

or answer given. - (Letter ^{"Counselor's"} April 22, 2015 page 4 of 4) (Repeating me)
• ... "Perhaps you should 'do what-ever' [sic] it takes if these additional issues are not presented ASAP" for "I find no cause or reason to include them at this point."

• ... "You must first move to have appointed counsel removed" ...
Can this appointed attorney enlighten this court and me on when would be a good time? Absurd!
(Actually, he need not being dismissed.)

Preservation and presentation of claims must or should all be raised in your first state post petition mandated by statute governing N.R.S. Chapter 34, if you choose to file for additional claims. • This then clearly allows the state to properly review and respond, generally followed by a reply, with this court overseeing all claims.

• CERTIORARI PETITION
The state fails to recognize that by law, Mc O'Heke had filed, being responded to by Nevada Solicitor General C. Wayne Hawke, Certiorari review of his direct appeal, N.S.C. #60631, which was denied October 15, 2013. O'Heke v Nevada, 134 S.Ct 444, 187 L.Ed.2d 297 (Case No. 13-6031)

Misero, petitioner had and still has a pending appeal, again seeking certiorari review, of the Ninth's ruling rendered February 2, 2015 in the initial pretrial habeas corpus petition pursuant 28 U.S.C. § 2241 (a)(3) on a "COLLATERAL" double jeopardy challenge which automatically divested jurisdiction in the first instance with the U.S. District Court's judicial admission, the double jeopardy claim was collateral, then bolstered by the granted Certificate of appealability.

Fn: 1 (MAILED - FILED MAY 29, 2015) 3

005150

see NRS. 47.140 (1) The Constitution and Statutes of the United States - followed Then only, (2) the constitution of Nevada

• Article VI (2) ... This "Constitution" ... Authority of the United States, shall be the supreme LAW of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The State courts are "CHARGED" with the same duty as this "Court" to protect the petitioner in the enjoyment of his CONSTITUTIONAL RIGHTS. see COOK v. HART, 146 U.S. 183 (U.S. Supreme Court 1892) STATE's are required to exercise Comity, sua sponte especially if necessary, when necessary.

• CONCLUSION

Petitioner humbly requests to dismiss counsel, striking supplement, and allowing petitioner to supplement his own petition and/or in the alternative, appoint new counsel that will communicate, especially to take phone calls, as outlined by the Nevada Supreme Court, IN THE MATTER OF REVIEW OF ISSUES CONCERNING REPRESENTATION OF INDIGENT DEFENDANTS IN CRIMINAL CASES, ADKT No. 411 FILED January 4, 2008, STANDARDS 1 and 3.

Dated: June 1, 2015
Clerk: FILE

By: Respectfully Submitted,
Bria K. O'Leary
90244

CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing Motion to Withdraw Counsel ... 34 to the below address(es) on this 1st day of JUNE, 20 13, by placing same in the U.S. Mail via prison law library staff, pursuant to NRCP 5(b): Buss Slip No. 195 7832

NOTE to Clerk: All registered parties of the appellate CM/ECF electronic filing system will be served by the clerk using that perspective system

Brian L. O'Keefe
Brian L. O'Keefe # 9224
 Lovelock Correctional Center
 1200 Prison Road
 Lovelock, Nevada 89419
Petitioner In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding Motion to Withdraw Counsel ... 34 filed in District Court Case No. 08-0250634 does not contain the social security number of any person.

Dated this 1st day of JUNE, 20 13.

Brian L. O'Keefe
Brian L. O'Keefe
Petitioner In Pro Se

003344

Brian Colette '90244

L.C. 11,
100 River East

Laurel, Me. 07419

Stephen Green,

Chief of the Post

200 Lewis Ave, 3rd Floor

Los Angeles, No. 89125

Brian Colette '90244

003344

003344

Steven L. Johnson
CLERK OF THE COURT

MC
DA
PP
AOR

*Att
McCormack
Carter*

Brian O'Heere
Petitioner In Propria Personam
Post Office Box 450 (HDBP)
Indian Springs, Nevada 89018

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

Brian O'Heere,
Petitioner

vs.

STATE OF NEVADA, et al.,
Respondent

Case No. 08 CZSLG-10
Dept No. XVII
Docket _____

NOTICE OF MOTION

YOU WILL PLEASE TAKE NOTICE, that MOTION TO WITHDRAW COUNCIL
FOR CONFLICT - CHAPTER 34
will come on for hearing before the above-entitled Court on the 30 day of JUNE, 2015
at the hour of 8:30 o'clock A.M. in Department XVII of said Court.

CC:FILE

DATED: this 1st day of JUNE, 2015

BY: *Brian L. O'Heere*
Brian L. O'Heere # 90244
Petitioner *In Propria Personam*

RECEIVED
JUN 08 2015

CLERK OF THE COURT

8:30 o'clock A.M. in Department XVII

MC
DA
PP
AOR

Sharon L. Johnson
CLERK OF THE COURT

MOTION
Brian K. O'Keefe : 9/2/14
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK

Brian Kerry O'Keefe)
Petitioner)
-vs-)
STATE OF NEVADA, et al)
Respondent)

Case No. 06C250630

Dept. No. XVII

06-30-15

8:30A

MEET TO WITHDRAW COUNSEL FOR VIOLATION
AND FAILURE TO PRESENT CLAIMS WHEN
I.A.S. CLAIMS MUST BE RAISED PER STATUTE
IN THE FIRST PERSON PRESENT (CHAPTER 34)

COMES NOW Brian K. O'Keefe petitioner pro se, to motion
this Court to dismiss appointed counsel striking supplement.

After three trials, two direct appeals, one writ extraordinary and
inter. 212, Court appointed counsel found and filed "one" issue.

No communication and consent to raise claim improperly.

This motion is made based upon the following points and
authorities with ~~attached~~ AND PER I.A.S. papers and pleadings on file -

Dated June 1, 2015

By: Brian K. O'Keefe : 9/2/14
Brian K. O'Keefe

LCC IL FORM 24.014

005155

• STATEMENT, POINTS AND AUTHORITIES

Petitioner filed his petition challenging jurisdiction on September - 15, 2014, pursuant N.R. 24.360. This court granted a PROW, (order for petition for writ of habeas corpus), on October 15, 2014. On November 6, 2014 this court also appointed counsel subsequently setting a briefing schedule. The supplement 04/07/15; Response 06/01/15; argument 07/01/15. Emphasizing, the timetable allotted no scheduled "reply to the state's response. (usually needed!)"

On 04/06/15, appointed counsel filed "one" issue without prior knowledge or consent. Additionally, counsel appointed by the court, failed to support or even acknowledge, in his supplement filed, that his petition was in fact a "supplement only", not to supersede the existing petition and failed to bolster or professionally comment on the jurisdictional claim, "writ of jurisdiction by 'Notice of Appeal' on venerable double jeopardy claim." Moreover, this "SUPPLEMENT" was not filed at the specific instruction of petitioner, Fin! Therefore, this becomes ^{an} ~~the~~ ^{ephemeral} document not consented to, causing great CONFLICT, especially omitting claims, properly arguing one claim filed, nullify. Petitioner sent a myriad of letters vaguely suggesting viable claims (due process; equal protection; I.A.C.). These letters were only to set the "gist" of some claims, with an experienced attorney. More energy was spent by dissecting negatively than optimistically supporting valid claims, possible.

Specifically, in response to one of my letters, this was the advice

or answer given. - (Letter ^{"Counselor's"} April 23, 2015 page 4 of 4) (Reporting me)
• ... "Perhaps, you should, 'do what-ever' [sic] it takes if these additional issues are not presented ASAP" for "I find no cause or reason to include them at this point."

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Preservation and presentation of claims must or should all be raised in your first state post petition mandated by statute governing N.H.S. Chapter 24, if you choose to file for additional claims. • This then clearly allows the state to properly review and respond, generally followed by a ^{1st} reply, with this court overseeing all claims.

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The state fails to recognize that by law, Mc O'Hare had filed, being responded to by Nevada Solicitor General C. Wayne Hauke, certiorari review of his direct appeal, N.S.C. #61631, which was denied October 15, 2013. O'Hare v Nevada, 134 S.Ct 444, 187 L.Ed.2d 297 (Case No. 13-6031)

Moreso, petitioner had and still has a pending appeal, again seeking certiorari review, of the Ninth's ruling rendered February 2, 2015 in the initial pretrial habeas corpus petition pursuant 28 U.S.C. § 2241 (a)(2) on a "Colorable" ^{1st} ~~double~~ jeopardy challenge which automatically divested jurisdiction in the first instance with the U.S. District Court's judicial admission, the double jeopardy claim was colorable, then bolstered by the granted Certificate of appealability.

Ex. 1 (MAILED - FILED MAR 29, 2015) 3

SEE NRS. 47.140 (1) - The Constitution and Statutes of the United States - followed Then only, (2) the constitution of Nevada

• ARTICLE VI (2) ... This "Constitution" ... Authority of the United States, shall be the supreme LAW of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

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• CONCLUSION

Petitioner humbly requests to dismiss counsel, striking ~~supplemental~~ and allowing petitioner to supplement his own petition and/or in the alternative, appoint new counsel that will communicate, especially to take phone calls, as outlined by the Nevada Supreme Court, IN THE MATTER OF REVIEW OF ISSUES CONCERNING REPRESENTATION OF INDIGENT DEFENDANTS IN CRIMINAL CASES, ADKT NO. 411 FILED January 4, 2008, STANDARDS 1 and 3.

Dated: June 1, 2015
cle: FHE

By: Respectfully Submitted,
Brian K. O'Leary
90246

CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing Motion to Withdraw Counsel ... 34 to the below address(es) on this 1st day of June, 2015, by placing same in the U.S. Mail via prison law library staff, pursuant to NRCP 5(b): Prison Slip No. 195 7832

NOTE TO CLERK: All registered parties of the appellate CM/ECF electronic filing system will be served by the clerk using that perspective system

CERTIFICATE

Brian L. O'Neil
Brian L. O'Neil # 9216
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419
Petitioner In Pro Se

AFFIRMATION PURSUANT TO WRB 239B.030

The undersigned does hereby affirm that the preceding Motion to Withdraw Counsel ... 34 filed in District Court Case No. 08-25663 does not contain the social security number of any person.

Dated this 1st day of June, 2015.

Brian L. O'Neil
Brian L. O'Neil
Petitioner In Pro Se

03244

Brain C. Harte + 90244
L.O.C.
1200 P. 1200
Larkfield, Me. 07419

Stephen Gerson,
Chief of the Port
200 Lewis Ave, 3rd Floor
Cambridge, Me. 07155

Boat Slip No. 105700

005160

SUPP. APPX.

Brian O'Keefe

L.C.O.

1200 Pearson Road
Las Vegas, NV 89419

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06/12/2015 02:43:11 PM

Adam L. Johnson

CLERK OF THE COURT

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

DA
PP

Brian Kerry O'Keefe,
Petitioner,

v.

STATE OF NEVADA, et al.,

Respondent.

Case no. 0250630

Dept. XVII

Hearing 7/10/2015

Time 08:15 am

- SUPPLEMENTAL APPENDIX OF EXHIBITS
TO PETITION FOR A WRIT OF HABEAS CORPUS
EXHIBITS ONE (1) through twenty-five (25)

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JUN 12 2015

CLERK OF THE COURT

Brian O'Keefe - 7244

6-8-2015

005161

exhibit 1

CASE No. 53859

ORDER

Reversal and Remand

APR 7, 2010

exhibit 1

005162

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 53859

FILED

APR 07 2010

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

ORDER OF REVERSAL AND REMAND

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

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

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

ORDER the judgment of conviction REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

Cherry, J.
Cherry

Saitta, J.
Saitta

Gibbons, J.
Gibbons

cc: Hon. Michael Villani, District Judge
Special Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

exhibit 2

STATE'S
FAST TRACK RESPONSE
FILED Sep 8, 2009

exhibit 2

005165

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

2
3
4
5 BRIAN KERRY O'KEEFE

) Case No. 53859

6 Appellant,

7 v.

)
Electronically Filed
Sep 08 2009 03:29 p.m.
Tracie K. Lindeman

8 THE STATE OF NEVADA,

9 Respondent.

10 FAST TRACK RESPONSE

- 11 1. Name of party filing this fast track response: The State of Nevada
12 2. Name, law firm, address, and telephone number of attorney submitting this fast
13 track response:

14 Steven S. Owens
Clark County District Attorney's Office
15 200 Lewis Avenue
Las Vegas, Nevada 89155
16 (702) 671-2750

- 17 3. Name, law firm, address, and telephone number of appellate counsel if different
18 from trial counsel:

19 Same as (2) above.

- 20 4. Proceedings raising same issues. List the case name and docket number of all
21 appeals or original proceedings presently pending before this court, of which you are
22 aware, which raise the same issues raised in this appeal: None

- 23 5. Procedural history.

24 On December 19, 2008, Defendant was charged, by way of Information with the
25 crime of Murder With Use of a Deadly Weapon (Open Murder) (Felony - NRS 200.010,
26 200.030, 193.165). On February 10, 2009, Defendant was charged, by way of Information
27 with the crime of Murder With Use of a Deadly Weapon (Open Murder) (Felony - NRS
28 200.010, 200.030, 193.165).

)
C:\APPELLATE\WPGC\SECRETARY\FASTTRACK\O'KEEFE, BRIAN KERRY, 53859, C20090, 2009-07-10.DOC

Docket 53859 Document 2009-21777

000007

005166

1 On May 8, 2009, Judgment of Conviction was entered and Defendant was sentenced
2 to a maximum of twenty-five (25) years with a minimum parole eligibility of ten (10) years
3 plus a consecutive term of two hundred forty (240) months maximum with a minimum
4 parole eligibility of ninety-six (96) months for the use of a deadly weapon to be served in the
5 Nevada Department of Corrections with one hundred eighty-one (181) days credit for time
6 served.

7 On May 21, 2009, Defendant filed his Notice of Appeal. On August 18, 2009,
8 Defendant filed his Fast Track Statement.

9 **6. Statement of facts.**

10 Defendant was convicted for the Second Degree Murder of his live-in girlfriend
11 Victoria Whitmarsh. Defendant was Caucasian, 5'10", 185 pounds, (Appellant's Appendix
12 ("AA") 281: 68), a decorated military veteran with combat experience and military training
13 in self defense. (AA 255: 178). Ms. Whitmarsh was 5'4", 110 pounds and Asian American.
14 (AA 281: 68). Prior to her murder, Defendant was quoted as stating that he wanted to "kill
15 the bitch" because he believed she was responsible for putting him away in prison. (AA 94:
16 14-15). Also prior to her murder, Defendant demonstrated to others the manner in which he
17 could kill a person with a knife. (AA 94: 2-24).

18 On November 5, 2008, a fight ensued between Defendant and Ms. Whitmarsh. (AA
19 67, 71-72, 281: 66). The fight was so loud that it woke sleeping neighbors and caused them
20 to go upstairs to see about the commotion (AA 67:188, 71: 204). Defendant fatally stabbed
21 Ms. Whitmarsh with a knife. (AA 283: 77). In addition to her knife wound, Ms. Whitmarsh
22 had a series of bruises all over her body that were determined to be a contributing cause of
23 her death. (AA 182: 99: 8-12). Despite being militarily trained in self defense, 6 inches
24 taller and weighing 75 pounds more than Ms. Whitmarsh, Defendant claims he had no
25 choice but to kill her out of self defense. (AA 303: 154). Defendant did not claim that Ms.
26 Whitmarsh's death was the result of a suicide. (See Generally AA). Defendant also did not
27 claim he killed Ms. Whitmarsh in the "heat of passion." (See Generally AA). Despite this
28 self-defense theory, Defendant never called 911. (AA 285: 83: 8-13). He also did not allow

1 police officers to come into the room to assist her. (AA 103: 51: 3 - 52: 10, AA 286: 86: 16-
2 21). Defendant had to be tazed by the police and removed from the murder scene. (AA 112:
3 23-24).

4 At trial, Defendant sought to admit evidence that Ms. Whitmarsh had tried to commit
5 suicide in the past and evidence that she struggled with depression, as proof of her violent
6 character towards other people. (AA 266). The trial court excluded this evidence on the
7 grounds that it did not amount to specific acts of violence against others. (AA 266: 7: 23 -
8 8:1).

9 During trial a police officer was allowed, over defendant's objection, to testify, about
10 the times that he encountered stabbing homicide suspects in his career, whether or not those
11 suspects had cuts on their hands similar to the cuts found on the Defendant's hands. (AA
12 203: 183: 10-12, 203: 184: 3-5, 203: 184: 24 - 185: 5). The trial court also precluded
13 defendant's accident reconstruction expert for providing a legal conclusion about whether
14 the stab wound Ms. Whitmarsh received was accidental. (AA 246: 144: 4-23). The trial
15 court reasoned that since the witness was not a medical doctor, had not been noticed to make
16 such a finding and had no reference to such testimony in his expert report regarding the
17 medical opinion, he should be excluded because it was beyond his area of expertise. (AA
18 248: 152: 22-25).

19 During trial, Officer Hutcherson testified that Defendant made two racial epithets
20 while sitting in the officer's vehicle (AA 135: 179: 10-12). Prior to testifying, the Officer
21 never memorialized the statements, never placed them in his police report, or included them
22 in a handwritten note submitted for discovery. (AA 153: 251: 22 - 252: 13). The State only
23 learned of the statements the night before trial. (AA 164: 26: 10-22) After learning of the
24 statements, the State instructed the officer not to include such remarks while testifying. (AA
25 164: 26: 15 - 27: 16). The officer disregarded the instruction and made them during trial.
26 Defendant sought a mistrial on the grounds that it was a discovery violation and prejudicial.
27 (AA 153: 251, AA 154: 254: 14-20). The district court found that in light of the lack of
28 memorialization no discovery violation was committed and given the limited prejudicial

1 effect of the two statements the prejudice that Defendant may have suffered did not warrant
2 an entirely new trial. (Id.).

3 The trial court also allowed the medical examiner to discuss photographs that
4 illustrated the extent and severity of Ms. Whitmarsh's injuries. (AA 182). The medical
5 examiner stated that the bruises covered her forehead, left arm, left side, right side of the
6 abdomen, knee, legs and feet as well as buttocks. (AA 182-183). The medical examiner
7 also testified that the bruises were a contributing cause of her death along with the stab
8 wound she suffered. (AA 182: 99: 8-12). The medical examiner concluded that the bruises
9 could have been caused by another person. (AA 182).

10 The trial court also made a number of rulings regarding proffered jury instructions.
11 The trial court also denied Defendant's request for a Flight Instruction because there was no
12 evidence of flight. (AA 230: 78: 22 - 79: 19). The trial court also denied Defendant's request
13 for a Heat of Passion Instruction because the State's instruction was an accurate statement of
14 the law. (AA 296: 126-127). Defendant and State jointly decided to forgo giving a Good
15 Character Instruction to the jury. (AA 295: 122-123). The State submitted Jury Instruction
16 #13 to the trial court. (AA 349). Instruction #13 defined that malice aforethought could be
17 express or implied. (AA 349). Defendant did not object to the instruction. (See Generally
18 AA). During closing arguments, the State discussed implied malice. (AA 298: 135: 8-20,
19 299: 140: 1-3). The State also submitted Jury Instruction #18 to the trial court. Instruction
20 #18 defined Second Degree Murder, but specifically omitted any reference to a Second
21 Degree Murder conviction based on a felony murder theory. (AA 354). Defendant objected
22 to the admission of this Instruction on the grounds that it argued felony murder. (AA 294).
23 The trial court overruled the objection and admitted the instruction. (AA 294: 119; 384).

24 7. Issues on appeal.

- 25 I. Did the Trial Court Err in Concluding that Evidence of a Victim's Past Suicide
26 Attempts and Depression Are Not Specific Acts of Violence Against Others?
27 II. Did the Trial Court Err in Admitting a Jury Instruction that Accurately Defined
28 Second Murder or Allowing the State to Properly Define Implied Malice During
Closing Arguments?

MAFFELLATERRA/DOCKRENEY/FASTTRACK/KEENE, BRIAN KIRBY, JESS, CHUCK, RESPE PTL.DOC

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1 III. Is a New Trial Warranted Where There Is No Discovery Violation and Where the
2 Prejudice from the Inadvertent Disclosure of Off-Color Remarks are Minimal?

3 IV. Did the Trial Court Err in Admitting Photographs of Injuries Determined to be a
4 Contributory Cause of the Victim's Death?

5 V. Did the Trial Court Err in Admitting the Lay Opinion of Police Officer or Precluding
6 Defendant's Expert Witness From Testifying to a Legal Conclusion that Was Not
7 Within His Realm of Expertise or Expert Report?

8 VI. Did the Trial Court Err in Settling the Jury Instructions?

9 8. Legal Argument, including authorities:

10 I. **THE TRIAL COURT PROPERLY CONCLUDED PAST SUICIDE**
ATTEMPTS DO NOT CONSTITUTE SPECIFIC ACTS OF VIOLENCE TOWARDS
OTHERS.

11 Overall, trial courts have considerable discretion in determining the relevance and
12 admissibility of evidence, and an appellate court should not disturb the trial court's ruling
13 absent a clear abuse of that discretion. Crowley v. State, 120 Nev. 30, 83 P.3d 282 (2004).
14 The standard of review in a criminal case is "whether, after viewing the evidence in the light
15 most favorable to the prosecution, any rational trier of fact could have found the essential
16 elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319,
17 99 S.Ct. 2781, 2789 (1979). Furthermore, it is well established that it is the jury's function,
18 not that of the court, to assess the weight of the evidence and determine the credibility of
19 witnesses. Walker v. State, 91 Nev. 724, 726, 542 P.2d 438, 438-39 (1975). A verdict
20 supported by substantial evidence will not be disturbed by a reviewing court. Nix v. State, 91
21 Nev. 613, 614, 541 P.2d 1, 2 (1975).

