

INSTRUCTION NO. _____

Express malice is that deliberate intention unlawfully to take away the life of another, which is manifested by external circumstances capable of proof.

Malice may be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

NRS 200.020; Cordova v. State, 116 Nev. 664, 6 P.3d 481 (2000) (malice may be implied is the preferred instruction).

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The abandoned and malignant heart implied malice requires that the State prove beyond a reasonable doubt that Brian O'Keefe acted with an extreme recklessness regarding homicidal risk. That is, he must have intended to commit acts which caused the death of Victoria Whitmarsh, he must have known that his acts were likely to cause her death, and he must have consciously disregarded the risk to her life.

Collman v. State, 116 Nev. 687, 712-13, 716, 7 P.3d 426, 442, 444 (2000).

INSTRUCTION NO. _____

The abandoned and malignant heart implied malice requires that the State prove beyond a reasonable doubt that Brian O'Keefe acted with an extreme recklessness regarding homicidal risk. That is, he must have intended to commit acts which caused the death of Victoria Whitmarsh, he must have known that his acts were likely to cause her death, and he must have consciously disregarded the risk to her life.

INSTRUCTION NO. _____

Involuntary manslaughter is the unintentional killing of a human being without malice aforethought, but in the commission of a lawful act which might probably produce such a consequence in an unlawful manner.

If Brian O'Keefe unintentionally or accidentally killed Victoria Whitmarsh during a lawful act, but in doing so acted with a wanton or reckless disregard for human life that is not of the extreme nature that will support a finding of implied malice, then the crime is involuntary manslaughter and not second-degree murder.

NRS 200.070; United States of America v. Crowe, 563 F. 3d 969, ____ (9th Cir. 2009); Crawford v. State, 121 Nev. 746, 751, 752-53, 121 P.3d 582 (2005) (state's burden, definition of malice aforethought, and defendant's entitlement to significance of his theory instruction); Brooks v. State, 124 Nev. ____, 180 P.3d 657, 662 (2008) (defendant's entitlement to significance instructions and instructions that are specifically tailored to the facts of the case).

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INSTRUCTION NO. _____

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

Crawford v. State, 121 Nev. 746, 751, 752-53, 121 P.3d 582 (2005) (state's burden, benefit of the doubt instruction, and defendant's entitlement to significance of his theory instruction); Brooks v. State, 124 Nev. ___, 180 P.3d 657, 662 (2008) (defendant's entitlement to significance instructions and instructions that are specifically tailored to the facts of the case).

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An lawful act done without any intention of killing which unfortunately kills another, and which is not done with such extreme or wanton and reckless disregard for human life as would constitute malice aforethought or involuntary manslaughter is not unlawful and does not constitute second degree murder or manslaughter. If you have a reasonable doubt whether the death of Victoria Whitmarsh was caused by such a lawful act, you must give the benefit of the doubt to Brian O'Keefe and return a verdict of Not Guilty.

NRS 200.180; United States of America v. Crowe, 563 F. 3d 969, ____ (9th Cir. 2009) (definition of involuntary manslaughter recklessness); Ybarra v. Wolff, 662 F. Supp. 44 (D. Nev. 1987) (government's burden); Collman v. State, 116 Nev. 687, 715, 7 P.3d 426, 444 (2000) (State's burden on malice, definition of abandoned and malignant heart malice); Crawford v. State, 121 Nev. 746, 751, 752-53, 121 P.3d 582 (2005) (state's burden, definition of malice aforethought, and defendant's entitlement to significance of his theory instruction); Brooks v. State, 124 Nev. ____, 180 P.3d 657, 662 (2008) (defendant's entitled to significance instructions and instructions that are specifically tailored to the facts of the case).

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INSTRUCTION NO. _____

To constitute the crime charged, there must exist a union or joint operation of an act forbidden by law and certain mental state in the mind of the actor. Unless the mental state is proved, the crime to which it relates is not committed.

CALJIC 3.31.5; NRS 193.190.

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The intent with which an act is done is shown by the facts and circumstances surrounding the case.

Do not confuse intent with motive. Motive is what prompts a person to act. Intent refers only to the state of mind with which the act is done.

Motive is not an element of the crime charged and the State is not required to prove motive on the part of a defendant in order to convict. However, you may consider evidence of motive or lack of motive as a circumstance in the case.

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INSTRUCTION NO. _____

Brian O'Keefe is presumed innocent until the contrary is proved. This presumption places on the State the burden of proving beyond a reasonable doubt every material element of the crime charged and that Brian O'Keefe committed the offense.

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

If you have a reasonable doubt as to the guilt of Brian O'Keefe, he is entitled to a verdict of Not Guilty.

NRS 175.211; Brooks v. State, 124 Nev. ___, 180 P.3d 657, 662 (2008) (defendant's entitled to significance instructions and instructions that are specifically tailored to the facts of the case).

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If you have a reasonable doubt as to the guilt of Brian O'Keefe, he is entitled to a verdict of Not Guilty.

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

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

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

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

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

21 Anything you may have seen or heard outside the courtroom is not evidence and
22 must also be disregarded.
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INSTRUCTION NO. _____

A witness who has special knowledge, skill, experience, training or education in a particular science, profession or occupation is an expert witness. An expert witness may give his opinion as to any matter in which he is skilled.

You should consider such expert opinion and weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if, in your judgment, the reasons given for it are unsound.

Prabhu v. Levine, 112 Nev. 1538, 930 P.2d 103 (1996).

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Although you are to consider only the evidence in the case in reaching a verdict, you must bring to the consideration of the evidence your everyday common sense and judgment as reasonable men and women. Thus, you are not limited solely to what you see and hear as the witnesses testify. You may draw reasonable inferences from the evidence which you feel are justified in light of common experience, keeping in mind that such inferences should not be based on speculation or guess. A verdict should never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law.

Howard v. State, 102 Nev. 572, 729 P.2d 1341 (1987).

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The right of self-defense is not available to an original aggressor, that is a person who has sought a quarrel with the design to force a deadly issue and thus through his fraud, contrivance or fault, to create a real or apparent necessity for making a felonious assault.

However, where a person without voluntarily seeking, provoking, inviting, or willfully engaging in a difficulty of his own free will, is attacked by an assailant, he has the right to stand his ground and need not retreat when faced with the threat of deadly force.

Culverson v. State, 106 Nev. 484, 797 P.2d 238 (1990).

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When acting in self-defense a person may use the amount of force reasonably necessary to defend themselves.

Runion v. State, 116 Nev. 1041, 13 P.3d 52, 59 (2000).

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Actual danger is not necessary to justify force used in self-defense. A person has a right to defend from apparent danger to the same extent as he would from actual danger. A person using even deadly force is justified if:

- 1) he is confronted by the appearance of imminent danger which arouses in his mind an honest belief and fear that he is about to be killed or suffer great bodily injury; and
- 2) He acts solely upon these appearances and his fear and actual beliefs; and
- 3) A reasonable person in a similar situation would believe himself to be in like danger.

Such force is justified even if it develops afterward that the person using it was mistaken about the extent of the danger.

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

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

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INSTRUCITON NO. _____

If evidence of self-defense is present, the State must prove beyond a reasonable doubt that the defendant did not act in self-defense. If you find the State has failed to prove beyond a reasonable doubt that Brian O'Keefe did not act in self-defense, you must find him Not Guilty.

Runion v. State, 116 Nev. 1041, 13 P.3d 52 (2000).

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If evidence of self-defense is present, the State must prove beyond a reasonable doubt that the defendant did not act in self-defense. If you find the State has failed to prove beyond a reasonable doubt that Brian O'Keefe did not act in self-defense, you must find him Not Guilty.

Before you may consider evidence of the Statements of Brian O'Keefe made during his interrogation by Homicide Detectives, you must find that the State has established by a preponderance of the evidence that he made those statements voluntarily. Voluntariness under the law requires that the act be a product of rational intellect and free will. In determining voluntariness, you must consider the totality of circumstances present during the interrogation, including, Brian O'Keefe's physical condition, including intoxication, experience with the criminal justice system, age, education, the length of the detention, repeated and prolonged nature of questioning, and use of physical punishment such as deprivation of food or sleep.

A defendant's intoxication will make a statement inadmissible only if the accused is intoxicated to the extent of being incapable of understanding the meaning of his comments. If you determine that Brian O'Keefe was so incapable, then you may not consider his interview with homicide detectives in your assessment of the evidence in this case.

Rosky v. State, 121 Nev. 184, 111 P.3d 690 (2005); Laursen v. State, 97 Nev. 568, 634 P.2d 1230 (1981).

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INSTRUCTION NO. _____

When you retire to consider your verdict, you must select one of you to act as foreperson who will preside over your deliberation and will be your spokesperson here in court.

During your deliberation, you will have all the exhibits which were admitted into evidence, these written instructions and forms of verdict which have been prepared for your convenience.

Your verdict must be unanimous. As soon as you have agreed upon a verdict, have it signed and dated by your foreperson and then return with it to this room.

The verdict must represent the considered judgment of each juror. In order to return a verdict must be unanimous.

It is your duty, as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors.

In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because it is the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are the judges of the facts. Your sole interest is to ascertain the truth from the evidence in this case.

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You are the judges of the facts. Your sole interest is to ascertain the truth from the evidence in this case.

INSTRUCTION NO. _____

The non-flight of a person from the location immediately after the act occurred which resulted in a criminal charge is not sufficient in itself to establish innocence, but is a fact which, if proved, may be considered by you in light of all other proved facts in deciding whether the State has met its burden of proof to establish the elements of the offense charged.

CALJIC NO. 2.52

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The non-flight of a person from the location immediately after the act occurred which resulted in a criminal charge is not sufficient in itself to establish innocence, but is a fact which, if proved, may be considered by you in light of all other proved facts in deciding whether the State has met its burden of proof to establish the elements of the offense charged.

INSTRUCTION NO. _____

No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition, but whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, evidence of intoxication may be taken into consideration in determining such purpose, motive or intent.

NRS 193.220

INSTRUCTION NO. _____

No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition, but whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, evidence of intoxication may be taken into consideration in determining such purpose, motive or intent.

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

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

Crane v. State, 88 Nev. 684, 687, 504 P.2d 12 (1972); Bails v. State, 92 Nev. 95, 97, 545 P.2d 1155 (1976).

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2 **VER**

3 **DISTRICT COURT**
4 **CLARK COUNTY, NEVADA**

5 **STATE OF NEVADA,**

6 **Plaintiff,**

7 **vs.**

8 **BRIAN K. O'KEEFE,**

9 **Defendant.**

) **CASE NO: C250630**

) **DEPT NO. XVII**

) **DATE:**

) **TIME:**

10
11
12 **VERDICT**

13
14 **We, the jury in the above entitled case, find the Defendant BRIAN KERRY**
15 **O'KEEFE, as follows:**

16 **COUNT 1 - SECOND DEGREE MURDER WITH USE OF A DEADLY**
17 **WEAPON:**

18
19 ☐ **Guilty of Second Degree Murder with Use of a Deadly Weapon**
20 ☐ **Guilty of Second Degree Murder**
21 ☐ **Guilty of Involuntary Manslaughter**
22 ☐ **Not Guilty**
23

24
25 **Dated this** **day of** **, 2010.**

26
27
28 **Foreperson**

ORIGINAL

1 ORDR
2 PALM LAW FIRM, LTD.
3 PATRICIA PALM, ESQ.
4 NEVADA BAR NO. 6009
5 1212 CASINO CENTER BLVD.
6 LAS VEGAS, NV 89104
7 Phone: (702) 386-9113
8 Fax: (702) 386-9114
9 Email: Patricia.palm@palmfirm.com
10 Attorney for Brian O'Keefe

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

AUG 23 2010

BY: *Carol Donahoo*
CAROL DONAHOO, DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

BRIAN K. O'KEEFE,

Defendant.

CASE NO: C250630

DEPT. NO: XVII

DATE:

TIME:

C250630
ORDR
Order
824137



ORDER GRANTING, IN PART, AND DENYING, IN PART, MOTION BY DEFENDANT
O'KEEFE FOR DISCOVERY

This matter having come before the Court on August 12, 2010, on a Notice of Motion and Motion by Defendant O'Keefe for Discovery, to which an Opposition was filed by the State, and the Court having heard argument and been fully advised in the premises, and good cause appearing therefore;

IT IS HEREBY ORDERED that the Motion is GRANTED, in part, except as to the information sought in paragraph 8(a) - (c). pursuant to this Court's Order, the State need provide only information which is sufficient to identify any felony convictions of the

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1 lay witnesses within the past ten (10) years and the last known addresses for the lay
2 witnesses, as to any additional information sought under paragraph 8(a)-(c), the Motion
3 is DENIED.

4 IT IS SO ORDERED this 22 day of August, 2010.

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8 Respectfully submitted by:
9 PALM LAW FIRM, LTD.


District Judge

EP

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11 
12 PATRICIA A. PALM
13 1212 Casino Center Blvd.
14 Las Vegas, NV 89104
15 (702) 386-9113
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JURL

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

AUG 25 2010

DISTRICT COURT
CLARK COUNTY, NEVADA

BY Carol Donahoo
CAROL DONAHOO, DEPUTY

THE STATE OF NEVADA,

Plaintiff,

-vs-

BRIAN K. O'KEEFE,

Defendant.

CASE NO. C250630

DEPT. NO. XVII

C250630
JURL
Jury List
08/24/10



JURY LIST

- | | |
|-----------------------|----------------------|
| 1. Barbara Butt | 8. Bill Lamb |
| 2. Richard Mathews | 9. Sergio Olivares |
| 3. Carolyn Renaud | 11. Jean Fajardo |
| 4. Janice Wright | 13. Yolanda Ward |
| 5. Vicki Jury | 14. Sherrill Stewart |
| 6. Deborah Ratanapool | |
| 7. Rita Wade | |

ALTERNATES

- | | |
|--------------------|-------------------|
| 10. Celeste Liston | 12. Lindsey Lopez |
|--------------------|-------------------|

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VJRU

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

SEP 02 2010

DISTRICT COURT

CLARK COUNTY, NEVADA

BY: Carol Donahoo
CAROL DONAHOO, DEPUTY

THE STATE OF NEVADA,

Plaintiff(s),

CASE NO. C250630

DEPT. NO. XVII

-VS-

BRIAN KERRY O'KEEFE,

Defendant(s).

C250630

VJRU

Verdict Submitted to the Jury But Returned
924138



**VERDICT SUBMITTED TO JURY
BUT RETURNED UNSIGNED**

Attached hereto is the verdict form which was submitted to the Jury in the above
entitled action, but returned unsigned.

DATED: This 2nd day of September, 2010.

Steven D. Grierson, Clerk of the Court

By: Carol Donahoo

Carol Donahoo, Deputy Clerk

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4 DISTRICT COURT
5 CLARK COUNTY, NEVADA

6 THE STATE OF NEVADA,
7 Plaintiff,

8 -vs-

9 BRIAN KERRY O'KEEFE,
10 Defendant.

CASE NO: C250360

DEPT NO: XVII

11
12 VERDICT

13 We, the jury in the above-entitled case, find the Defendant, BRIAN KERRY
14 O'KEEFE, as follows:

15 *(please check the appropriate box, selecting only one)*

- 16 ☐ Guilty of Murder of the Second Degree With Use of a Deadly Weapon
17 ☐ Guilty of Murder of the Second Degree Without Use of a Deadly Weapon
18 ☐ Not Guilty

19 DATED this ____ day of August, 2010

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21
22 FOREPERSON
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001398

ORIGINAL

1 INST

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

SEP 02 2010

BY Carol Donahoo
CAROL DONAHOO, DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

8 THE STATE OF NEVADA,

9 Plaintiff,

10 -vs-

11 BRIAN KERRY O'KEEFE

12 Defendant.

CASE NO: C250630
C250360

DEPT NO: XVII

13 INSTRUCTIONS TO THE JURY (INSTRUCTION NO. 1)
14 MEMBERS OF THE JURY:

15 It is now my duty as judge to instruct you in the law that applies to this case. It is
16 your duty as jurors to follow these instructions and to apply the rules of law to the facts as
17 you find them from the evidence.

18 You must not be concerned with the wisdom of any rule of law stated in these
19 instructions. Regardless of any opinion you may have as to what the law ought to be, it
20 would be a violation of your oath to base a verdict upon any other view of the law than that
21 given in the instructions of the Court.

REC-250630
INST
Instructions to the Jury
924142



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Recent Teaching:

Instructor: Physiology Laboratory
Monterey Peninsula College
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Course Coordinator: Gary Fuller, M.S.
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Recent Research:

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Previous Fellowship:

Fellowship, Blood Bank and Transfusion Medicine
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Previous Pathology Practice:

Post-Certification Pathology Practice (1999 - 2003)
Physician Specialist, Anatomic and Clinical Pathology,
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Section Chief of Clinical and Special Chemistry,
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Locum tenens Pathology Practice (9/00, 9/01, 9/02, & 9/03)
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Current Licensure:

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Educational Degrees:

University: University of California at Berkeley,
B.A. in Chemistry and Zoology, 1968
Medical School: University of Southern California,
M.D., 1972
Graduate School: University of Southern California,
M.S. in Anatomy and Cell Biology, 1988
Graduate School: University of California at Los Angeles,
Ph.D. in Anatomy and Cell Biology, 1983

Professional Societies:

Fellow, National Association of Medical Examiners, 2009 -
Fellow, College of American Pathologists, 1999 -
Fellow, American Society of Clinical Pathologists, 1989 -
Member, American Association
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Professional Training/Practice Chronology:

Internship: Cottage Hospital (Santa Barbara, CA),
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 Residency: Cottage Hospital (Santa Barbara, CA),
 first year, Pathology, 1973-74
 General Practice: Santa Barbara, CA, 1974-77. General admission privi-
 leges for Cottage and Goleta Valley Hospitals.
 General Practice: King City, CA, 1977-78. General admission privileges
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 Residency: Highland/Alameda County Hospital (Oakland, CA),
 second and third years, General Surgery, 1978-80
 Residency: Duke University Medical Center (Durham, NC),
 first and second years, Orthopaedics, 1980-82
 Residency: Los Angeles County/U.S.C. Medical Center,
 third year, Orthopaedics, 1982-83
 Graduate School: University of Southern California School of Medicine,
 Department of Anatomy and Cell Biology, 1984-86
 Graduate School: University of California at Los Angeles School of Medicine,
 Department of Anatomy and Cell Biology, 1987-93
 Residency: Harbor-U.C.L.A. Medical Center (Torrance, CA),
 second through fifth years, Anatomic and Clinical
 Pathology, 1994-9
 Fellowship: Orthopaedic Hospital (Los Angeles, CA), six months of
 Fellowship, Bone and Soft Tissue Pathology, 1998-99
 Pathology Practice: Los Angeles, CA, 1999-2003. Anatomic and Clinical
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 Fellowship: University of Wisconsin (Madison, WI), one year Fellowship,
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 "Marrow stromal fibroblastic cell cultivation *in vitro* on
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 Instructor: Physiology Laboratory, Fall and Spring semesters, 2007-08
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 Fellowship: St. Louis City Medical Examiner's Office (St. Louis, MO),
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Teaching Experience:

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Teaching Assistant: Anatomy Dissection Laboratory, Fall semesters, 1987-88
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University of California at Los Angeles School of Medicine

Staff Pathologist: Routinely presented histopathology of cases for review
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Martin Luther King, Jr. Hospital, Los Angeles, CA 1998-03

Staff Pathologist: Routinely presented histopathology case reviews at
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King-Drew Medical Center, Los Angeles, CA 1999-2003

Lecturer: "Blood Banking and Transfusion Medicine", Winter, 2005
University of Wisconsin School of Medical Technology

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Monterey Peninsula College

Publications:

Dutra, T.F. and Bernard, G.W.: "Size-selective Comparison of Fetal Calvarial
versus Adult Marrow Osteogenic Colony-forming Entities", *Anatomical Record*,
239: 1 - 8; 1994

Dutra, T.F. and Bernard, G.W.: "Post-fracture stimulation of *in vitro* osteogenesis
is not systemic", *International Journal of Oral Biology*, 23: 213 - 217; 1998

Dutra, T. and French, S.: "Marrow stromal fibroblastic cell cultivation *in vitro* on
de-cellularized bone marrow extracellular matrix"; manuscript published in
Experimental and Molecular Pathology on 9/22/2009

Presentations:

Dutra, T.F.: "Cultured Human Circulating Fibrocytes Express CD34 and Endo-
thelial Markers"; Hematopoietic Stem Cell Transplantation (Sixth International
Symposium); San Diego, CA; 4/16-4/18/88

Dutra, T.F.: "Flow Cytogenetics"; Clinical Cytogenetics Program, California State
University at Dominguez Hills; 4/25/01

Dutra, T.F. and Graham, M.A.: Poster presentation: "Big People, Big Hearts:
histochemical and immunohistochemical stain comparisons of hypertrophic heart
sections from morbidly obese decedents, compared with heart sections from age
matched controls"; 43rd Annual Meeting of the National Association of Medical
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CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA

12 **THE STATE OF NEVADA,**
13 **Plaintiff,**

14 **-VS-**

15 **Brian Kerry O'Keefe,**
16 **#1447732**

17 **Defendant.**

CASE NO: C250630

DEPT NO: XVII

18 **STATE'S OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS HIS**
19 **STATEMENTS TO POLICE, OR, ALTERNATIVELY, TO PRECLUDE THE**
20 **STATE FROM INTRODUCING PORTIONS OF HIS INTERROGATION**

21 **DATE OF HEARING: August 19th, 2010**

22 **TIME OF HEARING: 8:15 AM**

23 **COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through**
24 **Stephanie A. Graham, Deputy District Attorney, and hereby submits the attached Points and**
25 **Authorities in Response to Defendant's Motion to Suppress his Statements to Police, or,**
26 **Alternatively to Preclude The State From Introducing Portions of His Interrogation.**

27 **This response is made and based upon all the papers and pleadings on file herein, the**
28 **attached points and authorities in support hereof, and oral argument at the time of hearing, if**
deemed necessary by this Honorable Court.

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FACTS

Facts relevant to the issues are set forth in the argument below.

POINTS AND AUTHORITIES

The Statements Defendant made to Officer Ballejos in response to Officer Ballejos' questions of Defendant at the crime scene were not the product of a custodial interrogation under *Miranda* as the questioning was not intended to elicit incriminating statements.

On November 06, 2008, Officer Ballejos was dispatched to Defendant's apartment in response to a 911 call. The person reporting claimed someone had been stabbed and was bleeding. Upon arriving at the scene, Ballejos joined other officers and made entry into Defendant's living room.

All of the lights in the apartment were off except for the light in the bedroom. At this point, Ballejos was able to observe an unknown female lying on the floor, Defendant lying next to the female and white sheets covered in blood.

Officers repeatedly issued verbal commands directing Defendant to show his hands and to exit the apartment. At this point, Officers were unaware of the medical condition of the unknown female. Defendant was uncooperative and refused to exit the apartment.

Per policy, emergency responders were unable to assist the female until the Defendant was removed, so out of concern for the victim's condition, Ballejos deployed his tazer. Although one prong of the tazer made contact with Defendant, he remained uncooperative and was tazed again. At this point, Officers were able to subdue Defendant, place him in handcuffs and remove him from the apartment. With Defendant removed from the apartment, Medical Response was able to make entry to assist the unknown female.

Immediately after removing Defendant from the apartment, and completely unaware of the unknown females condition, Officer Ballejos asked Defendant his name and the female's name. Defendant did not respond to Ballejos questions. Ballejos then explained to Defendant that he needed information regarding the birthdates, blood-types, etc, so the paramedics could render treatment not only to the unknown female but to Defendant as well.

Initially, instead of answering Ballejos' questions, Defendant began to cry a little.

1 Defendant then suddenly stopped crying and spontaneously stated "you are mad at me, aren't
2 you?" Ballejos responded by asking Defendant what he meant. Defendant then
3 spontaneously stated "I didn't do this, man, she tried to stab me." Defendant was not
4 advised of his Miranda rights prior to the questions asked by Ballejos.

5 Under Miranda, a rights advisement is required when a suspect is subjected to a
6 custodial interrogation. Archanian v. State, 122 Nev. 1019, 145 P.3d 1008 (2006), citing
7 Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). "[A]n individual is
8 deemed 'in custody' where there has been a formal arrest, or where there has been a restraint
9 on freedom of movement of the degree associated with a formal arrest so that a reasonable
10 person would not feel free to leave." State v. Taylor, 114 Nev. 1071, 1082, 968 P.2d 315,
11 323 (1998); see Rosky v. State, 121 Nev. 184, 191, 111 P.3d 690, 695 (2005). An
12 interrogation for Miranda purposes "refers not only to express questioning, but also to any
13 words or actions on the part of the police (other than those normally attendant to arrest and
14 custody) that the police should know are reasonably likely to elicit an incriminating response
15 from the suspect." Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297
16 (1980) (footnote omitted).

17 Defendant does not argue that his statements to Officer Ballejos were involuntary. He
18 simply argues that because he was in handcuffs when Officer Ballejos asked him a few brief
19 questions, he was subjected to "custodial interrogation." True enough, Defendant was in
20 handcuffs. Defendant was combative and non-cooperative at the scene. However, asking
21 Defendant his name, date of birth and blood type were simply not questions designed to
22 elicit an incriminating response. Likewise, the question posed to Defendant regarding his
23 relationship with Victoria was nothing other than a qualifying question to determine if
24 Defendant was able to provide her name, date of birth, blood type, etc, so as to provide the
25 necessary information to medical responders on the scene.

26 Despite the fact that Defendant's argument is unfounded based on the absence of
27 "custodial interrogation," Defendant expands his argument in support of suppression by
28 claiming that the questions Ballejos asked had nothing to do with "booking needs" and there

1 was no "exigency" present to justify Ballejos' questions. True enough, the questions were
2 not asked due to "booking needs," however, the fact that an unknown female was lying in
3 Defendant's apartment covered in blood tends to suggest an exigent situation. Under the
4 circumstances, Ballejos' questions were proper, despite the lack of Miranda warning, under
5 the "public safety exception." New York v. Quarles, 467 U.S. 649, 104 S. Ct. 2626 (1984).

