
15 Plaintiff,
16
17 vs.
18 BRIAN O'KEEFE #1447732,
19
20 Defendant.

CASE NO. C 250630
DEPT NO. XVII

21 RECEIPT OF FILE

22 RECEIPT of the entire Brian O'Keefe file is hereby acknowledged.

23 Dated: 6/30/10

24
25 
26 PATRICIA PALM, ESQ.
1212 Casino Center Blvd.
Las Vegas, NV 89104

RECEIVED

JUL 0 12 2010

CLERK OF THE COURT

SPECIAL PUBLIC
DEFENDER
CLARK COUNTY
NEVADA

001046

ORIGINAL

13

001
PALM LAW FIRM, LTD.
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Email: Patricia.palm@palmlaw.com
Attorney for Brian O'Keefe

FILED

JUL 21 2010

John J. H. ...
CLERK OF COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

BRIAN K. O'KEEFE,

Defendant.

CASE NO: C250630

DEPT NO. XVI

DATE:

TIME:

08C250630
NOTM
Notice of Motion
884357



NOTICE OF MOTION AND MOTION BY DEFENDANT O'KEEFE TO PRECLUDE THE
STATE FROM INTRODUCING AT TRIAL OTHER ACT OR CHARACTER EVIDENCE
AND OTHER EVIDENCE WHICH IS UNFAIRLY PREJUDICIAL OR WOULD VIOLATE
HIS CONSTITUTIONAL RIGHTS

COMES NOW Defendant, Brian K. O'Keefe, by and through his attorney, Patricia
Palm of Palm Law Firm, Ltd., and hereby moves this Honorable Court for an order
precluding the State from introducing other act or character evidence and other
evidence which is unfairly prejudicial or would violate his constitutional rights.

This Motion is made and based upon the record in this case, including the papers
and pleadings on file herein, the Constitutions of the United States and the State of

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RECEIVED

JUL 21 2010

CLERK OF THE COURT

001047

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

3 Dated this 21st day of July, 2010.

4 PALM LAW FIRM, LTD.

5 
6 Patricia Palm, Bar No. 6009
7 1212 Casino Center Blvd.
8 Las Vegas, NV 89104
9 Phone: (702) 386-9113
10 Fax: (702) 386-9114
11 Attorney for Defendant O'Keefe

12 **NOTICE OF MOTION**


13 TO: STATE OF NEVADA, Plaintiff, and

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

15 YOU WILL PLEASE TAKE NOTICE that the undersigned will bring on the above
16 and foregoing MOTION BY DEFENDANT O'KEEFE TO PRECLUDE THE STATE
17 FROM INTRODUCING AT TRIAL OTHER ACT OR CHARACTER EVIDENCE AND
18 OTHER EVIDENCE WHICH IS UNFAIRLY PREJUDICIAL OR WOULD VIOLATE HIS
19 CONSTITUTIONAL RIGHTS on the 21 day of Aug, 2010, at the hour of
20 8:15 A.m., in Department No. XVII of the above-entitled Court, or as soon thereafter as
21 counsel may be heard.

22 DATED this 21st day of July, 2010.

23 PALM LAW FIRM, LTD.

24 
25 By: PATRICIA PALM
26 Nevada Bar No. 6009
27 1212 Casino Center Blvd.
28 Las Vegas, NV 89104
(702) 386-9113
Attorney for Defendant O'Keefe

1
2 POINTS AND AUTHORITIES
3 PROCEDURAL HISTORY

4 The State charged Defendant Brian K. O'Keefe with murder with use of a deadly
5 weapon. He entered a plea of not guilty and invoked his right to a speedy trial. The
6 State filed a motion to admit evidence of other crimes, which O'Keefe opposed. The
7 Court ruled that the State could introduce evidence of threats to the alleged victim
8 Victoria Whitmarsh that witness Cheryl Morris claims were made by O'Keefe, and his
9 demonstration of proficiency at killing with knives, which Morris claims to have
10 witnessed. The Court further ruled that the State could introduce certified copies of
11 O'Keefe's prior Judgment of Conviction for felony domestic battery, involving
12 Whitmarsh. Further, if O'Keefe testified, then the State could inquire into his other prior
13 felony convictions. Pursuant to the Court's ruling on his prior Judgments of Conviction,
14 the State is permitted to introduce only the details of when O'Keefe was convicted, in
15 which jurisdiction, and the name of the offenses, and with the felony domestic battery,
16 the fact that Whitmarsh had testified against him in that case. 3/18/09 TT 2-10.

17 The instant case was tried before this Honorable Court beginning March 16,
18 2009. After five days of trial, on March 20, 2009, the jury returned a verdict finding
19 O'Keefe guilty of second degree murder with use of a deadly weapon. On May 5, 2009,
20 this Court sentenced O'Keefe to 10 to 25 years for second-degree murder and a
21 consecutive 96 to 240 months (8 to 20 years) on the deadly weapon enhancement.

22 O'Keefe timely appealed to the Nevada Supreme Court. After briefing, the Court
23 reversed O'Keefe's conviction, agreeing with him that the district court "erred by giving
24 the State's proposed instruction on second-degree murder because it set forth an
25 alternative theory of second-degree murder, the charging document did not allege this
26 alternate theory, and no evidence supported this theory." The Court explained, "the
27 State's charging document did not allege that O'Keefe killed the victim while he was
28 committing an unlawful act and the evidence presented at trial did not support this
theory of second-degree murder." O'Keefe v. State, NSC Docket No. 53859, Order of