22 Defendant claims that his due process rights were violated because the trial court
23 excluded evidence of Ms. Whitmarsh's past suicide attempts and problems with depression.
24 (FTS at p. 6). He erroneously contends that this evidence demonstrated Ms. Whitmarsh's
25 violent character towards others and accordingly it should have been admitted to prove that
26 she was the first aggressor on the night Defendant murdered her. (FTS at p. 7). As a general
27 rule, character evidence is normally inadmissible to show that a person acted in conformity
28 with their character. NRS 48.045(1). However, one exception allows "a defendant to

1 present evidence of a victim's character when it tends to prove that the victim was the likely
2 aggressor, regardless of the defendant's knowledge of the victim's character." Daniel v.
3 State, 119 Nev. 498, 78 P.3d 890 (2003). More specifically, evidence that the victim
4 committed specific acts of violence against others is admissible, when a defendant raises a
5 claim of self-defense. Id.

6 Here, Defendant raised a claim of self-defense. Defendant sought to introduce his
7 own testimony and extrinsic evidence about her depression and past suicide attempts. (FTS
8 at p. 7). Defendant also sought to introduce his own testimony that two days before her
9 murder, Ms. Whitmarsh attacked Defendant with a knife. (AA 266: 6: 14-21). Defendant
10 mistakenly believed that Ms. Whitmarsh's past efforts to harm *herself* was tantamount to
11 aggressive acts of violence against other people, such as Defendant. (FTS at p. 7). The trial
12 court, however, disagreed. (AA 266: 7-8).

13 The trial court made two rulings. First, it properly determined that under NRS 48.045
14 and Daniel, Defendant could testify that Ms. Whitmarsh allegedly attacked him with a knife.
15 (AA 266: 7: 18-22). It was held to be a specific act of violence against another. Id. The
16 trial court also properly concluded that the evidence of her past suicide attempts and therapy
17 that she underwent should be excluded. (AA 266: 7: 10-8: 1). The trial court recognized that
18 under Daniel this proffered evidence did not amount to a "specific act of violence" towards
19 another person. (AA 266: 7: 23- 8:1).

20 Despite the clear holding of Daniel, Defendant still contends the ruling was in error.
21 (FTS at p. 6-10). Defendant relies on a trio of cases, all from outside this jurisdiction, to
22 support his claim. (FTS at p. 9) See State v. Stanley, 37 F.3d 85, 90 (N.M. 2001); People v.
23 Salcido, 246 Cal. App. 2d 450, 458-60 (Cal. App. 5th Dist. 1966); State v. Jaeger, 973 P.2d
24 404, 407-08 (Utah 1999). Defendant's reliance on these cases is entirely misplaced. In each
25 of those cases, the defendants sought to introduce evidence of the victims' past suicide
26 attempt history, because the defendants' defense at trial were that the victims *were not*
27 *murdered, but rather committed suicide*. See Stanley, 37 F.3d at 90; Salcido, 246 Cal. App.
28 2d at 458-60; Jaeger, 973 P.2d at 407-08. Consequently, the courts in those cases found

1 where the defense of suicide is being raised such evidence is probative because it supports
2 the defendant's theory that victim died as a result of a successful suicide attempt. See
3 Stanley, 37 F.3d at 90; Salcido, 246 Cal. App. 2d at 458-60; Jaeger, 973 P.2d at 407-08.
4 That situation is not present here. Defendant never argued Ms. Whitmarsh successfully
5 committed suicide. (See generally AA) Defendant argued that he killed her in self defense.
6 (AA 303: 156: 3-6). The factual circumstances and legal defenses raised in Stanley, Salcido
7 and Jaeger are entirely different than the case at bar. The issue before this jury was not
8 whether it was murder or suicide, but rather murder or self defense. This trio of decisions,
9 consequently, is irrelevant. There is no legal authority to suggest suicidal tendencies are
10 tantamount to having a propensity for violence towards other people. In light of Daniel, it is
11 evident that as matter of law the trial court's ruling was well reasoned and proper.

12 **II. THE TRIAL COURT PROPERLY SUBMITTED INSTRUCTION #18 AND
ALLOWED IMPLIED MALICE TO BE DISCUSSED DURING CLOSING.**

13 Defendant contends a new trial is warranted because it was improper to submit Jury
14 Instruction #18 ("Instruction #18") to the jury and to allow the State to discuss an implied
15 malice theory to the jury. Since a trial court is afforded great discretion when settling jury
16 instructions, its decisions are reviewed only for an abuse of discretion. Crawford v. State,
17 121 Nev. 744, 748 121 P.3d 582, 585 (2005). Such abuse only occurs when the decision is
18 considered "arbitrary or capricious or if it exceeds the bounds of law or reason." Jackson v.
19 State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). Upon review of the record and Nevada
20 law, it was proper to submit Instruction #18 to the jury and allow implied malice to be
21 discussed during closing arguments. Instruction #18 provided the definition of Second
22 Degree Murder to the jury. (AA 354). Defendant claims the admission was incorrect
23 because the second paragraph of Instruction #18 stated that the jury could find Defendant
24 guilty under a "felony murder" theory. (FTS at p. 10). Defendant argues that since no
25 felony murder theory was ever argued by the State, it was reversible error to provide such an
26 instruction. (*Id.*). Instruction #18, however, contained no reference to felony murder.
27 Paragraph 2 of Instruction #18 states as follows:
28

- 2) *Where an involuntary killing occurs in the commission of an unlawful act, the natural consequences of which are dangerous to life, which act is intentionally performed by a person who knows that his conduct endangers the life of another, even though the person has not specifically formed an intention to kill.*

(AA 354) (emphasis added). This second paragraph is taken virtually verbatim from NRS 200.070 which defines Involuntary Manslaughter. The selected language from this statute that was used for Instruction #18, however, is taken from part of the statute that specifically defines *what other type* of intentional unlawful behavior, *other than a felony*, if committed, would constitute murder in the second degree. NRS 200.700 states in full:

"Involuntary manslaughter" defined.

1. Except under the circumstances provided in NRS 484.348 and 484.377, involuntary manslaughter is the killing of a human being, without any intent to do so, in the commission of an unlawful act, or a lawful act which probably might produce such a consequence in an unlawful manner, *but where the involuntary killing occurs in the commission of an unlawful act, which, in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense is murder.*

2. Involuntary manslaughter does not include vehicular manslaughter as described in NRS 484.3775.

NRS 200.700 (emphasis added). A comparison of the emphasized text from Instruction #18 and NRS 200.700 reveals that a felony murder instruction was never given. It defines what other type *non-felonious but unlawful behavior* would warrant a Second Degree Murder conviction. Upon a closer review of NRS 200.700, it is clear that the State deliberately omitted the language of the statute that discussed felony murder. See NRS 200.700(1) ("or is committed in the prosecution of a felonious intent"). Thus no felony murder instruction was provided to the jury.

To avoid any risk of confusion, the trial court still gave the jury an oral instruction during trial that they were to disregard and not rely upon a felony murder theory. (AA 294: 119: 384.) Furthermore, the State was also instructed not to argue felony murder. (*Id.*) The State, accordingly, did not discuss it. (See Generally AA 297: 130 - 301: 147: 6; 305: 165: 20 - 309: 179: 23). Since the jury was not given a felony murder theory either in the form of Instruction #18 or closing arguments, Defendant's basis for appeal is meritless.

1 Defendant also contends a new trial is needed because the State argued to the jury that
2 a "finding of murder could be based upon implied malice." (FTS at p. 11). However, the
3 Defendant raised no objection to Jury Instruction #13 which expressly states "Murder is the
4 unlawful killing of another human being, *with malice aforethought, either express or*
5 *implied....*" (AA 349) (emphasis added). Consequently, the State was well within its rights
6 to state that murder can be found upon a showing of implied malice. There is no basis to
7 award a new trial on this ground.

8 **III. THE TRIAL COURT PROPERLY DENIED THE MOTION FOR A**
9 **MISTRIAL BECAUSE NO DISCOVERY VIOLATIONS OCCURRED AND**
10 **PREJUDICE FROM THE OFF-COLOR REMARKS WERE MINIMAL**

11 Defendant also claims that his due process rights were denied when a police officer,
12 after being instructed by the State not to discuss the matter, testified that Defendant made
13 two racial epithets while sitting in the officer's vehicle. (AA 135: 179: 10-12). A "denial of
14 a motion for a mistrial is within the trial court's sound discretion. The court's determination
15 will not be disturbed on appeal in the absence of a clear showing of abuse." Parker v. State,
16 109 Nev. 383, 388-389, 849 P.2d 1062, 1066 (1993).

17 Defendant claimed that a mistrial was warranted because the introduction of the
18 statement was prejudicial and it also constituted a discovery violation. (FTS at p. 12).
19 However, no discovery violation occurred and the prejudice suffered was at worst minimal.
20 There was no discovery violation because Officer Hutcherson never memorialized the
21 statements. (AA 153: 251: 22 - 252: 13). He never wrote them down in his police report, he
22 never gave a recorded statement of these facts and failed to put them down in a handwritten
23 note regarding the case that was submitted for discovery. (AA 153: 251: 22 - 252: 13). The
24 State only learned about the statement the night before the officer's testimony. (AA
25 164:26:10-22). However, the State did notice that the officer was an anticipated witness for
26 this trial long before the officer testified. (AA 153: 252: 5-11). Thus, Defendant had the
27 opportunity to pretrial the officer and discover the statements. In light of these facts, the
28 court properly concluded that no discovery violation took place. (AA 154: 254: 14-20).
Defendant fails to explain why this ruling amounts to an abuse of discretion. The record

1 reveals the trial court thoughtfully concluded that the violation took place because; 1) There
2 was no memorialization of the statement; 2) The State only learned of the statement on the
3 night prior to the testimony; and 3) Defendant had time to pretrial the officer.

4 Furthermore, Defendant was not so prejudiced to warrant a new trial. Prior to the
5 Officer's testimony, the State instructed him to "stay away from the racial slurs." (AA 164:
6 26: 15 - 27: 16). Despite the good faith efforts, these two short comments were made during
7 trial. After their disclosure the State promised the trial court that no further references to the
8 statements would be made. (AA 154: 256: 22 - 257: 7). The State made good on that
9 promise. (See Generally AA). As Defendant noted in his brief, the State's case against the
10 Defendant was never about race. (FTS at p. 12). It simply was not an issue in this trial -
11 especially because Ms. Whitmarsh was Asian American. The real issue was the amount of
12 racially neutral evidence that proved beyond a reasonable doubt that he was a murderer.
13 While Defendant may have suffered some minimal prejudice, it is clear that Defendant's due
14 process rights were protected during this fair trial.

15 **IV. THE TRIAL COURT PROPERLY ADMITTED THE VICTIM'S INJURY**
16 **PHOTOS BECAUSE THE INJURIES WERE A CONTRIBUTING CAUSE OF HER**
17 **DEATH.**

18 Defendant claims that he deserves a new trial because the trial court should have
19 excluded photographs of bruises on the victim's body that were a contributing factor in her
20 death. The admissibility of evidence, Crowley, 120 Nev. at 30, 83 P.3d at 282, as well as the
21 admissibility of expert testimony, Brown v. State, 110 Nev. 846, 852, 877 P.2d 1071, 1075
22 (1994), falls within the sound discretion of the trial court. Defendant erroneously argues
23 that it was an error to admit the photographs, because there was "no causation" between the
24 bruises and the night of her death, and there was no "foundation" that O'Keeffe could have
25 caused those bruises and it was difficult to conclude exactly when the bruises were made
(FTS at p. 13). These allegations are untrue.

26 First, the medical examiner concluded that the bruises were a *contributory cause* of
27 her death, because she died of exsanguination, more commonly known as "bleeding to
28 death." (AA 182: 99: 8-12). Second, the medical examiner's testimony established a causal

1 link between the defendant and those bruises, because he concluded these injuries could have
2 been made by another person. (AA 182). This testimony is particularly relevant because
3 Defendant physically struggled with Ms. Whitmarsh prior to murdering her. (AA 272: 32 -
4 273-36: 67-72). Third, although the medical examiner had difficulty in precisely
5 concluding how and when each bruise was made, the evidence is still relevant because
6 Defendant could have inflicted those injuries. Finally, the photographs are relevant because
7 they accurately depict her vast array of bruises that spanned from her forehead, left arm, left
8 side, right side of the abdomen, knee, legs, feet as well as her buttocks. (AA 182:100: 7 -
9 183: 103: 3). For these reasons, the trial court properly concluded the evidence was relevant.

10 Defendant's appeal is not really concerned with the photos' admissibility, but rather
11 the "weight" that should be afforded to them. Defendant has no issues with the authenticity
12 of the photos, the qualifications of the witness called to testify about the photos or the
13 accuracy of what the medical examiner concluded from the photos. (See FTS at p. 13).
14 Defendant simply did not find the evidence to be compelling. This is simply not a proper
15 basis for appeal. Determining the weight and sufficiency of evidence falls squarely within
16 the province of the jury - not this Court. Since the record demonstrates that the photographs
17 were authentic as well as relevant to the case, the trial court's decision to admit them was
18 proper.

19 **V. THE TRIAL COURT PROPERLY ADMITTED AN OFFICER'S LAY**
20 **OPINION AND PRECLUDED DEFENDANT'S EXPERT WITNESS FROM**
21 **TESTIFYING TO A LEGAL CONCLUSION BEYOND HIS EXPERTISE**

22 Defendant also claims his rights were violated because the trial court employed
23 "different standard[s]" when evaluating what the State and Defendant's witnesses could
24 testify to. (FTS at p. 14: 6-8). As discussed, the admission of expert testimony is reviewed
25 only for an abuse of discretion. Brown, 110 Nev. at 852, 877 P.2d at 1075. "The threshold
26 test for the admissibility of testimony by a qualified expert is whether the expert's
27 knowledge will assist the trier of fact to understand the evidence or determine a fact in
28 issue." Townsend v. State, 103 Nev. 113, 118, 734 P.2d 705, 708 (1987); N.R.S. 50.275.
Specifically, Defendant believes a double standard was created for state and defense

1 witnesses – that essentially permitted the State's detective to testify but denied his expert
2 witness the same opportunity. (FTS at p. 14). Although Defendant attempts to paint the two
3 sets of proffered testimony as a comparison of "apples to apples," the record reveals that the
4 comparison more akin to "apples to oranges."

5 First, Defendant takes issue with the State's examination of Detective Wildemann, a
6 police officer for the last twenty-one years. (AA 203: 183: 10-12). The detective testified
7 that during that time he had witnessed many stabbing cases. (AA 203: 184: 3-5). The
8 question and answer at issue for defendant was the following:

9 Mr. Smith: "...[I]n your training and experience, have you come across
10 occasions where a suspect in a stabbing has had cuts on their
11 fingers in the very area that the defendant does?
12 Det. Wildemann: Yes, Yes.
13 Mr. Smith: How often would you say or --
14 Det. Wildemann: I can't give you a specific number, but it happens frequently.

15 (AA 203: 184: 24 – 185: 5). On appeal, Defendant disingenuously mischaracterized the
16 record by claiming that this testimony provided the officer's "expert" opinion on whether or
17 not the wounds were defensive. (FTS at p. 13: 26-28). In actuality, the question called for
18 the perceptions of a lay witness and at best, a lay opinion. NRS 50.265. In Nevada,
19 testimony or opinions are permitted if they are based on the witness' rational perceptions.
20 NRS 50.265. Here, he was only asked about what he witnessed. He was never asked to
21 reach an expert opinion or legal conclusion about whether or not the cuts on Defendant's
22 hands were defensive. The record reveals this argument is baseless.

23 The trial court's decision to exclude Defendant's "expert" testimony presented very
24 different circumstances. Defendant called George Shiro as an expert witness. Defendant
25 noticed Mr. Shiro as an expert in crime scene analysis, crime scene investigation, processing
26 of crime scenes, collection and preservation of evidence, latent print comparison, foot wear
27 comparison and DNA evaluations. (AA 247: 147: 1-7). Mr. Shiro is not a doctor, a medical
28 examiner or affiliated in any way with the coroner's office. (AA 240: 119-121).
Furthermore, his expert report made no determination about Ms. Whitmarsh receiving an
accidental knife wound. (AA 247: 148-149; 248: 152: 1-4). Despite a lack of medical

1 expertise, discussion in his report or notice provided to the State, Defendant sought to ask
2 this witness to render an expert medical opinion that made a legal conclusion about whether
3 or not the fatal stab wound to Ms. Whitmarsh was an accident or a deliberate act. (AA 246:
4 144: 4-23).

5 Detective Wildemann's testimony was entirely different in nature from Mr. Shiro's
6 proffered testimony. One was a description of what an officer had witnessed in his twenty
7 years on the job. The other was a medical opinion about the central issue in the case from a
8 man who; 1) Was unqualified to make such a determination; 2) Failed to devote any part of
9 his report to this vital issue; and 3) Was not noticed to the State to even discuss the matter
10 before the jury. Defendant's argument that the court somehow failed to establish that Mr.
11 Shiro was not an expert in this area is unavailing. (See FTS at p. 14) Defendant admitted
12 that he was not a doctor, (AA 240: 119-121), but a chemist who specialized in reconstructing
13 accident scenes and collecting crime scene evidence. (Id.; AA 248: 151: 4-18).
14 Furthermore, the Court noted that Defendant, in noticing this expert, failed to state that it
15 anticipated he would testify to such a matter. Lastly, Mr. Shiro's expert report never
16 discussed whether or not the victim was accidentally stabbed. (AA 247: 148-149; 248: 152:
17 1-4). After hearing both sides, the trial court reached the only decision allowable under the
18 law. It properly excluded Mr. Shiro's testimony on the grounds that it was "beyond his
19 expertise, beyond what's identified in his report, and also beyond the notice of expert that
20 was filed in this court...." (AA 248: 152: 22-25). While Nevada law may permit an expert
21 to assist the trier of fact to understand a fact in issue, experts cannot offer legal conclusions
22 about matters beyond their education, training and experience.¹ Mr. Shiro's unqualified
23 legal conclusions were properly excluded.

24 VI. THE TRIAL COURT PROPERLY SETTLED THE JURY INSTRUCTIONS

25 Defendant erroneously claims that a number of errors were committed during the
26 selection of jury instructions. (FTS at p. 14-15). A trial court is afforded great discretion

27 ¹ Defendant's claim that his constitutional rights were denied, because a portion of Mr.
28 Shiro's testimony was excluded is erroneous. (See FTS at p. 14). Mr. Shiro had ample time
to speak on the areas he was qualified to discuss - namely accident reconstruction.

1 when settling jury instructions and should be reviewed solely for abuse of discretion.
2 Crawford, 121 Nev. at 748, 121 P.3d at 585. Defendant claims the trial court erred for
3 failing to give a Flight Instruction. A jury may be presented with a Flight Instruction when it
4 is reasonable from the evidence presented to infer that the defendant fled the scene of the
5 crime. Carter v. State, 121 Nev. 759, 700, 121 P.3d 592, 599 (2005). However, no evidence
6 of flight was introduced during trial. Furthermore, Defendant does not explain why he was
7 entitled to this instruction. (FTS at p. 14). The record reveals Defendant sought a Flight
8 Instruction as some type of proof that Defendant was not guilty of murder. Despite a
9 complete lack of legal authority to support this position, Defendant's trial counsel stated:

10 And honestly, I've seen the flight instruction so many times. The fact that Mr.
11 O'Keefe stayed in the location didn't attempt to flee even after he had been
12 discovered by private individuals and had the opportunity to flee. I think the fact
13 that he remained there certainly is evidence that he did not, in his mind, believe
14 he has committed a crime. So it's simply an inverse statement of a case - or of
15 an instruction that's been given by the State in numerous occasions.

16 (AA 230: 78: 22 - 79: 19). There is absolutely no basis under Nevada law to include such an
17 instruction, when there is no flight evidence. The trial court did the only thing allowable
18 under Nevada law - deny the request. Defendant also claims the trial court erred in refusing
19 its proffered instruction on malice, but again entirely fails to explain why it was an error.
20 (FTS at p. 15). A trial court can disregard a proffered jury instruction if it misstates the law.
21 Barron v. State, 783 P.2d 444, 338 (Nev. 1989). Here, however, there is no evidence that the
22 Malice Instruction, accepted by the court, was inaccurate. As discussed extensively in this
23 brief, *supra* 7-9, no error was committed.

24 Defendant also erroneously claims that the court denied its proffered instruction
25 Voluntary Manslaughter. Defendant relies on the holding of Crawford as support. 121 Nev.
26 at 754, 121 P.3d at 589. Defendant's reliance on Crawford, however, is entirely misplaced.
27 Crawford holds that this instruction must only be provided when the theory of Voluntary
28 Manslaughter is properly at issue. *Id.* This theory, however, is not at issue. Defendant never
claimed he killed in the heat of passion. He claimed self-defense - a theory thoroughly
covered by the instructions. (AA 370-376) Defendant, accordingly, is not entitled to this
instruction.

1 Defendant also argues that the trial court should have accepted his Good Character
2 Instruction. However, the record reveals that the State and Defendant mutually decided to
3 "forgo" submitting such an instruction. (AA 295: 122: 24 - 123: 15). The trial court,
4 accordingly, committed no error. Finally, Defendant contends that the cumulative effect of
5 the denied instructions warrants a new trial. Defendant's appeal not only fails to establish
6 that an error was made but also fails to demonstrate how any of the decisions were somehow
7 arbitrary, capricious or exceeded the bounds of law or reason. Defendant "is not entitled to a
8 perfect trial, but only a fair trial..." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115
9 (1975) (citing Michigan v. Tucker, 417 U.S. 433 (1974)). The trial court made sound, well
10 reasoned and legally accurate decisions when rejecting these proffered jury instructions.
11 Accordingly, this Court should not disturb its findings.