6 In Quarles, the Supreme Court recognized a public safety exception to the Miranda
7 requirement, holding that Miranda need not "be applied in all its rigor to a situation in which
8 police officers ask questions reasonably prompted by a concern for the public safety." 467
9 U.S. at 656, 104 S.Ct. at 2632. The Court distinguished between "questions necessary to
10 secure [the police's] own safety or the safety of the public and questions designed solely to
11 elicit testimonial evidence from a suspect." 467 U.S. at 659, 104 S.Ct. at 2633. The Court
12 concluded that voluntary responses to the first type of questions could be admitted, despite
13 the lack of Miranda warnings. See Quarles, 467 U.S. at 657-60, 104 S.Ct. at 2632-33. See
14 also, State v. Ramirez, 178 Ariz. 116, 871 P.2d 237 (1994) (finding that the public safety
15 exception applies to situations where Officer questioning is geared toward eliciting
16 information to determine the need to render assistance to suspected victim of a crime).

17 In State v. Ramirez, officers were dispatched in response to a 911 call where the
18 person reporting indicated that they were awakened by banging, screaming and running
19 noises coming from the apartment below. 871 P.2d 237, 240. Further, the person reporting
20 indicated that they heard a female scream "'Help' me or something like that" and one last
21 "ugly scream." Id. Additionally, the 911 caller reported that after hearing the screams he ran
22 down to the apartment, knocked on the door but received no response. Id. After receiving no
23 response, he attempted to kick down the door but was unsuccessful. Id. He then ran to a
24 window at the back of the apartment and looked into the window of the bedroom, noticed a
25 lamp on the floor and observed a shadow moving in the hallway near the bathroom. Id. He
26 then dialed 911. Id.

27 Officers responded 2 - 3 minutes after receiving the 911 call. Ramirez, 871 P.2 at
28 240. Officers knocked and announced their presence, but no-one responded. Id. Officers

1 went to the back of the apartment looked into the window and observed blood on the
2 window frame and latch. Id. Officers then observed a person enter the bedroom. Id. Officers
3 announced their presence and yelled to Defendant to go the front door. Defendant "grunted"
4 and left the bedroom. Id.

5 Officers remained at the bedroom window and observed Defendant return to the
6 bedroom. Ramirez, 871 P.2 at 240. Once again, officers instructed defendant to go to the
7 front door and unlock it. Id. Defendant did not comply with officers verbal commands. Id.
8 Since Defendant was uncooperative, Officers obtained a pass-key to the apartment from the
9 manager of the apartment complex, returned to the apartment and once again knocked on the
10 door, announced their presence. Ramirez, 871 P.2 at 241. Again, Defendant was instructed to
11 open the door. Id. With no response, Officers used the pass-key provided to them and
12 unlocked the door. Id.

13 Upon entering the apartment officers immediately observed a knife with a bloody
14 handle lying near the front door. Ramirez, 871 P.2 at 240. As they approached the living
15 room officers observed a body lying on the floor. Id. Officers then shouted for Defendant to
16 put his hands on the back of his head. Id. At this point, Officers were able to physically
17 remove him from the apartment. Id. After removing Defendant from the apartment, he was
18 placed in an arm-bar and forced to kneel in the grass a few feet from the front door. Id.
19 Without informing defendant of his Miranda Rights, officers asked Defendant three
20 questions:

- 21 1. "What was going on?" to which Defendant responded "we had a big fight."
- 22 2. "Who else was inside?" to which Defendant replied "My girlfriend and her daughter,"
- 23 3. If "anyone was hurt" to which Defendant responded "Yeah, they're hurt pretty bad. We're
- 24 all hurt pretty bad."

25 Ramirez, 871 P.2 at 244-455.

26 Prior to trial, Defendant moved to suppress the statements because the statements
27 were obtained in violation of his Miranda rights. Id. at 244. In denying, Defendant's motion,
28 the trial court ruled the statements were voluntary... they were not obtained in violation of

1 the Defendant's Fifth and Sixth Amendment rights, and... they were obtained pursuant to
2 public safety concerns of the officers at the time, also concern for the opportunity to rescue
3 anybody that might still be in the apartment, and to protect themselves. Id at 244.

4 Ultimately, Defendant was convicted of two counts of First-Degree Murder. Id at 242.

5 On appeal, Defendant claimed the trial court erred by denying Defendant's motion to
6 suppress statements made in response the Officer's questions at the scene because the
7 questions asked were beyond the scope of the public safety exception recognized by the
8 Supreme Court in Quarles, Ramirez, 871 P.2 at 245.

9 In upholding the trial court's ruling, the Arizona Supreme Court found that although
10 Defendant was clearly in custody when he made the statements in response to officer's
11 questions, the statements were indeed admissible under the public safety exception to the
12 Miranda requirements. Id. The court determined that based on the circumstances when
13 officers arrived on the scene, they did not know what had occurred in the apartment, how
14 many people were involved or whether anyone other than the person lying in the front room
15 needed assistance. Id. The court reasoned that in this case, the officer's questions were
16 directed at discovering what the officers would encounter when they entered the apartment.
17 Id. The court concluded that because the questions were geared toward eliciting information
18 that officers needed to protect themselves and anyone else in the apartment, the statements
19 were admissible under the public safety exception to the Miranda requirements. . Ramirez,
20 871 P.2 at 245.

21 The facts in Ramirez are analogous to the facts in the instant case. When Officers
22 arrived at Defendant's apartment they faced a great deal of uncertainty as to what had
23 occurred. Officers observed an unknown female lying on the floor covered in blood. Officers
24 had a reasonable belief that the female was injured and required medical assistance. As in
25 Ramirez, the questions that Officer Ballejo asked Defendant were geared toward eliciting
26 information that Officers needed to assist the unknown female in the apartment. Therefore, it
27 is reasonable to conclude that the statements Defendant made in response to Officer
28 Ballejo's questions fall within the public safety exception to the Miranda requirements.

1 Additionally, Defendant requests his non-responsive, spontaneous statements to
2 Officer Ballejos be suppressed. Specifically, Defendant claims that the State should be
3 precluded from eliciting testimony from Officer Ballejos that Defendant spontaneously
4 uttered, "you guys are mad at me, aren't you?" However, "spontaneous" or "volunteered"
5 statements of a suspect in custody are admissible despite the absence of prior Miranda
6 warnings. State v. Billings, 84 Nev. 55, 436 P.2d 212 (1968) See also Miranda, 384 U.S. at
7 478, 86 S.Ct. at 1630. Furthermore, Defendant's spontaneous statement is not hearsay if it is
8 offered by the State as a "statement by party opponent." See NRS 51.035 (3)(a).

9 Lastly, Defendant seeks to preclude Officer Ballejos from testifying as to his
10 impressions of Defendant's demeanor during his questioning. There is absolutely no rational
11 or legal basis for this Court to exclude such testimony. NRS 50.265 provides, in pertinent
12 part, a laywitness may testify as to opinions rationally based his/her perception that is helpful
13 in the determination of a fact in issue. Officer Ballejos' opinions as Defendant's demeanor
14 are rationally based on his personal interaction and observation of Defendant at the scene of
15 the crime. With the burden on the State to prove malice aforethought beyond a reasonable
16 doubt, Defendant's demeanor is helpful to the determination of a fact in issue. Therefore, so
17 long as the proper foundation is laid, Ballejos' opinions are admissible.

18 **Defendant's Video/Audio Recorded Statement Conducted by Detective Wildemann was**
19 **Freely and Voluntarily Given and Should not be Suppressed.**

20 From the outset, it should be noted that during Defendant's jury trial, a redacted
21 version (shortening the time) of Defendant's Video/Audio recorded statement was admitted
22 into evidence, played for the jury in its entirety with NO objection by Defendant. 3/18/09 TT
23 133 (State's Exhibit 68 and 69). Interestingly, Defendant now asserts that his statements
24 must be suppressed.

25 Defendant does not argue that Detective Wildemann failed to advise Defendant of his
26 Miranda rights. Nor does Defendant claim that he did not acknowledge/understand his
27 Miranda his rights. Instead, Defendant argues that he was too intoxicated to knowingly and
28 voluntarily waive his Miranda rights and, as a result, his decision to speak with Detective

1 Wildemann was not the result of rational intellect or free will. Fortunately, the statement he
2 seeks to suppress was not only audio recorded but, video recorded as well. And, in this case,
3 *res ipsa loquitur*—"the thing speaks for itself."

4 Miranda

5 The prosecutor has the burden to prove that the waiver of a suspect's 5th Amendment
6 Miranda rights was voluntary, knowingly and intelligently made. This burden is on the
7 prosecution by preponderance of the evidence. Falcon v. State, 110 Nev. 530, 874 P.2d 772
8 (1994). This is generally accomplished by demonstrating to the court that the officer advised
9 the defendant of his Miranda rights and at the conclusion of the advisement asked the
10 suspect if he understood his rights. An affirmative response by the suspect normally satisfies
11 the knowingly and intelligent portion of the waiver.

12 The voluntariness prong is normally judged under a totality of the circumstances
13 existing at the time that the rights were read to the defendant. A waiver of rights need not be
14 expressed, i.e., the suspect need not say "I waive my Miranda rights" nor need the officer ask
15 the suspect "do you waive your Miranda rights". It is sufficient if the officer obtains an
16 affirmative response to the question whether the suspect understands the rights that were just
17 read to him. See generally Tomarchio v. State, 99 Nev. 572, 665 P.2d 804 (1983); North
18 Carolina v. Butler, 441 U.S. 369, 99 S.Ct. 1755 (1979) (defendant refused to sign the waiver
19 but agreed to talk to the officers. This was an adequate waiver according to the United
20 States Supreme Court). See also Tague v. Louisiana, 444 U.S. 469, 100 S.Ct. 652 (1980).
21 See also, Connecticut v. Barrett, 479 U.S. 523, 107 S.Ct. 828 (1987), wherein defendant
22 agrees to make oral, but declines written statement.

23 In Mendoza v. State, 122 Nev. 267, 130 P.2d 176 (2006), our Nevada Supreme Court
24 addressed the issue of an explicit waiver and held:

25 A valid waiver of rights under Miranda must be voluntary, knowing, and intelligent. See
26 Miranda, 384 U.S. at 444, 86 S.Ct. 1602; see also Floyd, 118 Nev. at 171, 42 P.3d at 259-60.
27 "A waiver is voluntary if, under the totality of the circumstances, the confession was the
28 product of a free and deliberate choice rather than coercion or improper inducement." U.S. v.

1 Doe, 155 F.3d 1070, 1074 (9th Cir.1998) (citing United States v. Pinion, 800 F.2d 976, 980
2 (9th Cir.1986)) A written or oral statement of waiver of the right to remain silent is not
3 invariably necessary. See North Carolina v. Butler, 441 U.S. 369, 373, 99 S.Ct. 1755, 60
4 L.Ed.2d 286 (1979). Rather, a waiver may be inferred from the actions and words of the
5 person interrogated. Id.

6 A detective read Mendoza his rights in Spanish, and Mendoza never expressed difficulty
7 understanding the nature of his rights or the content of the subsequent questioning. Further,
8 Mendoza never expressed a desire not to speak. A review of the totality of the
9 circumstances reveals that Mendoza voluntarily, knowingly, and intelligently waived his
10 Miranda rights. Given the wealth of evidence pointing to Mendoza's guilt, even if a Miranda
11 violation occurred, any error in admitting Mendoza's un-Mirandized statement is harmless
12 beyond a reasonable doubt. See Arizona v. Fulminante, 499 U.S. 279, 295-96, 111 S.Ct.
13 1246, 113 L.Ed.2d 302 (1991).

14 Id., 122 Nev. 267, 130 P.2d 176, 181-182.

15 In the instant case, it is clear from Defendant's video/ audio statement that Detective
16 Wildemann read Defendant his Miranda rights and Defendant acknowledged he understood
17 them. See Audio/ Video Recording. The question then remains; did he "knowingly and
18 voluntarily" waive his rights. The answer is yes!

19 Knowing and Voluntary

20 "A confession is admissible only if it is made freely and voluntarily, without
21 compulsion or inducement." Passama v. State, 103 Nev. 212, 213, 735 P.2d 321, 322 (1987)
22 (citing Franklin v. State, 96 Nev. 417, 610 P.2d 732 (1980). A confession is voluntary if it is
23 the product of a "rational intellect and a free will." Blackburn v. Alabama, 361 U.S. 199,
24 208, 80 S.Ct. 274, 280 (1960). "To determine the voluntariness of a confession, the court
25 must consider the effect of the totality of the circumstances on the will of the defendant.
26 (citation omitted) The question in each case is whether the defendant's will was overborne
27 when he confessed." Passama, 103 Nev. at 214, 735 P.2d at 323. In Passama, the Nevada
28 Supreme Court, citing Schneekloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041 (1973),
delineated the following factors to be considered when evaluating the voluntariness of a
confession:

1 the youth of the accused; his lack of education or his low
2 intelligence; the lack of any advice of constitutional rights; the
3 length of detention; the repeated and prolonged nature of
4 questioning; and the use of physical punishment such as the
5 deprivation of food or sleep.
6 Id. at 323.

7 Intoxication

8 Intoxication rarely renders a confession involuntary. See State v. Clark, 434 P.2d 636
9 (Ariz. 1967); State v. Hall, 54 Nev. 213, 13 P.2d 624 (1932); Wallace v. State, 84 Nev. 603,
10 447 P.2d 30 (1968); Pickworth v. State, 95 Nev. 547, 553 P.2d 626 (1979). Instead, courts
11 look to the totality of the circumstances when determining whether a confession is
12 involuntary. Id.

13 The Nevada Supreme Court addressed the issue of the voluntariness of a confession
14 in the case of Chambers v. State, 113 Nev. 974, 944 P.2d 805 (1997). In that case the Court
15 upheld the voluntariness of the Defendant's confession even though at the time of giving the
16 confession the Defendant had a .28 blood alcohol, was in the hospital recovering from a stab
17 wound and was believed to have ingested methamphetamine or crack cocaine.

18 Prior to trial, Chambers filed a Motion to Suppress his post-Miranda statements to the
19 police claiming that his statements were not voluntarily given in light of the fact that he was
20 questioned for four hours after having been stabbed, that he was not well rested, and that he
21 was intoxicated. The District Court held that the confession was voluntary and this ruling
22 was upheld by the Nevada Supreme Court.

23 In addressing the voluntariness standard, the Court quoted at length from a previous
24 decision in Passama v. State, 103 Nev. 212 (1998), wherein the Court employed the totality
25 of the circumstances test. The Court stated, "In determining whether a confession is the
26 product of a free will, this Court employs a totality of the circumstances test; the Court must
27 consider the effect of the totality of the circumstances on the will of the Defendant, the
28 question in each case is whether the Defendant's will was overborne when he confessed.
Factors to be considered include: the youth of the accused; his lack of education or his low

1 intelligence; the lack of any advice of Constitutional Rights; the length of detention; the
2 repeated and prolonged nature of questioning; and the use of physical punishment such as
3 the deprivation of food or sleep." Id. at 214.

4 In the instant case, it is undisputed, Defendant had been drinking. Several witnesses
5 testified that he smelled heavily of alcohol and/or appeared to be intoxicated. However, the
6 totality of the circumstances establishes that he was not so intoxicated as to render his
7 statement involuntary.

8 **Totality of Circumstances surrounding the Interview**

9 In the instant case, the youth of Defendant is not an issue. Neither is his lack of
10 education or intelligence. Defendant was 41 yrs old when he murdered Victoria, He
11 graduated from high school and rose to the rank of Sergeant in the United State's Army. See
12 Defendant's Pre- Sentence Investigation Report on file with this Court. Further, Defendant
13 was intimately familiar with the criminal justice system as evidenced by his stealth criminal
14 record. Id. The length of the interview with Detective Wildemann was approximately 1 ½
15 hours in duration, not accounting for several breaks in the questioning. See State's Exhibits
16 68 and 69.

17 Additionally, Detective Wildemann was calm, patient and professional during the
18 questioning; Detective Wildemann did not threaten Defendant and certainly did not
19 physically punish him. Id. In addition, Detective Wildemann provided Defendant with
20 coffee and refills when Defendant asked. Id.

21 Throughout the interview, Defendant appears to understand and comprehend
22 Detective Wildemann's questions. And, despite Defendant's claim to the contrary, his
23 responses were not slurred or incoherent. See, State's Exhibits 68 and 69. Although at times
24 Defendant's statements' to Detective Wildemann were non-responsive, they were certainly
25 not incoherent ramblings but rather spontaneous, voluntary statements. And, "spontaneous"
26 or "volunteered" statements of a suspect in custody are admissible. State v. Billings, 84 Nev.
27 55, 436 P.2d 212 (1968) See also Miranda, 384 U.S. at 478, 86 S.Ct. at 1630.

28 Additionally, during Defendant's trial, he testified on his own behalf. The State

1 contends that Defendant's demeanor during his testimony during trial is *very consistent* with
2 his demeanor during his interview with Detective Wildemann. Again, the State asserts the
3 best evidence is the audio/video statement itself. Therefore, based on the totality of
4 circumstances surrounding the interview and, despite the fact that he had been drinking
5 earlier in the night, Defendant's statement was knowingly and voluntarily given and should
6 not be suppressed.

7 Further, in Nevada, once this Court determines that Defendant's statement lacks any
8 constitutional violations, the final determination of the voluntariness of a statement is left to
9 the jury. Carlson v. State, 84 Nev. 534, 445 P.2d 157 (1968); Grimaldi v. State, 90 Nev. 83,
10 89, 518 P.2d 615 (1974). See also Dawson v. State, 108 Nev. 112, 825 P.2d 593 (1992);
11 Varner v. State, 97 Nev. 486, 634 P.2d 1205 (1981). Having adopted the "Massachusetts
12 Rule," Detective Wildemann will to testify as to the circumstances under which the
13 statement was made. Id. As required by law, this Court must instruct the jury that the State
14 must prove by a preponderance of the evidence that the statement was voluntarily given.
15 Brimmage v. State, 93 Nev. 434, 567 P.2d 54 (1977); Falcon v. State, 110 Nev. 530, 874
16 P.2d 772 (1994); Colorado v. Connelly, 479 U.S. 157, 107 S. Ct. 515 (1986).

17 **Defendant's request to redact portions of his Statement**

18 In anticipation of this Court ruling against suppression of Defendant's statement;
19 Defendant objects to various portions of the statement. With regard to Defendant's request
20 to suppress various questions asked by Detective Wildemann, the questions are not hearsay
21 because the questions are not offered to prove the truth of any matter asserted but offered
22 simply give context to Defendant's responses. NRS 51.035. Additionally, Detective
23 Wildemann will be testifying at trial and is subject to cross-examination with regard to his
24 interview of Defendant. NRS 51.035(2)(not hearsay if the declarant testifies at trial and is
25 subject to cross-examination). Therefore, the questions asked by Detective Wildemann are
26 admissible.

27 With regard to Defendant's various statements during the interview where he
28 references his history of domestic violence with Victoria, refers to being in prison, speaks of

1 court documents associated with a criminal case; these statements are all voluntary,
2 spontaneous statements that were unresponsive to questions posed to him. See State v.
3 Billings, 84 Nev. 55, 436 P.2d 212 (1968) See also Miranda, 384 U.S. at 478, 86 S.Ct. at
4 1630.(spontaneous statements are admissible). Furthermore, the jury will learn of O'Keefe's
5 prior violent history with Victoria through other evidence; this Court has previously ruled
6 that Defendant's prior conviction of Battery Domestic Violence is admissible. Additionally,
7 the statements are statements of a party opponent and are admissible per NRS 51.035(3)(a).

8 Finally, with regard to Detective Wildemann's characterization of Defendant as a
9 "fucking nut," the statement is not offered for the truth of the matter asserted but simply an
10 observation based on Defendant's demeanor. Detective Wildemann will be subject to cross-
11 examination regarding his statement. NRS 51.035(2). For all the foregoing reasons,
12 Defendant's request to redact specific portions of the video-taped interview should be
13 denied.

14
15
16 DATED this _____ day of August, 2010.

17 Respectfully submitted,

18 DAVID ROGER
19 Clark County District Attorney
20 Nevada Bar #002781

21
22 BY /s/ STEPHANIE A. GRAHAM

23 Stephanie A. Graham
24 Deputy District Attorney
25 Nevada Bar #0010058
26
27
28

1 CERTIFICATE OF FACSIMILE TRANSMISSION

2

3 I hereby certify that service of STATE'S OPPOSITION TO DEFENDANT'S

4 MOTION TO SUPPRESS HIS STATEMENTS TO POLICE, OR, ALTERNATIVELY, TO

5 PRECLUDE THE STATE FROM INTRODUCING PORTIONS OF HIS

6 INTERROGATION, was made this _____ day of August, 2010, by facsimile transmission

7 to:

8

9 PATRICIA PALM ESQ

10 FAX #455-6273

11

12

13 /s/ T. Schessler

14 Secretary for the District Attorney's

15 Office

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20

21

22

23

24

25

26 sg/da

Alvin L. Johnson
CLERK OF THE COURT

OPPS
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
CHRISTOPHER J. LALLI
Chief Deputy District Attorney
Nevada Bar #005398
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
christopher.lalli@ccdanv.com
Attorney for Plaintiff

08C250630
OPPS
Opposition
901797



DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

BRIAN K. O'KEEFE,
#1447732

Defendant.

Case No: 08C250630-1
Dept. No: XVII

Date: April 19, 2010
Time: 8:15 a.m.

STATE'S OPPOSITION TO MOTION TO PRECLUDE
EXPERT TESTIMONY

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

DATED this 18th day of August, 2010.

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

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

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 On November 5, 2008, Brian K. O'Keefe (hereinafter "the Defendant") murdered
3 Victoria Whitmarsh by stabbing the right side of her chest. The knife he used to kill Victoria
4 sliced through various vital organs. It was also apparent that the much-larger Defendant had
5 badly beaten Victoria. Weighing seventy pounds less than him, her body was badly bruised
6 at autopsy.

7 On July 21, 2010, the Defendant filed a Motion to Preclude the State from
8 Introducing at Trial Other Act or Character Evidence and Other Evidence Which is Unfairly
9 Prejudicial or would Violate his Constitutional Rights. In that Motion, the Defendant argued
10 that Metro Homicide Detective Martin Wildemann should not be allowed to testify about a
11 cut on the Defendant's hand which he personally observed. At the previous trial of this
12 matter, Detective Wildemann testified that it is not uncommon for a suspect in a stabbing
13 case to cut himself during the course of the killing. It was further argued in the Motion that
14 Detective Wildemann should be qualified as an expert before such a statement could be
15 received into evidence.

16 In response, the State argued that Detective Wildemann's prior testimony was
17 properly received by the Court pursuant to NRS 50.265. As an accommodation to the
18 Defendant and should the Court wish to have Detective Wildemann qualified as an expert
19 before giving such testimony again, the State noticed Detective Wildemann as an expert in
20 the area. Now, apparently dissatisfied with that and wanting to have it both ways, the
21 Defendant objects to the State's notice. He now files his Motion to Preclude Expert
22 Testimony. The Motion should be denied.

23 **ARGUMENT**

24 **A. It is Not Necessary to Notice Detective Wildemann as an Expert**

25 As argued in its Opposition to the Defendant's Motion to Preclude the State from
26 Introducing at Trial Other Act or Character Evidence and Other Evidence Which is Unfairly
27 Prejudicial or would Violate his Constitutional Rights, it is not necessary that Detective
28 Wildemann be qualified as an expert before testifying about those things he has personally

1 encountered in this case and during the course of his career as a police officer.

2 NRS 50.265 provides:

3 If the witness is not testifying as an expert, his testimony in the
4 form of opinions or inferences is limited to those opinions or
5 inferences which are: (1) Rationally based on the perception of
the witness; and (2) Helpful to a clear understanding of his
testimony or the determination of a fact in issue.

6 Under this statutory provision, Detective Wildemann properly testified that it is not
7 uncommon for a suspect in a stabbing case to cut himself during the course of the killing.
8 Detective Wildemann personally observed the injury on the Defendant's hand and personally
9 worked on many homicide investigations involving stabbings. Therefore, such testimony is
10 rationally based upon his perception as he personally observed the Defendant's injury.
11 Moreover, such testimony is helpful to a clear understand of a fact in issue, namely how the
12 injury was received.

13 It is altogether proper to allow an experienced police officer to provide lay witness
14 opinion under such circumstances. The Nevada Supreme Court has so held in *Meadow v.*
15 *Civil Serv. Bd.*, 105 Nev. 624 (1989). That case involved the termination proceedings of a
16 police officer for using excessive force. During the course of the hearing, a police officer
17 with over fourteen years of experience was allowed to testify that, based upon what he heard,
18 "'it sounded like somebody getting their butt whipped' in the other room" *Id.* at 626.
19 On appeal, *Meadow* argued that the board erred by allowing the testifying officer to
20 speculate about things that he neither saw nor of which he had personal knowledge. *Id.* at
21 625. This argument was rejected. Relying on NRS 50.265, the court held, "Given Officer
22 Berni's experience, his testimony ... was rationally based upon his perceptions at the time."

23 *Meadow* is analogous to the instant case. Here, Detective Wildemann enjoys over
24 twenty-two years experience as a police officer. He has served as a homicide detective for
25 more than eight years and has personally worked over 200 murder cases. Just as Officer
26 Berni was allowed to render his opinion about what happened in an adjoining room based
27 only upon what he heard, Detective Wildemann should be allowed to render his opinion
28 about the injury he observed on the Defendant's hand. The noticing of Detective

1 Wildemann as an expert is unnecessary.

2 **B. The State Has Not Acted in Bad Faith**

3 Assuming the Court now rules that Detective Wildemann must qualify as an expert
4 before he testifies to the same information he previously testified to, it is not an abuse of
5 discretion for the Court to allow Detective Wildemann to be qualified as an expert in spite of
6 the fact that some provisions of NRS 174.234 have not strictly been complied with. In
7 *Mitchell v. State*, 124 Nev. -, 192 P.3d 721 (2008), the Nevada Supreme Court held that it
8 was not an abuse of discretion for a district court to allow an expert witness to testify where
9 the provisions of NRS 174.234 were not complied with provided the State did not act in bad
10 faith and the defendant did not suffer prejudice to his substantial rights.

11 Mitchell argued on appeal that the trial court abused its discretion in allowing a
12 mental health professional to testify where the State failed to make certain disclosures
13 required by NRS 174.234. *Id.* at 729. The State conceded it did not make the disclosures.
14 *Id.* In analyzing the issue, the Nevada Supreme Court noted that the defendant never
15 claimed the prosecution acted in bad faith. Moreover, there was no prejudice found because
16 the defendant had the ability to review the State's file, to talk to the expert and was aware of
17 the gist of the expert's testimony. *Id.* at 729 and n.24.