12 **9. Preservation of the Issue.**

13 The issues were properly preserved.
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1 VERIFICATION

2 I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track
3 response and the Supreme Court of Nevada may sanction an attorney for failing to file a
4 timely fast track response, or failing to raise material issues or arguments in the fast track
5 response, or failing to cooperate fully with appellate counsel during the course of an appeal.
6 I therefore certify that the information provided in this fast track response is true and
7 complete to the best of my knowledge, information and belief.

8 Dated this 8th day of September, 2009.

9 Respectfully submitted,

10 DAVID ROGER
11 Clark County District Attorney

12
13 BY /s/ Steven S. Owens
14 STEVEN S. OWENS
15 Chief Deputy District Attorney
16 Nevada Bar #004352
17 200 Lewis Avenue
18 3rd Floor
19 Las Vegas, Nevada 89155-2212
20 (702) 671-2500
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 8th day of September, 2009. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

CATHERINE CORTEZ MASTO
Nevada Attorney General

JONEL THOMAS
Deputy Special Public Defender

STEVEN S. OWENS
Chief deputy District Attorney

BY /s/ eileen davis
Employee, District Attorney's Office

SSO/Christopher Hammer/ed

\\PPELLATE\WFO\DOCS\SECRETARY\PASTRACK\OZKEFE, BRAD KIRBY, 1269, CHEN, KSEFE.PFL.DOC 17

000023

005182

exhibit 3

Case no. 08 F 23348X
Criminal Complaint

FILED 11/7/2008

Q250630

exhibit 3

005183

JUSTICE COURT, LAS VEGAS TOWNSHIP

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

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

Defendant.

CASE NO: 08F23348X

DEPT NO: 9

CRIMINAL COMPLAINT

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

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

11/7/2008

08F23348X/cb
LVMPD EV# 0811053918
(TK9)

exhibit 4

Case No. 08F23348X

Battery Domestic Violence

ADMINISTRATIVE OF RIGHTS

FILED 11/7/2008

exhibit 4

005185

Justice Court, Las Vegas Township

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

- vs. -

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

Defendant.

CASE NO.: 08F23148X

DEPT. NO.: 9

BATTERY/DOMESTIC VIOLENCE: ADMONISHMENT OF RIGHTS

I am the Defendant in this case. At this time, I am charged with battery constituting domestic violence in having willfully and unlawfully committed an act of force or violence upon my spouse, former spouse, a person to whom I am related by blood or marriage, a person with whom I am or was actually residing, a person with whom I have had or am having a dating relationship, a person with whom I have a child in common, my minor child, or the minor child of one of those persons (in violation of NRS 33.018/NRS 200.483).

I AM AWARE THAT I HAVE EACH OF THE FOLLOWING RIGHTS AND THAT I WILL BE WAIVING THESE RIGHTS IF I PLEAD GUILTY OR NOLO CONTENDERE:

1. The right to a speedy trial;
2. The right to require the State to prove the charge(s) against me beyond a reasonable doubt;
3. The right to confront and question all witnesses against me;
4. The right to subpoena witnesses on my behalf and compel their attendance;
5. The right to remain silent and not be compelled to testify if there were a trial; and
6. The right to appeal my conviction except on constitutional or jurisdictional grounds.

I AM ALSO AWARE THAT BY PLEADING GUILTY OR NOLO CONTENDERE I AM ADMITTING THE STATE COULD FACTUALLY PROVE THE CHARGE(S) AGAINST ME. I AM ALSO AWARE THAT MY PLEA OF GUILTY OR NOLO CONTENDERE MAY HAVE THE FOLLOWING CONSEQUENCES:

1. I understand the State will use this conviction, and any other prior conviction from this or any other State which prohibits the same or similar conduct to enhance the penalty for any subsequent offense;
2. I understand that, as a consequence of my plea of guilty or nolo contendere, if I am not a citizen of the United States, I may, in addition to other consequences provided by law, be removed, deported or excluded from entry into the United States or denied naturalization;
3. I understand that sentencing is entirely up to the court and the following range of penalties for committing the offense described above will apply (unless a greater penalty is provided pursuant to NRS 200.481):

DEFENDANT'S INITIALS: _____

DEFENDANT'S ATTORNEY'S INITIALS (if applicable): _____

PAGE 1 of 2

005186

FIRST OFFENSE WITHIN 7 YEARS (MISDEMEANOR):

At least 2 days in jail but not more than 6 months; at least 48 hours but not more than 120 hours, of community service; a fine of not less than \$200, but not more than \$1,000, in addition to certain fees and assessments that are required by statute; mandatory participation in weekly counseling sessions of not less than 1 1/2 hours per week for not less than 6 months, but not more than 12 months, at my expense; in the Court's discretion, the Court may order me to participate in an alcohol or drug treatment program at my expense; and, in the Court's discretion, if it appears from information presented to the Court that a child under the age of 18 years may need counseling as a result of the commission of a battery which constitutes domestic violence, the Court may refer the child to an agency which provides protective services, and, if that occurs, the Court will require me to reimburse the agency for the costs of any services provided, to the extent of my ability to pay.

SECOND OFFENSE WITHIN 7 YEARS (MISDEMEANOR):

At least 10 days in jail but not more than 6 months; at least 100 hours, but not more than 200 hours, of community service; a fine of not less than \$350, but not more than \$1,000, in addition to certain fees and assessments that are required by statute; mandatory participation in weekly counseling sessions of not less than 1 1/2 hours per week for 12 months, at my expense; in the Court's discretion, the Court may order me to participate in an alcohol or drug treatment program at my expense; and, in the Court's discretion, if it appears from information presented to the Court that a child under the age of 18 years may need counseling as a result of the commission of a battery which constitutes domestic violence, the Court may refer the child to an agency which provides protective services, and, if that occurs, the Court will require me to reimburse the agency for the costs of any services provided, to the extent of my ability to pay.

THIRD OFFENSE OR ANY SUBSEQUENT OFFENSE WITHIN 7 YEARS (CATEGORY C FELONY):

A category C felony punishable by a sentence of imprisonment in the Nevada State Prison for at least 1 year but not more than 5 years; a possible fine of not more than \$10,000, in addition to certain fees and assessments that are required by statute; in the Court's discretion, the Court may require me to participate in an alcohol or drug treatment program at my expense; and, in the Court's discretion, if it appears from information presented to the Court that a child under the age of 18 years may need counseling as a result of the commission of a battery which constitutes domestic violence, the Court may refer the child to an agency which provides protective services, and, if that occurs, the court will require me to reimburse the agency for the costs of any services provided, to the extent of my ability to pay. A third or subsequent offense is not probationable.

ALL DEFENDANTS MUST INITIAL EITHER #1 OR #2 BELOW-DO NOT INITIAL BOTH

- _____ 1. I am represented by an attorney in this case. My attorney has fully discussed these matters with me and advised me about my legal rights. My attorney is _____.
- _____ 2. I have declined to have an attorney represent me and I have chosen to represent myself. I have made this decision even though there are dangers and disadvantages in self-representation in a criminal case, including but not limited to, the following:
 - (a) Self-representation is often unwise, and a defendant may conduct a defense to his or her own detriment;
 - (b) a defendant who represents himself is responsible for knowing and complying with the same procedural rules as lawyers, and cannot expect help from the Judge in complying with those procedural rules;
 - (c) a defendant representing himself will not be allowed to complain on appeal about the competency or effectiveness of his or her representation;
 - (d) the state is represented by experienced professional attorneys who have the advantage of skill, training and ability;
 - (e) a defendant unfamiliar with legal procedures may allow the prosecutor an advantage, may not make effective use of legal rights, and may make tactical decisions that produce unintended consequences; and
 - (f) the effectiveness of the defense may well be diminished by a defendant's dual role as attorney and accused.

DEFENDANT'S SIGNATURE _____

DATE OF BIRTH _____

DATE _____

I HAVE REVIEWED THIS ADMONISHMENT WITH MY CLIENT AND HE/SHE UNDERSTANDS THE RIGHTS HE/SHE IS WAIVING AND THE CONSEQUENCES OF HIS/HER PLEA OF GUILTY/NOLO CONTENDERE TO THIS BATTERY/DOMESTIC VIOLENCE CHARGE

DEFENDANT'S ATTORNEY (if applicable) _____

BAR NUMBER _____

005187

exhibit 5

CASE No. 0250630

AMENDED INFORMATION

FILED FEB 10, 2009 Dept V.

exhibit 5

005188

ORIGINAL

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

FILED IN OPEN COURT

FEB 10 2009

EDWARD A. FRIEDLAND
CLERK OF THE COURT

BY

Kristen Brown
KRISTEN BROWN DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,

10 Plaintiff,

11 -vs-

12 BRIAN KERRY O'KEEFE,
13 #1447732

14 Defendant.

Case No. C250630
Dept No. V

AMENDED
INFORMATION

16 STATE OF NEVADA }

17 COUNTY OF CLARK }

ss:

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

20 That BRIAN KERRY O'KEEFE, the Defendant(s) above named, having committed
21 the crime of MURDER WITH USE OF A DEADLY WEAPON (OPEN MURDER)
22 (Felony - NRS 200.010, 200.030, 193.165), on or about the 5th day of November, 2008,
23 within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes
24 in such cases made and provided, and against the peace and dignity of the State of Nevada,
25 did then and there wilfully, feloniously, without authority of law, and with premeditation and
26 deliberation, and with malice aforethought, kill VICTORIA WHITMARSH, a human being,
27 by stabbing the said VICTORIA WHITMARSH with a deadly weapon, to-wit: a knife.
28 ///

1:11-cv-02109-GMN-VCF

000012

2:11-cv-02109-GMN-VCF

005189

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

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

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>
ARMBRUSTER, TODD	5001 OBANNON DR #34 LVNV
BALLEJOS, JEREMIAH	LVMPD #8406
BENJAMIN, JACQUELINE DR	ME 0081
BLASKO, KEITH	LVMPD #2995
BUNN, CHRISTOPHER	LVMPD #4407
COLLINS, CHELSEA	LVMPD #9255
CONN, TODD	LVMPD #8101
CUSTODIAN OF RECORDS	CDC
CUSTODIAN OF RECORDS	LVMPD COMMUNICATIONS
CUSTODIAN OF RECORDS	LVMPD RECORDS
FORD, DANIEL	LVMPD #4244
FONBUENA, RICHARD	LVMPD #6834
HATHCOX, JIMMY	5001 EL PARQUE AVE #C-36 LVNV
HUTCHERSON, CHRISTOPHER	LVMPD #12996
IVIE, TRAVIS	LVMPD #6405
KYGER, TERESA	LVMPD #4191
KOLACZ, ROBIN	5001 EL PARQUE AVE #38 LVNV

27 DA#08F23348X/LB
LVMPD EV#0811053918
(TK9)

exhibit 6

Case No. C250630

FIRST TRIAL JURY INSTRUCTIONS

FILED MAR 20, 2009

J.J.'s No. 1, 3, 4, 12, 13, 14, 15, 18, 19, 24

exhibit 6

1 INST

FILED IN OPEN COURT

MAR 20 2009 @ 7:15 PM

EDWARD A. FRIEDLAND
CLERK OF THE COURT

BY

Kristen Brown

DISTRICT COURT
CLARK COUNTY, NEVADA

KRISTEN BROWN DEPUTY

8 THE STATE OF NEVADA,

9 Plaintiff,

10 -vs-

11 BRIAN KERRY O'KEEFE,

12 Defendant.

CASE NO: C250630

DEPT NO: XVII

13 INSTRUCTIONS TO THE JURY (INSTRUCTION NO. 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.

INSTRUCTION NO. 3

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

In this case, it is charged in an Amended Information that on or about the 5th day of November, 2008, the Defendant committed the offense of MURDER WITH USE OF A DEADLY WEAPON (OPEN MURDER) (Felony - NRS 200.010, 200.030, 193.165) in the following manner, to-wit: did then and there wilfully, feloniously, without authority of law, and with premeditation and deliberation, and with malice aforethought, kill VICTORIA WHITMARSH, a human being, by stabbing the said VICTORIA WHITMARSH with a deadly weapon, to-wit: a knife.

It is the duty of the jury to apply the rules of law contained in these instructions to the facts of the case and determine whether or not the Defendant is guilty of the offense charged.

INSTRUCTION NO. 4

To constitute the crime charged, there must exist a union or joint operation of an act forbidden by law and an intent to do the act.

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

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

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

INSTRUCTION NO. 12

In this case the defendant is accused in an Amended Information alleging an open charge of murder. This charge includes and encompasses murder of the first degree, murder of the second degree, voluntary manslaughter and involuntary manslaughter.

The jury must decide if the defendant is guilty of any offense and, if so, of which offense.

INSTRUCTION NO. 13

Murder is the unlawful killing of a human being, with malice aforethought, either express or implied. The unlawful killing may be effected by various means.

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INSTRUCTION NO. 14

Malice as applied to murder does not necessarily import ill will toward the victim, but signifies general malignant recklessness of others' lives and safety or disregard of social duty.

INSTRUCTION NO. 15

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

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

1 On March 16, 2012, O'Keefe filed his *Motion to Dismiss Based Upon Violations of the*
2 *Fifth Amendment Component of the Double Jeopardy Clause, Constitutional Collateral Estoppel and*
3 *Alternatively, Claiming Res Judicata, Enforceable by the Fourteenth Amendment Upon the State's*
4 *Precluding State's Theory of Prosecution by Unlawful Intentional Stabbing with Knife, the Alleged Battery*
5 *Act Described in the Amended Information* (the "**Dismissal Motion**"). O'Keefe's Dismissal
6 Motion was denied. O'Keefe verbally renewed his Dismissal Motion on the first day of his
7 trial, and it was again denied.

8 On June 1, 2012, O'Keefe filed his *Motion to Continue Trial*. Continuance was denied
9 on June 5, 2012 at calendar call. During calendar call, O'Keefe informed the trial court that
10 he was not ready to proceed to trial, and requested that the matter be stayed because of the
11 Ninth Circuit Appeal that regarded violations to his constitutional rights in these
12 proceedings. O'Keefe argued he was not totally prepared for trial at this time because he had
13 been devoting much of his time to his federal case. After denying the continuance, the
14 Third Trial commenced June 11, 2012. On June 15, 2012, the jury returned a verdict finding
15 O'Keefe guilty of second degree murder with use of a deadly weapon. O'Keefe filed a *Notice*
16 *of Appeal* on September 5, 2012 from the conviction stemming from the Third Trial. He filed
17 a deficient *Fast Track Statement* in the NSC on November 1, 2012. He filed an *Amended Fast*
18 *Track Statement* on November 2, 2012. In his *Amended Fast Track Statement*, O'Keefe argued,
19 among other things, that the district court erred in denying O'Keefe's request to stay the trial
20 based upon his pending writ in federal court and the fact that he was not ready for trial to
21 begin. O'Keefe also argued that the district court erred in not allowing defense's jury
22 instruction for the element of the crime - malignant heart. On April 10, 2013 the NSC

1 entered its *Order of Affirmance* (the “**Third Trial Affirmance**”) regarding these two
2 arguments. The NSC faulted O’Keefe and found that “the district court did not abuse its
3 discretion by denying O’Keefe’s request for an extended continuance where the delay was
4 his fault,... Because O’Keefe has not provided this court with the instructions given at trial,
5 he fails to demonstrate that the district court abused its discretion by rejecting his proposed
6 instruction.” *O’Keefe v. State*, 2013 WL 1501038, NSC Docket No. 61631 (April 10, 2013).

7 On August 19, 2013, O’Keefe filed a petition for writ of certiorari in the United
8 States Supreme Court with regard to the Third Trial Affirmance, in Case No. 13-6031, which
9 was denied October 15, 2013. *O’Keefe v. Nevada*, 134 S.Ct. 444, 187 L.Ed.2d 297 (Case No.
10 13-6031; October 15, 2013).

11 On December 6, 2013 O’Keefe filed a *Petition for Writ of Mandamus or, in the Alternative,*
12 *Writ of Coram Nobis* arguing the issue of his prior burglary case being used against him in this
13 murder case. It was denied on January 28, 2014. On January 27, 2014 O’Keefe filed a *Motion*
14 *to Modify and/or Correct Illegal Sentence* (Post-Conviction Remedy - NRS 176.555) raising the
15 issue of lack of jurisdiction. It was denied on March 25, 2014. On July 23, 2014, O’Keefe
16 filed a *Motion for Relief from Judgment Based on Lack of Jurisdiction for U.S. Court of Appeals Had not*
17 *Issued any Remand, Mandate, or Remittur* (Post-Conviction Remedy - NRCP (60)(b)(4)) and it
18 was denied August 14, 2014. He filed a *Notice of Appeal* on August 29, 2014 regarding the
19 denial; however, it was eventually dismissed.

20 O’Keefe filed his *Petition for Writ of Habeas Corpus* on September 15, 2014, challenging
21 that the trial court lacked jurisdiction to hear the Third Trial because the Ninth Circuit
22 Appeal remained pending. On November 6, 2014 this Court appointed the undersigned

1 counsel to file a supplemental petition for writ of habeas corpus. Briefing was set with this
2 supplemental petition due April 7, 2015.

3 **STATEMENT OF THE FACTS**

4 **Rough Draft Transcript of Jury Trial – Day 1, dated June 11, 2012:**

5 **Outside presence of jury**

6 Mr. Lalli (state's counsel) states they are using the same exhibits used in the previous
7 trial. Jury Trial Transcript Vol. 1 ("JTT1") at p. 3. Mr. Lalli states they will refer to prior
8 testimony as hearings, things of that nature, and not refer to a prior trial. They have
9 admonished their witnesses to not do so, as well. JTT1:4. Mr. Lalli informed the court that
10 Judge Villani granted in part a bad act motion the State proffered. One incident was a
11 conviction O'Keefe suffered for domestic violence, third offense. JTT1:5. It is Mr. Lalli's
12 belief that the order allowed them to indicate that O'Keefe was tried on a charge of battery
13 constituting domestic violence, third offense. Lieutenant Price, a fact witness, will testify he
14 was aware of O'Keefe's record, which is a primary reason he removed O'Keefe from the
15 scene after being called there, determining there was not enough evidence to make an arrest.
16 This officer put O'Keefe in a car and drove him somewhere else. JTT1:6.

17 Mr. O'Keefe brought documents per NRS 47.150, mandating that the Court take
18 judicial notices of the facts of this case. He argued that Judge Villani denied his right to delay
19 this trial. JTT1:8. Mr. O'Keefe argued that the State of Nevada wrongfully charged him with
20 malice murder based on a battery act of intentional stabbing. He was forced to take the stand
21 because Judge Villani's ruling would not let in any evidence. The jury returned a second
22 degree murder with a deadly weapon. Nevada Supreme Court reversed the case based on an

1 erroneous jury instruction on second degree murder. The jury instruction was prejudicial
2 because evidence did not support it. JTT1:9.

3 Mr. O'Keefe states that once they charge malice aforethought and premeditated, they
4 did not have to list battery; it is duplicity. Jury Instruction 18 had no chance. Evidence did
5 not support that Mr. O'Keefe did any unlawful act. The issue was addressed, presented, and
6 reversed on direct appeal. They ruled in Mr. O'Keefe's favor. Constitutional collateral
7 estoppel applies. They said he did no unlawful act, no battery. JTT1:10.

8 There was a second trial and Mr. Lalli recharged Mr. O'Keefe with the same offenses,
9 after an acquittal; only second degree murder. Right now, they are proceeding on an
10 unintentional murder. Mr. O'Keefe argues that is based on nothing. Mr. O'Keefe has this
11 issue in the Ninth Circuit. Mr. Lalli recharges the same offense, regardless that the acquittal
12 was not officially entered; *U.S. v. Green* says it does not have to be. JTT1:11, Mr. O'Keefe
13 states that any issue decided is no longer open to consideration. He claims a *res judicata* form
14 of jeopardy on the same offense. However, they proceed to second trial. O'Keefe argues that
15 Mr. Lalli should not have been able to use in the second trial the same evidence from the
16 first trial, but he did. Mr. Lalli is barred because it is the same standard of proof. The issue
17 was decided in Mr. O'Keefe's favor. JTT1:12.

18 Citing *Byford v. Nevada*, 994 P.2d at 700, headnote 25, it was argued that trial court
19 decisions do not constitute the law of the case, and only the Nevada Supreme Court can
20 create such on direct appeal. Mr. O'Keefe argued he was acquitted by jury of first degree
21 intentional stabbing, criminal intent, and that the Nevada Supreme Court acquitted him of
22 any unlawful act. JTT1:13. O'Keefe argued Mr. Lalli admitted the NSC is well aware of how

1 involuntary manslaughter would become 2nd degree murder, believing that the NSC ruled the
2 evidence did not support it so the jury could not convict again. O'keefe argued that Mr. Lalli
3 used evidence he cannot use. *Id.* at p. 14.

4 Mr. O'Keefe moved to dismiss, arguing that Mr. Lalli has no evidence and thus
5 cannot proceed on the theory of intentional stabbing. The second trial was a mistrial. *Id.* at p.
6 15. Mr. O'Keefe took over the case because he is passionate that he did not do this, and was
7 acquitted. He filed a pretrial petition under USC §2241, claiming a true Double Jeopardy
8 violation. O'Keefe argued that Judge Navarro agrees there is a Double Jeopardy problem,
9 for which Mr. O'Keefe provides the order. Mr. O'Keefe's show cause response was denied
10 and, when he did the show cause response in the amended petition dropping ground 2 and 3
11 and proceeding with the Double Jeopardy, she denied it. Mr. O'Keefe appealed to the Ninth
12 Circuit. *Id.* at p. 16.

13 The Ninth Circuit granted O'Keefe a hearing on these issues. Pursuant to *White v.*
14 *Lambert* (2004), Judge Paez of the Ninth Circuit stated that if you are a pretrial detainee and
15 file under §2241, as long as you are not under State court judgment at the time of filing, we
16 have a true Double Jeopardy violation. They reversed it, sent it back, ordered full briefing,
17 and appointed him counsel. *Id.* at p. 17.

18 O'Keefe states Judge Navarro sent him an order two (2) weeks prior to recusing
19 herself. Villani recused himself as well. Navarro is married to a top district attorney in the
20 state who is in the criminal division named Mr. Rutledge. *Id.* at p. 18.

21 Mr. Lalli stated that the defendant was charged with open murder in the first trial. *Id.*
22 at p. 19. The Court gave an instruction on 2nd degree felony murder. The jury returned a

1 verdict of 2nd degree murder. On appeal, NSC said there was no evidence of felony 2nd
2 degree murder in the record. The conviction was reversed. Mr. Lalli argues they still have
3 available to them a theory of 2nd degree malice murder, the theory upon which they are
4 proceeding. Judge Villani denied the same motion Mr. O'Keefe brings now. *Id.* at p. 20.

5 Defendant filed a petition with same issues, which was summarily denied. The Ninth
6 Circuit allowed O'Keefe to appeal; however, the federal court did not stay this proceeding.
7 Mr. O'Keefe still has the ability to fully litigate that issue in the Ninth Circuit, and was
8 appointed a federal attorney to do that. *Id.* at p. 21.

9 O'Keefe rebutted by asking that all objections during the court, if it proceeds, be
10 "federalized" by the court. Mr. Lalli objects that that is contrary to established state law. *Id.*
11 at p. 22. If the defendant has an objection, he is required to make it. Blanket objections are
12 not allowed in their State jurisprudence, and the Court is required to rule on that. O'Keefe
13 argued that it was a simple procedure. On to the other issues, Mr. Lalli argued that it was a
14 felony murder theory. Mr. O'Keefe argues that murder is murder, for double jeopardy
15 purposes. *Id.* at p. 23.

16 Mr. Lalli argued there was nothing more than the implied malice murder. Instruction
17 13 states the jury must remember the rule. Murder was by malice aforethought, either
18 expressed or implied. Lalli argued that first degree was expressed malice murder, while
19 second degree was implied. In the fast track response, the State conceded that the
20 instruction was nothing but implied malice murder. O'Keefe argues that in Instruction 18
21 under the first theory, Mr. Lalli was trying to proceeding on malice murder. *Id.* at p. 24.

1 The Court stops O'Keefe, saying that he keeps on repeating the same thing. The
2 "federalization" request was denied. The Court allowed O'Keefe to make his exhibits part of
3 the record. The motion to dismiss is denied. *Id.* at p. 26. The court noted that Judge Villani
4 ruled that the State was allowed to bring before the jury the prior felony conviction for
5 battery domestic violence, third offense, as well as the facts supporting the conviction. *Id.* at
6 p. 27. The Court declines to revisit Judge Villani's decision on that. O'Keefe states that, on
7 February 10th, 2009, the State of Nevada held a *Petrocelli* hearing listing all of his battery
8 domestic violence cases and the one felony battery domestic violence. It was resolved on
9 March 16th, 2009. Mr. Smith was the prosecutor at the time. *Id.* at p. 28.

10 O'Keefe argues that issues were decided upon, that he did not commit a battery.
11 After the second trial's mistrial, a third trial was scheduled. He argues they re-litigated two
12 days late. *Id.* at p. 29. The Court tells O'Keefe that they are not reversing Judge Villani's
13 ruling. The same argument was made, and he made a ruling. O'Keefe states that trial court
14 decisions do not constitute the law of the case, and objects heavily. *Id.* at p. 30.

15 **Rough Draft Transcript of Jury Trial – Day 2, dated June 12, 2012:**

16 **Outside presence of jury:**

17 O'Keefe argues that Mr. Lalli is trumping all over his presumption of innocence by
18 giving an inference to the jury that a battery domestic violence has been committed. Jury
19 Trial Transcript Vol. 2 ("JTT2") at p. 2. The NSC adjudicated this issue in the first appeal.
20 Judge Villani ruled that battery domestic violence never happened; evidence did not support
21 it beyond a reasonable doubt. *Id.* at p. 3.

1 The Court reviewed the NSC order and reversal and stated that, "[t]he district court
2 abuses discretion when it instructed the jury that second degree murder includes involuntary
3 killing that occurs in the commission of an unlawful act, because the State's charging
4 document did not allege that O'Keefe killed the victim while he was committing an unlawful
5 act. And the evidence presented at trial did not support this theory of second degree
6 murder." *Id.* at p. 4. Mr. Lalli keeps inferring that this homicide was committed during a
7 battery act of intentional stabbing. The jury in the first trial acquitted O'Keefe of intentional
8 stabbing. They returned a 2nd degree on implied malice. *Id.* at p. 6.

9 Mr. Lalli argues that the jury never acquitted O'Keefe of an intentional stabbing. *Id.* at
10 p. 7. He was acquitted of a willful, deliberate, premeditated killing. The court notes that
11 O'Keefe has a continuing objection. *Id.* at p. 8. The court noted the record was preserved.
12 O'Keefe objected to this trial. *Id.* at p. 58. He objects to some of the evidence under on the
13 law of the case doctrine again. *Id.* at p. 59. The court is going to allow Ms. Mercer and Mr.
14 Lalli to bring that evidence in. *Id.* at p. 60.

15 Opening statements were given. JTT2:61-94. Mr. Lalli objects multiple times
16 throughout defense's opening statements stating O'Keefe was turning it into an argument
17 rather than an opening statement. JTT2:73,89.

18 **Witness Roger Price's Testimony:**

19 Mr. Price is a graveyard lieutenant at the Enterprise area command with LVMPD. He
20 has been employed with Metro for 15 years. In April of 2004, he was a swing shift police
21 officer at the downtown area command. JTT2:96. Mr. Price testifies he was dispatched on

1 April 2 2004 to 1825 Lewis. Victoria Whitmarsh had alleged her boyfriend, Brian O'Keefe,
2 had battered her. *Id.* at p. 97.

3 On domestic violence calls, Mr. Price testifies they interview both parties, evaluate
4 evidence and the scene, and determine from the scene which story corroborates with it.
5 They look for bruising, reddening, scratches, cuts. Mr. Price stated they had spoken to both
6 parties that night. *Id.* at p. 98. There was not enough physical evidence to support the
7 allegation of battery. Victoria had no visible injuries. Mr. Price testified that they suggested
8 one of them leave the apartment. *Id.* at p. 99. O'Keefe stated he would leave. Mr. Price
9 offered to take him wherever he wanted. This is the only time he has ever done that. *Id.* at p.
10 100.

11 Mr. Price testified he drove O'Keefe and dropped him off at the south side of
12 Charleston at the intersection of Charleston and Hinson. It was about 3 ½ to 4 miles from
13 1825 Lewis. JTT2:101. About an hour and-a-half after dropping him off, they were
14 dispatched back to the same place. Victoria had injuries on her and stated she was victim of
15 battery again, at the hands of O'Keefe. *Id.* at p. 102.

16 Mr. Price testifies they observed scratches, reddening, puffiness around her eyes and
17 broken glasses. The defendant contacted Victoria's cell phone and Mr. Price spoke to him
18 on it. Mr. Price testified it was the same voice from the man he dropped off. *Id.* at p. 103.
19 The man on the phone stated he was in a bar somewhere close. Mr. Price asked him to
20 return and give his side of the story, but he refused. He also refused to tell Mr. Price where
21 he was. They took a report. *Id.* at p. 104.

1 The Court admits the documents. Mr. Price admits to testifying in that matter. He is
2 shown a copy of the charging document, the information in that case. *Id.* at p. 106. He also
3 recognizes the judgment of conviction. Ms. Mercer passes the witness. O'Keefe has no
4 cross. *Id.* at p. 107.

5 **Elyne Warnicko Greene's Testimony:**

6 Ms. Greene is sworn in. She is a supervisor of victim's services in LVMPD. She
7 provides direct service to victims of all crimes, as well as supervising of staff. Ninety percent
8 of her work load deals with victims of domestic violence. *Id.* at p. 108.

9 She testified to having a bachelor's in psychology and a master's degree in counseling.
10 She worked as a therapist for 15 years and had trained as a volunteer in domestic violence
11 services. Since then, she has run shelter and worked at LVMPD. She worked a crisis hotline,
12 providing resources to those calling. After ceasing to do therapy, she worked in Southern
13 California with victims and was the director of a crisis response team. *Id.* at p. 109.

14 The activities of the crisis response teams were to assess and provide resources at that
15 exact time or for the future. They also let them know how the criminal justice system would
16 operate. The resources provided were safety planning, helping identify lethality risks, shelter,
17 support groups, and protection order information. *Id.* at p. 110.

18 She ran the shelter for 6 years while with the agency. While working as a therapist,
19 Ms. Greene mostly saw victims of domestic violence, as well as children exposed to violence.
20 *Id.* at p. 111. Ms. Green came to Las Vegas twenty years ago and joined LVMPD. She
21 testified to working with about 100 victims of domestic violence per month. She has testified
22 in court before as an expert. *Id.* at p. 112.

1 Ms. Green defines cycle abuse as the relationship between the victim and the abuser,
2 starting off with a tension building phase. Victims often describe that time as walking on
3 eggshells. The tension finally becomes explosive, which is when there is violence. The last
4 part is called the honeymoon phase, when the abuser shows guilt or shame. *Id.* at p. 113.

5 Often times, Ms. Greene states that victims will provoke their abusers to abuse them,
6 and get it over with. It can be simple as not cooking dinner right, or going out with friend
7 they were told not to, not calling back, not responding to text messages. When a victim
8 becomes physical, their intent is often defensive. *Id.* at p. 115. One person in a relationship
9 can have more power; it can be subtle or more obvious. So, when an abuser gets physical, it
10 is aimed at dominating the other party. They often use verbal intimidation. *Id.* at p. 116. Ms.
11 Greene testifies that these relationships start where there is a lot of attention. Looking back,
12 victims realize it is controlling and manipulative, rather than sweet. *Id.* at p. 117.

13 Grooming is the term used for the process of tearing the victim down mentally, going
14 along with physical abuse. Offenders typically prepare their victim by convincing them they
15 are unlovable and lucky to have them. If there is separation period, it is common for victims
16 to try and reestablish a relationship with their abuser. *Id.* at p. 118.

17 Ms. Greene testifies that there are multiple factors that can make a victim stay with
18 their abuser; emotional, financial, security. Truly loving the person, even though they are
19 dangerous, is the number one reason. Embarrassment goes along with being a victim of
20 domestic violence. *Id.* at p. 119. When an abuser feels they are losing control, they often
21 escalate. O'Keefe had no cross. State calls their next witness, Cheryl Morris. She is sworn in.
22 *Id.* at p. 120.

1 Witness Cheryl Morris' Testimony:

2 Ms. Morris dated O'Keefe between the months January of 2008 to September of
3 2008. She met him at Arizona Charlie's. She testifies that she came back from a trip and
4 starting see him. They conversed a lot on the phone. *Id.* at p. 121. Ms. Morris started to
5 spend nights at his dwelling. At the time, she lived with her friend, Dorothy Robe. O'Keefe
6 lived in a trailer on a friend's property whose name was Troy. *Id.* at p. 122. Ms. Morris
7 identified O'Keefe in the courtroom. She testifies that she had a romantic relationship with
8 him. *Id.* at p. 123.

9 Ms. Morris knew Victoria Whitmarsh was a former lover of O'Keefe's, from back in
10 2001. She learned that he had called her while they were at his trailer. *Id.* at p. 124. O'Keefe
11 told Ms. Morris that Victoria was calling to clear her conscience. She testified that that was
12 not the first time hearing about Ms. Whitmarsh. *Id.* at p. 125. Something happened with
13 O'Keefe and his friend, so he moved in with Ms. Morris at Dorothy's house. Her daughter
14 was also living with her. At times, the defendant would often consume alcohol. *Id.* at p. 126.

15 Ms. Morris testifies that O'Keefe would drink until intoxication. While he was living
16 with Ms. Morris, he would talk about how angry he was with Victoria. She put him in prison
17 for testifying that he hurt her. *Id.* at p. 127. O'Keefe told Ms. Morris he wanted to kill
18 Victoria for taking 3 years of his life. When first talking about Victoria, he was sad, but then
19 he would become more upset. From there, he would just start drinking and become
20 outraged. *Id.* at p. 128.

21 O'Keefe told Ms. Morris he was in Grenada and the government taught him how to
22 kill. He even demonstrated how to kill someone with a knife. *Id.* at p. 129. Ms. Morris stated

1 that O'Keefe said he liked Victoria because she was submissive. She testified that he always
2 wanted her to go to sleep with him, even when she was not tired. Victoria did the same. *Id.*
3 at p. 130.

4 Toward the end of their relationship, Ms. Morris testifies it became rocky. O'Keefe
5 was inconsistent with coming home. He had stayed with Victoria for a week at one point. *Id.*
6 at p. 131. Ms. Morris states that O'Keefe had suggested they look for an apartment. She
7 wanted to establish residence for herself and O'Keefe somewhere else until she was able to
8 get out. *Id.* at p. 132. They bought an apartment on 5001 El Parque Avenue. She was only
9 there for four days. O'Keefe stayed there off-and-on, but one day never came back. *Id.* at p.
10 133. Ms. Morris did not want Victoria coming to the apartment. She testifies that she called a
11 friend to pick her up, and she left. *Id.* at p. 134.

12 Mr. Lalli presents proposed State's Exhibit 2 for identification. Ms. Morris recognizes
13 it as the apartment they lived at. The court admitted it into evidence. He presents proposed
14 State's Exhibit 1 for identification and she recognizes it as the apartment layout. *Id.* at p. 135.
15 The Court admitted proposed State's Exhibit 1. *Id.* at p. 136. Ms. Morris identifies an open
16 door to her apartment in State's Exhibit 2. She testifies she became aware O'Keefe was
17 arrested in connection with the murder of Victoria Whitmarsh on November 6th, 2008. *Id.* at
18 p. 137.

19 Ms. Morris received a call before then from O'Keefe. O'Keefe wanted to see her and
20 said Victoria would not mind her coming over. She stated she was not sure if he wanted a
21 platonic relationship, or to rekindle what they had. *Id.* at p. 138. O'Keefe suggested having a
22 threesome with Victoria and Cheryl.

1 O'Keefe steps up for cross-examination. *Id.* at p. 139. Ms. Morris testified O'Keefe
2 was honest with her about the phone call he received on Father's Day of 2008. *Id.* at p. 140.
3 O'Keefe had told her he did not think it was right to lie to her. Ms. Morris states that
4 O'Keefe did not share with her that he was on parole when they met. *Id.* at p. 141.

5 Ms. Morris testified O'Keefe mentioned he went to prison because Victoria testified
6 against him in the battery domestic violence case later on. *Id.* at p. 142. Ms. Morris
7 remembers O'Keefe telling her distinctly that Victoria testified against him at that trial.

8 Ms. Morris testified that she cosigned for a car for him. *Id.* at p. 144. They had a bank
9 account together, and Ms. Morris took herself off of it. *Id.* at p. 145.

10 Ms. Morris does not recall having a discussion with Jimmy Hathcox and "them." She
11 does not remember going back to the apartment a few days after the tragedy. *Id.* at p. 146.

12 **Outside Presence of Jury:**

13 The defendant asked Cheryl Morris a question regarding whether she ever told
14 another witness the defendant had never been violent toward her. Mr. Lalli states she
15 described to him several times he had been violent. One incident was in his trailer, another
16 was in a car where O'Keefe was drinking Vodka. *Id.* at p. 148. The Court disregarded the
17 question and answer. O'Keefe opened the door to a history of violence with Ms. Morris. *Id.*
18 at p. 149. The Court informs Mr. O'Keefe not to open the door to that violence, to be
19 careful. *Id.* at p. 152.

20 Judge Villani allowed the State to go into the facts and circumstances of this case.
21 O'Keefe stated that Judge Villani ordered the State not to call an expert witness on domestic
22 violence. The court allowed Ms. Greene's testimony because they do not have the order. *Id.*

1 at p. 155. Mr. Lalli indicated there was never a motion to strike the notice of experts, and he
2 was not aware of any order. *Id.* at p. 156. Mr. Lalli stated Judge Villani never entered such an
3 order. *Id.* at p. 158. O'Keefe's motion to not allow the expert was thus denied. *Id.* at p. 159.

4 The court stated that there was no intention for Judge Villani to dodge this case. *Id.* at
5 p. 161. O'Keefe argues that Judge Villani had everyone under the assumption he would sit at
6 the trial on Monday herein, but instead Senior Judge Bonaventure appeared. *Id.* at p. 162.
7 The court noted that O'Keefe's objection on the record was preserved.

8 **Witness Joyce Toliver's Testimony:**

9 She is married to Charles Toliver, also known as "Cookie". *Id.* at p. 164. Mrs. Toliver
10 currently resides at 1013 North Jones Blvd, Las Vegas, Nevada. She resided at 5001 El
11 Parque in November of 2008 in the bottom floor apartment 29. She was there for 14 years.
12 *Id.* at p. 165.

13 Mrs. Toliver recognizes State's Exhibit 2 as the apartment complex. *Id.* at p. 166. Mrs.
14 Toliver was familiar with people who resided directly above them, *Id.* at p. 167. She testified
15 that O'Keefe had a young lady with him on the night of the tragedy. She describes her as
16 petite with light blond hair. *Id.* at p. 168.

17 Ms. Mercer presents State's Exhibit 1, which Mrs. Toliver recognizes as the
18 apartment layout. *Id.* at p. 169. At 9pm on November 5th, 2008, Mrs. Toliver was watching
19 TV in her bedroom with her husband. All of a sudden a lot of "ruckus" was coming from
20 upstairs. *Id.* at p. 170. Mrs. Toliver turned the TV up after initially hearing the noises, but the
21 noise upstairs was getting louder, and she heard a woman crying. *Id.* at p. 171. It went on for
22 about an hour, with the noise quieting down a little after 10:00 o'clock. *Id.* at p. 172.

1 Mr. Toliver was awoken by the noises. He took a broom to the ceiling and it stopped
2 for a second or two, but then resumed. *Id.* at p. 173. When Mr. Toliver left the apartment,
3 the noise had died down, but she heard a loud moan from the woman who was crying
4 before. *Id.* at p. 174. When her husband came back downstairs, his eyes were big and he
5 looked shocked. *Id.* at p. 175. The police arrived about 15-20 minutes after Mr. Toliver came
6 back into the apartment and indicated something concerned him. *Id.* at p. 176.

7 On Cross-examination, Mrs. Toliver testified she heard no screaming or yelling. After
8 her husband came back, he went back out again into the corridor where everyone was. *Id.* at
9 p. 177. Mrs. Toliver never heard O'Keefe talking, and she has probably talked to his
10 neighbor, Jimmy, at one time or another after the tragedy. *Id.* at p. 178.

11 **Charles Edward Toliver's Testimony:**

12 Charles Edward Toliver testified that he is married to the previous witness, Joyce
13 Toliver and they have lived at 5001 El Parque for 13 years. Mr. Toliver identifies what was
14 once his upstairs neighbor, O'Keefe, in the courtroom. *Id.* at p. 181.

15 At 9:30 to 10:00 pm on November 5th, 2008, Mr. Toliver was asleep and abruptly
16 awoken by banging on the ceiling. His wife told him the noise had been going on for a while.
17 He testified he went to the kitchen, got the broom, came back and hit the ceiling. The noise
18 stopped for a minute, but resumed, so he proceeded to go upstairs. *Id.* at p. 182.

19 The upstairs apartment door was open. O'Keefe was asking him to come into the
20 bedroom, saying she would not wake up. Mr. Toliver stated he saw blood on the bed while
21 standing at the bedroom door and he left the apartment. *Id.* at p. 183. Mr. Toliver testified
22 he also saw a handle to a knife and Victoria's legs. Ms. Mercer presents proposed State's

1 Exhibit 22, which accurately depicts what Mr. Toliver had seen. *Id.* at p. 184. The Court
2 admitted Exhibit 22 and allowed it to be published. Mr. Toliver testified that the location
3 of the handle was close to the pillow. *Id.* at p. 185.

4 Mr. Toliver hollered for help after leaving O'Keefe's apartment, telling someone to
5 call the police. This drew people outside. Mr. Toliver testified he told Todd, the apartment
6 maintenance man, what happened when he came out. *Id.* at p. 186. When they both went up
7 to apartment 35, the door was still open. They went to the bedroom door. *Id.* at p. 187.

8 Mr. Toliver testified O'Keefe told them to "get the hell out." He does not recall
9 O'Keefe being physically aggressive with Todd, in part because he was sitting on the floor.
10 *Id.* at p. 188.

11 Mr. Toliver testified that O'Keefe was holding Victoria, kind of rocking her. He
12 recalls him telling her to, "Wake up, don't do me like this." *Id.* at p. 189. The defendant
13 never asked for help, or for them to call the police. Mr. Toliver testified O'Keefe had a scary
14 look on his face. Mr. Toliver told the police exactly the same information as contained in his
15 testimony here. *Id.* at p. 190.