18 In this case, there is certainly no bad faith. The State does not believe it is necessary
19 to qualify Detective Wildemann as an expert, especially when he was previously allowed to
20 render the testimony at issue. Furthermore, there is no prejudice to the Defendant. The
21 defense has had access to all of Detective Wildemann's reports as well as his testimony at
22 the preliminary hearing and the previous trial. Moreover, they have had the ability to cross-
23 examine Detective Wildemann on subject while he testified previously. The Defendant
24 would certainly suffer no prejudice from allowing Detective Wildemann to now be qualified
25 as an expert.

26 Relying on *Hallmark v. Eldridge*, 124 Nev. -, 189 P.3d 646 (2008), the Defendant
27 argues that Detective Wildemann should not be allowed to testify on the subject because he
28 does not meet the criteria to be recognized as an expert witness. Indeed, that has yet to be

1 seen. If the issue ripens to the point of qualifying Detective Wildemann as an expert, that
2 decision should be made in a court proceeding after His Honor has heard the plethora of
3 experience accumulated by this seasoned police investigator.

4 **CONCLUSION**

5 Based upon all of the foregoing, the State respectfully prays that the Defendant's
6 Motion to Preclude Expert Testimony be denied.

7 DATED this 18th day of August, 2010.

8 DAVID ROGER
9 Clark County District Attorney
Nevada Bar #002781

10 BY /s/ Christopher J. Lalli
11 **CHRISTOPHER J. LALLI**
12 Chief Deputy District Attorney
13 Nevada Bar #005398
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17

18 **CERTIFICATE OF FACSIMILE TRANSMISSION**

19 I hereby certify that service of the above and foregoing was made this 18th day of
20 August, 2010, by facsimile transmission to:

21 PATRICIA PALM, ESQ.
22 FAX: (702) 386-9114

23 BY: /s/ Jennifer Georges
24 Secretary for the District Attorney's Office
25
26
27
28

User ID: GEORGJE

=====

TO: Name: Patricia Palm, Esq.

Company:

Fax Phone Number: (702) 386-9114

Contact Phone Number:

Info Code 1:

Info Code 2:

Sent to remote ID: 7023869114

Sent at: Wed Aug 18 11:46:21 2010

Sent on channel 0

Elapsed Time: 2 minutes, 32 seconds

Transmission Status (0/339;0/0): Successful Send

Page Record: 1 - 5.

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• ORIGINAL •

1 AINF
2 DAVID ROGER
3 Clark County District Attorney
4 Nevada Bar #002781
5 CHRISTOPHER J. LALLI
6 Chief Deputy District Attorney
7 Nevada Bar #005398
8 200 South Third Street
9 Las Vegas, Nevada 89155-2211
10 (702) 671-2500
11 Attorney for Plaintiff

FILED IN OPEN COURT
AUG 19 2010 20

CHARLES J. SHORT
CLERK OF THE COURT

BY Carol Donahue
CAROL DONAHUE DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

08C250630
AINF
Amended Information
08/18/10



10 THE STATE OF NEVADA,
11 Plaintiff,

12 -vs-

13 BRIAN KERRY O'KEEFE,
14 #1447732

15 Defendant.

Case No. C250630
Dept No. XVII

SECOND AMENDED
INFORMATION

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

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

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

27 ///

28 ///

1 and into the body of the said VICTORIA WHITMARSH, with a deadly weapon, to-wit: a
2 knife.

3
4 DAVID ROGER
DISTRICT ATTORNEY
5 Nevada Bar #002781

6 BY

Christopher J. Lalli
7 CHRISTOPHER J. LALLI
Chief Deputy District Attorney
8 Nevada Bar #005398

9
10 In addition to any other Notice of Witnesses, names of witnesses known to the
District Attorney's Office at the time of filing this Information are as follows:

<u>NAME</u>	<u>ADDRESS</u>
12 ARMBRUSTER, TODD	5001 OBANNON DR #34 LVNV
13 BALLEJOS, JEREMIAH	LVMPD #8406
14 BENJAMIN, JACQUELINE DR	ME 0081
15 BLASKO, KEITH	LVMPD #2995
16 BUNN, CHRISTOPHER	LVMPD #4407
17 COLLINS, CHELSEA	LVMPD #9255
18 CONN, TODD	LVMPD #8101
19 CUSTODIAN OF RECORDS	CDC
20 CUSTODIAN OF RECORDS	LVMPD COMMUNICATIONS
21 CUSTODIAN OF RECORDS	LVMPD RECORDS
22 FORD, DANIEL	LVMPD #4244
23 FONBUENA, RICHARD	LVMPD #6834
24 HATHCOX, JIMMY	3955 CHINCHILLA AVE LVNV
25 HUTCHERSON, CHRISTOPHER	LVMPD #12996
26 IVIE, TRAVIS	LVMPD #6405
27 KYGER, TERESA	LVMPD #4191
28	

1	KOLACZ, ROBIN	5001 EL PARQUE AVE #38 LVNV
2	LOWREY-KNEPP, ELAINE	DISTRICT ATTORNEY INVESTAGATOR
3	MALDONADO, JOCELYN	LVMPD #6920
4	MORRIS, CHERYL	C/O DISTRICT ATTORNEY
5	MURPHY, KATE	LVMPD #9756
6	NEWBERRY, DANIEL	LVMPD #4956
7	PAZOS, EDUARDO	LVMPD #6817
8	RAETZ, DEAN	LVMPD #4234
9	SANTAROSSA, BRIAN	LVMPD #6930
10	SHOEMAKER, RUSSELL	LVMPD #2096
11	TAYLOR, SEAN	LVMPD #8718
12	TINIO, NORMA	2992 ORCHARD MESA HENDERSONNV
13	TOLIVER, CHARLES	1013 N. JONES #101 LVNV
14	TOLIVER, JOYCE	1013 N. JONES #101 LVNV
15	WHITMARSH, ALEXANDRA	7648 CELESTIAL GLOW LVNV
16	WHITMARSH, DAVID	7648 CELESTIAL GLOW LVNV
17	WILDEMAN, MARTIN	LVMPD #3516
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27	DA#08F23348X/Ls	
28	LVMPD EV#0811053918	
	(TK9)	

ORIGINAL

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PATRICIA PALM, ESQ.
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1212 CASINO CENTER BLVD.
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Phone: (702) 386-9113
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Email: Patricia.palm@law.com
Attorney for Brian O'Keefe

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

AUG 19 2010

BY: Carol Donahoo
CAROL DONAHOO, DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

VS.

BRIAN K. O'KEEFE,

Defendant.

CASE NO: C250630

DEPT NO. XVII

DATE:

TIME:

88C250630
NOT
MOTION
1282772



MOTION BY DEFENDANT O'KEEFE

TO PRECLUDE LATE NOTICED EXPERT TESTIMONY FROM DR. DUTRA

COMES NOW, the Defendant, BRIAN O'KEEFE, by and through his attorney, PATRICIA PALM of PALM LAW FIRM, LTD., and hereby moves this Honorable Court to preclude the State's late-noticed witness Timothy Dutra from offering testimony regarding the nature of the "victim's injuries" during the trial of this matter.

This Motion is made and based upon all the papers and pleadings on file

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1 herein, the attached Declaration, and any oral argument at the time set for hearing this
2 Motion.

3 DATED this 18th 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

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DECLARATION

PATRICIA A. PALM makes the following declaration:

1. I am an attorney duly licensed to practice law in the State of Nevada; I am the attorney representing Defendant O'Keefe in this matter.

2. That on July 29, 2010, well within the time for noticing expert witnesses, O'Keefe filed and served upon the State his Supplemental Notice of Expert Witnesses.

3. That not until the late afternoon of Friday, August 13, 2010, did the State provide to this counsel a Supplemental Notice of Witnesses via email, which notice listed "Detective Marty Wildemann," who "Will testify as to his opinion regarding the nature of injury to Defendant's hand."

4. No Curriculum vitae was attached to the notice.

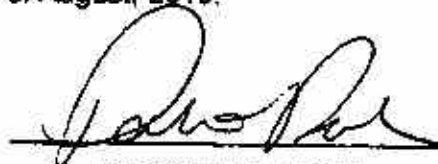
5. That not until the afternoon following calendar call on August 17, 2010, was this counsel served with a Supplemental Notice of Expert Witnesses, which was filed on August 16, 2010.

6. It is not known to this counsel nor has it been made known to the Court to this counsel's knowledge what exact efforts were made to determine whether Dr. Benjamin's presence could be secured before the expert notice deadline.

7. That the Supreme Court issued remittitur in the prior appeal in this case on May 6, 2010. That on June 10, 2010, trial was set in this matter to begin August 23, 2010.

I declare under penalty of perjury that the foregoing is true and correct.
(NRS 53.045).

EXECUTED this 18th day of August, 2010.



PATRICIA A. PALM
Bar No. 6009

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POINTS AND AUTHORITIES

Where the State wishes to introduce expert testimony, special notice is required pursuant to NRS 174.234(2), which provides:

If the defendant will be tried for one or more offenses that are punishable as a gross misdemeanor or felony and a witness that a party intends to call during the case in chief of the State or during the case in chief of the defendant is expected to offer testimony as an expert witness, the party who intends to call that witness shall file and serve upon the opposing party, **not less than 21 days before trial** or at such other time as the court directs, a written notice containing:

- (a) A brief statement regarding the subject matter on which the expert witness is expected to testify and the substance of the testimony;
- (b) A copy of the curriculum vitae of the expert witness; and
- (c) A copy of all reports made by or at the direction of the expert witness.

(Emphasis added.) With this statutory provision, the Nevada Legislature obviously intended to protect defendants' due process rights and ensure adequate opportunity to review and possibly impeach proposed experts' qualifications and expected testimony. Here, for the second time, the State has deprived O'Keefe of his procedural due process right to 21 days' notice. U.S. Const., 14th Amend.; Nev. Const., art. 1, sec. 8.

As asserted in the attached affidavit, O'Keefe filed and served his Supplemental Expert Witness Notice well within the time for noticing expert witnesses. The State failed to serve its notice until after calendar call, but did so just 3 court days prior to the start of trial. Therefore, the State has failed to comply with the statutory notice requirement and should be precluded from presenting this and any other "expert" testimony which has not been properly and timely noticed. See NRS 174.295 (providing that court may impose sanctions, including prohibiting a party from introducing in evidence material not disclosed in compliance with NRS 174.234).

Here, Dr. Dutra was not the medical examiner who performed the autopsy. To the extent that Dr. Dutra has formed his own opinions, O'Keefe has not been given

1 sufficient notice by which he might have time to prepare to meet any new evidence not
2 already introduced through Dr. Benjamin's prior testimony.

3 Conversely, to the extent that Dr. Dutra will rely on any information obtained from
4 Dr. Benjamin, which was not subjected to cross-examination, his testimony would
5 violate O'Keefe's Sixth Amendment rights as set forth in Crawford v. Washington, 541
6 U.S. 36, 124 S. Ct. 1354 (2004), Meiendez-Diaz v. Massachusetts, 557 U.S. ___, 129
7 S. Ct. 2527 (2009); Polk v. State, 126 Nev. ___, 233 P.3d 357 (2010). It does not
8 matter whether any other state statute allows for an expert to rely on hearsay, a
9 defendant's Sixth Amendment rights trump such statutes. See Polk, 233 P.3d 357
10 (rejecting argument that because NRS 50.285 allowed an expert to offer opinion based
11 on inadmissible evidence, an analyst could testify to the results of a test performed by a
12 non-testifying analyst).

13 Moreover, if the State desired to admit Dr. Benjamin's prior testimony, it would be
14 required to make a timely motion, at least 15 days before trial, and in no event later than
15 calendar call. EDCR 3.20, 3.28, and NRS 174.125. The State would be required to
16 show good cause to support the untimely motion, and reasonable diligence used to
17 secure the testimony of the unavailable witness before the motion deadline. Hernandez
18 v. State, 124 Nev. ___, 188 p.3d 1126 (2008). Here, the State appears to be making an
19 end run around the requirements of the rules by filing a late notice so that another
20 doctor can parrot Dr. Benjamin's testimony, even though the State has made no
21 showing that it would be able to admit that testimony directly.

22 Considering that the State had since June 10, 2010, when trial was set, to locate
23 and secure the presence of Dr. Benjamin for trial, the prosecution should have known
24 prior to the expiration of the notice and motion deadlines whether she was available. If
25 the State had used reasonable diligence, the prosecutors would have known it was
26 necessary to either notice their intent to use her prior testimony or timely notice another
27 expert.
28

1 In sum, based on the State's failure to timely comply with the statutes addressing
2 time requirements and good cause and based on O'Keefe's confrontation rights, this
3 Court should preclude the State from allowing Dr. Dutra to testify as an expert witness
4 regarding the nature of the "victim's injuries."
5

6
7 CONCLUSION

8 For the reasons stated above, Brian O'Keefe respectfully requests this Honorable
9 Court issue an order precluding the State from introducing at trial evidence or testimony
10 from its proposed expert Dr. Timothy Dutra related to the nature of any injuries in this
11 case.
12

13 Dated this 18th day of August, 2010.

14 PALM LAW FIRM, LTD.

15
16 By 
17 PATRICIA A. PALM, #6009
18 1212 Casino Center Blvd.
19 Las Vegas, NV 89104
20 (702) 386-9113
21
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Email: Patricia.palm@palmfirm.com
Attorney for Brian O'Keefe

FILED IN OPEN COURT
STEVEN GREENSON
CLERK OF DISTRICT COURT

AUG 23 2010

BY: *Carol Donahoo*
CAROL DONAHOO, DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

BRIAN K. O'KEEFE,

Defendant.

CASE NO: C250630

DEPT NO. XVII

DATE:

TIME:

00C250630

JJ

Jury Instructions

024135



DEFENDANT'S PROPOSED JURY INSTRUCTIONS

COMES NOW Defendant, Brian K. O'Keefe, by and through his attorney, Patricia Palm of Palm Law Firm, Ltd., and hereby submits to this Honorable Court his attached proposed and requested jury instructions.

Dated this 21st day of August, 2010.

PALM LAW FIRM, LTD.

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

INSTRUCTION NO. _____

If, in these instructions, any rule, direction or idea is repeated or stated in different ways, no emphasis therein is intended by me and none may be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore others, but you are to consider all the instructions as a whole and regard each in light of all the others.

The order in which the instructions are given has no significance to their relative importance.

Yamaha Motor Co. v. Arnoult, 114 Nev. 233, 955 P.2d 661 (1998).

INSTRUCTION NO. _____

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The order in which the instructions are given has no significance to their relative importance.

INSTRUCTION NO. _____

An information is a formal method of accusing a person of a crime but is not evidence of his guilt.

In this case, Brian O'Keefe is charged by Second Amended Information with Second Degree Murder with Use of a Deadly Weapon. This charge encompasses the lesser charge of Involuntary Manslaughter.

The jury must decide if the State has met its burden of proving beyond a reasonable doubt that Brian O'Keefe is guilty of any offense, and if so, which offense.

Crawford v. State, 121 Nev. 746, 751, 121 P 3d 582, 586 (2005).

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The jury must decide if the State has met its burden of proving beyond a reasonable doubt that Brian O'Keefe is guilty of any offense, and if so, which offense.

INSTRUCTION NO. _____

The credibility or believability of a witness should be determined by the witness's manner on the stand, his or her relationship to the parties, fears, motives, interests or feelings, and opportunity to have observed the matter to which the witness testified; the reasonableness of the witness's statements and the strength or weaknesses of his or her recollections.

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

The weight of the evidence is not necessarily determined by the number of witnesses testifying. You should consider all the facts and circumstances in evidence.

Quillen v. State, 112 Nev. 1369, 1381, 929 P.2d 893, 901 (1997).

INSTRUCTION NO. _____

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The weight of the evidence is not necessarily determined by the number of witnesses testifying. You should consider all the facts and circumstances in evidence.

Evidence that Brian O'Keefe committed the felony offense of domestic battery, or is alleged to have made statements indicating an intent to harm Victoria Whitmarsh, and evidence that he is alleged to have indicated an ability to kill with a knife by cutting a person in the sternum area was not received and may not be considered by you to prove that he is a person of bad character or to prove that he has a propensity to commit any crime. Such evidence was received and may be considered by you only for the limited purpose of determining the issue of whether or not Brian O'Keefe had a motive or intent to commit the crime charged.

Neither the felony conviction, nor the other acts, if believed, necessarily establish proof of motive or intent to commit the crime charged. You must weigh this evidence in the same manner as you do all other evidence.

Fields v. State, 125 Nev. ___, 220 P.3d 724, 729 (2009) (trial court, absent waiver from defendant, must give a limiting instruction explaining the purpose for which bad act evidence is being admitted immediately prior to its admission and an instruction at the end of the case reminding jurors of the limited use of the evidence).

Harris v. State, 106 Nev. 667, 799 P.2d 1104 (1990) (addressing the use of felony convictions).

INSTRUCTION NO. _____

Evidence that Brian O'Keefe committed the felony offense of domestic battery, or is alleged to have made statements indicating an intent to harm Victoria Whitmarsh, and evidence that he is alleged to have indicated an ability to kill with a knife by cutting a person in the sternum area was not received and may not be considered by you to prove that he is a person of bad character or to prove that he has a propensity to commit any crime. Such evidence was received and may be considered by you only for the limited purpose of determining the issue of whether or not Brian O'Keefe had a motive or intent to commit the crime charged.

Neither the felony conviction, nor the other acts, if believed, necessarily establish proof of motive or intent to commit the crime charged. You must weigh this evidence in the same manner as you do all other evidence.

INSTRUCTION NO. _____

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

Harris v. State, 106 Nev. 667, 799 p.2d 1104 (1990).

INSTRUCTION NO.

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

INSTRUCTION NO. _____

The elements of second degree murder are: (1) an unlawful killing of a human being, and (2) with malice aforethought, either express or implied. The unlawful killing may be effected by various means.

NRS 200.010

INSTRUCTION NO. _____

The elements of second degree murder are: (1) an unlawful killing of a human being, and (2) with malice aforethought, either express or implied. The unlawful killing may be effected by various means.

INSTRUCTION NO. _____

Malice aforethought means the intentional doing of a wrongful act without legal cause or excuse. The State has the burden of proving the intent to do a wrongful act beyond a reasonable doubt.

This requires that the State also disprove beyond a reasonable doubt that the killing was legally excused or justified by accident or self-defense.

If the State fails either to prove malice aforethought or to disprove accident and self-defense, it is your duty to return a verdict of Not Guilty of second degree murder.

NRS 200.010; Ybarra v. Wolff, 662 F. Supp. 44 (D. Nev. 1987) (government's burden); Collman v. State, 116 Nev. 687, 715, 7 P.3d 426, 444 (2000) (State's burden on malice); Crawford v. State, 121 Nev. 746, 751, 752-53, 121 P.3d 582 (2005) (state's burden, definition of malice aforethought, and defendant's entitlement to significance of his theory instruction); Brooks v. State, 124 Nev. ___, 180 P.3d 657, 662 (2008) (defendant's entitled to significance instructions and instructions that are specifically tailored to the facts of the case).

INSTRUCTION NO. _____

Malice aforethought means the intentional doing of a wrongful act without legal cause or excuse. The State has the burden of proving the intent to do a wrongful act beyond a reasonable doubt.

This requires that the State also disprove beyond a reasonable doubt that the killing was legally excused or justified by accident or self-defense.

If the State fails either to prove malice aforethought or to disprove accident and self-defense, it is your duty to return a verdict of Not Guilty of second degree murder.

1 In addition to his failure to cite relevant legal authority, the Defendant is asking to
2 admit extrinsic evidence which violates NRS 48.015 (relevance) and NRS 48.035 (prejudice,
3 confusion or waste of time). First, it is wholly irrelevant whether a homicide detective ever
4 collected blood alcohol evidence in another case. It was not done in this case and the
5 Defendant certainly can cross-examine on whether it was done and why it was not done.
6 Moreover, NRS 48.035(2) provides for the exclusion of evidence "if its probative value is
7 substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of
8 misleading the jury." Because the Defendant is now only charged with murder of the second
9 degree, voluntary intoxication is no longer relevant to these proceedings and allowing
10 evidence on the subject would only serve to prejudice, confuse and mislead the jury.

11 While the subject of voluntary intoxication may be considered by a jury in cases of
12 murder of the first degree, it has no relevance in cases of murder of the second degree.
13 Because murder of the second degree is a general intent crime (*Poole v. State*, 97 Nev. 175,
14 178 (1981) ("No premeditation, deliberation or other specific intent is involved in second
15 degree murder"); *Hancock v. State*, 80 Nev. 581, 583 (1964) (holding that a general
16 intent instruction is compatible with the crime of second degree murder)), the general rule of
17 inadmissibility of voluntary intoxication applies.

18 NRS 193.220 provides that "No act committed by a person while in a state of
19 voluntary intoxication shall be deemed less criminal by reason of his condition" It is
20 only when "the actual existence of a particular purpose, motive or intent is a necessary
21 element of the particular species or degree of the crime" that such evidence may be
22 considered. Because the Defendant only stands charged with murder of the second degree
23 (i.e. the particular species or degree of murder is no longer at issue), voluntary intoxication
24 cannot be considered by the jury.

25 The Nevada Supreme Court made this point perfectly clear in *Leaders v. State*, 92
26 Nev. 250 (1976). In that case, the defendant argued he was entitled to a jury instruction that
27 the element of malice may be negated by a showing of voluntary intoxication. *Id.* at 251.
28 This argument was flatly rejected.

1 This is not, and has never been, the law in Nevada. ... "While
2 the authorities are not all agreed, the great weight thereof in this
3 country is to the effect that mere intoxication cannot reduce
4 murder to manslaughter." Appellant has advanced no persuasive
reason, and we perceive none, why we should now change this
rule. The refusal to give the instruction was correct.

5 *Id.* at 251-252 (quoting *State v. Fisko*, 58 Nev. 65, 77 (1937). and citing *Lisby v. State*, 82
6 Nev. 183 (1966) and *Stewart v. State*, 92 Nev. 168 (1976)). In this case, the Defendant is
7 only charged with a malice murder. Therefore, as the Nevada Supreme Court recognized in
8 *Leaders*, voluntary intoxication is not a defense to that charge. To admit such evidence
9 would only serve to prejudice, confuse and mislead the jury.

10 CONCLUSION

11 Based upon all of the foregoing, the State respectfully requests that the Defendant's
12 Motion to Admit Evidence Showing LVMPD Homicide Detectives have Preserved
13 Blood/Breath Alcohol Evidence in Another Recent Case be denied.

14 DATED this 10th day of May, 2014.

15 DAVID ROGER
16 Clark County District Attorney
Nevada Bar #002781

17 BY /s/ Christopher J. Lalli
18 CHRISTOPHER J. LALLI
19 Chief Deputy District Attorney
Nevada Bar #005398

20 CERTIFICATE OF FACSIMILE TRANSMISSION

21 I hereby certify that service of the above and foregoing was made this 10th day of
22 August, 2010, by facsimile transmission to:

23 PATRICIA PALM, ESQ.
24 FAX: (702) 386-9114

25 BY: /s/ Jennifer Georges
26 Secretary for the District Attorney's Office
27
28

User ID: GEORGJE

=====

TO: Name: Patricia Palm, Esq.

Company:

Fax Phone Number: (702) 386-9114

Contact Phone Number:

Info Code 1:

Info Code 2:

Sent to remote ID:7023869114

Sent at:Tue Aug 10 11:10:36 2010

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

JUG 12 8 28 AM '10

CLERK COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

BRIAN K. O'KEEFE,

Defendant.

CASE NO: C250630

DEPT NO. XVII

DATE:

TIME:

ORDER AUTHORIZING CONTACT VISIT

Based upon the request of Defendant, BRIAN O'KEEFE, by and through his attorney, PATRICIA A. PALM, of PALM LAW FIRM, LTD., the Court being fully advised in the premises, and good cause appearing therefor;

///

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JUG 12 2010

CLERK OF THE COURT

C250630
CROR
Order
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3
4 IT IS HEREBY ORDERED that Bob Jukich is authorized to make a contact visit
5 in the presence of Clark County Detention Center personnel with Defendant, BRIAN
6 O'KEEFE, ID No. 1447732, at the Clark County Detention Center for the sole purpose
7 of cutting Defendant's hair. Mr. Jukich is authorized to bring with him whatever barber
8 tools he will need in that regard.

9 IT IS SO ORDERED this 12 day of August, 2010.

10
11
12 
13 DISTRICT COURT JUDGE

CP

14 Respectfully submitted by:

15 PALM LAW FIRM, LTD.

16
17 
18 PATRICIA A. PALM
19 1212 Casino Center Blvd.
20 Las Vegas, NV 89104
21 (702) 386-9113
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Fax: (702) 386-9114
Email: Patricia.palm@law.com
Attorney for Brian O'Keefe

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CLERK COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

BRIAN K. O'KEEFE,

Defendant.

CASE NO: C250630

DEPT NO. XVII

DATE:

TIME:

RECEIPT OF COPY

I, the undersigned, acknowledge that on this 13 day of Aug.
2010, I received a true copy of O'KEEFE'S REPLY TO STATE'S
OPPOSITION TO MOTION TO ADMIT EVIDENCE SHOWING LVMPD
HOMICIDE DETECTIVES HAVE PRESERVED BLOOD/BREATH ALCOHOL
EVIDENCE IN ANOTHER RECENT CASE.

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

RECEIVED

AUG 13 2010

CLERK OF THE COURT

By: *[Signature]*

C250630
ROC
Receipt of Copy
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1 RPLY
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4 NEVADA BAR NO. 6009
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6 LAS VEGAS, NV 89104
7 Phone: (702) 386-9113
8 Fax: (702) 386-9114
9 Email: Patricia.palm@palmfirm.com
10 Attorney for Brian O'Keefe

AUG 13 9 12 AM '10

Ann L. Palmer
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: 8/17/10

TIME: 8:15 a.m.

O'KEEFE'S REPLY TO STATE'S OPPOSITION TO MOTION TO ADMIT
EVIDENCE SHOWING LVMPD HOMICIDE DETECTIVES HAVE PRESERVED
BLOOD/BREATH ALCOHOL EVIDENCE IN ANOTHER RECENT CASE

COMES NOW Defendant, Brian K. O'Keefe, by and through his attorney, Patricia
Palm of Palm Law Firm, Ltd., and hereby REPLIES to the State's Opposition to
O'Keefe's request 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 Reply 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

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AUG 13 2010

CLERK OF THE COURT

C250630
RDP
Reply to Opposition
8/20/10

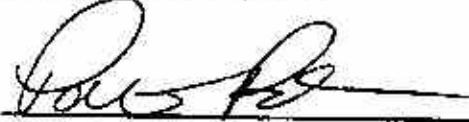


001256

1 argument of counsel at the time of the hearing on this Motion.