16 Ms. Mercer presented the witness with his taped statement. He only remembers
17 O'Keefe telling Todd to get out. *Id.* at p. 191. Ms. Mercer shows Mr. Toliver page 17 of his
18 statement, and it refreshes his memory. *Id.* at p. 192. He told police O'Keefe drew back at
19 Todd. *Id.*

20 O'Keefe asked Mr. Toliver to read half way down page 7 of his recorded statement to
21 police. *Id.* at p. 194. Mr. Toliver testifies he remembers O'Keefe telling him to come in here,
22 she will not wake up. He agrees the apartment was just like his apartment. *Id.* at p. 195.

1 There was no light fixture. He states the only light came from the bathroom. He testifies
2 O'Keefe had her lying in his lap, saying "wake up." *Id.* at p. 196.

3 A jury member wanted to know if, "when entering the defendant's room, could you
4 tell if he was intoxicated, drunk?" Mr. Toliver testified he could not tell.

5 **Jimmy Hathcox's Testimony:**

6 Jimmy Hathcox testified he lived upstairs at 5001 El Parque November 5th of 2008.
7 Mr. Hathcox recognizes State's Exhibit 2 as unit 36. He worked maintenance at the complex.
8 *Id.* at p. 199. Mr. Hathcox knew his neighbor, O'Keefe, and identified him in the courtroom.
9 He testified to sometimes seeing him outside his apartment. *Id.* at p. 200. Mr. Hathcox
10 sometime saw O'Keefe hanging out, or drinking. He had surgery on his foot three days prior
11 to November 5th, 2008. He testified he was taking Lortab. *Id.* at p. 201.

12 That night, Mr. Hathcox heard a bang on the rail. Hathcox was not so under the
13 influence of Lortab that he could not telling what was going on around him. *Id.* at p. 202.
14 Upon hearing the noise, he opened the door and saw O'Keefe entering his apartment. Mr.
15 Hatchcox testified that Brian had a mean look on his face. He closed the door and went
16 back inside and heard little noises through the wall. *Id.* at p. 203. Mr. Hathcox testifies that
17 he wondered if O'Keefe was beating up his girlfriend. The noise continued for 45 minutes.
18 He heard Mr. Toliver coming up. *Id.* at p. 204.

19 Police showed up and Mr. Hathcox eventually gave a statement, providing the same
20 information as in his testimony here. There was 30 minutes between seeing O'Keefe and
21 hearing Cookie come upstairs. *Id.* at p. 206. The bang on the rail that Mr. Hathcox heard was
22 loud enough for him to go and open the door. *Id.* at p. 207. Mr. Hathcox did not see any

1 weapons on O'Keefe's person that night. At no point did he hear yelling and screaming, just
2 thumping noises. *Id.* at p. 208.

3 The only time he saw O'Keefe's door open was when he came out after Cookie had
4 come up. Mr. Hathcox testifies that he thought O'Keefe was intoxicated. He remembers the
5 police sitting O'Keefe on the porch after bringing him out. *Id.* at p. 209. Mr. Hathcox
6 testifies that he saw O'Keefe handcuffed on the porch and agreed he was getting pretty loud
7 with the police. He states he did not know O'Keefe was passed out in the car. *Id.* at p. 210.

8 **Officer Todd Conn's Testimony:**

9 Todd Conn is employed with LVMPD, currently assigned to the traffic bureau with
10 accident investigation. Officer Conn was assigned to the Bolden area command in
11 November of 2008. *Id.* at p. 212.

12 Patrol divisions are set up by area command. Area command is a specific area are
13 assigned to conduct patrol activities. Area command 15 is Bolden's east border, with Jones
14 in the west border, Carrie as the north, and Desert Inn as the south border. Officer Conn is
15 a first responder and familiar with the CIT program, which deals with subjects suffering in
16 mental crisis, sometimes drug-induced states. *Id.* at p. 213.

17 Officer Conn was a CIT officer in 2008, having gone through a 40 hour class,
18 speaking with people who were bipolar and schizophrenic, to get an idea of their concerns
19 with dealing with police officers and recognize symptoms. Officer Conn responded to 5001
20 El Parque on November 5th, 2008. *Id.* at p. 214.

1 The call had a female body down inside with blood everywhere. Officer Conn
2 testified that he sent a text message via computer to dispatch, advising them he was en route
3 code (activating lights and sirens) to the location. *Id.* at p. 215.

4 Two patrol vehicles arrived before Officer Conn. Conn immediately went upstairs
5 and saw the apartment door open. He recognized State's Exhibit 2 as the stairway and the
6 door open in the picture. Walking in, there was a living room, a kitchen on the right, an open
7 doorway ahead, a bathroom, and another open door on the right, with another bedroom on
8 the left. *Id.* at p. 216.

9 Officer Conn looked at proposed State's Exhibits 3 through 6. He testified they fairly
10 depict the inside of unit 35 to which he responded. The exhibit were admitted. State's
11 Exhibit 2 was recognized as the view looking through the doorway. *Id.* at p. 217. State's
12 Exhibit 4 was just inside the doorway, looking off to the right. Zooming in, you can see the
13 bedroom where the tragedy took place.

14 Upon looking inside the apartment, he testified that he saw two officers in the
15 kitchen, namely, Officers Santarosa and Fonbuena. *Id.* at p. 218. The officer's guns were
16 drawn, and they were looking directly towards the door of the southwest bedroom. *Id.* at p.
17 219.

18 Officer Conn testified he ran to the wall, gun drawn, so he could cover the portion
19 they could not see. He testified that he saw blood and let Officer Fonbuena know he was
20 going to give verbal commands. *Id.* at p. 220. Officer Conn told whoever was in the room to
21 come out, but there was no response. There was a mumbled talking noise that came from
22 the room, and sometimes agitated yelling. *Id.* at p. 221.

1 The first response Officer Conn got was she stabbed herself. Due to the amount of
2 blood, he testifies that he felt the subject wanted to bait them into coming into the room
3 because the voice was agitated. *Id.* at p. 222. There was no pleading for them to come in and
4 save her. Officer Conn continued his verbal commands. The subject had then began saying,
5 "She's dead." *Id.* at p. 223.

6 Officer Conn testified that the subject had said the woman's name was Veronica. He
7 continued with verbal commands, then O'Keefe was saying, "She's alive." Sergeant
8 Newberry and his officers had then come into the room. *Id.* at p. 224.

9 Officer Conn handed his taser off to Officer Ballejos. *Id.* at p. 225. Officer Conn
10 thought it was important somebody utilized a taser, as opposed to everyone going in with
11 guns. Sergeant Newberry had stated that he was going to do a quick peek. Officer Conn's
12 view only allowed a bloody bed and a bit of a wall. *Id.* at p. 226.

13 Sergeant Newberry saw O'Keefe laying on the female and a knife on the bed. All the
14 officers stacked up behind Officer Conn, their hands on shoulders. O'Keefe's right hand
15 was cradling her head, with the left on her torso, and she was naked from the waist down. *Id.*
16 at p. 227.

17 Officer Conn identifies O'Keefe in the courtroom. He testified they were laying
18 parallel together. O'Keefe was ignoring all verbal commands. *Id.* at p. 228. O'Keefe was
19 screaming at them not to look at her. Officer Conn testifies that they entered the room very
20 fast, not running, but in a controlled manner. There were four total officers in the back
21 bedroom, with tactical vests on. *Id.* at p. 229.

1 Officer Conn testifies that O'Keefe was becoming highly agitated. Officer Ballejos
2 fired the taser, striking O'Keefe. Officer Conn went to grab hands-on. *Id.* at p. 230. Officer
3 Conn gave gloves to Officer Thomas, so he could put handcuffs on O'Keefe. O'Keefe had
4 begun to struggle, so both Officer Conn and Thomas grabbed under his armpits and took
5 him into the living room. *Id.* at p. 231. Medical personnel were then immediately brought
6 into the room. Officer Conn does not believe he ever stepped on the woman's body. *Id.* at p.
7 232.

8 On cross-examination, Officer Conn testified that O'Keefe never told them to "get
9 the F out", and they did not realize he was extremely intoxicated. *Id.* at p. 233. The 9-11
10 I.VPD Communication Center states, "23:06, this person advised subject who lives in
11 apartment is Brian. Extremely 408." The call was code red, so there is no further
12 communications over that radio. The stand-off was mere minutes. *Id.* at p. 234.

13 Officer Conn cannot state what O'Keefe's mindset was at that time, but he felt
14 O'Keefe could have possibly been baiting them. *Id.* at p. 235. When the officers came in,
15 O'Keefe was not waiting for them. *Id.* at p. 236. Officer Conn was only focusing on O'Keefe
16 during that time. He agrees it is a small space from the end of the bed to the closet. Officer
17 Conn states he can only attest to what he did. *Id.* at p. 237.

18 Officer Conn testifies he was stacked in first position, with the other officers directly
19 behind him. *Id.* at p. 239. They were not directly on the wall, and he was in the corner. They
20 were stacked at an angle. Officer Conn did not see a weapon in O'Keefe's hand.

21 Mr. Lalli stepped up for redirect examination. *Id.* at p. 240. Officer Conn testified he
22 clearly gave the defendant directions to come out, but he did not respond. O'Keefe had

1 ordered them to come in. O'Keefe was not consistent with what he was telling the officers,
2 saying first that she was dead, then that she was alive. *Id.* at p. 241.

3 **Dan Newberry's Testimony:**

4 Officer Newberry is employed with LVMPD as a sergeant in the K-9 section,
5 utilizing K-9 dogs to search for suspects. He has been doing this for about 2 years, working
6 with Metro for a total of 17 years. *Id.* at p. 242. On the night of the tragedy, Officer
7 Newberry was a sergeant with the problem solving unit. They were working in plain-clothes
8 and an unmarked car at 11:00 that night. Officer Newberry was the supervisor of a squad of
9 officers. *Id.* at p. 243.

10 The squad was conducting robbery suppression, which Officer Newberry explained is
11 looking for where robberies or crimes are occurring. That night, a call came over the radio to
12 which Officer Newberry felt he and his officers needed to respond. The call described a
13 female bleeding heavily with a male in her room. They responded to the area. *Id.* at p. 244.

14 Officer Newberry stated that domestic disturbances are routine and can often be
15 quite serious. He testified he was working with Officer Sean Taylor and Officer Jeremiah
16 Ballejos that evening. They made their way to unit 35, of which he agrees that State's Exhibit
17 1 depicts a diagram of that. *Id.* at p. 245.

18 Upon entering, he testified that Officer Conn was giving orders, trying to negotiate.
19 Several uniformed officers were in the kitchen and living room area. Officer Newberry stood
20 next to Officer Conn. *Id.* at p. 246. Officer Newberry testified that the conversation he
21 heard was fruitless, with O'Keefe consistently refusing to come out. Officer Newberry
22 testified that he did a quick peek and, upon looking in, saw the female victim and O'Keefe

1 laying on her left side. There was light in the room. *Id.* at p. 247. Officer Newberry saw large
2 amounts of blood and a knife handle on the bed. He formed an entry team and told Officer
3 Coon to do a lethal cover as they entered, asking Officer Ballejos to be a less than lethal
4 cover. *Id.* at p. 248. Officer Newberry asked Officer Taylor to roll in with him as part of the
5 arrest team. They rolled in, their verbal commands were ignored, so they deployed a taser on
6 O'Keefe. *Id.* at p. 249.

7 The female victim was nude from the waist down and in a black tank-top. Something
8 was tied around her arm. He remembers O'Keefe saying not to look at her, his hands
9 moving all around her. *Id.* at p. 250. After entering the room, Officer Newberry cleared the
10 bathroom and came back out after O'Keefe was already tased. A second cycle was deployed
11 and eventually they were able to get O'Keefe in handcuffs. *Id.* at p. 251.

12 He testified he immediately administered aid after O'Keefe was taken out of the
13 bedroom. He checked her pulse, used a flashlight for pupil dilation and looked for
14 respirations on her. Officer Newberry stated she appeared deceased. He recognized State's
15 Exhibit 23 as the female victim. *Id.* at p. 253.

16 Officer Newberry testified he felt no pulse on the female victim. He is trained as an
17 EMT Intermediate. One paramedic had entered the room, and he also checked for a carotid
18 pulse on her neck. *Id.* at p. 254. Officer Newberry picked up a taser probe and moved it to a
19 table in the living room. It is shown in State's Exhibit 1 and accurately depicted in proposed
20 State's Exhibit 9. *Id.* at p. 255. Officer Newberry returned back outside to speak with
21 O'Keefe. He wanted to make sure that medical was tending to O'Keefe for the taser usage.
22 *Id.* at p. 256. It is department policy to have a medical check on someone who had a taser

1 used on them. O'Keefe had blood on him, so they also wanted to check him for injuries.
2 Officer Newberry noticed a small injury on his forehead, an abrasion. Officer Newberry was
3 present when medical aid was rendered to O'Keefe on the walkway. *Id.* at p. 257.

4 O'Keefe was belligerent and uncooperative for the paramedics trying to help him.
5 Mr. O'Keefe stepped up for cross-examination. Officer Newberry testified that O'Keefe
6 appeared intoxicated. *Id.* at p. 258. Officer Newberry explained that a 408, which is what the
7 communication center had announced, means the person is extremely intoxicated. *Id.* at p.
8 259.

9 Officer Newberry testified that all four officers entered the room right behind each
10 other. *Id.* at p. 263. Nobody attempted to draw blood or give O'Keefe a breath test. He
11 stated that use of force reports are completed when there is an injury or suspected injury. *Id.*
12 at p. 264.

13 An assessment was made that O'Keefe was mentally ill/under the influence, also
14 appearing extremely intoxicated and erratic/emotional in his behavior. Officer Newberry
15 testified he never saw a weapon in O'Keefe's hand. *Id.* at p. 266. The bathroom light
16 attached to the bedroom was on, providing light in the room. *Id.* at p. 267.

17 **Outside Presence of Jury:**

18 The court makes sure O'Keefe knows his rights regarding taking the stand and
19 testifying. *Id.* at p. 274-275.

20 **Rough Draft Transcript of Jury Trial – Day 3, June 13, 2012:**

21 **Daniel Ford's Testimony:**

1 Mr. Ford is retired from the I.VMPD Criminalistics Bureau where he worked for 20
2 years. He was assigned to an incident involving O'Keefe on November 5th, 2008. Jury Trial
3 Transcript Vol. 3 ("JTT3") at p. 2. Mr. Ford's responsibilities were to take photographs of
4 the suspect and collect his clothing. Some duties of his position as a Crime Scene Analyst
5 ("CSA") include responding to crime scenes when requested, documenting the scene,
6 searching for items of evidence, identify them, collecting, processing the scene for latent
7 fingerprints, completing their reports and submitting evidence collected at the scenes. *Id.* at
8 p. 3.

9 Mr. Ford testified he was called to the scene at around 3:44 in the morning. Upon
10 arriving, he made contact with Marty Wildemann. His purpose was to photograph the
11 suspect and show his condition at the time of arrest. *Id.* at p. 4. Mr. Ford identified O'Keefe
12 in the courtroom because he actually photographed O'Keefe in an interview room. *Id.* at p.
13 5. Mr. Ford recognizes the proposed State's Exhibits 60 through 64 as photographs he had
14 taken of O'Keefe. *Id.* at p. 6.

15 Exhibit 61 is a close-up of bruising and an abrasion on O'Keefe's forehead. State's
16 Exhibit 62 is a close-up of O'Keefe's palmer side of the index finger. *Id.* at p. 7. State's
17 Exhibit 64 is a close-up of the right hand with the index finger extended. There appears to
18 be a slight laceration to the thumb. Mr. Ford testified he asked the officers to assist him in
19 collecting O'Keefe's clothing, which he took back to the lab. *Id.* at p. 8.

20 Each piece of clothing went in a separate bag. Mr. Ford also took a buccal swab, for
21 DNA purposes, and swabbed the right index finger. A buccal swab is a cheek swab. *Id.* at p.
22 9. The buccal swab was item 7, package 4. Mr. Ford followed standard procedures as far as

1 impounding that buccal swab in this case. *Id.* at p. 10. The swab of the index fingers was
2 item 5, package 4. After collecting the swabs, Mr. Ford testified he took the clothing to the
3 forensic lab. He proceed to take photographs of each piece. *Id.* at p. 11. Mr. Ford recognized
4 State's proposed Exhibits 65 through 76 as O'Keefe's clothing on the night of the arrest. *Id.*
5 at p. 12. Once Mr. Ford took photographs of the clothing, he put them back into the bags
6 and placed the evidence seal with his initials and P number, the date, and put them in the
7 evidence hold room. *Id.* at p. 16.

8 On cross-examination, Mr. Ford testified they just wanted a picture of basically the
9 laceration on the right index finger. *Id.* at p. 17. Nothing was said to Mr. Ford about the
10 thumb. Mr. Ford testified that O'Keefe had problems standing that morning. *Id.* at p. 18.
11 Officers had to keep the defendant from falling over while Mr. Ford took photographs.

12 On re-direct examination, Mr. Ford testified he arrived at the homicide bureau at 3:47
13 in the morning and was there for about an hour. *Id.* at p. 19.

14 On re-cross-examination, Mr. Ford testified he was never at the scene, just at the
15 homicide bureau. *Id.* at p. 20. Defense Exhibits A through E are admitted. *Id.* at p. 21. After
16 finishing his job at the homicide bureau, Mr. Ford testified he went back to Criminalistics
17 Bureau on the south side of the city. *Id.* at p. 23.

18 **Officer Christopher Hutcherson's Testimony:**

19 Christopher Hutcherson has been employed as a police officer at LVMPD for 4 ½
20 years. On November of 2008, he was a patrol officer, completing field training. *Id.* at p. 27.
21 Officer Hutcherson was at the end of his training in November of 2008. The night of the
22 tragedy, he was riding solo and was dispatched at 11:00 P.M. to an incident at 5001 E]

1 Parque. The call was a neighbor had walked past an apartment and saw a woman bleeding.
2 *Id.* at p. 28.

3 Upon arriving, Officer Hutcherson testifies that several officers were already there.
4 He was instructed to go to the rear of the apartment to make sure no one fled. *Id.* at p. 29.

5 Officer Hutcherson recognizes State's Exhibit 2 as the apartment. He stood behind
6 the apartment for 10-15 minutes. He was eventually made aware the suspect was in custody.
7 He testified that he was instructed to put up crime scene tape and take control of the suspect
8 in custody. *Id.* at p. 30.

9 Officer Hutcherson identified O'Keefe in the courtroom. He testified that the crime
10 scene tape was put in front of the unit. *Id.* at p. 31. All entrances were cordoned off so no
11 one could come out of the apartment into the crime scene. *Id.* at p. 32.

12 Officer Hutcherson testified that O'Keefe was belligerent and yelling obscenities
13 while in handcuffs. He took the defendant to his patrol car. *Id.* at p. 33. Officer Hutcherson
14 conducted what they call search incident to arrest before placing O'Keefe in the patrol car.
15 O'Keefe was uncooperative. *Id.* at p. 34.

16 He testifies that he had to physically nudge O'Keefe into the back of the patrol car.
17 Officer Hutcherson eventually decided to get out of the patrol car because he did not want
18 to hear O'Keefe's loud profanities. *Id.* at p. 35. O'Keefe proceeded to yell profanities for 5-8
19 minutes, eventually falling asleep. Upon waking up, Officer Hutcherson testified the
20 defendant was mumbling to himself, no longer being loud. *Id.* at p. 36. Officer Hutcherson
21 took notes of some of what the defendant was mumbling, stuff like, "I love you, V." *Id.* at p.
22 37. O'Keefe mumbled to himself, "I swear to God, V, I didn't mean to hurt you. What did I

1 do wrong? Let's go do the ten years. That's why I love you, V, because you're so crazy." The
2 mumbling went on for a couple minutes. *Id.* at p. 38.

3 Officer Hutcherson took O'Keefe to the detectives and was present when
4 photographs were taken of him. He testified that O'Keefe was loud and belligerent while
5 the photographs were taken, but not uncooperative. Officer Hutcherson spent 45 minutes
6 with the defendant that evening. *Id.* at p. 40.

7 After the photographs, Officer Hutcherson took O'Keefe back to the patrol car and
8 transported him to the Detective Bureau for an interview. *Id.* at p. 41. O'Keefe remained
9 loud and belligerent the entire way to the Bureau. The car ride was 6 minutes. It took some
10 prodding to get him inside. *Id.* at p. 42. Officer Hutcherson stood in the hallway as
11 detectives interviewed O'Keefe. He then transported O'Keefe to the Clark County
12 Detention Center around 4:30-5:00 o'clock in the morning. He testified O'Keefe was normal
13 until realizing he was going to jail. *Id.* at p. 43. Officer Hutcherson testified that the
14 defendant appeared intoxicated.

15 On cross-examination Officer Hutcherson did not recall officers calling in that
16 O'Keefe was extremely "408." He realized O'Keefe was extremely intoxicated upon coming
17 in contact with him. *Id.* at p. 45.

18 Officer Hutcherson agreed that O'Keefe was intoxicated and it was clear at 11:13 that
19 the police had him apprehended. On the way to jail, he testified that O'Keefe was asking
20 why he was going to jail. *Id.* at p. 54. Officer Hutcherson testified he knew nothing of
21 Victoria's mental illness or that she had 5 years left to live. *Id.* at p. 55.

22 **Robbie Dahn's Testimony:**

1 Mr. Dahn is a Crime Scene Analyst ("CSA") with LVMPD. He has been employed
2 with Metro for 14 years. He responds to crime scenes and autopsies. *Id.* at p. 57

3 Mr. Dahn's job is to collect evidence and take photographs. He responded to an
4 autopsy on November 7th, 2008. The doctor assigned was Dr. Jacqueline Benjamin. *Id.* at p.
5 58. Mr. Dahn testified regarding the photographs of the victim and the autopsy *Id.* at pp.
6 60-61.

7 O'Keefe did not cross-examine this witness.

8 **Dr. Timothy Dutra's Testimony:**

9 Dr. Dutra has been a medical examiner for Clark County officer of the coroner and
10 medical examiner for over two (2) years. He is a licensed physician in the State of Nevada.
11 He has been a medical doctor since 1974. *Id.* at p. 70. Dr. Dutra is tasked with determining
12 cause and manner of death. *Id.* at p. 73.

13 Dr. Dutra was not employed with Clark County Coroner's Officer on November 7th,
14 2008, but is familiar with Dr. Jacqueline Benjamin, a board-certified pathologist. *Id.* at p. 79.

15 Dr. Benjamin now practices as a neuropathologist in Southern California. It is normal
16 for a pathologist who has died or is no longer living in the state to assign a different
17 pathologist to review the case file and testify in front of juries. He has done so for Dr.
18 Benjamin's cases twice. *Id.* at p. 80. Dr. Dutra has reviewed all the materials associated with
19 the autopsy performed on Victoria Whimmarsh, Case No. 08-8747. As such, he can render
20 an opinion with respect to the cause and manner of death. *Id.* at p. 81.

1 Dr. Dutra testified the autopsy was performed November 7th, 2008. Dr. Dutra
2 testified that Ms. Whitmarsh suffered from of blunt force trauma on the outside of the body
3 by an un-sharp object. *Id.* at p. 82

4 Dr. Dutra testified regarding the injuries found on the victim. *Id.* at p. 89-100. Dr.
5 Dutra's testified that Victoria Whitmarsh died of a stab wound to the chest. His opined that
6 the manner of death was homicide. *Id.* at p. 107. Dr. Dutra ruled out suicide or accident.
7 *Id.* at p. 107.

8 O'Keefe cross-examined Dr. Dutra. *Id.* at pp. 110-123.

9 On redirect examination, Dr. Dutra testified that forensic pathologists are allowed to
10 review everything they get, come to a conclusion and make a determination of the manner of
11 death. *Id.* at p. 125. Dr. Benjamin's opinion on her cause of death was a stab wound of the
12 chest. She also listed "cutaneous blunt trauma". Dr. Benjamin's manner of death was
13 reported as homicide. *Id.* at p. 126.

14 On re-cross-examination, O'Keefe states he wants an opinion as to whether the
15 wound was intentional or accidental. *Id.* at p. 130. O'Keefe begins making argument to the
16 witness, but the court stops him after Mr. Lalli objects, telling O'Keefe to save his argument
17 for jury. *Id.* at p. 131-132.

18 Juror No. 1 submitted a question to Dr. Dutra. The questions read, "[i]s there any
19 way she could have reached the wound site herself? Could she have stabbed herself at this
20 angle, while having the knife in her hand, accidentally?" Dr. Dutra testified that he thinks it
21 would be very difficult. *Id.* at p. 134. Dr. Dutra noted that the wound is a simple in-and-out

1 wound. Dr. Dutra states it is improbable that she stabbed herself accidentally. Dr. Dutra
2 answered a couple more juror questions. *Id.* at pp. 135-140.

3 **Outside Presence of Jury:**

4 Mr. Lalli stated they will be calling Jocelyn Maldonado, CSA, Edward Guenther, the
5 latent print examiner, and Jennifer Bas, the DNA analyst. *Id.* at p. 142. O'Keefe states that
6 Dr. Benjamin did an examination closer here and it has been years, so he made an objection.
7 Mr. Lalli indicated that he was careful to only elicit Dr. Dutra's proper opinions. *Id.* at p. 143.
8 Mr. Lalli states that O'Keefe violated the confrontation clause and cannot raise that claim on
9 appeal. They were supposed to only get into the opinion of Dr. Dutra, but the defendant
10 insisted on obtaining opinions of Dr. Benjamin. The court warned him, saying he would
11 open the door to redirect examination regarding Dr. Benjamin. *Id.* at p. 144. O'Keefe only
12 went into that area for the record after he was denied his objection. *Id.* at p. 145.

13 **Jocelyn Maldonado's Testimony:**

14 Ms. Maldonado testified that she is a CSA with the LVMPD and was working in that
15 capacity back on November 6th, 2008. She responded to 5001 Parque Ave., unit #35. She
16 was called to document and process the crime scene. Ms. Maldonado testifies that two
17 CSAs usually respond to the scene and the supervisor assigns responsibilities. Gary Reed was
18 the crime scene supervisor there. She was teamed up with Chelsea Collins. *Id.* at p. 149. Ms.
19 Collins took photographs of the scene. Ms. Maldonado collected and impounded evidence,
20 constructed a sketch of the scene, and also, the computer-generated diagram. *Id.* at pp. 150-
21 151.

1 Ms. Maldonado explained how she collected and processed evidence from the crime
2 scene while referring to pictures. *Id.* at pp. 156-178.

3 On cross-examination, Ms. Maldonado testified she did not take the photographs. *Id.*
4 at p. 179. She was present when the photographs were taken. *Id.* at p. 180. O'Keefe shows
5 Ms. Maldonado a document she does not recognize at all. *Id.* at p. 181. It is a receipt from
6 O'Keefe's wallet. O'Keefe argues that it was evidence that should have been photographed,
7 but it was not. *Id.* at p. 182. Ms. Maldonado testifies she does not know if anyone flipped the
8 light switch with blood to test it. *Id.* at p. 185. She reiterates that she only documents and
9 recovers evidence, any further analysis would be at the direction of a detective. *Id.* at p. 186.

10 **Jennifer Bas' Testimony:**

11 Ms. Bas works for the LVMPD in the biology DNA detail, specializing in DNA
12 testing. She has been with Metro for 5 years. *Id.* at p. 188.

13 Ms. Bas testified how DNA evidence is collected and used. *Id.* at pp. 189-192. She
14 discussed the evidence collected in this matter and how it could be used in a case. *Id.* at p.
15 193-215. O'Keefe did not cross-examine the witness.

16 **Rough Draft Transcript of Jury Trial – Day 4, dated June 14, 2012:**

17 Jury Trial Transcript Vol. 4 ("JTT4")

18 **Outside Presence of Jury**

19 The Defendant argued that he did not stipulate to State's Exhibit 14, the mental health
20 records of the victim. He argued that the his attorney during the second trial stipulated to their
21 admission. Previously, Judge Villani ruled he would read the stipulation into the record. Mr.
22 Lalli was willing to agree to Judge Bonaventure reading Exhibit 14 to the jury. *Id.* at pp. 2-8.

1 The parties discuss some 911 calls and their admissibility. *Id.* at pp. 9-17. The Court
2 ruled that neither call will be played do to foundational issues. *Id.* at p. 18.

3 **Ed Guenther's Testimony:**

4 Mr. Guenther is employed with LVMPD. His assignment in the Criminalistics
5 Bureau and the forensic lab. His area of expertise is latent fingerprints. Mr. Guenther
6 expaine the process of collection and analyzing fingerprints. *Id.* at pp. 26-27.

7 Mr. Guenther testified that he reviewed the subject knife for fingerprints. *Id.* at pp. 28-
8 32. On cross-examination, Mr. Guenther testified he examined the knife thoroughly. *Id.* at
9 p. 35. He could find no clear fingerprints belonging to the defendant. *Id.* at p. 36.

10 **Officer Jeremiah Ballejos' Testimony:**

11 Office Ballejos was employed at the LVMPD robbery/homicide bureau and is
12 currently a detective with Metro. *Id.* at p. 38. On November 5th, 2008, he was working with
13 Officer Sean Taylor and Sergeant Dan Newberry. They were finishing up some follow-up
14 investigation and heading back to the station when they heard a 911 call. They were wearing
15 plain clothes, along with a badge. *Id.* at p. 39. Officer Ballejos' testified the three of them
16 responded. *Id.* at p. 40.

17 Upon arrival, patrol vehicles and medical had already arrived. Medical was in the
18 courtyard. Once arriving upstairs, Officer Ballejos came in contact with Officer Todd Conn,
19 who was communicating with a male individual in a back bedroom. *Id.* at p. 42. Officer
20 Ballejos and the two other officers went into the living room at the same time. He testified
21 that Officer Conn was standing at the very end of the wall, giving commands. *Id.* at p. 43.

1 Officer Ballejos testified regarding entry and contact with the defendant. *Id.* at p. 44-
2 51. He testified regarding deploying a taser on the defendant. *Id.* at p. 52. Officer Ballegos
3 testimony mainly supports previous law enforcement testimony. *Id.* at pp. 55-66.

4 **Detective Martin Wildemann's Testimony:**

5 Detective Martin Wildemann testified. *Id.* at pp. 68-124.

6 **Medical records read out loud:**

7 Mr. Lalli requests the stipulation regarding certain facts be read to the jury. *Id.* at p.
8 125. Victoria Whitmarsh's medical record facts are read aloud. She has made multiple suicide
9 attempts, cutting her wrists, stabbing her hands, and overdosing on pills and morphine. She
10 was admitted to Montevista Hospital October 2001, September 2006, August 2006 and
11 October 2006. She admitted to being depressed and getting into fights with her husband,
12 which caused her to feel suicidal. *Id.* at p. 127-129.

13 **Outside Presence of Jury:**

14 O'Keefe objected stating he feels he is being violated, per *Miranda v. Arizona*.
15 Detective Wildemann did not refresh his *Miranda* rights even when he was extremely
16 intoxicated and incoherent. *Id.* at p. 92. There was a point during the interview where
17 Detective Wildemann left and O'Keefe passed out. Mr. Lalli states the video was heavily
18 edited, but O'Keefe was very aware of what was going on throughout the interview. *Id.* at p.
19 93. The motion to suppress was denied by Judge Villani. The court allowed the tape to be
20 played.

21 O'Keefe argued that Mr. Lalli violated the ABA Model Rules of Ethics. *Id.* at p. 94.
22 Mr. Lalli allowed his witness to testify—knowing it was his whole argument, clearly—that

1 Ms. Whitmarsh testified for O'Keefe in the felony domestic violence case, not against. The
2 State allowed their witness to give perjured testimony in violation of the rules of ethics. *Id.* at
3 p. 95. Mr. Lalli states that Ms. Whitmarsh testified regarding the battery O'Keefe committed
4 against her. As such, O'Keefe was convicted by a jury. *Id.* at p. 96. The court denied
5 O'Keefe's motion. *Id.* at p. 97.

6 O'Keefe argued that he properly and timely objected to the 911 tapes now being
7 admitted, stating the State opened the door. The State responded that they did not prohibit
8 O'Keefe from admitting any 911 tapes; however, there is no foundation, so they are still not
9 admissible. *Id.* at p. 132.

10 O'Keefe cited *Nevada v. Colmes*, under NRS 175.381(1) stating that the "[i]f at any
11 time after the evidence of either side is closed, the Court deems the evidence insufficient to
12 warrant a conviction, it may advise the jury to acquit the defendant, but the jury is not bound
13 by such evidence." *Id.* O'Keefe argued the evidence in this case was identical and less than
14 evidence presented in the first trial, and that the evidence did not support that theory of 2nd
15 degree murder. *Id.*

16 Mr. Lalli argued that the state is proceeding on simple implied malice murder.
17 O'Keefe argued he was acquitted of the battery act and through a little trickery, duplicity was
18 being used. *Id.* at p. 135. In other words, O'Keefe argued that all the evidence was already
19 in the record of appeal on the first trial, and there has been no new evidence. O'Keefe
20 believed some evidence was wrongfully used, to which he objected. O'Keefe argued that the
21 evidence does not support murder and that he does not think it should be turned over to
22 jury for deliberation. *Id.* at p. 136.

1 Mr. Lalli opposed the motion. The State is still free to proceed on 2nd degree murder
2 based upon an unlawful killing with malice, aforethought. Mr. Lalli argued that the State has
3 proven guilt beyond a reasonable doubt. *Id.* at p. 138. The court indicated that it felt
4 compelled to leave this to jury. *Id.* at p. 139.

5 **Jury Instructions (outside presence of jury):**

6 The parties and court reviewed the submitted instructions. "*Id.* at pp. 140-168,

7 Both parties stipulate they settled these instructions in court and will be given to the
8 jury prior to the argument. *Id.* at p. 169.

9 **Rough Draft Transcript of Jury Trial – Day 5, dated June 15, 2012:**

10 The jury instructions were read. Jury Trial Transcript Vol. 5 ("JTT5") at p. 2.
11 Closing arguments were given. JTT5:3-51. The jury found O'Keefe guilty of murder in the
12 second degree with use of a deadly weapon. *Id.* at 55-56.

13 **ARGUMENT**

14 **I. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO**
15 **PROVIDE THE APPELLATE COURT WITH THE CHALLENGED**
16 **JURY INSTRUCTION RESULTING IN THE APPELLATE COURT'S**
17 **INABILITY TO REACH THE MERITS OF THE DISTRICT COURT'S**
18 **REJECTION OF A JURY INSTRUCTION DEFINING AN ELEMENT**
19 **OF THE CRIME.**
20

21 Under *Strickland v. Washington* it sets the precedent for challenges to the ineffective
22 assistance of counsel as has been adopted in the State of Nevada as the standard. *Ibid.*, 466
23 U.S. 668, 686-87, 104 S.Ct. 2052, 2063-64 (1984). *Strickland* provides a two-prong test which
24 includes (1) whether counsel's representation fell below an objective standard of
25 reasonableness, and (2) whether defendant was prejudiced to the extent that, but for

1 counsel's errors, there was a reasonable probability of a different outcome. *Id.* The NSC has
2 indicated that the assistance needs to fall within the "range of competence demanded of
3 attorney's in criminal cases." *Jackson v. Warden, Nevada State Prison*, 91 Nev. 430, 432, 537
4 P.2d 473, 474 (1975), quoting *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449
5 (1970). In *Ellis v. State* it states as follows:

6 To state a claim of ineffective assistance of counsel...a petitioner must
7 demonstrate that his counsel's performance was deficient in that it fell below
8 an objective standard of reasonableness, and resulting prejudice such that
9 there is a reasonable probability of a different outcome in the proceedings.
10 *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674
11 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984).

12 *Ibid.*, 281 P. 3d 1170. Furthermore, in *Thomas v. State* the ineffectiveness of counsel on
13 appeal states as follows:

14 For a defendant to assert a claim that appellate counsel was ineffective, he
15 "must show that an omitted issue would have had a reasonable probability of
16 success on appeal." *Id.* While counsel is not required to assert every issue on
17 appeal, counsel is required to act in a manner that does not prejudice the
18 defendant, or destroy a viable claim.

19
20 *Ibid.*, 83 P.3d 818, 823 (Nevada 2004). See SCR 153, *Middleton v. Warden, Nevada State Prison*,
21 120 Nev. 664, 98 P.3d 694 (2004); *Means v. State*, 120 Nev. 1001, 103 P.3d 25 (2004); *Warner*
22 *v. State*, 102 Nev. 635, 729 P.2d 1359 (1987); *Knorr v. State*, 103 Nev. 604, 748 P.2d 1 (1987).

23 Appellant has the ultimate responsibility to provide this court with "portions
24 of the record essential to determination of issues raised in appellant's appeal."

25 *Thomas v. State*, 120 Nev. 37, 43, & n. 4, 83 P.3d 818 (2004) quoting NRAP 30(b)(3); see also
26 *Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a proper

1 appellate record rests on appellant.”); *Jacobs v. State*, 91 Nev. 155, 158, 532 P.2d 1034, 1036
2 (1975).

3 “Murder” is defined as “the unlawful killing of a human being; With malice
4 aforethought, either express or implied ...” NRS § 200.010. Express and implied malice are
5 defined as follows:

- 6 1. Express malice is that deliberate intention unlawfully to take away the life of
7 a fellow creature, which is manifested by external circumstances capable of
8 proof.
- 9 2. Malice shall be implied when no considerable provocation appears, or when
10 all the circumstances of the killing **show an abandoned and malignant**
11 **heart.**

12
13 NRS § 200.020 (emphasis added). The NSC has upheld the use of the language provided in
14 NRS 200.020(2) in jury instructions.

15 The instruction uses the language provided in NRS 200.020(2), and this court
16 has upheld use of the instruction where the jury is properly instructed on the
17 presumption of innocence and the State's burden to prove beyond a
18 reasonable doubt every element of the crime charged. *See Doyle v. State*, 112
19 Nev. 879, 900-02, 921 P.2d 901, 915-16 (1996).

20
21 *Cordova v. State*, 116 Nev. 664, 666, 6 P.3d 481, 483 (2000). All elements of the crime must be
22 submitted to the jury in the jury instructions. Failure to do so results in constitutional error.

23 When a jury instruction omits a necessary element of the crime, constitutional
24 error has occurred. ... The court's erroneous instruction on the elements of
25 murder in the second degree was also constitutional error. *Sandstrom v.*
26 *Montana*, 442 U.S. 510, 523-24, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) (holding
27 that a jury instruction that relieved the State of its burden to prove the element
28 of intent was unconstitutional).

29
30 *Ho v. Carey*, 332 F.3d 587,592 (9th Cir. 2003) referencing *Wade v. Calderon*, 29 F.3d 1312,
31 1321 (9th Cir.1994). Every element of the offense charged should be in the jury instructions.
32 Failure to do so results in violation of defendant's Due Process rights.

1 The prosecution has the burden of proving every element of a crime beyond a
2 reasonable doubt. *Carella v. California*, 491 U.S. 263, 265, 109 S.Ct. 2419, 2420,
3 105 L.Ed.2d 218 (1989) (citing *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068,
4 1073, 25 L.Ed.2d 368 (1970)). Accordingly, when a trial judge omits an
5 element of the offense charged from the jury instructions, it deprives the jury
6 of its fact-finding duty and violates the defendant's due process rights. *Id.*
7

8 *United States v. Mendoza*, 11 F.3d 126, 128 (9th Cir. 1993); see also *Brooksby*, 668 F.2d 1102. "It
9 is well-established that a district court errs if it fails to instruct the jury on an element of a
10 charged offense." *United States v. McCaleb*, 552 F.3d 1053, 1058 (9th Cir. 2009); see *United*
11 *States v. Alghazouli*, 517 F.3d 1179, 1189 (9th Cir.2008), cert. denied, --- U.S. ---, 129 S.Ct. 237,
12 172 L.Ed.2d 180 (2008).

13 The failure to instruct on an essential element of an offense is "fundamental
14 error," *United States v. King*, 521 F.2d 61, 63 (10th Cir. 1975), which cannot be
15 cured by reference to the indictment or by reading the unexplained language
16 of the statute to the jury. ... Therefore, notwithstanding that the indictment,
17 the statute and an instruction on "willfully" were read to the jury, the failure to
18 instruct them that "willfulness" was an essential element of the crime
19 prejudiced the defendant. The steps already mentioned that were taken by the
20 district court did not cure the error.
21

22 *United States v. Brooksby*, 668 F.2d 1102, 1105 (9th Cir. 1982) quoting *United States v. Pope*, 561
23 F.2d 663 (6th Cir. 1977). Even if the court adequately instructs on most of the elements of
24 the crime, it must instruct on the essential elements of the crime.

25 At the end of the third trial O'Keefe requested that his proposed jury instruction
26 further defining "abandoned and malignant heart" be given. An "abandoned and malignant
27 heart" may constitute implied malice, which is an element of murder with use of a deadly
28 weapon. NRS § 200.020(2). The court denied his request. On direct appeal appellate
29 counsel broadly argued that the district court erred in rejecting O'Keefe's instructions, one
30 of which was regarding defining an "abandoned and malignant heart." Other rejected

1 instructions pertain to O'Keefe's requests regarding non-flight (p. 27), intoxication (p. 28),
2 and defining reasonable doubt (p. 29). Each of these were marked as "proposed" and
3 rejected by the trial court. Although appellate counsel made a broad challenge to the rejected
4 jury instructions on appeal, he failed to provide a copy of the jury instructions to the
5 appellate court in the appeal appendix. Thus, the Nevada Supreme Court faulted appellate
6 counsel as follows:

7 O'Keefe has not provided this court with the instructions given at trial, he
8 fails to demonstrate that the district court abused its discretion by rejecting his
9 proposed instruction. ...see also *Greene v. State*, 96 Nev. 555, 558, 612 P.2d
10 686, 688 (1980) ("The burden to make a proper appellate record rests on
11 appellant."). O'Keefe also does not identify which instructions he contends
12 were erroneously given. We conclude that he fails to demonstrate that the
13 district court abused its discretion.

14
15 *O'Keefe v. State*, WL 1501038 (2013).

16 The failure to submit the instructions in the appendix by O'Keefe's appellate counsel
17 meets the requirements of *Strickland v. Washington*. *Ibid.*, 466 U.S. at 686-87, 104 S.Ct. at
18 2063-64. Counsel's representation fell below an objective standard of reasonableness in
19 omitting a necessary document from the appellate record, which resulted in the NSC's
20 inability to render a meritorious decision thereon. *Id.* This exclusion is not within the range
21 of competence demanded of appellate attorneys in criminal cases, since it is common
22 knowledge that any appellate challenge to a specific pleading or document presented in trial
23 below will not be supported absent that document or pleading. See *Jackson*, 91 Nev. at 432,
24 537 P.2d at 474, quoting *McMann*, 397 U.S. at 771, 90 S.Ct. at 1449. O'Keefe, through his
25 appointed counsel, maintained the ultimate responsibility to provide the NSC with "portions
26 of the record essential to determination of issues raised in appellant's appeal." *Thomas*, 120

1 Nev. at 43, & n. 4, *quoting* NRAP 30(b)(3); *see also* *Greene*, 96 Nev. at 558; *Jacobs*, 91 Nev. at
2 158. There can be no “objective reasonableness” found in such an omission. *Id.*; *see also* *Ellis*,
3 281 P.3d 1170. Further, this is not a situation where there was an omitted issue on appeal,
4 rather the issue was actually argued by appellate counsel without the proper record support
5 submitted to enable such review, thereby destroying a viable claim. *Thomas*, 83 P.3d at 823;
6 *see* *SCR 153*, *Middleton*, 120 Nev. 664; *Means*, 120 Nev. 1001; *Warner*, 102 Nev. 635; *Knorr*, 103
7 Nev. 604. The challenge to the instruction on appeal had a reasonable probability of
8 success, hence the omitted instruction in the appendix submitted by appellate counsel caused
9 prejudice. *Thomas* O’Keefe was significantly prejudiced to the extent that, but for counsel’s
10 error in preparing and submitting the appendix to the NSC, there was a reasonable
11 probability of a different outcome on the appeal. *Strickland*, 466 U.S. at 686-87, 104 S.Ct. at
12 2063-64.