2 Dated this 12th day of August, 2010.

3 PALM LAW FIRM, LTD.

4 

5 Patricia Palm, Bar No. 8009

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

1
2 POINTS AND AUTHORITIES

3 ARGUMENT

4 The State is apparently arguing that the detectives' lack of good faith and
5 thoroughness is no longer relevant because, the State thinks, O'Keefe's extreme
6 intoxication is no longer relevant now that the State is limited to seeking a second
7 degree murder. However, the manner in which the detectives and police conducted
8 their investigation here is relevant to the entire case, and O'Keefe has a right to confront
9 them.

10 Again, during O'Keefe's previous trial, Detective Wildemann had testified that in
11 his twenty-one (21) years of experience, a suspect would generally only be
12 administered a blood or breath alcohol test in a DUI. 3/18/09 TT at 183. He had also
13 previously testified at the preliminary hearing that he was not aware of a homicide case
14 where such a test was given. Id. at 182. Further, he was asked, "Does Metro have a
15 protocol, especially in homicide cases, when an officer or detective would offer a
16 suspect a blood or breath alcohol test or take one?" He testified, "We don't have a
17 protocol for that." PHT 92-93.

18 To challenge Wildemann's testimony and its implication that alcohol-level testing
19 is unheard of, O'Keefe presented testimony from Forensic Scientist George Schiro, who
20 testified that the police should have collected O'Keefe's blood or breath alcohol within
21 the hours after Whitmarsh's death to determine whether his behavior or state of mind
22 might have been affected. The source of authority for this opinion is an industry
23 standard text for crime scene investigations. 3/19/09 TT 123-24, 125-26.

24 Not only have LVMPD Homicide Detectives done such testing, in the recent case
25 which O'Keefe seeks to show, but their Department Manual addresses it, stating that for
26 felony charges,

27 Non-consensual, warrantless obtaining of a blood sample to show
28 percentage of alcohol or use of drugs of abuse can be done where
probable cause exists that it is relevant to the investigation of a felony.

1 (i.e., A homicide suspect is arrested on probable cause immediately after
2 the crime and appears slightly intoxicated. A blood sample can be taken
3 to show degree of intoxication which may become an important issue for
4 the state or the defense.)

5 Manual, Section 5/202.21 (emphasis added). In addition, as this Court is aware,
6 homicide detectives declined to turn over evidence specifically requested for the prior
7 trial, stating that the evidence of the use of force report did not exist, see 3/18/09 TT
8 179, and causing a motion for a mistrial, see 3/18/09 TT 2-5.

9 O'Keefe has good reason to challenge the good faith of the investigation and
10 prosecution. And, as was apparent during the previous trial, O'Keefe has consistently
11 attempted to prove that LVMPD officers and detectives were minimizing his intoxication
12 in the reports and in their testimony. The evidence of the other murder case in which
13 testing was done helps show bias and/or lack of good faith/thorough investigation here.

14 The failure to preserve evidence which is likely to be exculpatory is relevant to
15 the good faith of the investigation, which is an appropriate issue in criminal cases. See
16 Mazzan v. Warden, 116 Nev. 48, 67, 998 P.2d 25, 32 (2000). Furthermore, extrinsic
17 evidence is admissible to prove a witness's bias or prejudice. See Lobato v. State, 120
18 Nev. 512, 96 P.3d 765 (2004); Abbott v. State, 122 Nev. 715, 736, 138 P.3d 462, 475
19 (2006). It would be unfair and a violation of O'Keefe's confrontation rights to tie
20 O'Keefe's hands in impeaching detectives' good faith in the limited manner sought here.
21 It is highly relevant that such testing has occurred in at least one similar and recent
22 case. O'Keefe has not cast a wide net seeking discovery on every case where this was
23 done, he seeks only to admit evidence that it has in fact been done in at least one other
24 case. This proof should be permitted, especially in light of the State's attempt to create
25 a false perception that such testing is unheard of in homicide investigations conducted
26 by LVMPD.

27 Furthermore, if this Court denies suppression of O'Keefe's interview with
28 homicide detectives, then the validity of any waiver of O'Keefe's Miranda rights is an

1 issue for the jury, and the jury should be able to consider the issues of bias, good faith
2 and thoroughness of the detectives when it is assessing their testimony regarding his
3 condition and whether to consider the interrogation as evidence against O'Keefe.¹

4 The State also seems to be using this opportunity to argue that evidence of
5 intoxication is *not even relevant* because this case only involves second degree murder
6 now. See Opposition, p. 3. However, the police did not know that O'Keefe's case
7 would not be one of first degree murder when they failed to preserve this crucial
8 evidence. Therefore, the fact that they are now limited by law does not change the
9 reasons for challenging them.

10 In addition, the State is wrong in claiming that the evidence of intoxication is not
11 relevant. The State relies on Leaders v. State, 92 Nev. 250 (1976), which held that
12 mere intoxication could not reduce murder to manslaughter. However, more recent
13 developments in the law have clarified and strengthened the State's burdens as to
14 proving murder. For instance, in Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000),
15 the Nevada Supreme Court took great care to establish that proof is required on each
16 separate element of murder. In Collman v. State, 116 Nev. 687, 715, 7 P.3d 426, 443-
17 44 (2000), the Court reiterated that the fact that not every murder requires a specific
18 intent to kill does not relieve the State of the burden to prove some kind of malice to
19 establish murder. O'Keefe submits that under a contemporary understanding of
20 Nevada law, intoxication must be treated as a relevant factor for the jury to consider in
21 determining whether the State has met its burden to prove malice.
22

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27
28 ¹If O'Keefe's statements are admitted, then the question of voluntariness must also be
submitted to the jury. See Laursen v. State, 87 Nev. 568, 634 P.2d 1230 (1981).

1
2 NRS 193.220 provides that

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

9 Emphasis added. California Courts have recognized the nearly identical language
10 formerly used in California's statute addressing the same evidence,² permits evidence
11 of intoxication to be considered to determine the issue of whether a defendant actually
12 harbored express or implied malice. See People v. Whitfield, 868 P.2d 272, 276-80
13 (Cal. 1994); see also People v. Knoller, 158 P.3d 731, 738-43 (Cal. 2007) (addressing
14 subsequent amendments). Recognition of the same rule under Nevada law would be
15 consistent with the language of our statute, as well as the Nevada Supreme Court's
16 treatment of issues affecting criminal intent, such as mental health conditions not
17 meeting the definition of insanity. In Finger v. State, 117 Nev. 548, 576-77, 27 P.3d 66,
18 84-85 (2001), the Court recognized that evidence that does not rise to the level of legal
19 insanity may still be considered in evaluating whether or not the prosecution has proven
20 each element of an offense beyond a reasonable doubt, for example, in determining
21 whether a killing is first or second degree murder or manslaughter or some other
22 argument regarding diminished capacity. Id. O'Keefe submits that evidence of
23 intoxication is no less relevant than evidence of a defendant's state of mental health in
24 considering whether the State has met its burdens.

25 ²Cf. Former version of Cal. Pen. Code Sec. 22 (1981) providing:

26 No act committed by a person while in a state of voluntary intoxication is
27 less criminal by reason of his having been in such condition. But
28 whenever the actual existence of any particular purpose, motive, or intent
is a necessary element to constitute any particular species or degree of
crime, the jury may take into consideration the fact that the accused was
intoxicated at the time.

1 NRS 200.010(1) provides that "[m]urder is the unlawful killing of a human being.
2 with malice aforethought, either express or implied."

3 NRS 200.020(1) defines express malice as "that deliberate intention unlawfully to
4 take away the life of a fellow creature, which is manifested by external circumstances
5 capable of proof." The crime of second degree murder may involve an intentional killing
6 with express malice, but without the admixture of premeditation and deliberation, i.e., a
7 killing that is the result of passionate impulse but not within the definition of
8 manslaughter. Byford v. State, 116 Nev. 215, 236 & n.4, 994 P.2d 700, 714 & n.4
9 (2000). Accordingly, with express malice, the defendant must have a purpose or intent
10 to kill.

11 The alternative form of second degree murder relevant here is one based on
12 implied malice. Malice is implied "when no considerable provocation appears, or when
13 all the circumstances of the killing show an abandoned and malignant heart." NRS
14 200.020(2). Abandoned and malignant heart refers to "an extreme recklessness
15 regarding homicidal risk." Collman v. State, 116 Nev. 687, 712-13, 7 P.3d 426, 442
16 (2000) (quoting Model Penal Code § 210.2 cmt. 1 at 15). See also Keys v. State, 104
17 Nev. 736, 738, 766 P.2d 270, 271 (1988) (implied malice signifies a general malignant
18 recklessness). Criminal recklessness requires that "the actor is conscious of a
19 substantial risk that the prohibited events will come to pass." United States v.
20 Mottweiler, 82 F.3d 769 (7th Cir. 1996) (citing Farmer v. Brennan, 114 S. Ct. 1970
21 (1994) and quoting Model Penal Code Sec. 2.02(2)(c) (1962) ("[a] person acts
22 recklessly . . . when he consciously disregards a substantial and unjustifiable risk that a
23 material element exists or will result from his conduct.")). Here, for O'Keefe to have
24 acted with malignant recklessness, he must have understood there was a substantial
25 risk that Whitmarsh's death would come to pass and he must have consciously
26 disregarded the substantial and unjustifiable risk of death. A killing that is done only in a
27 criminally negligent manner, without realizing the risk involved, is involuntary
28

manslaughter. See NRS 200.070(1);³ CALJIC 8.51 ("There are many acts which are lawful but nevertheless endanger human life. If a person causes another's death by doing an act or engaging in conduct in a criminally negligent manner, without realizing the risk involved, he is guilty of involuntary manslaughter. If, on the other hand, the person realized the risk and acted in total disregard of the danger to life involved, malice is implied, and the crime is murder."). For an implied malice murder, where the felony murder rule is not applicable, "the defendant must intend to commit acts that are likely to cause death and that show a conscious disregard for human life." Collman, 116 Nev. at 716, 7 P.3d at 444.

Under the above authorities, a necessary element of second degree (non-felony) murder is a purpose or intent to kill (express malice), or a purpose or intent to consciously disregard a known and substantial risk of death (implied malice). Therefore, under the language of NRS 193.220, evidence of intoxication is relevant to whether O'Keefe had such a purpose or intent. If O'Keefe's intent and purpose are no longer probative because second degree murder does not necessarily involve an intent to kill, as suggested by the State, then neither the threats and propensity evidence from Cheryl Morris nor the prior conviction for domestic battery can retain their probative value and this evidence must be precluded.

O'Keefe is *not* arguing that he intentionally killed Whitmarsh but was too intoxicated to understand his actions. He is arguing that she was accidentally stabbed when he could not maintain his balance during a struggle as he was attempting to get

³NRS 200.070(1) defines involuntary manslaughter, as relevant here:

[I]nvoluntary manslaughter is the killing of a human being, *without any intent to do so*, in the commission of an unlawful act, or a lawful act which *probably might produce such a consequence in an unlawful manner*, but where the involuntary killing occurs in the commission of an unlawful act, which, in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense is murder.

1 the knife away from Whitmarsh. This was not an intentional or reckless malice murder,
2 but an accident which he could not prevent. O'Keefe's gross intoxication makes it more
3 probable, and thus relevant, that his perceptions, balance and coordination were
4 affected at the time of the incident and that he did not consciously disregard any risk of
5 death; and it explains why he would fall during a struggle over the knife and why he
6 behaved so strangely at the time of and subsequent to arrest; and it affects whether his
7 statements to police were knowingly and voluntarily made (if these statements are
8 admitted). See NRS 48.015 ("relevant evidence" means evidence having any tendency
9 to make the existence of any fact that is of consequence to the determination of the
10 action more or less probable than it would be without the evidence). In sum, O'Keefe's
11 extreme intoxication is entirely relevant to his theory of defense.

12 O'Keefe submits that to deny him the opportunity to rebut the State's evidence of
13 malice by limiting the jury's consideration of evidence of his intoxication in any way, or
14 to deny him the opportunity to confront and cross-examine Detectives with evidence to
15 impeach their testimony as requested herein, would deny him his constitutional rights to
16 a fair trial, to present a defense, to compulsory process and to confront and cross
17 examine the witnesses against him. See U.S. Const., amends. VI and XIV; Nev.
18 Const., art. 1, sec. 8.

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Dated this 12th day of August, 2010.

Paula Lee

Patricia Palm, Bar No. 6009
1212 Casino Center Blvd.
Las Vegas, NV 89104
Phone: (702) 386-9113
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Adam L. Johnson
CLERK OF THE COURT

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08C250630
SUPP
Supplemental
894174



DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,

10 Plaintiff,

11 -VS-

12 BRIAN O'KEEFE,
13 #1447732

14 Defendant.

CASE NO: C250630

DEPT NO: II

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

17 TO: BRIAN O'KEEFE, Defendant; and

18 TO: PATRICIA PALM ESQ, Counsel of Record:

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

21 1.) DETECTIVE MARTY WILDEMANN, Las Vegas Metropolitan Police
22 Department. Will testify as to his opinion regarding the nature of injury to Defendant's hand.
23 Detective Wildemann has been with the Las Vegas Metropolitan Police Department for
24 22 1/2 years. For the past 8 1/2 years, Detective Wildemann has been assigned to Homicide
25 and has worked over 200 cases with 25% of those cases involving stabbings.

26 The substance of each expert witness' testimony and a copy of all reports made by or
27 at the direction of the expert witness has been provided in discovery.

28 ///

1 A copy of each expert witness' curriculum vitae, if available, is attached hereto.
2
3

4 BY

David Roger

5 DAVID ROGER
6 DISTRICT ATTORNEY
7 Nevada Bar #002781

8 CERTIFICATE OF FACSIMILE TRANSMISSION
9

10 I hereby certify that service of SUPPLEMENTAL NOTICE OF EXPERT
11 WITNESSES, was made this _____ day of August, 2010, by facsimile transmission to:

12 PATRICIA PALM
13 Deputy Public Special Defender
14 FAX #455-6273

15
16 /s/T. Schessler
17 Secretary for the District Attorney's
18 Office
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● ORIGINAL ●

FILED

AUG 16 2010

Clerk of Court
CLERK OF COURT

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2 DAVID ROGER
3 Clark County District Attorney
4 Nevada Bar #002781
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8 200 Lewis Avenue
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10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA



THE STATE OF NEVADA,

Plaintiff,

-vs-

Brian Kerry O'Keefe,
#1447732

Defendant.

CASE NO: C250630

DEPT NO: XVII

STATE'S RESPONSE TO DEFENDANT'S MOTION TO PRECLUDE THE STATE
FROM INTRODUCING AT TRIAL OTHER BAD ACTS OR CHARACTER
EVIDENCE AND OTHER EVIDENCE THAT IS UNFAIRLY PREJUDICIAL OR
WOULD VIOLATE HIS CONSTITUTIONAL RIGHTS

DATE OF HEARING: August 17th, 2010
TIME OF HEARING: 8:15 AM

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through
Stephanie A. Graham, Deputy District Attorney, and hereby submits the attached Points and
Authorities in Opposition to Defendant's Motion to Preclude the State From Introducing at
Trial Other Bad Acts or Character Evidence and Other Evidence that is Unfairly Prejudicial
or Would Violate His Constitutional Rights.

This response is made and based upon all the papers and pleadings on file herein, the
attached points and authorities in support hereof, and oral argument at the time of hearing, if
deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

A. Defendant's statement to Cheryl Morris that he is "capable of killing anyone with a knife" and his disturbing demand of Cheryl to play the role of victim to demonstrate his ability to slice someone open with a knife are relevant to the State's theory of the case and are otherwise admissible under Nevada law.

Cheryl Morris began dating Defendant in January 2008. 3/17/10 Trial Transcript 10 [hereinafter "TT"]. Their relationship abruptly ended in August 2008 when Defendant reunited with Victoria Whitmarsh. *Id.* During Defendant's seven month relationship with Cheryl Morris, he spoke about his disdain for Victoria Whitmarsh on a daily basis; sometimes three or four times a day. 3/17/10 TT 14.

More Specifically, Cheryl has consistently maintained that Defendant stated to her on more than one occasion that he "hated" Victoria for testifying against him, she "put him in jail," she is "poison" and she "took three years of his life away." 12/17/08 Preliminary Hearing Transcript 69-70 [hereinafter "PHT"]; 3/17/10 TT 21. Further, Defendant made numerous statements to Cheryl declaring his desire "kill the bitch." 12/17/08 PHT 70; 3/17/10 TT 15. According to Cheryl Morris, during their brief seven month relationship, "Victoria was always there", and Defendant spoke of little else. 3/17/10 TT 29. Except, of course, *knives*. 12/17/08 PHT 69; 3/17/10 TT 17.

Defendant requests this court to preclude the State from eliciting testimony from Cheryl Morris with regard to Defendant's statements touting his proficiency with knives and his capability to kill anyone with a knife. Defendant claims that the statements should be precluded because they are irrelevant, highly inflammatory and overly prejudicial. Despite Defendant's claim, under Nevada law, the statements are admissible.

1. **The statements are relevant to the State's theory of the case.**

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 more or less probable than it would be without the evidence.

Although the State is barred from seeking a conviction of First Degree Murder in this case, the State steadfastly maintains that the death of Victoria Whitmarsh was not an accident or self-defense; rather Defendant intended to murder Victoria and he had a motive

1 to do so. Defendant, on the other hand, claims that Victoria's death was an accident that
2 occurred as a result of self-defense. There is no evidence whatsoever to corroborate
3 Defendant's theory of the case aside from his self-serving testimony. The fact that Defendant
4 previously demonstrated his proficiency/capability of killing someone with a knife tends to
5 disprove any Defense of mistake or accident. According to Cheryl Morris, during her brief
6 relationship with Defendant, he was obsessed with Victoria and how much he hated her. The
7 State contends it is no coincidence that Victoria was stabbed to death by Defendant.
8 Therefore, testimony of Defendant's statements regarding knives tends to make the existence
9 of a fact that is of consequence to the determination of the action more or less probable than
10 it would be without the testimony.

11 **2. The probative value of the statements outweighs the prejudicial effect.**

12 NRS 48.035(1) provides, although relevant, evidence is not admissible if its probative
13 value is substantially outweighed by the danger of unfair prejudice, of confusion of the
14 issues or of misleading the jury. Based on the State's theory of the case Defendant was
15 obsessed with Victoria, hated her and he had a motive to kill Victoria: he had previously
16 gone to prison for beating her as a result of Victoria's testimony against him.

17 Indeed, the State recognizes that the statements sought to be excluded are prejudicial.
18 However, relevant evidence is not simply rendered inadmissible because of its "highly
19 prejudicial nature...the best evidence often is!" See United States v. Parker 549 F.2d 1217 at
20 1222. (9th Cir. 1977).

21 Defendant is being tried for Second Degree Murder with Use of a Deadly Weapon.
22 The deadly weapon used was a knife. It is incumbent upon the state to prove malice
23 aforethought beyond a reasonable doubt as an element to the offense charged. Therefore,
24 Defendant's statements regarding knives have *significant* probative value to the State's case
25 outweighing any danger of unfair prejudice.

26 **3. The statements fall within an Exception to Hearsay**

27 Pursuant to NRS 51.035, Cheryl Morris may testify as to Defendant's statements during
28 the State's case-in-chief as the statements are an exception to the hearsay rule as statements

1 of a party opponent.

2 Therefore based on the foregoing, the Statements are admissible under Nevada law and
3 the State should not be precluded from presenting admissible evidence.

4 **B. The State has no opposition to Defendant's request for redaction to omit the**
5 **reference to "concurrent" sentencing contained within the Judgment of Conviction in**
6 **case number C207835X.**

7 **C. The State has no intention of introducing or eliciting evidence of Sexual Assault**
8 **charges stemming from case # C202793X during its case-in-chief.**

9 However, should evidence relating to the sexual assault become relevant and/or
10 otherwise admissible to impeach and/or to rebut evidence presented during the Defendant's
11 case-in-chief or become relevant as a result of cross-examination; the State will seek the
12 appropriate ruling.

13 **D. This Court should not preclude the use of the accurate term, "Sexual Assault**
14 **Kit" by medical professionals called to testify in this case.**

15 The term "sexual assault kit" is not unduly prejudicial but rather an accurate term of
16 art used by medical professionals to describe a group of evidence gathering tools used for a
17 special purpose. In the instant case, a sexual assault kit was utilized during the autopsy of
18 Victoria Whitmarsh. No evidence of a sexual assault could be determined

19 The Defendant claims that the use of the accurate term "Sexual Assault Kit" is highly
20 prejudicial and seeks to preclude the State from introducing the "term" during retrial.
21 Essentially, the Defendant is requesting this Court to direct the State to admonish members
22 of the legal profession from using terminology which is common parlance within their field
23 of expertise. Requesting those in the medical professional to agree to call a "Sexual Assault
24 Kit" something other than what it is seems absurd. Further, because the accurate term is
25 common parlance among the medical field, it is not unlikely that even if admonished,
26 medical professionals could inadvertently make reference to the "Sexual Assault Kit."

27 Defendant has failed to show how reference to a "term of art" is highly prejudicial
28 especially since the evidence gathered was favorable to the Defendant with respect to any
signs of a sexual assault. Therefore Defendant's request on this point should be denied.

1 **E. Autopsy photos showing the condition of Victoria's body at the time of her death**
2 **were properly admitted by this Court during Defendant's previous trial and there is no**
3 **basis to exclude them now.**

4 The decision to admit autopsy photographs as evidence lies within the sound discretion
5 of the court. Turpen v. State, 94 Nev. 576, 577 (1978). Such a decision of the trial court
6 will not be reversed absent a showing of abuse of discretion. Ybarra v. State, 100 Nev. 167,
7 172 (1984). In Robins v. State, 106 Nev. 611, 623 (1990), the court upheld the trial judge's
8 decision to allow autopsy photographs of a badly beaten little girl. The court held:

9 We have reviewed the challenged photographs and although they
10 are indeed graphic and troubling to human sensibility, they were
11 not prejudicial. The photographs depicted exactly what Dr.
12 Hollander described and were undoubtedly helpful in assisting the
13 jury to understand the nature and the gravity of the wounds
14 inflicted upon Brittany by Robins. The trial court did not abuse
15 its discretion; the photographs were properly admitted into
16 evidence.

17 In the instant case, Defendant claims that the admission of autopsy photos depicting
18 Victoria's bruised body should be excluded because they are highly prejudicial and there is
19 no nexus between the bruises on her body and the cause of Victoria's death. True enough,
20 the cause of Victoria's death was a stab wound to the chest. 3/18/10 TT 99. However,
21 Defendant's claim that Dr. Benjamin "admitted that none of the bruises could be linked to
22 the incident leading to [Victoria]'s death" is a gross misstatement of Dr. Benjamin's
23 testimony.

24 At trial, Dr. Benjamin specifically testified that blunt force trauma caused the bruising to
25 Victoria's body and that the bruises did, in fact, contribute to her death. 3/18/10 TT 98-105.
26 Further, Dr. Benjamin's testimony is supported by the Autopsy Report that states "cutaneous
27 blunt trauma" as a significant condition related to Victoria's death. Based on Dr. Benjamin's
28 testimony and findings, the autopsy photos depicting the bruising on Victoria's body are
29 relevant to the cause of death and admissible under NRS 48.015. Undoubtedly, the photos
30 have probative value as they will be "helpful in assisting the jury to understand the nature
31 and the gravity" of the blunt force trauma which caused the bruising. See Robins, 106 Nev.
32 At 623.

1 Also, based on witness testimony, it is the State's theory that before Defendant stabbed
2 Victoria to death, he beat her for almost an hour. Clearly, the photos have *significant*
3 probative value in establishing Defendant's motive, intent and state of mind prior to stabbing
4 Victoria to death. With the burden resting on the State to prove malice aforethought beyond
5 a reasonable doubt, the probative value of the photos outweigh any danger of unfair
6 prejudice to the Defendant. NRS 48.035(1). Therefore, there is no basis to exclude the
7 photos under Nevada law.

8 **F. The State concurs that reference to racial slurs made by Defendant to an African**
9 **American Metro Officer after he murdered Victoria are irrelevant to this case.**

10 The State will admonish the officer to make no reference to the Defendant's inappropriate
11 comments to the officer. However, should the statements become relevant and/or otherwise
12 admissible to impeach and/or to rebut evidence presented during the Defendant's case-in-
13 chief or become relevant as a result of cross-examination; the State will seek the appropriate
14 ruling.

15
16 **G. The hearsay statement, "baby, he done killed that girl," made by Charles Toliver**
to his wife on the night of Victoria's murder is admissible under Nevada law.

17 The statement Defendant seeks to exclude is admissible as an exception to hearsay. NRS
18 51.095 provides, statements relating to a startling event or condition made while the declarant
19 was under the stress of excitement caused by the event or condition is not inadmissible under
20 the hearsay rule. Additionally, NRS 51.085 provides, a statement describing or explaining
21 an event or condition made while the declarant was perceiving the event or condition, or
22 immediately thereafter, is not inadmissible under the hearsay rule.

23 Charles Toliver and his wife, Joyce, lived in the apartment directly below Defendant and
24 Victoria Whitmarsh. On the night of Victoria's murder Charles Toliver was angry when
25 woken up by loud banging noises and crying coming from Defendant's apartment. See
26 generally, 3/16/10 TT pp 229-245. After about ten to fifteen minutes, Charles left his
27 apartment with the intent to confront the Defendant about the noise. Id.
28

1 Upon approaching the Defendant's apartment, Charles noticed the door was wide open
2 and observed Defendant bent over Victoria's bloody body. Id. Charles immediately yelled
3 to Defendant, "what the hell have you done." Id. Defendant did not respond but instead,
4 gave Charles a crazy look that scared him. Id. Charles immediately yelled to another
5 neighbor to call for help and then returned to his apartment and told his wife Joyce, "baby,
6 he done killed that girl." 3/16/10 TT 224.