13 The instruction argued on appeal pertained to elements of the crime for which O’Keefe
14 was convicted. The codified definition of “murder” contains the phrase “[w]ith malice
15 aforethought, either express or implied ...”. NRS § 200.010. The term “implied malice” is
16 further defined to include circumstances “when no considerable provocation appears, or
17 when all the circumstances of the killing show an abandoned and malignant heart”. NRS §
18 200.020(2). This is precisely the instruction O’Keefe sought to define for the jury, which the
19 NSC has indicated as properly instructing the jury “on the presumption of innocence and
20 the State’s burden to prove beyond a reasonable doubt every element of the crime charged.”
21 *Cordova*, 116 Nev. at 666, 6 P.3d at 483; *see, Doyle*, 112 Nev. at 900-02, 921 P.2d at 913-16.
22 Thus, the challenged instruction dealt particularly with not only an element of the crime, but

1 also impacted the level of the State's burden as submitted to the jury, necessarily causing a
2 constitutional Due Process error in the proceedings. *Ho*, 332 F.3d at 592, *citing Wade*, 29 F.3d
3 at 1321; *see also Sandstrom*, 442 U.S. at 523-24, 99 S.Ct. 2450 (holding that a jury instruction
4 that relieved the State of its burden to prove the element of intent was unconstitutional);
5 *Carella*, 491 U.S. at 265, 109 S.Ct. at 2420 (*citing In re Winship*, 397 U.S. at 364, 90 S.Ct. at
6 1073); *Mendoza*, 11 F.3d at 128; *see also Brooksby*, 668 F.2d 1102. "It is well-established that a
7 district court errs if it fails to instruct the jury on an element of a charged offense." *McCaleb*,
8 552 F.3d at 1058; *see Alghazouli*, 517 F.3d at 1189.

9 The failure of the trial court to properly instruct the jury in this matter resulted in a
10 "fundamental error" in the proceedings. *Brooksby*, 668 F.2d at 1105, *quoting Pope*, 561 F.2d
11 663. The appellate counsel's failure to adequately present the instruction to the NSC in
12 making such argument on appeal effectively destroyed O'Keefe's right to have the matter
13 reviewed on its merits. O'Keefe's only cure and avenue for relief remaining is through these
14 proceedings.

15 Not only did counsel fail to provide the jury instructions, he failed to adequately
16 argue the issue, citing only one case in support of his argument. There is an abundance of
17 case law as set forth *supra* that requires jury instructions be given on all essential elements of
18 the offense charged. It deprives the jury of its fact-finding duty, the defendant's Due Process
19 rights are violated and a fundamental error has occurred necessitating reversal. *See Mendoza*
20 *and Brooksby*, *supra*. Counsel failed to adequately research and present this case to the NSC on
21 the level of severity it warranted, instead simply glossing over it to O'Keefe's detriment.

1 Thus, O'Keefe has been denied his ability to be heard on that issue thus preventing
2 him from a meaningful right to appeal. Had appellate counsel provided the jury instructions
3 and performed the proper research necessary to this issue, he would have been able to
4 provide a very compelling argument that would have resulted in O'Keefe's favor. Therefore,
5 counsel's failure to do so not only fell below the standard of reasonableness, but also
6 prejudiced O'Keefe so he was unable to be heard on that issue thus denying him a
7 meaningful right to appeal that issue.

8 **CONCLUSION**

9 **WHEREFORE**, Brian O'Keefe prays that the court will conduct an evidentiary
10 hearing and grant habeas corpus relief to which he may be entitled in this proceeding.

11 **DECLARATION AND VERIFICATION**

12 I, Matthew Carling, am an attorney licensed to practice law in the State of Nevada
13 who was duly appointed to represent the Petitioner, Brian O'Keefe, in the preparation and
14 filing of the above Petition for Writ of Habeas Corpus (Post-Conviction), and that I filed
15 the foregoing document at the specific instruction of the Petitioner, and based on the order
16 of appointment by the Court.

17 Respectfully submitted this 8th day of April, 2015.

18 CARLING LAW OFFICE, PC
19

20 /s/ Matthew D. Carling

21 MATTHEW D. CARLING, ESQ.

22 Nevada Bar No.: 007302

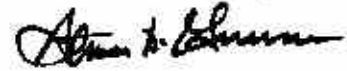
23 Court-appointed Attorney for Petitioner/ Defendant

24 BRIAN O'KEEFE
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/s/ Matthew D. Carling
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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

BRYAN O'KEEFE,
aka Brian Kerry O'Keefe, #1447732

Defendant.

CASE NO: 08C250630

DEPT NO: XVII

STATE'S RESPONSE TO DEFENDANT'S PRO PER POST-CONVICTION
PETITION FOR WRIT OF HABEAS CORPUS

DATE OF HEARING: JULY 10, 2015
TIME OF HEARING: 9:30 A.M.

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through RYAN J. MACDONALD, Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Defendant's Pro Per Post-Conviction Petition for Writ of Habeas Corpus.

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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//

1 CONCLUSION

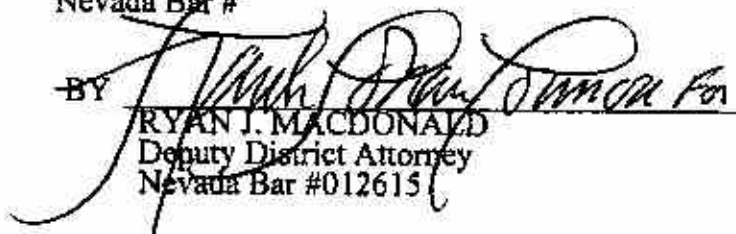
2 Based on the foregoing reasons, the State asks that Appellant's Post-Conviction Petition
3 for Writ of Habeas Corpus and Amended Petition be DISMISSED and Defendant's Request
4 for Evidentiary Hearing and Motion to Appoint Counsel be DENIED.

5 DATED this 2nd day of June, 2015.

6 Respectfully submitted,

7 STEVEN B. WOLFSON
8 Clark County District Attorney
9 Nevada Bar #

10 BY

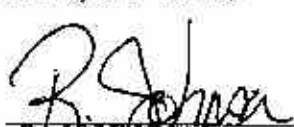

11 RYAN J. MACDONALD
12 Deputy District Attorney
13 Nevada Bar #012615

14 CERTIFICATE OF MAILING

15 I hereby certify that service of the above and foregoing was made this 2nd day of June,
16 2015, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

17 BRYAN O'KEEFE,
18 aka Brian Kerry O'Keefe #90244
19 LOVELOCK CORRECTIONAL CENTER
20 1200 PRISON ROAD
21 LOVELOCK, NV 89419

22 BY


23 R. JOHNSON
24 Secretary for the District Attorney's Office

25
26
27
28 GC/RJM/tj/M-1

MC
DA
PP
AOR

Adam L. Blum
CLERK OF THE COURT

1 MOTION
2 Brian K. O'Keefe # 90244
3 Lovelock Correctional Center
1200 Prison Road
4 Lovelock, Nevada 89419

5 Petitioner In Pro Se

6 IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF CLARK

8 * * * * *

9 BRIAN KERRY O'KEEFE)

10 Petitioner)

Case No. 08C250630

11 -vs-

Dept. No. XVII

12 STATE OF NEVADA, et al)

06-30-15

13 Respondent)

8:30A

14
15 MOTION TO WITHDRAW COUNSEL FOR CONFLICT
16 AND FAILURE TO PRESENT CLAIMS WHEN
17 I.A.E. CLAIMS MUST BE RAISED PER STATUTE
18 IN THE FIRST PETITION PURSUANT CHAPTER 34

19 COMES NOW Brian K. O'Keefe petitioner pro se, to motion
20 this Court to dismiss appointed counsel striking supplement.
21 After three trials, two direct appeals, one writ extraordinary and
22 inter-alia, Court appointed counsel found and filed "one" issue.
23 No communication and consent to raise claim improperly.
24 This motion is made based upon the following points and
25 authorities with all prior papers and pleadings on file.
26
27
28

Dated June 1, 2015

By: Brian K. O'Keefe # 90244
Brian K. O'Keefe

• STATEMENT, POINTS AND AUTHORITIES

Petitioner filed his petition challenging jurisdiction on September 15, 2014, pursuant N.R.S. 24.360. This court granted a PPWL, (order for petition for writ of habeas corpus), on October 15, 2014. On November 6, 2014 this court also appointed counsel subsequently setting a briefing schedule. The supplement 04/07/15; Response 06/08/15; Argument 07/08/15. Emphasizing, the timetable allotted no scheduled "reply" to the state's response. (usually needed!)

On 04/08/15, appointed counsel filed "one" issue without prior knowledge or consent. Additionally, counsel appointed by the court, failed to support or even acknowledge, in his supplement filed, that his petition was in fact a "supplement only", not to supersede the existing petition and failed to bolster or professionally comment on the jurisdictional claim, "writ of jurisdiction by Notice of Appeal on colorable double jeopardy claim." Moreover, this "SUPPLEMENT" was not filed at the specific instruction of petitioner, Fin! Therefore, this becomes a fugitive document not consented to, causing great CONFLICT, especially omitting claims, properly arguing one claim filed's halfway. Petitioner sent a myriad of letters vaguely suggesting viable claims. (due process; equal protection; J.A.C.). These letters were only to set the "gist" of some claims, with an experienced attorney. More energy was spent by dissecting negatively than optimistically supporting valid claims, possible.

Specifically, in response to one of my letters, this was the advice.

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 10th day of October, 2014, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

BRYAN O'KEEFE,
aka Brian Kerry O'Keefe #90244
LOVELOCK CORRECTIONAL CENTER
1200 PRISON ROAD
LOVELOCK, NV 89419

BY



R. JOHNSON

Secretary for the District Attorney's Office

GC/HLS/rj/M-1

1 PPOW

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FILED

DISTRICT COURT 2014 OCT 15 P 2:21
CLARK COUNTY, NEVADA

Don J. Johnson
CLERK OF THE COURT

Brian Kerry O'Keefe,
Petitioner,

vs.

Warden Robert LeGrand,
Respondent,

Case No: C250630
Dept No: 17

ORDER FOR PETITION FOR
WRIT OF HABEAS CORPUS

Petitioner filed a petition for writ of habeas corpus (Post-Conviction Relief) on September 15, 2014. The Court has reviewed the petition and has determined that a response would assist the Court in determining whether Petitioner is illegally imprisoned and restrained of his/her liberty, and good cause appearing therefore,

IT IS HEREBY ORDERED that Respondent shall, within 45 days after the date of this Order, answer or otherwise respond to the petition and file a return in accordance with the provisions of NRS 34.360 to 34.830, inclusive.

IT IS HEREBY FURTHER ORDERED that this matter shall be placed on this Court's

Calendar on the 28th day of October, 2014, at the hour of

8:15 o'clock for further proceedings.

[Signature]
District Court Judge

[Signature]

RECEIVED BY
DEPT 17 ON
SEP 17 2014

082250630
CPWH
Order for Petition for Writ of Habeas Corpus
4354547



005051

DA
PP

RPLY
Brian Kerry O'Keefe # 90244
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Alanna L. Quinn
CLERK OF THE COURT

Petitioner In Pro Se

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK

THE STATE OF NEVADA,)
Plaintiff,)
-vs-)
Brian Kerry O'Keefe,)
1447132)
90244 - DMC Defendant)

Case No. 080250630

Dept. No. XVII

ONE EXHIBIT AS "F"

"REPLY" TO STATE'S RESPONSE AND MOTION
TO DISMISS TO DEFENDANT'S PRO PER
PETITION FOR WRIT OF HABEAS CORPUS
PURSUANT TO NCS 34.260... SINCE

Comes now, Brian Kerry O'Keefe, pro per, and hereby submits
the attached Points and Authorities in "REPLY" (NCS 34.470) to
State's Response filed 10/10/2014 in which Mr. O'Keefe received 10/17/2014.

This "REPLY" is made and based upon all the papers and
pleadings on file herein, the attached points and authorities
in support hereof, and requested "evidentiary hearing" by way
of the Court, sua sponte, if additional argument and proof
need be heard.

BK Respectfully Submitted,
Brian K. O'Keefe - #90244
October 19, 2014

RECEIVED

OCT 27 2014

CLERK OF THE COURT

005052

1710 24.014 WFOF CLERK OF THE COURT

OCT 24 2014

RECEIVED

STATEMENT OF THE CASE

For judicial economy and judicial administration upon this Court, defendant will stick closely to the argument at hand, i.e., lack of jurisdiction. Truly, it is petitioner's belief that the State mislead the Court compounded by the lack of appearance from the local Attorney General's Office when notified by the Clerk of the U.S. Court of Appeals. (see Exhibit "A" pg 2-3 to Petitioner)

PETITIONER'S ANSWER PURSUANT NRS 34.470(1)

Noting in the State's procedural is the fact Mr. O'Keefe had requested a stay of the mandate/remittitur from the Supreme Court of Nevada. Mr. O'Keefe had filed a pro per U.S. Petition, Case # 13-6031, with the Solicitor General of Nevada, C. Wayne Houde responding.

Additionally, the State clearly construes my petition as a post-conviction pursuant NRS 34.724. (id at page 1, over, line 27)

Here again my petition was clearly filed pursuant to NRS 34.360 in which habeas corpus will lie to test and inquire into, upon submission, the jurisdiction of a court.

The State fails to recognize that the "scope of provisions" pursuant NRS 34.720 to 34.830, inclusive apply only to petitions for writs of habeas corpus in which the petitioner: (1) Requests relief from a judgment or sentence ... Petitioner was clearly demonstrating the question of jurisdiction and the State's lack of, to proceed to the third trial while

1 subject-matter jurisdiction remains in the Ninth Circuit. Mr.
2 O'Hecke would still remain in custody until the mandate
3 and remand should issue from the Court of Appeals.

4 These facts are statutory law in Nevada.

5 ● a.) NRS 34.360 - Jurisdiction of Court is matter to be inquired
6 into on habeas corpus.

7 see distinguished Camino v. Lewis, 52 Nev. 202 at 20 (1936)

8
9 ● b.) NRS 34.500(1) - Grounds for discharge in certain cases.
10 When the jurisdiction of the Court... has been exceeded.

11
12 ● c.) NRS 34.722 - "Petition defines. As used in 34.720 to
13 34.830, INCLUSIVE, ... "petition" means a
14 postconviction petition for habeas corpus filed
15 pursuant to NRS 34.724.

16
17 ● d.) NRS 34.726 - Limitations on time to file;
18 Provision 1.) Unless there is good cause shown for delay,
19 a petition ... must be filed within 1 year...

20
21 ● e.) NRS 34.720 - The provisions of NRS 34.720 to 34.830,
22 inclusive, apply only to petitions for writs
23 of habeas corpus ... [34.724]

24
25 Emphasis, Mr. O'Hecke filed under NRS 34.360. For
26 "arguendo", good cause has more than been demonstrated.
27 Petitioner has filed a series of actions and legally the
28 pending appeal still holds exclusive jurisdiction.

FUNDAMENTAL CONSTITUTIONAL ERROR

1
2 Indefinite Assistance of Counsel claims ("IAC") may be used to
3 overcome state procedural faults. This clearly can assist the Court
4 when petitioners clearly demonstrate prior notice was also given
5 by, 1.) the Clerk of the Ninth Circuit notified
6 all parties that the "Certificate of Appealability
7 Panel" granted an appeal on the subject-matter
8 of JEFFREY using the same formal charging document.
9

10 2.) Mr. O'Hare provided multiple copies of the "COA"
11 to the Court also way in advance of trial.
12

13 The law holds that even a mere suggestion that the "Court" lacks
14 jurisdiction to proceed, by any party, the Court must properly
15 determine if jurisdiction exists on the subject-matter.

16 see NRC-P 12(h); FRCP-P 12(h); FRCP 12(b)(5)

17 see also U.S. v. GARNER, 2017-2d 440 (2002)

18 Subject-matter jurisdiction
19 can NEVER be WAIVED or FORFEITED. The objection may be
20 resurrected at any point in the litigation... • See GARNER v. TURNER,
21 132 S.Ct. 641, citing ("Henderson v. Shirek," 131 S.Ct. 1197, at 1202)
22

23 The Court: "The challenge in this case goes to subject-matter
24 jurisdiction of the Court and hence its power to issue
25 the order. The distinction between subject-matter
26 jurisdiction and waivable defenses is not a mere nicety
27 of legal metaphysics. It rests instead on the central
28 principle... that courts have finite bounds of authority".

CAUSE AND PREJUDICE

1 Court appointed counsel failed to raise or advance the issue of want of
2 jurisdiction on direct appeal. (Martinez v. Ryan, 132 S. Ct. 1319 (2012)).
3 This cause was an EXTERNAL FORCE. If the Supreme Court of
4 Nevada would have been briefed on this error of Constitutional
5 magnitude, petitioner would not be raising new. This issue
6 could have been then extracted for federal court review long ago.
7 The prejudice speaks for itself. This issue professionally
8 briefed could have been won on the merits and precluded
9 any prejudice to the defendant and the Courts. Prejudice lies
10 in the fact that not only was Mr. O'Heck violated of his
11 due process and equal protection of his rights granted, i.e., 12253,
12 the law was violated. (U.S. Amendments 1, 5, 6, 14)

13 The Court has jurisdiction of the
14 case and person charged but fails to recognize that subject=
15 matter jurisdiction is held by the 9th Circuit.

16 • ~~Issue~~: (The Habeas Petition DID NOT APPLY) • This was
17 an immediate appealable Abney-type claim. This was
18 not an order, i.e., collateral order, that could wait.

19 There was no judgment to attack. The briefing schedule
20 had been set for after the third trial which if it
21 could not be resolved before the trial then Comity existed.

22 The stay was not required and any denial had
23 no precedent against the "COA" issued. In fact
24 the 9th denied because the appeal was already perfected.

25 CONCLUSION
26 GOOD CAUSE SHOWN

27 State's failure to address jurisdiction is an omission. One cannot even
28 file a habeas petition without proper jurisdiction in the first instance.
Exclusion to North Civil. - 5 -

EXHIBIT "F"

EDITORIAL INFORMATION:
PRIOR HISTORY

Brian Kerry O'Deeffe v. Nevada

No. 13-6031

DB-CZ50630

October 19, 2014

EXHIBIT "F"

005057

Brian Barry O'Keefe, Petitioner v. Nevada,
SUPREME COURT OF THE UNITED STATES
734 S. CL 444; 127 L. Ed. 2d 287; 2013 U.S. LEXIS 7506; 82 U.S.L.W. 3219
No. 13-6033
October 15, 2013, Decided

Editorial Information: Prior History

O'Keefe v. State, 2013 Nev. Unpub. LEXIS 906 (2013)

Judge: Roberts, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan

Opinion

Petition for writ of certiorari to the Supreme Court of Nevada denied.

SCTH01

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005058

CERTIFICATE OF SERVICE

I do certify that I mailed a true and correct copy of the foregoing ^{"Reply"} ~~NOTICE~~
~~TO STATES RESPOND...~~ ~~OF CHANGE OF ADDRESS~~ to the below address(es) on this 19th day of October,
20 14, by placing same in the U.S. Mail, First-Class postage, per NRCF 5(b):

BREX ZIP # 2004560

NOTE: All parties registered to the OALCF electronic filing
system will be served by the clerk using that
respective system.