7 The State maintains that Charles was under the stress of excitement of a startling event
8 when he made the statement to Joyce. Further, when Charles made the statement, he was
9 describing an event/condition immediately after he perceived the event. So long as a proper
10 foundation is laid during the direct examination of Joyce Toliver, the State can properly
11 elicit the statement pursuant to either NRS 51.095 or NRS 51.085. Therefore, the State
12 requests that this Court reserve its ruling as to this issue until such time as an objection by
13 the Defendant is appropriate.

14 **H. Detective Wildemann is qualified to give his opinion as to the nature and/or cause of**
15 **injury to Defendant's hand as a Lay Witness or in the alternative as an Expert Witness.**

16 NRS 50.265 provides, in pertinent part: if a witness is not testifying as an expert, the
17 witness's testimony in the form of opinions or inferences is limited to those opinions or
18 inferences which are: 1) rationally based on the perception of the witness; and 2) helpful to
19 a clear understanding of the testimony of the witness or the determination of a fact in issue.
20 During Defendant's jury trial, Detective Wildemann testified that, in his opinion, the injury
21 on Defendant's hand was consistent with injuries present on others suspected of murder with
22 use of a knife. Certainly, his testimony concerns the "determination of a fact in issue."

23 Detective Wildemann has been with the Las Vegas Metropolitan Police Department
24 for 22 ½ yrs. For the past 8 ½ yrs, Detective Wildemann has been assigned to Homicide and
25 has worked over 200 homicide cases with 25% of those cases involving stabbings. It would
26 stand to reason then, that Detective Wildemann's opinion, as to the nature of Defendant's
27 injury, was "rationally based on his perception" of the injury. Therefore, The State
28

1 maintains that Detective Wildemann's testimony was proper opinion testimony by a lay
2 witness.

3 However, out of an abundance of caution, the State has noticed Detective Wildemann
4 as an expert witness to testify as to his opinion regarding the nature of injury to Defendant's
5 hand. See NRS 50.275 (a witness qualified as an expert by special knowledge, skill,
6 experience, training or education may testify to matters within the scope of such knowledge);
7 See also State v. Macumber, 112 Ariz. 569, 544 P.2d 1084 (1976), cert. denied, 439 U.S.
8 1006, 99 S.Ct. 621, 58 L.Ed.2d 683 (1978)(an expert need not be a professional but may be a
9 lay person who has special knowledge superior to men in general through actual experience
10 or careful study). In light of Detective Wildemann's experience as a homicide detective he
11 has the special knowledge that would qualify him to give expert opinion testimony.

12 **H. The State does not intend to introduce evidence of a prior trial, conviction or**
13 **reversal occurred in this case.**

14 It is the practice of the State, if referring to previous testimony during a prior Jury
15 Trial to characterize the testimony as that of a "prior proceeding."

16
17 DATED this _____ day of August, 2010.

18 Respectfully submitted,

19 DAVID ROGER
20 Clark County District Attorney
21 Nevada Bar #002781

22
23 BY /s/ STEPHANIE A. GRAHAM
24 Stephanie A. Graham
25 Deputy District Attorney
26 Nevada Bar #0010058
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/s/ T. Schessler
Secretary for the District Attorney's
Office

9

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AUG 16 2010

CLERK OF COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

08C250630
OPPS
Deposition
894823



12 THE STATE OF NEVADA,)

13 Plaintiff,)

14 -vs-)

15 Brian Kerry O'Keefe,
16 #1447732

17 Defendant.)

CASE NO: C250630

DEPT NO: XVII

18 STATE'S OPPOSITION TO DEFENDANT'S MOTION TO ADMIT EVIDENCE
19 PERTAINING TO THE ALLEGED VICTIM'S MENTAL HEALTH CONDITION
20 AND HISTORY, INCLUDING PRIOR SUICIDE ATTEMPTS, ANGER
21 OUTBURSTS, ANGER MANAGEMENT THERAPY, SELF-MUTILATION AND
22 ERRATIC BEHAVIOR.

23 DATE OF HEARING: August 17th, 2010

24 TIME OF HEARING: 8:15 AM

25 COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through
26 Stephanie A. Graham, Deputy District Attorney, and hereby submits the attached Points and
27 Authorities in Opposition to Defendant's Motion to Admit Evidence and History, Including
28 Prior Suicide Attempts, Anger Outbursts, Anger Management Therapy, Self-Mutilations and
Erratic Behavior.

This opposition is made and based upon all the papers and pleadings on file herein,
the attached points and authorities in support hereof, and oral argument at the time of
hearing, if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

Defendant's Request to Admit the Victim's Medical Records Must be Denied Because Admission of the Information Contained Within the Records Would Constitute the Improper Use of Character Evidence Under Nevada Law.

According to Defendant's theory of the case, the victim, Victoria Whitmarsh, was the initial aggressor and that her death was a result of self-defense and/or accident. Because there is nothing to support his theory other than his self-serving testimony, Defendant requests this Court to allow him to corroborate his theory with Victoria's mental health records. Specifically, Defendant requests that an expert be allowed to offer opinion testimony summarizing Victoria's mental health history and its manifestations based on the content of the records. Remarkably, Defendant indicates that he intends to testify that he has personal knowledge of the specific instances contained in Victoria's mental health records documenting her "prior acts of violence, including violence to herself by cutting/overdosing and her anger problems" even though he was not present when the incidents occurred. Defendant claims the "specific acts" mentioned in the records, corroborate that his only culpability in Victoria's death was simply as an "innocent response to her aggression."

This Court previously ruled that Defendant could certainly testify that Victoria was the initial aggressor pursuant to NRS 48.045 and State v. Daniel, 119 Nev. 498, 78 P.3d 890 (2003). However, this Court specifically ruled that Daniel precluded the use of Victoria's mental health records to corroborate his theory of the case, either through his own testimony or that of an expert (stating the proffered evidence contained within the records did not amount to specific acts of violence towards *another person*). This Court properly excluded Victoria's mental health records during Defendant's first trial; there is no valid legal basis for their admission now.

As a general rule, character evidence is inadmissible to show that a person acted in conformity with their character. NRS 48.045(1). However, evidence that the victim committed specific acts of violence *against others* is admissible, when a defendant raises a claim of self-defense. Daniel v. State, 119 Nev. 498. Evidence of specific acts of violence

1 against others can be presented through the defendant's own testimony, through cross-
2 examination of witnesses and with extrinsic evidence of a victim's specific conduct known
3 to the defendant. Id. at 516.

4 In State v. Daniel, the defendant shot four men, two were killed but two survived their
5 injuries. 119 Nev. 504. The defendant was acquainted with all four victims. Id. Initially,
6 defendant denied any involvement in the shootings but ultimately changed his story and
7 claimed he shot the victims in self-defense. Daniel at 506.

8 During his trial, the defendant testified and admitted to the shootings but claimed he
9 acted in self-defense. Id. Further, the defendant testified that three of the victims had
10 reputations for violence and was able to describe specific acts of violence by the victims
11 against others he had personal knowledge of. Id. Additionally, several witnesses testified
12 for the defense, including two LVMPD Detectives, who all testified as to the violent
13 reputation of at least two of the victims. Id.

14 However, the court precluded the defendant from presenting extrinsic evidence,
15 specifically, prior Judgements of Convictions of the victims even though Defendant had
16 personal knowledge of the facts surrounding those conviction. Daniel, at 515. Additionally,
17 the court prevented the defendant from questioning the surviving victims about their specific
18 acts of violence against others during cross-examination. Daniels, at 516. The the court
19 also denied the defendant's request to call witnesses on his behalf to testify to being robbed
20 or assaulted by the victims. Id. Ultimately, the jury rejected the defendant's claim of self-
21 defense and was convicted. Daniel, at 506.

22 The defendant appealed his conviction on multiple grounds. Id. at 507. On appeal,
23 the defendant argued that the District Court abused its discretion by precluding extrinsic
24 evidence offered to corroborate the defendant's testimony as it was relevant to his state of
25 mind when he shot the victims. Daniel, at 515-16. The Nevada Supreme Court agreed and
26 concluded that the evidence was relevant to the defendant's state of mind as to whether he
27 had a reasonable belief that use of force was necessary. Id. at 516. The Court concluded that
28 where a defendant claims he acted in self defense, extrinsic evidence of a victim's specific

1 conduct known to the defendant in the form of prior convictions or in the form of
2 corroborating witness testimony evidencing specific acts of violence, is admissible. Daniel at
3 516.

4 In the instant case, Defendant relies on Daniel for the proposition that Victoria's
5 mental health records (containing information regarding prior suicide attempts, anger
6 outbursts, erratic behavior, "cutting" and that her treatment plan included anger
7 management) are admissible as extrinsic evidence to corroborate his claim of self-defense.
8 Defendant's reliance on Daniel is misplaced. The victims in Daniel, had violent reputations
9 for shooting and assaulting others. Additionally, the victims in Daniel had significant
10 criminal histories to support their reputation as evidenced by the fact that two LVMPD
11 Detectives testified as to their violent reputation *against others*. There is no evidence to
12 suggest that Victoria had such a reputation for violence *against others*.

13 Victoria's mental health records do not demonstrate that she had a reputation for
14 violence *against others*; the records are replete of any mention of specific acts of violence
15 *against others*. The fact that the records contain information that Victoria had anger
16 outbursts, was undergoing anger management counseling and had attempted suicide on
17 several occasions does not support, in any way, Defendant's claim that she was dangerous or
18 violent *to others*.

19 Additionally, Defendant's reliance on a trio of cases, all from outside this jurisdiction,
20 in support of his argument to admit the records is without merit. See State v. Stanley, 37 F.
21 3d 85, 90 (N.M. 2001); People v. Salcido, 246 Cal. App. 2d 450, 458-60 (Cal. App. 5th Dist.
22 1966); State v. Jaeger, 973 P.2d 404, 407-08 (Utah 1999). In each of those cases, the
23 defendants sought to introduce evidence of the victim's past suicide attempt history, because
24 the defense in each of those trials was that the victims *were not murdered, but rather*
25 *committed suicide*. See Stanley, 37 F.3d at 90; Salcido, 246 Cal. App 2d at 458-60; Jaeger,
26 973 P.2d at 407-08. Consequently, the courts in those cases found *where the defense of*
27 *suicide* is being raised such evidence is probative because it supports the defendant's theory
28 that the victim died as a result of a successful suicide attempt. See Stanley, 37 F.3d at 90;

1 Salcido, 246 Cal. App. 2d at 458-60; Jaeger, 973 P.2d at 407-08.

2 Here, Defendant does not claim that Victoria committed suicide. Instead, he claims
3 that he killed Victoria in self-defense. The factual circumstances and legal defenses raised in
4 Stanley, Salcido and Jaeger are entirely different than the facts of this case. The issue in this
5 case is not whether it was murder *or suicide*, but rather murder *or self defense*. This trio of
6 decisions, consequently, is irrelevant. There is no legal authority to suggest suicidal
7 tendencies are tantamount to having a propensity for violence *against others*.

8 Based on the fact that Victoria's mental health history does not document a single
9 specific act of violence *against others*, the State fails to see how the records provide any
10 corroborative evidence establishing that Victoria was the initial aggressor.

11 Additionally, the State takes issue with Defendant's claim that during the previous
12 trial the State admitted character evidence of Victoria's reputation of peacefulness.
13 Defendant's claim is simply belied by the record.

14 During the State's case in chief, Cheryl Morris testified as to statements Defendant
15 made to her regarding Victoria. Cheryl Morris asserted that Defendant told her that he liked
16 Victoria because she was "meek" and "submissive." The testimony the State elicited from
17 Cheryl Morris regarding Victoria's meek and submissive nature was not character evidence.
18 Rather, it was the Defendant's own statement offered by party opponent. Given the fact that
19 Cheryl Morris was not acquainted with Victoria, it would be improper to allow Defendant to
20 question Cheryl Morris with regard to Victoria's character without first seeking judicial
21 authorization as required by NRS 48.045(2)(Limiting the admissibility of character evidence
22 to relevant acts, acts proven by clear and convincing evidence, and proving that the evidence
23 sought to be admitted is more probative than prejudicial).

24 ///

25 ///

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1 For all the foregoing reasons, Defendant's request to admit Victoria's mental health
2 records should be denied.

3
4
5
6 DATED this _____ day of August, 2010.

7 Respectfully submitted,

8 DAVID ROGER
9 Clark County District Attorney
Nevada Bar #002781

10
11
12 BY /s/ STEPHANIE A. GRAHAM

13 Stephanie A. Graham
14 Deputy District Attorney
Nevada Bar #0010058

15 CERTIFICATE OF FACSIMILE TRANSMISSION

16
17 I hereby certify that service of STATE'S OPPOSITION TO DEFENDANT'S
18 MOTION TO ADMIT EVIDENCE PERTAINING TO THE ALLEGED VICTIM'S
19 MENTAL HEALTH CONDITION AND HISTORY, INCLUDING PRIOR SUICIDE
20 ATTEMPTS, ANGER OUTBURSTS, ANGER MANAGEMENT THERAPY, SELF-
21 MUTILATION AND ERRATIC BEHAVIOR, was made this _____ day of August, 2010,
22 by facsimile transmission to:

23
24 PATRICIA PALMS Deputy Special Public Defender
FAX #455-6273

25
26 /s/ T. Schessler
27 Secretary for the District Attorney's Office
28

ORIGINAL

FILED

AUG 16 2010

Ch. 11
CLERK OF COURT

1 OST
2 PALM LAW FIRM, LTD.
3 PATRICIA PALM, ESQ.
4 NEVADA BAR NO. 6009
5 1212 CASINO CENTER BLVD.
6 LAS VEGAS, NV 89104
7 Phone: (702) 386-9113
8 Fax: (702) 386-9114
9 Email: Patricia.palm@palmfirm.com
10 Attorney for Brian O'Keefe

DISTRICT COURT
CLARK COUNTY, NEVADA

FILE WITH
MASTER CALENDAR

11 STATE OF NEVADA,
12 Plaintiff,

13 vs.

14 BRIAN K. O'KEEFE,
15 Defendant.

CASE NO: C250630

DEPT NO. XVII

DATE:

TIME:

C250630

OST

Order Shortening Time

894961



16 ORDER SHORTENING TIME

17 Upon application of the Defendant, appearing through counsel, Patricia
18 Palm of Palm Law Firm, Ltd., and good cause appearing therefor:

19 IT IS HEREBY ORDERED that the time for hearing Defendant's Motion to
20 Preclude Expert Testimony is hereby shortened and shall be heard on the 19
21 day of August, 2010, at the hour of 8:15 a.m. in Department 17.

22 DATED this 16 day of August, 2010.

23 By: *[Signature]*
24 DISTRICT COURT JUDGE

25 Respectfully submitted by
26 PALM LAW FIRM, LTD.

27 *[Signature]*
28 Patricia Palm, Bar No. 6009
1212 Casino Center Blvd.
Las Vegas, NV 89104

DEPARTMENT XVII
OFFICE OF HEARING
8:15 AM TIME 8:15 AM
FILED BY CP

RECEIVED
AUG 16 2010
CLERK OF THE COURT

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ORIGINAL

FILED

AUG 16 2010

John J. Williams
CLERK OF COURT

001
PALM LAW FIRM, LTD.
PATRICIA PALM, ESQ.
NEVADA BAR NO. 6009
1212 CASINO CENTER BLVD.
LAS VEGAS, NV 89104
Phone: (702) 386-9113
Fax: (702) 386-9114
Email: Patricia.palm@law.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:

C250630
M07
Motion
894888



**NOTICE OF MOTION AND MOTION BY DEFENDANT O'KEEFE
TO PRECLUDE EXPERT TESTIMONY**

COMES NOW, the Defendant, BRIAN O'KEEFE, by and through his attorney, PATRICIA PALM of PALM LAW FIRM, LTD., and hereby moves this Honorable Court to preclude the State's witness Detective Marty Wildemann from offering his opinion regarding "the nature of injury to Defendant's hand," during the trial of this matter.

This Motion is made and based upon all the papers and pleadings on file

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RECEIVED


AUG 16 2010

CLERK OF THE COURT

1 herein, the attached Declaration, and any oral argument at the time set for
2 hearing this Motion.

3 DATED this 16th Day of August, 2010.

4 PALM LAW FIRM, LTD.

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

13 **NOTICE OF MOTION**


14 TO: STATE OF NEVADA, Plaintiff; and

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

16 YOU WILL PLEASE TAKE NOTICE that the undersigned will bring on the
17 above and foregoing **MOTION BY DEFENDANT O'KEEFE TO PRECLUDE EXPERT**
18 **TESTIMONY** on the 19 day of August, 2010, at the hour of 8:15 m., in
19 Department No. XVII of the above-entitled Court, or as soon thereafter as
20 counsel may be heard.

21 DATED this 16th day of August, 2010.

22 PALM LAW FIRM, LTD.

23 
24 By: PATRICIA PALM
25 Nevada Bar No. 6009
26 1212 Casino Center Blvd.
27 Las Vegas, NV 89104
28 (702) 386-9113
Attorney for Defendant O'Keefe

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DECLARATION

PATRICIA A. PALM makes the following declaration:

1. I am an attorney duly licensed to practice law in the State of Nevada; I am the attorney representing Defendant O'Keefe in this matter.

2. That on July 29, 2010, well within the time for noticing expert witnesses, O'Keefe filed and served upon the State his Supplemental Notice of Expert Witnesses.

3. That not until the late afternoon of Friday, August 13, 2010, did the State provide to this counsel a Supplemental Notice of Witnesses via email, which notice listed "Detective Marty Wildemann," who "Will testify as to his opinion regarding the nature of injury to Defendant's hand." The notice further states, "Detective Wildemann has been with the Las Vegas Metropolitan Police Department for 22 ½ years. For the past 8 ½ years, Detective Wildemann has been assigned to Homicide and has worked over 200 cases with 25% of those involving stabbings."

4. No Curriculum vitae is attached to the notice.

I declare under penalty of perjury that the foregoing is true and correct. (NRS 53.045).

EXECUTED this 16th day of August, 2010.



PATRICIA A. PALM
Bar No. 6009

[illegible]

If the defendant will be tried for one or more offenses that are punishable as a gross misdemeanor or felony and a witness that a party intends to call during the case in chief of the State or during the case in chief of the defendant is expected to offer testimony as an expert witness, the party who intends to call that witness shall file and serve upon the opposing party, **not less than 21 days before trial** or at such other time as the court directs, a written notice containing:

- (Emphasis added.) With this statutory provision, the Nevada Legislature obviously intended to protect defendants' due process rights and ensure adequate opportunity to review and possibly impeach proposed experts' qualifications and expected testimony. Here, the State has deprived O'Keefe of his procedural due process right to 21 days' notice. U.S. Const., 14th Amend.; Nev. Const., art. 1, sec. 8.

5

001287

1 party from introducing in evidence material not disclosed in compliance with
2 NRS 174.234).

3 Additionally, Detective Wildemann is not qualified to offer an "expert
4 opinion" on the nature of wounds or injuries. NRS 50.275 provides that "[i]f
5 scientific, technical or other specialized knowledge will assist the trier of fact to
6 understand the evidence or to determine a fact in issue, a witness qualified as
7 an expert by special knowledge, skill, experience, training or education may
8 testify to matters within the scope of such knowledge."

9 In Hallmark v. Eldridge, 124 Nev. ___, 189 P.3d 646 (2008), the Nevada
10 Supreme Court set forth the factors applicable to the determination of allowing
11 expert testimony. In that case, the Court determined that the district court
12 abused its discretion in allowing a physician with an engineering background
13 to testify as a biomechanical expert. The court stated, "the testimony did not
14 assist the jury in understanding the evidence as the testimony was not based
15 on reliable methodology." Id. at ___, 189 P.3d at 648. The Court stated that
16 when considering whether to admit expert testimony on a subject,
17

18 the witness must satisfy the following three requirements: (1) he or
19 she must be qualified in the area of "scientific, technical or other
20 specialized knowledge" (the qualification requirement); (2) his or
21 her specialized knowledge must "assist the trier of fact to
22 understand the evidence or to determine a fact in issue" (the
23 assistance requirement); and (3) his or her testimony must be
24 limited "matters within the scope of [his or her specialized]
25 knowledge" (the limited scope requirement).

26 Id. at ___, 189 P.3d at 650 (citation omitted). When determining whether the
27 *qualification requirement* is met, the court should consider: (1) formal schooling
28 and academic degrees, (2) licensure, (3) employment, and (4) practical
experience and specialized training. These factors are not exhaustive and may
vary in weight or not apply, depending on the case. Id. at ___, 189 P.3d at 650-
51.

1 In considering whether the *assistance requirement* has been met, a
2 district court should consider whether the opinion is (1) within a recognized
3 field of expertise, (2) testable and has been tested, (3) published and subjected
4 to peer review, (4) generally accepted in the scientific community (which is not
5 always determinative), and (5) based more on particularized facts rather than
6 assumption, conjecture or generalization. *Id.* at 651-52.

7 Here, Detective Wildemann fails the first prong of the test. There are no
8 curriculum vitae attached to the State's notice to show that Wildemann has
9 any special qualifications such as formal schooling or degrees, licensure,
10 employment, practical experience or specialized training in the area of the
11 nature of injuries. Therefore, there is no need to go further. He has no
12 expertise by which he could assist the jury or within which his testimony can
13 be confined. See also Lord v. State, 107 Nev. 28, 33-34, 806 P.2d 548, 551
14 (1991) (a detective's opinion based on his experience as to the
15 significance/cause of injuries on the defendant was improper, the detective was
16 not qualified to give an expert opinion, and layperson opinion is not an
17 appropriate vehicle to illuminate the cause of injuries).

18 In sum, based on the State's failure to timely comply with the
19 requirements of NRS 174.234(2), and based on Detective Wildemann's lack of
20 expertise in addressing the nature of injuries or wounds, this Court should
21 preclude the State from offering him as an expert and prevent him from giving
22 his opinion on the nature or cause of the wounds in this case.
23

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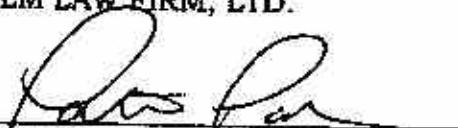
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CONCLUSION

For the reasons stated above, Brian O'Keefe respectfully requests this Honorable Court issue an order precluding the State from introducing at trial evidence or testimony from its proposed expert Marty Wildemann related to the nature of any injuries in this case.

Dated this 16th day of August, 2010.

PALM LAW FIRM, LTD.

By 
PATRICIA A. PALM, #6009
1212 Casino Center Blvd.
Las Vegas, NV 89104
(702) 386-9113

RECEIPT OF COPY

RECEIPT OF COPY of the above and foregoing MOTION BY
DEFENDANT O'KEEFE TO PRECLUDE EXPERT TESTIMONY is hereby
acknowledged this ____ day of August 2010.

ORIGINAL

FILED

AUG 16 2010

Patricia Palm
CLERK OF COURT

001
PALM LAW FIRM, LTD.
PATRICIA PALM, ESQ.
NEVADA BAR NO. 6009
1212 CASINO CENTER BLVD.
LAS VEGAS, NV 89104
Phone: (702) 386-9113
Fax: (702) 386-9114
Email: Patricia.palmlaw@gmail.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:

OSC250630
EX007
Ex Parte Motion
884901



EX PARTE MOTION FOR AN ORDER SHORTENING TIME

COMES NOW DEFENDANT, BRIAN O'KEEFE, by and through counsel,
Patricia Palm of Palm Law Firm, Ltd., and hereby moves this Honorable for an
Order Shortening Time pursuant to EDCR 3.60, and requests that this Court
shorten the time in which to hear the Motion by Defendant O'Keefe to Preclude
the State from Presenting Expert Testimony.

This application is based upon the pleadings and papers on file and the
Declaration of Counsel Attached to this Motion.

Dated this 16th day of August, 2010.

PALM LAW FIRM, LTD.

Patricia Palm, Bar No. 6009
1212 Casino Center Blvd.
Las Vegas, NV 89104

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AUG 16 2010

CLERK OF THE COURT

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DECLARATION

PATRICIA A. PALM makes the following declaration:

1. I am an attorney duly licensed to practice law in the State of Nevada; I am the attorney representing Defendant O'Keefe in this matter.

2. That on August 13, 2010, the State sent O'Keefe via email a Supplemental Notice of Expert Witnesses.

3. That trial is set to begin on August 23, 2010, and O'Keefe has invoked his statutory right to a speedy trial. Therefore, the MOTION BY DEFENDANT O'KEEFE TO PRECLUDE EXPERT TESTIMONY must be set as soon as possible in order to allow O'Keefe sufficient time to plan his trial strategy.

4. That this Ex Parte Motion for an Order Shortening Time is made in good faith.

I declare under penalty of perjury that the foregoing is true and correct. (NRS 53.045).

EXECUTED this 16th day of August, 2010.



PATRICIA A. PALM

ORIGINAL

FILED

NOTC
PALM LAW FIRM, LTD.
PATRICIA PALM, ESQ.
NEVADA BAR NO. 6009
1212 CASINO CENTER BLVD.
LAS VEGAS, NV 89104
Phone: (702) 386-9113
Fax: (702) 386-9114
Email: Patricia.palmlaw@gmail.com
Attorney for Brian O'Keefe

AUG 16 8 55 AM '10

CLERK COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,
Plaintiff,

vs.

BRIAN K. O'KEEFE,
Defendant.

CASE NO: C250630

DEPT. NO: XVII

DATE:

TIME:

RECEIVED
NOTICE
Notice of Witnesses
8/16/10



DEFENDANT'S SUPPLEMENTAL NOTICE OF WITNESSES

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 The Defendant, BRIAN O'KEEFE, by and through his attorney, PATRICIA PALM of PALM LAW FIRM, LTD., intends to call the following witnesses, in addition to those witnesses listed on previously filed notices, in his case in chief:

Skye Campbell

Campbell Investigations
2961 Industrial Rd., Ste. 113
Las Vegas, NV 89109

Dorothy Robe

424 SaraJane Lane,
Las Vegas, NV 89107

Dodge Slagel

1090 Wigwam Pkwy. Ste. 100

RECEIVED

AUG 16 2010

CLERK OF THE COURT

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1
2 COR AMR

Henderson, NV 89074

4701 Stoddard Rd., Modesto
CA 95353

3
4 COR LVF&R

500 N. Casino Center Blvd.
Las Vegas, NV 89101

5
6 COR MINES & ASSOC.

10367 W. Centennial Rd., Ste.
100, Littleton, CO 80127

7
8 COR Military Personnel Records

9700 Page Ave., St. Louis, MO
63132

9
10 COR M.J. DEAN CONSTRUCTION CO.
101

5055 W. Patrick Lane, Ste.

Las Vegas, NV 89118

11
12 COR PERINI Bldg. Co.

2955 N. Green Valley Pkwy.
Henderson, NV 89014

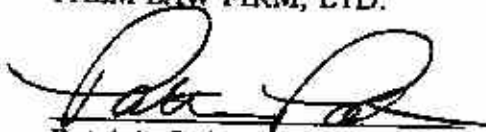
13
14 COR for Unemployment Debit Card Acct.
15 Through NV Dpt. Of Emp. Training & Rehab.

2800 E. St. Louis Ave., Las
Vegas, NV 89713

16
17 These witnesses are in addition to those previously noticed and for
18 whom a separate Notice has been filed.
19

20 Dated this 16th day of August, 2010.

21 PALM LAW FIRM, LTD.

22
23 

24 Patricia Palm, Bar No. 6009
25 1212 Casino Center Blvd.
Las Vegas, NV 89104

26 Phone: (702) 386-9113

27 Fax: (702) 386-9114

28 Attorney for Defendant O'Keefe

///

///

RECEIPT OF COPY

I, the undersigned, acknowledge that on this 26 day of Aug
2010, I received a true copy of the foregoing DEFENDANT'S
SUPPLEMENTAL NOTICE OF WITNESSES.

**CLARK COUNTY DISTRICT ATTORNEY
200 Lewis Ave., Las Vegas, NV 89155-1212**

By: V. [Signature]

Alan L. Schuman
CLERK OF THE COURT

06C250630
NRS
Notice of Expert Witnesses
801408



1 NOTC
2 DAVID ROGER
3 Clark County District Attorney
4 Nevada Bar #002781
5 STEPHANIE A. GRAHAM
6 Deputy District Attorney
7 Nevada Bar #0010058
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,

10 Plaintiff,

11 -vs-

12 BRIAN O'KEEFE,
13 #1447732

14 Defendant.

CASE NO: C250630

DEPT NO: II

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

17 TO: BRIAN O'KEEFE, Defendant; and

18 TO: PATRICA PALM ESQ, Counsel of Record:

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

21 1.) DR. TIMOTHY DUTRA and/or DESIGNEE: Will testify regarding the nature of
22 victim's injuries.

23 The substance of each expert witness' testimony and a copy of all reports made by or
24 at the direction of the expert witness has been provided in discovery.

25 ///

26 ///

27 ///

28 ///

1 A copy of each expert witness' curriculum vitae, if available, is attached hereto.
2
3

4 BY

David Roger

5 DAVID ROGER
6 DISTRICT ATTORNEY
7 Nevada Bar #002781

8 CERTIFICATE OF FACSIMILE TRANSMISSION
9

10 I hereby certify that service of SUPPLEMENTAL NOTICE OF EXPERT
11 WITNESSES, was made this _____ day of August, 2010, by facsimile transmission to:

12 PATRICIA PALM ESQ
13 FAX #455-6273
14

15
16 /s/ T. Schessler

17 Secretary for the District Attorney's
18 Office
19
20
21
22
23
24
25
26
27
28

Curriculum Vitae

Timothy Franklin Dutra, M.D., M.S., Ph.D.

Personal Data:

Permanent Address: 14889 Fieldstone Ct.,
Saratoga, CA 95070
Cellphone: (314) 610-6841
E-Mail: tdmtdphd@yahoo.com
Languages: English & Spanish

Board Certifications:

Forensic Pathology
ABP Diplomate and certified, September 9, 2009

Blood Banking and Transfusion Medicine
ABP Diplomate and certified, September 9, 2005

Anatomic and Clinical Pathology
ABP Diplomate and certified, November 11, 1998

Most Recent Fellowship:

Fellowship, Forensic Pathology
St. Louis University
(A.C.G.M.E., accredited: 10/1/08 - 9/30/09)
Program Director: Jane W. Turner, M.D., Ph.D.
St. Louis City Medical Examiner's Office
1300 Clark Avenue
St. Louis, MO 63103

Recent Colleague:

Visiting Colleague, Forensic Pathology
(10/5/09 - 10/31/09)
Servicio Medico Forense
Ninos Heroes #102
Col. Doctores, Del. Cuauhtémoc
Mexico, D.F. 06720
Director: Dr. Felipe Takajashi

001299

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 10:53 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

6
7 **APPELLANT'S APPENDIX – VOLUME VII – PAGES 1200-1399**

8 **MATTHEW D. CARLING**
9 51 East 400 North, Bldg. #1
10 Cedar City, Utah 84720
11 (702) 419-7330 (Office)
 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**
13 Attorney General
14 100 North Carson Street
15 Carson City, Nevada 89701-4717
16 Counsel for Respondent

INDEX
O'Keefe, Brian

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(Ex Parte) Motion to Appoint Counsel filed on 12/06/13	4698-4700
"Amended" Exhibits to "Amended Petition for Writ of Habeas Corpus by a True Pretrial Detainee filed on 10/03/14	5008-5036
"Evidentiary Hearing Request" (Amended Petition for Writ of Habeas Corpus Pursuant to NRS 34.360 Exclusive 1 Based on Subject-Matter of Amended Information Vested in Ninth Circuit by Notice of Appeal then "COA" Granted on a Double Jeopardy Violation with No Remand Issued Since) filed on 10/03/14	4995-5007
"Reply" to State's Response and Motion to Dismiss to Defendant's Pro Per Petition for Writ of Habeas Corpus Pursuant to NRS 34.360 filed on 10/27/14	5052-5061
"True Pretrial Detainee's" Reply to State's Opposition(s) Admitting the State has a Jurisdictional Defect by the Aung of a Notice of Appeal Which Divests Jurisdiction of the Matter Appealed; i.e., O'Keefe's Pretrial Habeas Matter Appealed to the 9 th Circuit on the Subject Matter of the Amended Information Already Named a Double Jeopardy Violation filed on 10/01/14	4989-4994
Affidavit of Matthew D. Carling, Esq. filed on 06/29/15	5447-5453
Affidavit of the Honorable Michael P. Villani filed on 09/24/14	4981-4983
Amended Information filed on 02/10/09	0175-0177
Amended Notice of Appeal filed on 10/29/15	5565-5568
Appendix of Exhibits for: Motion to Dismiss based Upon Violation(s) of the Fifth Amendment Component of the Double Jeopardy Clause, Constitutional Collateral Estoppel and, Alternatively, Claiming Res Judicata, Enforceable by the Fourteenth Amendment Upon the States Precluding State's Theory of Prosecution by Unlawful Intentional Stabbing with Knife, the Alleged Battery Act Described in the Amended Information filed on 03/16/12	3225-3406
Case Appeal Statement filed on 03/14/14	4850-4851
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Case Appeal Statement filed on 09/24/12	4625-4628
Case Appeal Statement filed on 10/20/15	5547-5548
Case Appeal Statement filed on 10/21/15	5554-5556
Case Appeal Statement filed on 11/04/15	5572-5573
Case Appeal Statement filed on 11/24/14	5070-5071
Certificate of Mailing filed on 05/03/11	3048

1	Certificate of Service filed on 06/29/15	5454
2	Clerks Certificate Judgment Reversed and Remanded filed on 05/06/10	1023-1027
3	Criminal Bindover filed on 12/26/08	0004-0020
4	Criminal Order to Statistically Close Case filed on 07/31/13	4662
5	Defendant O'Keefe's Opposition to Motion in Limine to Admit Evidence of Other Bad Acts Pursuant to NRS 48.045 and Evidence of Domestic Violence Pursuant to 48.061 filed on 01/18/11	2877-2907
6	Defendant's Brief on Admissibility of Evidence of Alleged Victim's History of Suicide Attempts, Anger Outbursts, Anger Management Therapy, Self-Mutilation (With Knives and Scissors), and Erratic Behavior filed on 03/20/09	0293-0301
7	Defendant's Motion to Require Court to Advise the Prospective Jurors as to the Mandatory Sentences Required if the Defendant is Convicted of Second Degree Murder filed on 03/04/09	0196-0218
8	Defendant's Motion to Settle Record filed on 03/24/09	0317-0322
9	Defendant's Proposed Jury Instructions filed on 03/20/09	0302-0316
10	Defendant's Proposed Jury Instructions filed on 08/23/10	1335-1393
11	Defendant's Submission to Clark County District Attorney's Death Review Committee filed on 12/31/08	0021-0027
12	Defendant's Supplemental Proposed Jury Instructions filed on 03/20/09	0290-0292
13	Defendant's Supplemental Notice of Witnesses filed on 08/16/10	1294-1296
14	District Court Amended Jury List filed on 03/19/09	0245
15	District Court Jury List filed on 03/16/09	0239
16	Ex Parte and/or Notice of Motion and Motion to Chief Judge to Reassign Case to Jurist of Reason Based on Pending Suit 3:14-CV-00385-RCJ-WGC Against Judge Michael Villani for proceeding in Clear "Want of Jurisdiction" Thereby Losing Immunity, Absolutely filed on 08/28/14	4903-4912
17	Ex Parte and/or Notice of Motion filed on 08/28/14	4913
18	Ex Parte Application for Order Requiring Material Witness to Post Bail filed on 03/10/09	0232-0236
19	Ex Parte Motion for an Order Shortening Time filed on 08/16/10	1292-1293
20	Ex Parte Motion for Appointment of Counsel Pursuant to NRS 34.750 filed on 09/15/14	4950-4952
21	Ex Parte Motion for Defense Costs filed on 06/30/10	1037-1043
22	Ex Parte Motion for Production of Documents (Specific) Papers, Pleadings and Tangible Property of Defendant filed on 01/13/14	4714-4720
23	Ex Parte Motion for Reimbursement of Legal Cost of Faretta Canvassed Defendant to Above Instant Case filed on 12/13/13	4701-4707
24	Ex Parte Motion for Release of Medical Records filed on 04/08/11	3041-3042
25	Ex Parte Motion to Extend Prison Copywork Limit filed on 06/24/15	5438-5441
26	Exhibits to Petition for Writ of Habeas Corpus by a True Pretrial Detainee filed on 09/15/14	4954-4980
27	Ex-Parte Motion for Reimbursement of Incidental Costs Subsequent the Court Declaring Defendant Indigent and Granting Forma Pauperis filed on 01/21/14	4722-4747
28		

1	Ex-Parte Motion to Extend Prison Copywork Limit filed on 01/28/14	4764-4767
2	Filing in Support of Motion to Seal Records as Ordered by Judge filed on 04/19/12	3438-3441
3	Findings of Fact, Conclusion of Law and Order filed on 10/02/15	5528-5536
4	Information filed on 12/19/08	0001-0003
5	Instructions to the Jury (Instruction No. 1) filed on 09/02/10	1399-1426
6	Instructions to the Jury filed on 03/20/09	0246-0288
7	Judgment of Conviction (Jury Trial) filed on 09/05/12	4623-4624
8	Judgment of Conviction filed on 05/08/09	0327-0328
9	Judicial Notice Pursuant NRS 47.140(1)-NRS 47.150(2) Supporting Pro-Se Petition Pursuant NRS 34.360 filed on 03/12/15	5082-5088
10	Jury List filed on 06/12/12	3456
11	Jury List filed on 08/25/10	1396
12	Letters in Aid of Sentencing filed on 05/04/09	0324-0326
13	Motion by Defendant O'Keefe filed on 08/19/10	1329-1334
14	Motion for Complete Rough Draft Transcript filed on 04/03/12	3430
15	Motion for Judicial Notice the State's Failure to File and Serve Response in Opposition filed on 02/24/14	4800-4809
16	Motion for Judicial Ruling filed on 05/24/10	1028-1030
17	Motion for Leave to File Supplemental Petition Addressing All Claims in the First Instance Required by Statute for Judicial Economy with Affidavit filed on 06/15/15	5420-5422
18	Motion for Relief from Judgment Based on Lack of Jurisdiction for U.S. Court of Appeals has not Issued any Remand, Mandate, or Remittitur filed on 07/23/14	4871-4889
19	Motion to Continue Trial filed on 06/01/12	3450-3455
20	Motion to Dismiss Counsel filed on 10/03/11	3164-3168
21	Motion to Modify and/or Correct Illegal Sentence filed on 01/27/14	4749-4759
22	Motion to Place on Calendar filed on 10/26/11	3169-3182
23	Motion to Place on Calendar filed on 11/28/11	3184-3192
24	Motion to Withdraw as Counsel filed on 04/29/11	3044-3047
25	Motion to Withdraw Counsel filed on 11/28/11	3193-3198
26	Motion to Withdraw Counsel for Conflict and Failure to Present Claims when I.A.C. Claims Must be Raised Per Statute in the First Petition Pursuant Chapter 34 filed on 06/08/15	5148-5153
27	Motion to Withdraw filed on 09/14/10	1434-1437
28	Notice of Appeal filed on 03/13/14	4843-4849
	Notice of Appeal filed on 04/11/14	4858-4861
	Notice of Appeal filed on 05/21/09	0332-0333
	Notice of Appeal filed on 07/31/15	5467-5472
	Notice of Appeal filed on 08/11/15	5478-5483
	Notice of Appeal filed on 08/29/14	4923-4924
	Notice of Appeal filed on 10/21/15	5552-5553
	Notice of Appeal filed on 11/03/15	5569-5571

1	Notice of Appeal filed on 11/21/14	5067-5069
2	Notice of Change of Address filed on 06/06/14	4864-4865
3	Notice of Defendant's Expert Witness filed on 02/20/09	0180-0195
4	Notice of Defendant's Witnesses filed on 03/06/09	0224-0227
5	Notice of Entry of Findings of Fact, Conclusion of Law and Order filed on 10/06/15	5537-5546
6	Notice of Expert Witnesses filed on 03/05/09	0222-0223
7	Notice of Motion and Motion by Defendant O'Keefe for a Reasonable Bail filed on 09/24/10	1441-1451
8	Notice of Motion and Motion by Defendant O'Keefe for Discovery filed on 08/02/10	1211-1219
9	Notice of Motion and Motion by Defendant O'Keefe for Evidentiary Hearing on Whether the State and CCDC have Complied with Their Obligations with Respect to the Recording of a Jail Visit Between O'Keefe and State Witness Cheryl Morris filed on 08/02/10	1220-1239
10	Notice of Motion and Motion by Defendant O'Keefe to Admit Evidence Pertaining to the Alleged Victim's Mental Health Condition and History, Including Prior Suicide Attempts, Anger Outbursts, Anger Management Therapy, Self-Mutilation and Erratic Behavior filed on 07/21/10	1064-1081
11	Notice of Motion and Motion by Defendant O'Keefe to Admit Evidence Pertaining to the Alleged Victim's Mental Health Condition and History, Including Prior Suicide Attempts, Anger Outbursts, Anger Management Therapy, Self-Mutilation and Erratic Behavior filed on 07/21/10	1099-1116
12	Notice of Motion and Motion by Defendant O'Keefe to Admit Evidence Showing LVMPD Homicide Detectives Have Preserved Blood/Breath Alcohol Evidence in Another Recent Case filed on 08/02/10	1199-1210
13	Notice of Motion and Motion by Defendant O'Keefe to Dismiss on Grounds of Double Jeopardy Bar and Speedy Trial Violation and, Alternatively, to Preclude State's New Expert Witness, Evidence and Argument Relating to the Dynamics or Effects of Domestic Violence and Abuse filed on 01/07/11	2785-2811
14	Notice of Motion and Motion by Defendant O'Keefe to Preclude Expert Testimony filed on 08/16/10	1284-1291
15	Notice of Motion and Motion by Defendant O'Keefe to Preclude the State from Introducing at Trial Other Act or Character Evidence and Other Evidence Which is Unfairly Prejudicial or Would Violate his Constitutional Rights filed on 07/21/10	1047-1063
16	Notice of Motion and Motion by Defendant O'Keefe to Preclude the State from Introducing at Trial Other Act or Character Evidence and Other Evidence Which is Unfairly Prejudicial or Would Violate his Constitutional Rights filed on 07/21/10	1082-1098
17	Notice of Motion and Motion by defendant O'Keefe to Preclude the State from Introducing at Trial Improper Evidence and Argument filed on 01/03/11	1682-2755
18	Notice of Motion and motion by Defendant O'Keefe to Suppress his	

1	Statements to Police, or, Alternatively, to Preclude the State from	
2	Introducing Portions of his Interrogation filed on 08/02/10	1152-1198
3	Notice of Motion and Motion for Leave of Court to File Motion for	
4	Rehearing – Pursuant to EDCR, Rule 2.24 filed on 08/29/14	4914-4921
5	Notice of Motion and Motion in Limine to Admit Evidence of Other Bad	
6	Acts Pursuant to NRS 48.045 and Evidence of Domestic Violence	
7	Pursuant to 48.061 filed on 01/06/11	2762-2784
8	Notice of Motion and Motion to Admit Evidence of Other Crimes filed on	
9	02/02/09	0150-0165
10	Notice of Motion and Motion to Admit Evidence of Polygraph	
11	Examination Results filed on 03/29/12	3412-3415
12	Notice of Motion and Motion to Dismiss based Upon Violation(s) of the	
13	Fifth Amendment Component of the Double Jeopardy Clause,	
14	Constitutional Collateral Estoppel and, Alternatively, Claiming Res	
15	Judicata, Enforceable by the Fourteenth Amendment Upon the States	
16	Precluding State's Theory of Prosecution by Unlawful Intentional	
17	Stabbing with Knife, the Alleged Battery Act Described in the Amended	
18	Information filed on 03/16/12	3201-3224
19	Notice of Motion and Motion to Seal Records filed on 03/22/12	3416-3429
20	Notice of Motion and Motion to Waive Filing Fees for Petition for Writ of	
21	Mandamus filed on 12/06/13	4695-4697
22	Notice of Motion and Motion to Withdraw as Attorney of Record filed on	
23	09/23/15	5517-5519
24	Notice of Motion and Motion to Withdraw as Attorney of Record filed on	
25	09/29/15	5525-5527
26	Notice of Motion filed on 01/13/14	4721
27	Notice of Motion filed on 01/21/14	4748
28	Notice of Motion filed on 01/27/14	4760
	Notice of Motion filed on 02/24/14	4810
	Notice of Motion filed on 03/04/14	4833
	Notice of Motion filed on 06/08/15	5154-5160
	Notice of Motion filed on 07/23/14	4890
	Notice of Motion filed on 08/29/14	4922
	Notice of Motion filed on 09/15/14	4953
	Notice of Witness and/or Expert Witnesses filed on 02/03/09	0166-0167
	Notice of Witnesses and/or Expert Witnesses filed on 02/17/09	0178-0179
	NV Supreme Court Clerks Certificate/ Judgment Affirmed filed on	
	02/06/15	5072-5081
	NV Supreme Court Clerks Certificate/Judgment Affirmed filed on	
	07/26/13	4653-4661
	NV Supreme Court Clerks Certificate/Judgment Dismissed filed on	
	06/18/14	4866-4870
	NV Supreme Court Clerks Certificate/Judgment Dismissed filed on	
	03/12/15	5089-5093
	NV Supreme Court Clerks Certificate/Judgment Dismissed filed on	

1	09/28/15	5520-5524
2	NV Supreme Court Clerks Certificate/Judgment Dismissed filed on 10/29/14	5062-5066
3	O'Keefe's Reply to State's Opposition to Motion to Admit Evidence Showing LVMPD Homicide Detectives have Preserved Blood/Breath Alcohol Evidence in Another Recent Case filed on 08/13/10	1256-1265
5	Opposition to State's Motion to Admit Evidence of Other Bad Acts filed on 02/06/09	0169-0172
6	Order Authorizing Contact Visit filed on 03/04/09	0219-0220
7	Order Authorizing Contact Visit filed on 08/12/10	1253-1254
8	Order Denying Defendant's Ex Parte Motion to Extend Prison Copywork Limit filed on 08/13/15	5486-5488
9	Order Denying Defendant's Ex-Parte Motion for Reimbursement of Incidental Costs Declaring Defendant Ingigent and Granting Forma pauperis filed on 03/11/14	4840-4842
10	Order Denying Defendant's Motion for Relief From Judgment Based on Lack of Jurisdiction for U.S. Court of Appeals had not Issues any Remand, Mandare or Remittature filed on 09/04/14	4927-4929
12	Order Denying Defendant's Motion to Dismiss filed on 04/11/12	3434-3435
13	Order Denying Defendant's Motion to Seal Records and Defendant's Motion to Admit Evidence of Polygraph Examination filed on 05/24/12	3448-3449
14	Order Denying Defendant's Petition for Writ of Mandamus or in the Alternative Writ of Coram Nobis; Order Denying Defendant's Motion to Waive Filing Fees for Petition for Writ of Mandamus; Order Denying Defendant's Motion to Appoint Counsel filed on 01/28/14	4761-4763
16	Order Denying Defendant's Pro Per Motion for Judicial Notice- The State's Failure to File and Serve Response in Opposition filed on 04/01/14	4855-4857
18	Order Denying Defendant's Pro Per Motion for Leave to File Supplemental Petition Addressing all Claims in the First Instance Required by Statute for Judicial Economy with Affidavit filed on 07/15/15	5464-5466
20	Order Denying Defendant's Pro Per Motion to Modify and/or Correct Illegal Sentence filed on 03/25/14	4852-4854
21	Order Denying Defendant's Pro Per Motion to Withdraw Counsel for Conflict and Failure to Present Claims When I.A.C. Claims Must be Raised Per Statute in the First Petition Pursuant to Chapter 34 filed on 07/15/15	5461-5463
24	Order Denying Matthew D. Carling's Motion to Withdraw as Attorney of Record for Defendant filed on 11/19/15	5574-5575
25	Order Denying Motion to Disqualify filed on 10/06/14	5037-5040
26	Order filed on 01/30/09	0149
26	Order filed on 11/06/10	1462-1463
27	Order for Petition for Writ of Habeas Corpus filed on 10/15/14	5051
27	Order for Production of Inmate Brian O'Keefe filed on 05/26/10	1032-1033
28	Order for Return of Fees filed on 11/10/11	3183

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

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

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

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

TRANSCRIPTS

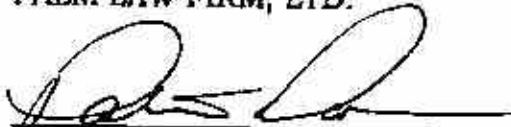
Document	Page No.
Transcript – All Pending Motions and Calendar Call filed on 02/04/11	2996-3038
Transcript – All Pending Motions filed on 07/10/09	0351-0355
Transcript – All Pending Motions filed on 08/30/12	3461-3482
Transcript – All Pending Motions filed on 11/23/10	1464-1468
Transcript – All Pending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

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

1 counsel at the time of the hearing on this Motion.

2 Dated this 2nd day of August, 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**

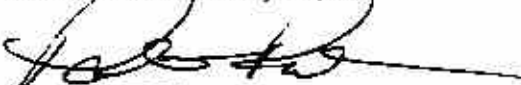
12 TO: STATE OF NEVADA, Plaintiff; and

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

14 YOU WILL PLEASE TAKE NOTICE that the undersigned will bring on the
15 above and foregoing **NOTICE OF MOTION AND MOTION BY DEFENDANT**
16 **O'KEEFE TO ADMIT EVIDENCE SHOWING LVMPD HOMICIDE**
17 **DETECTIVES HAVE PRESERVED BLOOD/BREATH ALCOHOL EVIDENCE**
18 **IN ANOTHER RECENT CASE** on the 12 day of August 2010, at the hour
19 of 8:15 m., in Department No. XVII of the above-entitled Court, or as soon
20 thereafter as
21 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

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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 that witness Cheryl Morris claims were made by O'Keefe, and his demonstration of proficiency at killing with knives, which Morris claims to have witnessed. The Court further ruled that the State could introduce certified copies of O'Keefe's prior Judgment of Conviction for felony domestic battery, involving 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 as a State's witness in that case. 3/16/09 TT 2-10.

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

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

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 interviewed 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 interview O'Keefe smelled heavily of alcohol, and when police took photographs
13 of him at about 3:55 a.m., they had to hold him upright to steady him.
14 3/18/09 TT 146-49. Wildemann said it was pretty obvious that O'Keefe had
15 been drinking, however, law enforcement did not obtain a test for his breath or
16 blood alcohol level either before or after the interview. 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 is constitutionally entitled to present evidence to support his
10 theory of defense, which is, in part, that the State has not conducted a good
11 faith investigation and prosecution of this case. For instance, not only did
12 homicide detectives decline to turn over evidence specifically requested for the
13 prior trial, stating that the evidence of the use of force report did not exist, see
14 3/18/09 TT 179, and causing a motion for a mistrial, see 3/18/09 TT 2-5, but
15 they also failed to offer O'Keefe a blood or breath alcohol test to preserve
16 evidence of the quantitative amount of alcohol in his system subsequent to his
17 arrest and at the time of his statement. O'Keefe hopes to demonstrate at trial
18 that this was part of an effort to minimize O'Keefe's extreme intoxication at the
19 time of the offense, and, therefore, the jury should disbelieve any testimony
20 which plays down his intoxication.

21 During O'Keefe's previous trial, Detective Wildemann had testified that
22 in his twenty-one (21) years of experience, a suspect would generally only be
23 administered a blood or breath alcohol test in a DUI. 3/18/09 TT at 183. He
24 had also previously testified at the preliminary hearing that he was not aware
25 of a homicide case where such a test was given. Id. at 182.

26 To challenge Wildemann's testimony and its implication that alcohol-level
27 testing is unheard of, O'Keefe presented testimony from Forensic Scientist
28

1 George Schiro, who testified that the police should have collected O'Keefe's
2 blood or breath alcohol within the hours after Whitmarsh's death to determine
3 whether his behavior or state of mind might have been affected. The source of
4 authority for this opinion is an industry standard text for crime scene
5 investigations. 3/19/09 TT 123-24, 125-26. O'Keefe had also subpoenaed
6 Detective Clifford Mogg to testify regarding the circumstances of alcohol testing
7 in *State v. Franco*, Event No. 070408-0444. Franco had stated during his
8 interview with LVMPD homicide detectives that he did not know what
9 happened during the 2007 stabbing of the alleged victim. Homicide detectives
10 determined to administer a breath test to determine the suspect's level of
11 intoxication. When O'Keefe's counsel called Detective Mogg to the stand during
12 O'Keefe's prior trial, the State objected, and the Court ruled that Mogg would
13 not be allowed to testify. 3/19/09 TT 12-14.

14
15 The defense should be permitted to attack the good faith of the police
16 investigation by showing that LVMPD homicide detectives have obtained blood
17 or breath alcohol testing in another recent homicide case when the victim
18 claimed he did not know how a stabbing occurred.

19 The evidence sought to be introduced is relevant to show bias and attack
20 the credibility of the State's witnesses and the State's proof that O'Keefe was
21 not so intoxicated that he could not form an intent to kill and was not so
22 intoxicated that an accidental stabbing during a struggle is likely. If the jury
23 believes that O'Keefe might have been extremely intoxicated, and proof of this
24 was not gathered or documented because of bias, then the jury might
25 disbelieve the State's entire case. Furthermore, if this Court denies
26 suppression of O'Keefe's interview with homicide detectives, then the validity of
27 any waiver of O'Keefe's Miranda rights is an issue for the jury, and the jury
28 should be able to consider the issues of bias, good faith and thoroughness of

1 the detectives when it is assessing their testimony regarding his condition and
2 whether to consider the interrogation as evidence against O'Keefe.¹

3 The failure to preserve evidence which is likely to be exculpatory is
4 relevant to the good faith of the investigation, which is an appropriate issue in
5 criminal cases. See Mazzan v. Warden, 116 Nev. 48, 67, 998 P.2d 25, 32
6 (2000). Furthermore, extrinsic evidence is admissible to prove a witness's bias
7 or prejudice. See Lobato v. State, 120 Nev. 512, 96 P.3d 765 (2004). In Abbott
8 v. State, 122 Nev. 715, 736, 138 P.3d 462, 475 (2006), the Nevada Supreme
9 Court addressed the issue of when extrinsic evidence should be admitted to
10 protect a defendant's constitutional right to present a defense. The Court
11 stated that the purpose of the evidentiary rule banning extrinsic evidence is
12 based on the idea of conserving judicial resources by avoiding mini-trials on
13 collateral issues. Id. However, this policy loses import where extrinsic
14 evidence relates to a crucial issue directly in controversy. Id. Further, witness
15 credibility which is a key factor in determining guilt or acquittal amounts to
16 such a crucial issue. Id. Thus, "an evidentiary rule rendering non-collateral,
17 highly relevant evidence inadmissible must yield to the defendant's
18 constitutional right to present a full defense." Id.

19
20 As was apparent during the previous trial, O'Keefe has consistently
21 attempted to prove that LVMPD officers and detectives were minimizing his
22 intoxication in the reports and in their testimony. This was the reason for the
23 motion for mistrial when Officer Ballejos's previously withheld report was
24 disclosed mid-trial and it showed that Ballejos believed that O'Keefe was
25 "extremely intoxicated," a fact which was not recorded on any police report
26

27
28 ¹If O'Keefe's statements are admitted, then the question of voluntariness must
also be submitted to the jury. See Laursen v. State, 97 Nev. 568, 634 P.2d
1230 (1981).

1 provided during discovery. O'Keefe should be permitted to support his theory
2 by demonstrating that LVMPD homicide detectives have obtained evidence of
3 blood or breath alcohol in another recent case. The jury should be permitted to
4 consider this evidence in determining whether detectives' failure to gather and
5 preserve the evidence here demonstrates bias and lack of good faith or
6 thoroughness in their investigation of his case.

7 It would be unfair and a violation of O'Keefe's confrontation rights to
8 again allow the jury to consider Detective Wildemann's testimony that in
9 twenty-one (21) years he never heard of such testing in a murder case, without
10 being confronted with the fact that such testing has in fact occurred in at least
11 one recent case. The jurors can determine for themselves whether
12 Wildemann's testimony is credible and whether he acted in good faith in his
13 investigation. This limited proof on the issue should be permitted, especially in
14 light of the State's attempt to create a false perception that such testing is
15 unheard of in homicide investigations conducted by LVMPD. To prohibit
16 O'Keefe from attacking the investigation in support of his claim that police have
17 minimized his intoxication would deny him his constitutional rights to due
18 process, to confront his accusers and to present a defense. See U.S. Const.,
19 amends. VI and XIV; Nev. Const., art. 1, sec. 8.
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CONCLUSION

Based on the foregoing, Brian O'Keefe moves this Honorable Court for a ruling permitting him to introduce the evidence requested herein pertaining to the other recent homicide case where blood/breath alcohol was obtained from a homicide suspect who claimed no knowledge of a stabbing incident.

Dated this 2nd day of August, 2010.

PALM LAW FIRM, LTD.



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ORIGINAL

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8 EMAIL: patricia.palmlaw@gmail.com
9 ATTORNEY FOR DEFENDANT O'KEEFE

FILED

AUG 02 2010

John J. Williams
CLERK OF COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

10 STATE OF NEVADA,
11
12 Plaintiff,
13
14 vs.
15 BRIAN K. O'KEEFE,
16 Defendant

Case No.: C250630

Dept. No.: XVII

08C250630
NOTM
No Fee at Motion
875667



**NOTICE OF MOTION AND MOTION BY DEFENDANT O'KEEFE
FOR DISCOVERY**

18 COMES NOW Defendant Brian K. O'Keefe, by and through his attorney,
19 Patricia Palm of Palm Law Firm, Ltd., and hereby moves this Honorable Court
20 for an order granting discovery as requested herein.

21 This Motion is made and based upon the record in this case, including
22 the papers and pleadings on file herein, NRS Chapter 174, the Constitutions of
23 the United States and the State of Nevada, the points and authorities set forth
24

25 ///

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FILED

AUG 02 2010

John J. Williams
CLERK OF COURT

001211

1 herein, and any argument of counsel at the time of the hearing on this Motion.

2 Dated this 2nd day of August, 2010.

3 PALM LAW FIRM LTD.

4 

5 Patricia Palm, Bar No. 6009

6 1212 Casino Center Blvd.

7 Las Vegas, NV 89104

8 (702) 386-9113

9 Attorney for Defendant O'Keefe

10 **NOTICE OF MOTION**

11 TO: THE STATE OF NEVADA, Plaintiff,

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

13 PLEASE TAKE NOTICE that the undersigned will bring on the above and
14 foregoing Motion by Defendant O'Keefe for Discovery on the 12 day of
15 August, 2010 at the hour of 8:15 a.m., or as soon thereafter as counsel
16 can be heard.

17 DATED this 2nd day of August, 2010.

18 PALM LAW FIRM LTD.

19 

20 Patricia Palm, Bar No. 6009

21 1212 Casino Center Blvd.

22 Las Vegas, NV 89104

23 (702) 386-9113

24 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 that witness Cheryl Morris claims were made by O'Keefe, and his demonstration of proficiency at killing with knives, which Morris claims to have witnessed. The Court further ruled that the State could introduce certified copies of O'Keefe's prior Judgment of Conviction for felony domestic battery, involving 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 as a State's witness in that case. 3/16/09 TT 2-10.

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

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

1 did not allege that O'Keefe killed the victim while he was committing an
2 unlawful act and the evidence presented at trial did not support this theory of
3 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
5 court's error in giving this instruction was not harmless because it is not clear
6 beyond a reasonable doubt that a rational juror would have found O'Keefe
7 guilty of second-degree murder absent the error." Id. at 2.

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

9 The parties have been cooperating in discovery; however, in an effort to
10 preserve O'Keefe's rights, including his right to a favorable standard of review
11 on appeal, if any, he is now specifically requesting the discovery items set forth
12 below.

13 DISCOVERY REQUESTED

14 Defendant BRIAN K. O'KEEFE, hereby requests that this Honorable
15 Court order the Clark County District Attorney's Office to supply or make
16 available the following:

17 1. All written, transcribed, or recorded statements, confessions, or
18 admissions made by Defendant to any person, or copies thereof;

19 2. The substance of any other statements made by Defendant which
20 the prosecution intends to use as evidence at the trial of this case, specifically
21 including any conversations or correspondence overheard or intercepted by any
22 jail personnel or other inmates;

23 3. Copies of all tapes and recorded statements from all witnesses and
24 Defendant, as well as copies of the recorded phone calls or jail visits in a
25 format that can be played on cassette or CD or DVD player;

26 4. The most recent names and addresses of all persons who have given
27 written, recorded, video and/ or oral statements or communications in the
28

1 course of this case, including, but not limited to any current addresses for any
2 of the lay witnesses in this case;

3 5. Copies of statements given by any State lay witness on any case,
4 specifically including any reports of said information prepared by any law
5 enforcement agent;

6 6. All reports and results of scientific tests including, but not limited to,
7 complete reports of fingerprint comparisons, DNA and any other scientific
8 analysis of physical evidence, and any records of requests for such testing to be
9 done;

10 7. Any photographs in the State's possession including, but not limited
11 to, all photographs taken of the alleged victim, the scene of the crime, aerial
12 photographs, photo enlargements of latent prints or other evidence, and all
13 photographs the State intends to introduce as evidence;

14 8. Any evidence which would tend to exculpate Defendant including, but
15 not limited to:

16 (a) The most recent names and addresses of any and all witnesses who
17 could provide exculpatory evidence to the defense and are known to the State,
18 though the State does not intend to call them at trial.

19 (b) Current NCICs, Pre-Sentencing and/or Probation reports and any
20 other information or documents in the State's possession or available to the
21 State regarding the background, arrest record (state or federal), criminal record
22 (state and federal), pending criminal actions (state or federal), of the deceased
23 and witnesses in this case. The defense specifically requests that the State be
24 required to check the current NCIC information on its lay witnesses and allow
25 the Defense to view that information;

26 (c) The immigration records of all lay witnesses, if any;
27
28

1 (d) All written or taped statements, correspondence, or memorandum
2 concerning any promise of immunity, any promises of leniency, any
3 suggestions of leniency or immunity, any proposed attempts to influence the
4 court or the District Attorney's office with reference to leniency concerning any
5 witness who is expected to testify at trial, the reference to any case of which all
6 of the persons referred to in this paragraph are, or were, a suspect, if the
7 promises or suggestions, or attempts to influence or leniency related to or were
8 in exchange for, such persons' statements, present or past, against Defendant,
9 the names and addresses of all persons present during any such statements,
10 promises, proposals or attempts to exert influence on behalf of the persons
11 mentioned in this paragraph.

12 9. Copies of all police reports, impound reports, reports regarding the
13 use of force, diagrams, sketches, surveillance tapes, and medical reports in the
14 actual or constructive possession of the District Attorney's Office, the Las
15 Vegas Metropolitan Police Department, the Sheriff's Office, the FBI, and I.C.E.
16 This request includes but is not limited to any reports or records documenting
17 O'Keefe's mental or physical condition, including intoxication, at the time of his
18 arrest and his initial interrogation by homicide detectives. It also includes but
19 is not limited to a copy of the crime scene impound report prepared by CSA
20 Maldonado.

21 AUTHORITIES

22 A trial court has wide discretion in permitting discovery. See, Marshall v.
23 District Court, 79 Nev. 280, 382 P.2d 214 (1963). Pursuant to NRS
24 174.235(1)(a), Defendant O'Keefe is entitled to receive copies of any written or
25 recorded statements, confessions or admissions made by him or any State's
26 witness. That statute states, in part, that the prosecuting attorney shall permit
27 the defendant to inspect, copy or photograph any
28

1 [w]ritten or recorded statements or confessions made by the
2 Defendant, or any written or recorded statements made by a
3 witness the prosecuting attorney intends to call during the case in
4 chief of the State, or copies thereof, within the possession, custody
5 or control of the State, the existence of which is known, or by the
6 exercise of due diligence may become known, to the prosecuting
7 attorney

8 O'Keefe submits knowledge of any oral statements is as critical as
9 knowledge of written statements in preparing an adequate defense.
10 Fundamental fairness and the absence of any compelling reason for non-
11 disclosure require revelation of any oral statements made by the defendant
12 which the prosecution intends to introduce in its case in chief. State v.
13 Johnson, 28 N.J. 133, 145 A.2d 313 (1958), cited in ABA Standards for
14 Criminal Justice - Discovery and Procedure Before Trial, p. 258.

15 Additionally, constitutional due process guarantees under the Fifth and
16 Fourteenth Amendments of the United States Constitution, as well as pursuant
17 to the Nevada Constitution, article 1, section 8, require the State to provide a
18 criminal defendant with discovery to include all exculpatory evidence in its
19 possession. See generally Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194
20 (1963); Roberts v. State, 110 Nev. 1121, 1133, 881 P.2d 1, 8 (1994)
21 (recognizing that state and federal constitutional due process requires
22 disclosure by the prosecution of evidence that would enable effective cross-
23 examination and impeachment). The State must disclose evidence "if it
24 provides grounds for the defense to attack reliability, thoroughness, and good
25 faith of the police investigation, to impeach credibility of the state's witnesses,
26 or to bolster the defense case against prosecutorial attacks[.]" and this
27 obligation is not limited to evidence that will be admissible at trial. Mazzan v.
28 Warden, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000) (citing Kyles v. Whitley, 514
U.S. 419, 442 n.13, 445-51, 115 S. Ct. 1555 (1995)). Furthermore, the State's

1 attorney is charged with constructive knowledge and possession of evidence
2 held by other state agents, including law enforcement officers. Id.

3 The defense is also relying on the Clark County District Attorney's Office
4 to honor its open file policy and provide access to all exculpatory as well as
5 inculpatory information and evidence related to the government's case against
6 him. "A prosecutor, as an agent of the State, is held to a high ethical standard
7 and must abide by the promises he makes." McKee v. State, 112 Nev. 642,
8 644, 917 P.2d 940, 944 (1996) (reversing a judgment of conviction based on
9 prosecutorial misconduct where the prosecutor did not make available all
10 relevant inculpatory and exculpatory evidence consistent with the county
11 district attorney's open file policy); see also Furbay v. State, 116 Nev. 481, 998
12 P.2d 553 (2000) (discussing prosecution's duty to provide all evidence in its
13 possession where it has promised to do so).

14 Together, NRS 174.235, Brady and its progeny, and the District
15 Attorney's open file policy require that the State provide the information
16 requested as to any statements and other information as to any witnesses,
17 regardless of whether the State intends to call them as witnesses and whether
18 the evidence is inculpatory or exculpatory. Witnesses known to the State but
19 not called by the State could prove to have exculpatory evidence which should
20 be made available to the defense. No legitimate interest could be served by
21 precluding the defense from calling such witnesses for trial, and their identity
22 should accordingly be made known. United States v. Elev, 335 F. Supp. 353
23 (N.D. Ga. 1972); United States v. Houston, 339 F. Supp. 762 (N.D. GA 1972).

24 Similarly, O'Keefe is entitled to access to any reports and results of
25 scientific testing or analysis of the physical evidence in this case. Specifically,
26 NRS 174.235(1)(b) requires the prosecuting attorney to provide access to
27 "[r]esults or reports of physical or mental examinations, scientific tests or
28

1 scientific experiments made in connection with the particular case, or copies
2 thereof, within the possession, custody or control of the State, the existence of
3 which is known, or by the exercise of due diligence may become known to the
4 prosecuting attorney." See also NRS 174.234(2) (addressing notice
5 requirements related to expert witnesses). This evidence would also be subject
6 to disclosure under Brady as well as the District Attorney's open file policy.

7 Disclosure of any photographs or other police reports or records made in
8 investigating the alleged crime is required pursuant to Brady, the District
9 Attorney's open file policy, and NRS 174.235(1)(c), requiring that the State
10 allow inspection of "[b]ooks, papers, documents, tangible objects, or copies
11 thereof, which the prosecuting attorney intends to introduce during the case in
12 chief of the State and which are within the possession, custody or control of the
13 State, the existence of which is known or by the exercise of due diligence may
14 become known, to the prosecuting attorney."

15 CONCLUSION

16 Defendant O'Keefe respectfully requests that this Court order the State to
17 produce the above-requested discovery within a reasonable time so that
18 O'Keefe may present an effective defense at trial.

19 DATED this 2nd day of August, 2010.

20
21 PALM LAW FIRM LTD.

22 

23 Patricia Palm, Bar No. 6009
24 1212 Casino Center Blvd.
25 Las Vegas, NV 89104
26 (702) 386-9113
27 Attorney for Defendant O'Keefe
28

ORIGINAL

FILED

AUG 02 2010

John J. [Signature]
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

DEPT NO. XVII

DATE:

TIME:

ESC250630
NOTM
Notice of Motion
879674



**NOTICE OF MOTION AND MOTION BY DEFENDANT O'KEEFE FOR
EVIDENTIARY HEARING ON WHETHER THE STATE AND CCDC HAVE
COMPLIED WITH THEIR OBLIGATIONS WITH RESPECT TO THE
RECORDING OF A JAIL VISIT BETWEEN O'KEEFE AND STATE WITNESS
CHERYL MORRIS**

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 granting an evidentiary hearing date to address the issues of the
existence of a recording of the CCDC visit between witness Cheryl Morris and
Defendant O'Keefe, which has been denied by CCDC's Custodian of Records,
and whether the State has complied with its discovery obligations and CCDC
has complied with its obligations pursuant to NRS 174.235-.385 with respect
to this visit.

This Motion is made and based upon the record in this case, including
the papers and pleadings on file herein, NRS Chapter 174, the Constitutions of
the United States and the State of Nevada, the points and authorities set forth

FILED

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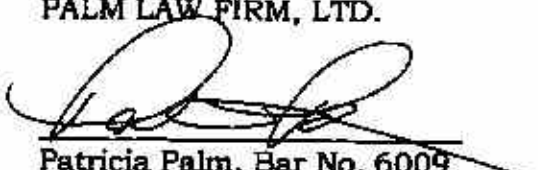
John J. [Signature]
CLERK OF COURT

001220

1 below, the attached declaration of counsel, and any argument of counsel at the
2 time of the hearing on this Motion.
3

4 Dated this 2nd day of August, 2010.

PALM LAW FIRM, LTD.

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


13 **NOTICE OF MOTION**

14 TO: STATE OF NEVADA, Plaintiff; and
15 TO: DAVID ROGER, District Attorney, Attorney for Plaintiff

16 YOU WILL PLEASE TAKE NOTICE that the undersigned will bring on the
17 above and foregoing **NOTICE OF MOTION AND MOTION BY DEFENDANT**
18 **O'KEEFE FOR EVIDENTIARY HEARING ON WHETHER THE STATE AND**
19 **CCDC HAVE COMPLIED WITH THEIR OBLIGATIONS WITH RESPECT TO**
20 **THE RECORDING OF A JAIL VISIT BETWEEN OKEEFE AND STATE**
21 **WITNESS CHERYL MORRIS** on the 12 day of August, 2010, at the hour
22 of 8:15 m., in Department No. XVII of the above-entitled Court, or as soon
23 thereafter as counsel may be heard.

24 DATED this 2nd day of August, 2010.

PALM LAW FIRM, LTD.

25 
26 Patricia Palm, Bar No. 6009
27 1212 Casino Center Blvd.
28 Las Vegas, NV 89104
Phone: (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 that witness Cheryl Morris claims were made by O'Keefe, and his demonstration of proficiency at killing with knives, which Morris claims to have witnessed. The Court further ruled that the State could introduce certified copies of O'Keefe's prior Judgment of Conviction for felony domestic battery, involving 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 as a State's witness in that case. 3/16/09 TT 2-10.

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

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

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 interviewed him at 1:20 a.m., at which time he was crying, raising his voice,
11 talking to himself, and slurring. Detective Wildemann stated that during the
12 interview O'Keefe smelled heavily of alcohol, and when police took photographs
13 of him at about 3:55 a.m., they had to hold him upright to steady him.
14 3/18/09 TT 146-49. Wildemann said it was pretty obvious that O'Keefe had
15 been drinking, however, law enforcement did not obtain a test for his breath or
16 blood alcohol level either before or after the interview. 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 This motion is made under the authorities providing for a defendant's
10 rights to effective representation by counsel and due process of law, including
11 the right to discovery of evidence that may enable effective cross-examination
12 and impeachment of a government witness. See Brady v. Maryland, 373 U.S.
13 83 (1963), 83 S. Ct. 1194; Giles v. Maryland, 386 U.S. 66, 87 S. Ct. 793 (1967);
14 Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555 (1995); United States v. Pitt,
15 717 F.2d 1334 (11th Cir. 1983); Jimenez v. State, 112 Nev. 610, 918 P.2d 687
16 (1996); Roberts v. State, 110 Nev. 1121, 1133, 881 P.2d 1, 8 (1994). See also
17 Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105 (1974) (recognizing that denial of
18 the right to effective cross-examination is constitutional error of the first
19 magnitude); U.S. Const. amend. V, VI, XIV; Nev. Const. art. I, sec. 8.

20 This motion is also based upon NRS Chapter 174. Pursuant to NRS
21 174.335, and 174.385, a criminal defendant has the right to subpoena
22 documents and objects, and a party who does not comply with such a subpoena
23 may be held in contempt. Pursuant to NRS 174.235(1)(a), a criminal defendant
24 is also entitled to receive copies of any written or recorded statements,
25 confessions or admissions made by him or any State's witness. That statute
26 states, in part, that the prosecuting attorney shall permit the defendant to
27 inspect, copy or photograph any
28

1 [w]ritten or recorded statements or confessions made by the
2 Defendant, or any written or recorded statements made by a
3 witness the prosecuting attorney intends to call during the case in
4 chief of the State, or copies thereof, within the possession, custody
5 or control of the State, the existence of which is known, or by the
6 exercise of due diligence may become known, to the prosecuting
7 attorney.

8 Additionally, constitutional due process guarantees under the Fifth and
9 Fourteenth Amendments of the United States Constitution, as well as pursuant
10 to the Nevada Constitution, article 1, section 8, require the State to provide a
11 criminal defendant with discovery to include all exculpatory evidence in its
12 possession. See generally Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194
13 (1963); Roberts v. State, 110 Nev. 1121, 1133, 881 P.2d 1, 8 (1994)
14 (recognizing that state and federal constitutional due process requires
15 disclosure by the prosecution of evidence that would enable effective cross-
16 examination and impeachment). The State must disclose evidence "if it
17 provides grounds for the defense to attack reliability, thoroughness, and good
18 faith of the police investigation, to impeach credibility of the state's witnesses,
19 or to bolster the defense case against prosecutorial attacks[.]" and this
20 obligation is not limited to evidence that will be admissible at trial. Mazzan v.
21 Warden, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000) (citing Kyles v. Whitley, 514
22 U.S. 419, 442 n.13, 445-51, 115 S. Ct. 1555 (1995)). Furthermore, the State's
23 attorney is charged with constructive knowledge and possession of evidence
24 held by other state agents, including law enforcement officers. Id.

25 Witness Cheryl Morris is a crucial witness for the State. She has testified
26 regarding O'Keefe's alleged threat toward Whitmarsh and his alleged
27 demonstration of how he would kill someone with a knife. She also testified
28 regarding a CCDC visit with O'Keefe on December 6, 2008, which was after she
had contacted homicide detectives to volunteer information about O'Keefe. She
testified that O'Keefe gave to her an account of the events leading to

1 Whitmarsh's death, which was inconsistent with his own trial testimony
2 regarding the incident. O'Keefe contends that Morris gave false testimony as to
3 all of the above matters, and he desires to impeach her testimony by showing a
4 recording of the December 6, 2008 CCDC visit. O'Keefe has been unsuccessful
5 in his attempts to obtain a recording of that CCDC visit.

6 O'Keefe's counsel met with Deputy District Attorney Graham on July 30,
7 2010, and Graham's file did not contain any copies of a recording of the jail
8 visit. O'Keefe has subpoenaed a recording of that visit from CCDC, and
9 obtained the vague response that "under normal circumstances our INTEL
10 section does not record normal visiting conversations." See Exh. A (attached
11 hereto). However, when O'Keefe himself sent inmate kites in an attempt to
12 locate the recording, he was told that all visits are saved for 99 years. See Exh.

13 B. These inconsistent responses have caused O'Keefe anxiety concerning
14 whether yet another discoverable and exculpatory item is being withheld from
15 him.

16 Thus, in order to effectively prepare for trial, and ascertain whether the
17 State has complied with its discovery obligations and whether CCDC has used
18 due diligence in its effort to respond to O'Keefe's subpoena, O'Keefe requests an
19 evidentiary hearing be set so that he may question CCDC's Custodian of
20 Records and/or INTEL section on the issues of: their diligence used to locate the
21 recording in response to O'Keefe's subpoena; whether anyone decided or
22 directed that the visit would not be recorded; whether they confirmed that the
23 visit was not recorded; whether if recorded, it was subsequently destroyed or
24 not preserved; and, what are the policies on recording and retention of
25 recordings of inmate social visits when a murder case is pending.

27 ///

28 ///

1
2 CONCLUSION

3 O'Keefe respectfully requests that this Honorable Court grant him an
4 evidentiary hearing prior to trial, so that he may question under oath CCDC's
5 Custodian of Records and/or Intel Division Custodian regarding the above
6 matters.

7 DATED this 2nd day of August, 2010.

8 PALM LAW FIRM, LTD.
9

10 
11

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

19 DECLARATION OF PATRICIA PALM

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

22 1. That I am an attorney duly licensed to practice law in the State of
23 Nevada and am counsel for Defendant Brian K. O'Keefe.

24 2. That I have read and am familiar with the discovery provided by the
25 State and other records related to this matter, and that I have set forth true
26 and accurate factual representations as to the contents of that discovery and
27 those records.
28

EXHIBIT A

001232

Visitors

ID Number : '%1447732%', Start Date : '19-NOV-2008', End Date : '27-JAN-2009'

27-JAN-09

	ID Number	Living Unit	Inmate Last Name	Inmate First Name	Start Date & Time	Visit Type	Rel Type	Visitor Last Name	Visitor First Name	Visitor Middle Name
1	0001447732	LVMPD-NT-7A-24-L	OKEEFE	BRIAN	20-Nov-08 09:30:00	LEG	ATT	ROSALES	MARIBEL	NULL
2	0001447732	LVMPD-NT-7A-24-L	OKEEFE	BRIAN	20-Nov-08 09:30:00	LEG	INV	ROSALES	MARIBEL	NULL
3	0001447732	LVMPD-NT-7A-24-L	OKEEFE	BRIAN	20-Nov-08 09:30:00	LEG	O	ROSALES	MARIBEL	NULL
4	0001447732	LVMPD-NT-7A-24-L	OKEEFE	BRIAN	20-Nov-08 09:30:00	LEG	PD	ROSALES	MARIBEL	NULL
5	0001447732	LVMPD-NT-7A-24-L	OKEEFE	BRIAN	01-Dec-08 14:09:00	LEG	ATT	PIKE	RANDALL	NULL
6	0001447732	LVMPD-NT-7A-24-L	OKEEFE	BRIAN	01-Dec-08 14:09:00	LEG	O	PIKE	RANDALL	NULL
7	0001447732	LVMPD-NT-7A-24-L	OKEEFE	BRIAN	01-Dec-08 14:09:00	LEG	PD	PIKE	RANDALL	NULL
8	0001447732	LVMPD-NT-7A-24-L	OKEEFE	BRIAN	01-Dec-08 14:09:00	LEG	PP	PIKE	RANDALL	NULL
9	0001447732	LVMPD-NT-7A-24-L	OKEEFE	BRIAN	01-Dec-08 14:09:00	LEG	ATT	PALM	PATRICIA	NULL
10	0001447732	LVMPD-NT-7A-24-L	OKEEFE	BRIAN	01-Dec-08 14:09:00	LEG	PD	PALM	PATRICIA	NULL
11	0001447732	LVMPD-NT-7A-24-L	OKEEFE	BRIAN	01-Dec-08 14:09:00	LEG	PP	PALM	PATRICIA	NULL
12	0001447732	LVMPD-NT-7A-24-L	OKEEFE	BRIAN	01-Dec-08 14:09:00	LEG	ATT	PEREZ	JOSEPH	NULL
13	0001447732	LVMPD-NT-7A-24-L	OKEEFE	BRIAN	01-Dec-08 14:09:00	LEG	INV	PEREZ	JOSEPH	NULL
14	0001447732	LVMPD-NT-7A-24-L	OKEEFE	BRIAN	01-Dec-08 14:09:00	LEG	O	PEREZ	JOSEPH	NULL
15	0001447732	LVMPD-NT-7A-24-L	OKEEFE	BRIAN	01-Dec-08 14:09:00	LEG	PD	PEREZ	JOSEPH	NULL
16	0001447732	LVMPD-NT-7A-24-L	OKEEFE	BRIAN	04-Dec-08 15:07:00	LEG	ATT	ROSALES	MARIBEL	NULL
17	0001447732	LVMPD-NT-7A-24-L	OKEEFE	BRIAN	04-Dec-08 15:07:00	LEG	INV	ROSALES	MARIBEL	NULL
18	0001447732	LVMPD-NT-7A-24-L	OKEEFE	BRIAN	04-Dec-08 15:07:00	LEG	O	ROSALES	MARIBEL	NULL
19	0001447732	LVMPD-NT-7A-24-L	OKEEFE	BRIAN	04-Dec-08 15:07:00	LEG	PD	ROSALES	MARIBEL	NULL
20	0001447732	LVMPD-NT-7A-24-L	OKEEFE	BRIAN	08-Dec-08 21:30:00	SOC	FR	MORRIS	CHERYL	NULL
21	0001447732	LVMPD-NT-7A-24-L	OKEEFE	BRIAN	08-Dec-08 14:35:00	LEG	ATT	PIKE	RANDALL	NULL
22	0001447732	LVMPD-NT-7A-24-L	OKEEFE	BRIAN	08-Dec-08 14:35:00	LEG	O	PIKE	RANDALL	NULL
23	0001447732	LVMPD-NT-7A-24-L	OKEEFE	BRIAN	08-Dec-08 14:35:00	LEG	PD	PIKE	RANDALL	NULL
24	0001447732	LVMPD-NT-7A-24-L	OKEEFE	BRIAN	08-Dec-08 14:35:00	LEG	PP	PIKE	RANDALL	NULL
25	0001447732	LVMPD-NT-7A-24-L	OKEEFE	BRIAN	08-Dec-08 14:35:00	LEG	ATT	ROSALES	MARIBEL	NULL
26	0001447732	LVMPD-NT-7A-24-L	OKEEFE	BRIAN	08-Dec-08 14:35:00	LEG	INV	ROSALES	MARIBEL	NULL
27	0001447732	LVMPD-NT-7A-24-L	OKEEFE	BRIAN	08-Dec-08 14:35:00	LEG	O	ROSALES	MARIBEL	NULL
28	0001447732	LVMPD-NT-7A-24-L	OKEEFE	BRIAN	08-Dec-08 14:35:00	LEG	PD	ROSALES	MARIBEL	NULL
29	0001447732	LVMPD-NT-7A-24-L	OKEEFE	BRIAN	08-Dec-08 14:35:00	LEG	ATT	PALM	PATRICIA	NULL
30	0001447732	LVMPD-NT-7A-24-L	OKEEFE	BRIAN	08-Dec-08 14:35:00	LEG	PD	PALM	PATRICIA	NULL
31	0001447732	LVMPD-NT-7A-24-L	OKEEFE	BRIAN	08-Dec-08 14:35:00	LEG	PP	PALM	PATRICIA	NULL
32	0001447732	LVMPD-NT-7A-24-L	OKEEFE	BRIAN	12-Dec-08 09:30:00	LEG	ATT	PIKE	RANDALL	NULL
33	0001447732	LVMPD-NT-7A-24-L	OKEEFE	BRIAN	12-Dec-08 09:30:00	LEG	O	PIKE	RANDALL	NULL
34	0001447732	LVMPD-NT-7A-24-L	OKEEFE	BRIAN	12-Dec-08 09:30:00	LEG	PD	PIKE	RANDALL	NULL
35	0001447732	LVMPD-NT-7A-24-L	OKEEFE	BRIAN	12-Dec-08 09:30:00	LEG	PP	PIKE	RANDALL	NULL
36	0001447732	LVMPD-NT-7A-24-L	OKEEFE	BRIAN	12-Dec-08 09:30:00	LEG	ATT	PALM	PATRICIA	NULL
37	0001447732	LVMPD-NT-7A-24-L	OKEEFE	BRIAN	12-Dec-08 09:30:00	LEG	PD	PALM	PATRICIA	NULL
38	0001447732	LVMPD-NT-7A-24-L	OKEEFE	BRIAN	12-Dec-08 09:30:00	LEG	PP	PALM	PATRICIA	NULL
39	0001447732	LVMPD-NT-7A-24-L	OKEEFE	BRIAN	12-Dec-08 09:30:00	LEG	ATT	PEREZ	JOSEPH	NULL
40	0001447732	LVMPD-NT-7A-24-L	OKEEFE	BRIAN	12-Dec-08 09:30:00	LEG	INV	PEREZ	JOSEPH	NULL
41	0001447732	LVMPD-NT-7A-24-L	OKEEFE	BRIAN	12-Dec-08 09:30:00	LEG	O	PEREZ	JOSEPH	NULL



LAS VEGAS METROPOLITAN
POLICE DEPARTMENT

DOUGLAS C. GILLESPIE, Sheriff

Partners with the Community

July 15, 2010

Patricia Palm, Esq.
Palm Law Firm
1212 Casino Center Blvd
Las Vegas, NV 89104

Re: Subpoena for Records
Case # C250630 O'Keefe, Brian K. ID# 1447732

Dear Ms. Patricia Palm,

The Clark County Detention Center Records Bureau is in receipt of your subpoena for production of, *"and/all video/audio/other recordings of the social visit between Cheryl Morris and CCDC Inmate Brian O'Keefe, #0001447732, which occurred on or about December 6, 2008"*.

Your subpoena is requesting "video/audio recordings" of your client's social visit. Although, the Detention Center gives notice that a visiting phone conversation may be recorded, under normal circumstances our INTEL Section does not record normal visiting conversations.

Sincerely,

DOUGLAS C. GILLESPIE, SHERIFF

BY: CAROL DALY, SR LEST
DSD RECORDS BUREAU

cc: Maria Lavell
Deputy District Attorney

CCDC Intel Section

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

vs. Plaintiff,

O'Keefe, Brian K.
#0001447732

Defendant.

CASE NO. C250630
DEPT NO. XVII

SUBPOENA

☐ Regular ☒ Duces Tecum

THE STATE OF NEVADA SENDS GREETINGS TO:

CLARK COUNTY DETENTION CENTER
CUSTODIAN OF RECORDS
BEVERLY AMIN
330 SOUTH CASINO CENTER BLVD
LAS VEGAS, NV 89101
(702) 671-5925

YOU ARE HEREBY DEMANDED, that all and singular business and excuses set aside, you furnish to Palm Law Firm, Ltd., 1212 Casino Center Blvd., Las Vegas, Nevada 89104, by August 1, 2010 the following items:

*****ANY/ALL VIDEO/AUDIO/OTHER RECORDINGS OF THE SOCIAL VISIT BETWEEN
CHERYL MORRIS AND CCDC INMATE BRIAN O'KEEFE, #0001447732, WHICH
OCCURRED ON OR ABOUT DECEMBER 6, 2008*****

If you fail to comply you will be deemed guilty of Contempt of Court and liable to pay all losses and damages caused by your failure to appear and in addition forfeit One Hundred Dollars (\$100.00).

DATED this 13th of July, 2010.

PALM LAW FIRM, LTD.

By: 

PATRICIA PALM, ESQ.
Attorney for Brian O'Keefe
State Bar # 6009
(702) 366-9113

AFFIDAVIT OF SERVICE

being duly sworn says: That at all time herein Affiant was over 18 years of age, not a party to or interested in the proceeding in which this Affidavit is made. That Affiant received the subpoena on the _____ day of _____, 2010, and served the same on the _____ day of _____, 2010 by delivering a copy to the witness at _____.

Signature of Affiant

PLEASE CONTACT INVESTIGATOR SKYE CAMPBELL at 702-338-4854 WHEN READY FOR PICKUP.

001235

EXHIBIT B

001236

501
VISITATION
RECORD

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
INMATE REQUEST/GRIEVANCE

Name: (last) <u>O'KEEFE</u> (first) <u>BRIAN</u> (middle initial) <u>R</u> Floor <u>7</u>			Date <u>4-4-09</u>
<input checked="" type="checkbox"/> REQUEST <input type="checkbox"/> GRIEVANCE			Housing Unit <u>A</u> Bed <u>24L</u>
ID Number <u>1447732</u>			Prop Number <u>S1166</u>

(All grievances must be submitted within 72 hours of incident.)

IS THERE A STATUTE OF LIMITATIONS ON
INMATES WHO RECEIVE VISITS? HOW
LONG ARE TELEPHONE VISITS SAVED FOR?
INMATE RECEIVED VISIT FROM HIS OLD GIRLFRIEND
WE HAD FINANCED A "NEW" VEHICLE TOGETHER
SHE WANTED TO TAKE OVER MY ACCOUNTS.

ON THE VISITATION CARD PRINTOUT RECEIVED

FROM ATTORNEY SHOWS VIDEO TYPED (TELEPHONE)

BELOW DATE/TIME OF 12/06/12 VISITOR LAST FIRST

NAME MORRIS, CHERYL BORN IN ETC ETC

RELATIONSHIP MARKED (FRIEND), IDENTIFICATION MARKED

(DRIVERS LICENSE) SAVE HIGHLIGHTED TO THE LEFT

AND UNDER WHERE IT'S MARKED FRIENDS EMPLOYEE'S CARD

IT'S MINE (COMMENT: MY NAME

ARE ALL VISITS SAVED

D. E. O'K. 4-4-09 FRASER 4/4/09

Inmate's Signature Date Staff Person Receiving Date/Time

Issue has been resolved as follows: yes - 99 years

Signature of employee who resolved the Request/Grievance Problem 56820 4/11/09 0708

Signature of employee who resolved the Request/Grievance Problem Date/Time

ORIGINAL--INMATE FILE YELLOW--RETURNED TO INMATE WITH RESPONSE PINK--INMATE KEEPS

RECORDS

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
INMATE REQUEST/GRIEVANCE

7A242

Name (Last)	Name (First)	Name (Middle Initial)	Room	Date	Housing Unit	Bed
D'KEEFE	BRIAN	K	7	APRIL 19, 2009	A	2A2
<input checked="" type="checkbox"/> REQUEST <input type="checkbox"/> GRIEVANCE <small>(All grievances must be submitted within 72 hours of incident.)</small>				ID Number	Prog Number	
				1447732	S-166	

INITIAL WITH PAGE # L56820 RESOLVED

AM REQUEST FOR INMATE CONCERNING

VIDEO VISITS. OFFICER VERIFIED THAT

IN FACT ALL VIDEO-AUDIO RECORDINGS

ARE RECORDED UNDER THE STATUTE OF

LIMITATIONS ARE SAVED FOR 99 YRS

WHO/HOW WOULD INMATE CONTACT TO

AND OR IN REQUESTING A COPY OF

RECORDED VISITATION THRU DSD RECORDS BUREAU

OF THE C.C.D.C. DESS. YES & YES

ANY COSTS?

Inmate's Signature

Date

Staff Person Receiving

Date/Time

Issue has been resolved as follows:

ADDRESS A KITE TO DSD INTELL

Signature of employee who resolved the Request/Grievance Problem

Date/Time

ORIGINAL-INMATE FILE

YELLOW-RETURNED TO INMATE WITH RESPONSE

PINK-INMATE KEEPS

001238

DSD
RECORDS

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
INMATE REQUEST/GRIEVANCE

NT SA 29

Name: (Last) O'KEEFE (First) BRIAN (Middle Initial) KERRY	Floor 5	Date JUNE 16, 2010
<input checked="" type="checkbox"/> REQUEST <input type="checkbox"/> GRIEVANCE	ID Number 1447732	Housing Unit A Bed 29
(All grievances must be submitted within 72 hours of incident.)		Prison Number

WHEN INMATES RECEIVE VISITS IS IT
NOT TRUE OF THE FOLLOWING ?

- 1.) ALL VISITS ARE SAVED. ?
- 2.) PER STATUTE RETENTION PERIOD
OF SAVED AND OR RECORDED
VISITS IS 99 YRS. ?

ALSO, WHEN KEY WORDS SUCH AS
DEATH, KILL, STAB, SHOOT, MURDER
ETC, ETC, ARE SPOKEN OR DISCUSSED
IT'S A TRIGGER FOR RECORDING

SINCERELY BLESS YOU & YOURS /

Inmate's Signature **Ben L. O'Keefe** Date **6-16-10** Staff Person Receiving **M. Galvin** #9476 Date/Time **06/16/10**

Issue has been resolved as follows:

All visits are saved.
Out retention is 99 yrs.
Any conversation can be recorded.

Signature of employee who resolved the Request/Grievance Problem

Date/Time **06/17/10**

ORIGINAL--INMATE FILE

YELLOW--RETURNED TO INMATE WITH RESPONSE

PINK--INMATE KEEPS

001239

ORIGINAL

FILED

Aug 2 2 15 PM '10

CLERK COURT

ROC
PALM LAW FIRM, LTD.
PATRICIA PALM, ESQ.
NEVADA BAR NO. 6009
1212 CASINO CENTER BLVD.
LAS VEGAS, NV 89104
Phone: (702) 386-9113
Fax: (702) 386-9114
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:

C250630
ROC
Receipt of Copy
676666



RECEIPT OF COPY

I, the undersigned, acknowledge that on this 2 day of August 2010, I received a true copy of the **NOTICE OF MOTION AND MOTION BY DEFENDANT O'KEEFE FOR DISCOVERY.**

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

By: Kayonda Hild

ORIGINAL

FILED

AUG 2 2 16 PM '10

CLERK COURT

1 ROC
2 PALM LAW FIRM, LTD.
3 PATRICIA PALM, ESQ.
4 NEVADA BAR NO. 6009
5 1212 CASINO CENTER BLVD.
6 LAS VEGAS, NV 89104
7 Phone: (702) 386-9113
8 Fax: (702) 386-9114
9 Email: Patricia.palm@law@gmail.com
10 Attorney for Brian O'Keefe

DISTRICT COURT
CLARK COUNTY, NEVADA

9 STATE OF NEVADA,

10 Plaintiff,

11 vs.

12 BRIAN K. O'KEEFE,

13 Defendant.

CASE NO: C250630

DEPT NO. XVII

DATE:

TIME:

DOC250630
RDC
Receipt of Copy
876667



14
15
16 RECEIPT OF COPY

17 I, the undersigned, acknowledge that on this 2 day of August
18 2010, I received a true copy of the **NOTICE OF MOTION AND MOTION**
19 **BY DEFENDANT O'KEEFE FOR EVIDENTIARY HEARING ON WHETHER**
20 **THE STATE AND CCDC HAVE COMPLIED WITH THEIR OBLIGATIONS**
21 **WITH RESPECT TO THE RECORDING OF A JAIL VISIT BETWEEN O'KEEFE**
22 **AND STATE WITNESS CHERYL MORRIS.**

23
24 **COUNTY DISTRICT ATTORNEY**
25 **200 Lewis Ave., 3rd Floor**
26 **Las Vegas, NV 89155**

27 By: *Kassandra [Signature]*
28

1 ROC
2 PALM LAW FIRM, LTD.
3 PATRICIA PALM, ESQ.
4 NEVADA BAR NO. 6009
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 Brian O'Keefe

11
12 DISTRICT COURT
13 CLARK COUNTY, NEVADA

14 STATE OF NEVADA,
15
16 Plaintiff,

17 vs.

18 BRIAN K. O'KEEFE,
19
20 Defendant.

CASE NO: C250630

DEPT NO. XVII

DATE:

TIME:

08250630
ROC
Receipt of Copy
875599



21
22 **RECEIPT OF COPY**

23 I, the undersigned, acknowledge that on this 2 day of August
24 2010, I received a true copy of the **NOTICE OF MOTION AND MOTION**
25 **BY DEFENDANT O'KEEFE TO ADMIT EVIDENCE SHOWING LVMPD**
26 **HOMICIDE DETECTIVES HAVE PRESERVED BLOOD/BREATH ALCOHOL**
27 **EVIDENCE IN ANOTHER RECENT CASE.**

28
COUNTY DISTRICT ATTORNEY
200 Lewis Ave., 3rd Floor
Las Vegas, NV 89155

By: Kassandra [Signature]

FILED

AUG 2 2 15 PM '10

CLERK COURT

ORIGINAL

FILED

Aug 2 2 15 PM '10

CLERK
COURT

1 ROC
2 PALM LAW FIRM, LTD.
3 PATRICIA PALM, ESQ.
4 NEVADA BAR NO. 6009
5 1212 CASINO CENTER BLVD.
6 LAS VEGAS, NV 89104
7 Phone: (702) 386-9113
8 Fax: (702) 386-9114
9 Email: Patricia.palm@law.com
10 Attorney for Brian O'Keefe

7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

9 STATE OF NEVADA,

10 Plaintiff,

11 vs.

12 BRIAN K. O'KEEFE,

13 Defendant.

CASE NO: C250630

DEPT NO. XVII

DATE:

TIME:

88266830
ROC
Receipt of Copy
875802



14
15
16 **RECEIPT OF COPY**

17 I, the undersigned, acknowledge that on this 2 day of August
18 2010, I received a true copy of the **NOTICE OF MOTION AND MOTION**
19 **BY DEFENDANT O'KEEFE TO SUPPRESS HIS STATEMENTS TO POLICE,**
20 **OR, ALTERNATIVELY, TO PRECLUDE THE STATE FROM INTRODUCING**
21 **PORTIONS OF HIS INTERROGATION.**

22
23 **COUNTY DISTRICT ATTORNEY**
24 **200 Lewis Ave., 3rd Floor**
25 **Las Vegas, NV 89155**

26 By: *Kenneth A. Nelson*


CLERK OF THE COURT

1 **OPPS**
2 **DAVID ROGER**
3 Clark County District Attorney
4 Nevada Bar #002781
5 **CHRISTOPHER J. LALLI**
6 Chief Deputy District Attorney
7 Nevada Bar #005398
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 christopher.lalli@ccdanv.com
12 Attorney for Plaintiff
13

8 DISTRICT COURT
9 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,)
10)
11 Plaintiff,)

11 -vs-

12 BRIAN K. O'KEEFE)

13 Defendant.)

Case No: C-08-250630-1

Dept. No: XVII

Date: August 12, 2010
Time: 8:15 a.m.

14 **STATE'S OPPOSITION TO MOTION FOR EVIDENTIARY**
15 **HEARING ON WHETHER THE STATE AND CCDC HAVE**
16 **COMPLIED WITH THEIR OBLIGATIONS WITH RESPECT TO**
17 **THE RECORDING OF A JAIL VISIT BETWEEN O'KEEFE AND**
18 **STATE WITNESS CHERYL MORRIS**

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

22 DATED this 10th day of May, 2014.

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

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

1 **DECLARATION OF CHRISTOPHER J. LALLI**

2 CHRISTOPHER J. LALLI makes the following Declaration:

3 1. Declarant is an attorney, duly licensed to practice law in the State of Nevada
4 and is a Chief Deputy District Attorney in and for the County of Clark, State of Nevada.
5 Declarant has been assigned the prosecution of *State of Nevada v. Brian K. O'Keefe*, Case
6 No. C250630, and is familiar with the facts and circumstances of the said case.

7 2. That upon reviewing the Defendant's Motion for Evidentiary Hearing on
8 Whether the State and CCDC have Complied with their Obligations with Respect to the
9 Recording of a Jail Visit Between O'Keefe and State Witness Cheryl Morris, Declarant
10 contacted Detective Robert Foster, a Corrections Officer in the Intelligence Unit at the Clark
11 County Detention Center (CCDC).

12 3. Declarant inquired of Detective Foster whether CCDC was in possession of a
13 video and/or audio recording of a social visit between the Defendant and Cheryl Morris
14 which occurred on December 6, 2008, at 21:30 hours. Declarant was informed that, at that
15 time, Metro's Technical and Surveillance Section (TASS) was responsible for activating the
16 recording equipment in the visiting kiosks. The recording equipment would only be
17 activated if there was a specific request made by either CCDC's Intelligence Unit or by an
18 investigating detective. Declarant was further informed that both CCDC and TASS kept
19 records of any such requests.

20 4. Declarant asked Detective Foster to check CCDC records to determine whether
21 there was a request made to record the above-referenced social visit between the Defendant
22 and Morris. After reviewing the records, Detective Foster indicated that he found no such
23 request.

24 5. Declarant then contacted Detective Michael Correia with Metro's Technical
25 and Surveillance Section. Detective Correia confirmed the information provided by
26 Detective Foster with respect to TASS being responsible for conducting the recordings at
27 that time and that recordings were only made upon specific request. Declarant asked
28 Detective Correia to check TASS records to determine whether there was a request made to

1 record the above-referenced social visit between the Defendant and Morris. After reviewing
2 the records, Detective Correia indicated that he found no such request.

3 6. Declarant submits an evidentiary hearing would confirm the foregoing and
4 would, therefore, be unwarranted. The visit between the Defendant and Morris was never
5 recorded. Nor was there any obligation by the State to record the visit. The Defendant's
6 Motion should be denied.

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

8 DATED this 10th day of August, 2010.

9
10 /s/ Christopher J. Lalli
11 CHRISTOPHER J. LALLI
12

13
14 CERTIFICATE OF FACSIMILE TRANSMISSION

15 I hereby certify that service of the above and foregoing was made this 10th day of
16 August, 2010, by facsimile transmission to:

17 PATRICIA PALM, ESQ.
18 FAX: (702) 386-9114

19 BY: /s/ Jennifer Georges
20 Secretary for the District Attorney's Office
21
22
23
24
25
26
27
28

User ID: GEORGJE

=====

TO: Name: Patricia Palm, Esq.

Company:

Fax Phone Number: (702) 386-9114

Contact Phone Number:

Info Code 1:

Info Code 2:

Sent to remote ID:7023869114


Sent at:Tue Aug 10 11:08:00 2010

Sent on channel 2

Elapsed Time: 1 minute, 38 seconds

Transmission Status (0/339;0/0): Successful Send

Page Record: 1 - 3.


CLERK OF THE COURT

OPPS
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
CHRISTOPHER J. LALLI
Chief Deputy District Attorney
Nevada Bar #005398
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
christopher.lalli@ccdanv.com
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

BRIAN K. O'KEEFE

Defendant.

Case No: C-08-250630-1

Dept. No: XVII

Date: August 12, 2010

Time: 8:15 a.m.

**STATE'S OPPOSITION TO MOTION TO ADMIT
EVIDENCE SHOWING LVMPD HOMICIDE DETECTIVES
HAVE PRESERVED BLOOD/BREATH ALCOHOL
EVIDENCE IN ANOTHER RECENT CASE**

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

DATED this 10th day of May, 2014.

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

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

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 On November 5, 2008, Brian K. O'Keefe (hereinafter "the Defendant") murdered
3 Victoria Whitmarsh by stabbing the right side of her chest. The knife he used to kill Victoria
4 sliced through various vital organs. It was also apparent that the much-larger Defendant had
5 badly beaten Victoria. Weighing seventy pounds less than him, her body was badly bruised
6 at autopsy. On August 2, 2010, the Defendant filed his Motion to Admit Evidence Showing
7 LVMPD Homicide Detectives have Preserved Blood/Breath Alcohol Evidence in Another
8 Recent Case. This Opposition follows.

9 This matter was first tried in March of 2009. On March 19, 2009, the Defendant
10 called Metro Homicide Detective Clifford Mogg as a witness and began to elicit information
11 regarding an investigation under Metro Event Number 070408-0444. Before too much
12 information could be elicited, the State objected that the evidence was irrelevant and, after a
13 bench conference, the witness was excused. See Transcript of Proceedings of March 19,
14 2009, at 12-13. In filing the instant Motion, the Defendant appears to be asking the Court to
15 once again consider the issue and reverse its earlier ruling. Not only has the Defendant
16 failed to provide good reason to do so, but there is also a great deal of legal authority
17 supporting the Court's initial decision.

18 It is initially noted that the Defendant's Motion is woefully lacking in any legal
19 support for the position he takes. Absent a single, obscure reference to the United States
20 Constitution (see Def.'s Mot. at 11), he fails to cite a single rule, statute or case. This – by
21 itself – is a basis upon which the Court should deny his Motion. Arguments or contentions
22 which are unsupported by legal authority should summarily be rejected. See *Rhyne v. State*,
23 118 Nev. 1, 13 (2002) ("Contentions unsupported by specific argument or authority should
24 be summarily rejected on appeal.") (quoting *Mazzan v. Warden*, 116 Nev. 48, 75 (2000) and
25 citing *Maresca v. State*, 103 Nev. 669, 673 (1987); *Jones v. State*, 113 Nev. 454, 468 (1997)
26 ("[U]nsupported contention[s] should be summarily rejected on appeal.") (citing *Bennett v.*
27 *Fidelity & Deposit Co.*, 98 Nev. 449, 453 (1982), and *McKinney v. Sheriff*, 93 Nev. 70, 71
28 (1977)).