Brian K. O'Leary

BRIAN K. O'LEARY # 90204
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Defendant - Petitioner

In Pro Se

AFFIRMATION PURSUANT TO WRS 239B.030

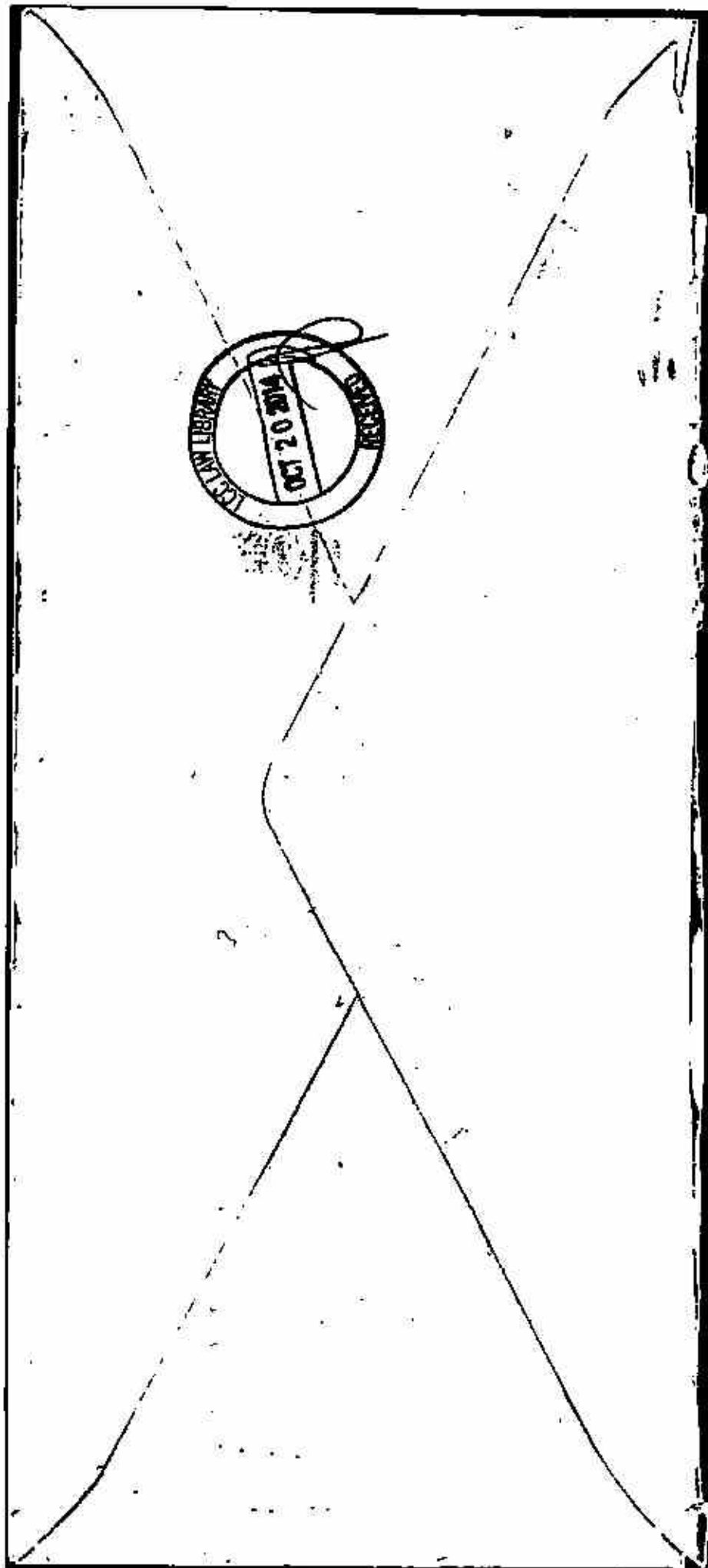
I do affirm that the preceding document, NOTICE OF CHANGE OF ADDRESS, does
NOT contain the social security number of any person.

Dated this 19th day of October, 20 14.

Brian K. O'Leary

Brian K. O'Leary

In Pro Se



005061

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Supreme Court No. 66416
District Court Case No. C250630

FILED

OCT 29 2014

Tracie Lindeman
CLERK OF COURT

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

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

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"ORDER this appeal DISMISSED."

Judgment, as quoted above, entered this 24th day of September, 2014.

90C250630
CCJB
NV Supreme Court Clerks Certificate/Judge
4484481



IN WITNESS WHEREOF, I have subscribed
my name and affixed the seal of the Supreme
Court at my Office in Carson City, Nevada this
October 22, 2014.

Tracie Lindeman, Supreme Court Clerk

By: Sally Williams
Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 66416

FILED

SEP 24 2014

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

ORDER DISMISSING APPEAL

This is a proper person appeal from an order denying a motion for relief from judgment. Eighth Judicial District Court, Clark County, Michael Villani, Judge.

Because no statute or court rule permits an appeal from an order denying a motion for relief from judgment filed in a criminal case, we lack jurisdiction. *Castillo v. State*, 106 Nev. 349, 352, 792 P.2d 1133, 1135 (1990). Accordingly, we

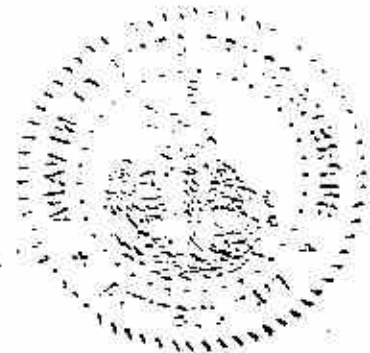
ORDER this appeal DISMISSED.

J. Hardesty J.
Hardesty

Douglas J.
Douglas

Cherry J.
Cherry

cc: Hon. Michael Villani, District Judge
Brian Kerry O'Keefe
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk



CERTIFIED COPY

This document is a full, true and correct copy of
the original on file and of record in my office.

DATE: October 22nd 2014

Supreme Court Clerk, State of Nevada

By Anthony Williams Deputy

005065

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Supreme Court No. 66416
District Court Case No. C250630

REMITTITUR

TO: Steven D. Grierson, Eighth District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: October 22, 2014

Tracie Lindeman, Clerk of Court

By: Sally Williams
Deputy Clerk

cc (without enclosures):
Hon. Michael Villani, District Judge
Brian Kerry O'Keefe
Attorney General/Carson City
Clark County District Attorney

RECEIPT FOR REMITTITUR

Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the
REMITTITUR issued in the above-entitled cause, on OCT 29 2014

HEATHER UNGERMANN

Deputy District Court Clerk

RECEIVED

OCT 27 2014

CLERK OF THE COURT

NOAB
Brian Kerry O'Keefe # 90244
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Electronically Filed
11/21/2014 02:23:51 PM

Alvin L. Colman
CLERK OF THE COURT

Defendant In Pro Se

DISTRICT COURT
CLARK COUNTY, NEVADA

The STATE OF NEVADA

Plaintiff,

Case No. 08 CZ50630

-vs-

Dept. No. XVII

BRIAN KERRY O'KEEFE

Defendant

NOTICE OF APPEAL

NOTICE IS GIVEN that Plaintiff, Brian Kerry O'Keefe,
in pro se, hereby appeals to the Nevada Supreme Court the
denial of his petition pursuant NRS 34.360
as filed/entered on the 6th day of NOVEMBER, 2014,
(complete if applicable) and the

_____, as filed/entered on the _____ day of _____, 20____, in the above-entitled Court.

Dated this 10th day of NOVEMBER, 2014.

Brian O'Keefe
90244
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Plaintiff In Pro Se

090-22 FORM 11-2004
CLERK OF THE COURT
RECEIVED
NOV 21 2014

CERTIFICATE OF SERVICE

I do certify that I mailed a true and correct copy of the foregoing NOTICE OF APPEAL to the below address(es) on this 10th day of NOVEMBER, 20 14, by placing same in the U.S. Mail via prison law library staff:

Bless Slip No. 1964555

Brian L. O'Keefe
Brian L. O'Keefe # 90244
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se

AFFIRMATION PURSUANT TO NRS 339B.030

The undersigned does hereby affirm that the preceding NOTICE OF APPEAL filed in District Court Case No. 08 0250630 does not contain the social security number of any person.

Dated this 10th day of NOVEMBER, 20 14.

Brian L. O'Keefe
Brian L. O'Keefe # 90244

Petitioner In Pro Se

005068

MR. BRIAN K. O'KEEFE
#90244

LOVELOCK CORRECTIONAL CENTER
1200 PRISON ROAD
LOVELOCK, NV. 89419



INMATE LEGAL
MAIL CONFIDENTIAL

LEGAL MAIL &

CRIMINAL CASE

005089



Box SUP No. 1964555

STEVEN GRIERSON, CLERK OF THE COURT
200 LEWIS AVE., 3RD FLOOR
Las Vegas, NV. 89155-1160




CLERK OF THE COURT

1 ASTA

2
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5
6 **IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE**
7 **STATE OF NEVADA IN AND FOR**
8 **THE COUNTY OF CLARK**

9
10 STATE OF NEVADA,

11 Plaintiff(s),

12 vs.

13 BRIAN K. O'KEEFE,

14 Defendant(s).

Case No: 08C250630

Dept No: XVII

15
16
17 **CASE APPEAL STATEMENT**

18 1. Appellant(s): Brian K. O'Keefe

19 2. Judge: Michael Villani

20 3. Appellant(s): Brian K. O'Keefe

21 Counsel:

22 Brian K. O'Keefe #90244
23 1200 Prison Road
24 Lovelock, NV 89419

25 4. Respondent: The State of Nevada

26 Counsel:

27 Steven B. Wolfson, District Attorney
28 200 Lewis Ave.
Las Vegas, NV 89101

(702) 671-2700

5. Appellant(s)'s Attorney Licensed in Nevada: N/A
Permission Granted: N/A

Respondent(s)'s Attorney Licensed in Nevada: Yes
Permission Granted: N/A

6. Appellant Represented by Appointed Counsel In District Court: Yes

7. Appellant Represented by Appointed Counsel On Appeal: N/A

8. Appellant Granted Leave to Proceed in Forma Pauperis: N/A

9. Date Commenced in District Court: December 19, 2008

10. Brief Description of the Nature of the Action: Criminal

Type of Judgment or Order Being Appealed: Writ of Habeas Corpus

11. Previous Appeal: Yes

Supreme Court Docket Number(s): 53859, 61631, 65217, 65436, 66416

12. Child Custody or Visitation: N/A

Dated This 24 day of November 2014.

Steven D. Grierson, Clerk of the Court

Mary Kielty

Mary Kielty, Deputy Clerk
200 Lewis Ave
PO Box 551601
Las Vegas, Nevada 89155-1601
(702) 671-0512

cc: Brian K. O'Keefe

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Supreme Court No. 65217
District Court Case No. C250630

FILED

FEB 06 2015

Tracie Lindeman
CLERK OF COURT

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

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

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"ORDER the judgments of the district court AFFIRMED."

Judgment, as quoted above, entered this 23rd day of July, 2014.

"Rehearing Denied."

Judgment, as quoted above, entered this 26th day of September, 2014.

09C250630
CCJA
NV Supreme Court Clerk Certificate/Judge
4431578



IN WITNESS WHEREOF, I have subscribed
my name and affixed the seal of the Supreme
Court at my Office in Carson City, Nevada this
January 30, 2015.

Tracie Lindeman, Supreme Court Clerk

By: Sally Williams
Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 65040

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

No. 65217 ✓

FILED

JUL 23 2014

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

ORDER OF AFFIRMANCE

These are proper person appeals from orders of the district court denying a petition for a writ of mandamus or *coram nobis* and a motion to modify or correct an illegal sentence.¹ Eighth Judicial District Court, Clark County; Stefany Miley, Judge (Docket No. 65040), Eighth

¹These appeals have been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the records are sufficient for our review and briefing is unwarranted. See *Luckett v. Warden*, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). We elect to consolidate these appeals for disposition. See NRAP 3(b)(2).

Judicial District Court, Clark County; Michael Villani, Judge (Docket No. 65217).

Docket No. 65040

In his December 6, 2013, petition, appellant challenged his criminal conviction by claiming that there was insufficient evidence to support his conviction for burglary, that the district court judge that sentenced him had a conflict of interest, and that he suffered from ineffective assistance of counsel. Appellant asserted he was entitled to mandamus relief or, in the alternative, relief through a writ of *coram nobis*.

First, appellant improperly challenged the validity of a judgment of conviction through a petition for a writ of mandamus. See NRS 34.160; NRS 34.724(2) (stating that a post-conviction petition for a writ of habeas corpus is the proper vehicle with which to challenge a judgment of conviction); *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981) (discussing the scope of mandamus). In addition, appellant failed to demonstrate that he did not have an adequate remedy with which to challenge his conviction. See NRS 34.170. Therefore, the district court did not err in denying the petition.

Second, appellant failed to demonstrate that he was entitled to relief on his petition for a writ of *coram nobis*. Appellant's claims were not properly raised in a petition for a writ of *coram nobis* because they were claims arising from alleged factual errors that are on the record, the claims could have been raised earlier, or they involved legal and not factual errors. See *Trujillo v. State*, 129 Nev. ___, ___, 310 P.3d 594, 601-

02 (2013). Appellant has previously litigated a post-conviction petition for a writ of habeas corpus, *O'Keefe v. State*, Docket Nos. 48673 and 49329 (Order of Affirmance, March 24, 2008), and appellant failed to demonstrate that he could not have raised his current claims in that petition. *See Trujillo*, 129 Nev. at ___, 310 P.3d at 601-02 (discussing that it is the petitioner's burden to demonstrate that he could not have reasonably raised his claims at an earlier time). Therefore, the district court did not err in denying the petition.

Docket No. 65217

In his January 27, 2014 motion, appellant claimed that the trial court was without jurisdiction because appellant had sought relief in federal court and a decision regarding his federal habeas petition was pending before the Ninth Circuit Court of Appeals during his state court trial. This claim fell outside the narrow scope of claims permissible in a motion to modify sentence. *See Edwards v. State*, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996). Appellant also failed to demonstrate that his sentence was facially illegal or that the district court lacked jurisdiction due to the federal court proceedings. *See id.* Appellant did not demonstrate that the federal court proceedings divested Nevada state courts of jurisdiction over this case. Moreover, appellant failed to demonstrate that the federal court had stayed the proceedings in state court while it considered appellant's petition. *See* 28 U.S.C. § 2251(a)(1).

Therefore, we conclude that the district court did not err in denying appellant's motion. Accordingly, we

ORDER the judgments of the district court AFFIRMED.²

Pickering J.
Pickering
Parraguirra J.
Parraguirra
Saitta J.
Saitta

cc: Hon. Stefany Miley, District Judge
Hon. Michael Villani, District Judge
Brian Kerry O'Keefe
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

²We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in these matters, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.

CERTIFIED COPY

This document is a full, true and correct copy of
the original on file and of record in my office.

DATE: January 31, 2015

Supreme Court Clerk, State of Nevada

By Danijel M. Murrison Deputy

005077

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 65217

FILED

SEP 26 2014

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

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.¹

Pickering J.
Pickering

Parraguirre J.
Parraguirre

Saitta J.
Saitta

¹On August 15, 2014, this court received appellant's motion for leave to file his petition for rehearing. Cause appearing, we grant appellant's motion and direct the clerk of this court to file appellant's proper person petition for rehearing. See NRAP 46(b). To the extent appellant seeks any additional relief in his motion, we deny that request for relief.

cc: Hon. Michael Villani, District Judge
Brian Kerry O'Keefe
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

CERTIFIED COPY

This document is a full, true and correct copy of
the original on file and of record in my office.

DATE: January 30th, 2015

Supreme Court Clerk, State of Nevada

By Deputy Clerk Deputy

005080

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Supreme Court No. 65217
District Court Case No. C250630

REMITTITUR

TO: Steven D. Grierson, Eighth District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: January 30, 2015

Tracie Lindeman, Clerk of Court

By: Sally Williams
Deputy Clerk

cc (without enclosures):

Hon. Michael Villani, District Judge
Brian Kerry O'Keefe
Clark County District Attorney
Attorney General/Carson City

RECEIPT FOR REMITTITUR

Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the
REMITTITUR issued in the above-entitled cause, on FEB 06 2015.

HEATHER UNGERMANN

Deputy District Court Clerk

RECEIVED

FEB 04 2015

CLERK OF THE COURT

DA
PP

NOTE

Brian O'Keefe # 90244
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Allen L. Johnson
CLERK OF THE COURT

Petitioner In Pro Se

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK

Brian Kerry O'Keefe

Petitioner

Case No. 1250630

-vs-

Dept. No. XVII

Robert LeBlond

Respondent

JUROR NOTICE PURSUANT NRS 47.140(1) - NRS 47.150(2)
SUPPORTING PRO-SE PETITION PURSUANT NRS 34.260
see NRS 47.140(1) FEDERAL STATUTES 1291, 2253
see NRS 47.150(2) NOTICE MEMORANDUM FILED FEB 02 2015

COMES NOW, Brian O'Keefe, pro-se, to supply the
ORDER OF MEMORANDUM SUPPORTING his pending question
of law concerning jurisdiction. Clearly, this order
manifests that no mandate, remand and or remittitur
has been issued and the appeal is still pending.

(N.R.Civ.P. 12, F.R.Civ.P. 12) Sua Sponte action is
mandated. The 9th Circuit states, "We have
jurisdiction under sections 1291 and 2253(2)", from a final
decision that was immediately appealable. Res ipsa loquitor
Dated February 18, 2015
B. O'Keefe pursuant to NRS 34.260

RECEIVED

FEB 25 2015

CLERK OF THE COURT

RECEIVED JCC LL FORM 24.014

FEB 24 2015

CLERK OF THE COURT

AFFECT OF NOA AND COA

1
2 • Habeas Act of 1867, Act of Feb. 5, 1867, Ch 28 § 1, 14 Stat. 385 •

(IMPOSES
AUTOMATIC
5-11)

3 The Supreme Court of the United States opines in
4 GONZALEZ v. THALER, 132 S.Ct. 641 that section 2253 is
5 an absolute jurisdictional grant. The appellate court requires
6 appellate jurisdiction which is exclusive.

7 Emphasis that
8 subject-matter jurisdiction can never be waived or forfeited.
9 Additionally, when a requirement goes to subject-matter
10 jurisdiction, courts are obligated to consider SUA SPONTE
11 issues that the parties have disclaimed or have not presented.
12 See United States v. Ojeda, 535 U.S. 625, 630 (2002).

13 Here, when
14 the U.S. District Court abused her discretion in dismissing
15 O'Keefe's first petition, solely based on a non-required
16 procedural ruling, upon appeal, petitioner passed the (2)
17 prong test.

18 #1) "that jurist of reason would find it debatable
19 that the petition states a valid claim of the denial of a
20 constitutional right" - MAKING IT A COLORABLE CLAIM

21 2nd
22 #2) "that jurist of reason would find it debatable
23 whether the district court was correct in its procedural ruling."

24
25 Moreover, the final decision of the U.S. District Court
26 was an immediately appealable decision which once the NOA
27 was filed, alone it divested all district courts of
28 any jurisdiction to proceed to trial, etc. See also

ABNEY v. U.S. 431 U.S. 651; - SUPREMACY CLAUSE, Art. III § 1, cl. 2

FILED

NOT FOR PUBLICATION

FEB 02 2015

UNITED STATES COURT OF APPEALS

**MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

BRIAN KERRY O'KEEFE,

Petitioner - Appellant,

v.

DOUG GILLESPIE, Sheriff; et al.,

Respondents - Appellees.

No. 12-15271

**D.C. No. 2:11-cv-02109-GMN-
VCF**

MEMORANDUM*

**Appeal from the United States District Court
for the District of Nevada
Gloria M. Navarro, Chief District Judge, Presiding**

**Argued and Submitted November 20, 2014
San Francisco, California**

**Before: THOMAS, Chief Judge, and REINHARDT and CHRISTEN, Circuit
Judges.**

Brian Kerry O'Keefe appeals the district court's dismissal of his petition for a writ of habeas corpus due to lack of exhaustion. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253(a). Because the parties are familiar with the history of this case, we need not recount it here.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

005084

O'Keefe filed his petition under 28 U.S.C. § 2241, seeking to prevent an upcoming retrial on grounds that it would violate his right against double jeopardy. However, in the intervening time between his filing of the petition and our consideration of it, O'Keefe was retried and convicted in state court. His sought relief is therefore no longer available. Therefore, the appeal is moot.

We need not, and do not, address the government's arguments that O'Keefe's appeal is moot because he filed his petition under 28 U.S.C. § 2241 rather than § 2254. Nor need we address the merits of O'Keefe's double jeopardy claims. Our decision is without prejudice to the consideration of those claims in a properly filed § 2254 petition.¹

AFFIRMED.

¹ O'Keefe's pro se motions for judicial notice and for summary judgment are denied. Because O'Keefe is represented by counsel, we decline to entertain O'Keefe's other pro se motions and submissions.

CERTIFICATE OF SERVICE

I do certify that I mailed a true and correct copy of the foregoing JUDICIAL NOTICE REWARD AKE 47.140 . 47.150 to the below address(es) on this 18th day of February 2015, by placing same into the hands of prison staff for posting in the U.S. Mail: BRASS SLIP 243835

Clerk of Court
700 E. LEWIS AVE
CARLETON, Nevada 89106

Attorney For _____

() check for additional address(es) below

B. L. O'NEILL
Deputy Sheriff # 70244
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419
Deputy In Pro Se

ADDRESS(ES) Continued from Above (If Applicable):

_____, Nevada 89

Attorney For _____

_____, Nevada 89

Attorney For _____

_____, Nevada 89

Attorney For _____

Brian Keith O'Hara - #90244

L.C.C.

1200 Prison Road

Camarillo, NV 89419



Steven Grosser, Clerk of the Court

200 E. Lewis, Ave., 3rd Floor

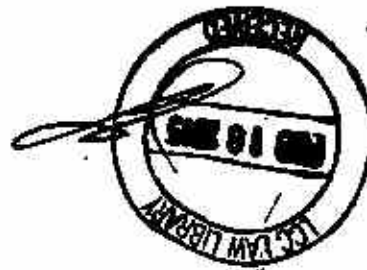
Las Vegas, NV. 89155

INMATE LEGAL
MAIL CONFIDENTIAL

LEGAL MAIL

8915534501





005088

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Supreme Court No. 66956
District Court Case No. C250630

FILED

MAR 12 2015

Tracie Lindeman
CLERK OF COURT

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

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

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"ORDER this appeal DISMISSED"

Judgment, as quoted above, entered this 11th day of February, 2015.

05C260630
CCJD
NV Supreme Court Clerks Certificate/Judge
4440201



IN WITNESS WHEREOF, I have subscribed
my name and affixed the seal of the Supreme
Court at my Office in Carson City, Nevada this
March 09, 2015.

Tracie Lindeman, Supreme Court Clerk

By: Joan Hendricks
Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 66956

FILED

FEB 11 2015

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

ORDER DISMISSING APPEAL

This is a pro se appeal from a purported order denying a post-conviction petition for a writ of habeas corpus in case number C250630. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

No decision, oral or written, had been made on the petition when appellant filed his appeal on November 21, 2014.¹ Because appellant failed to designate an appealable order, we lack jurisdiction over this appeal, and we

ORDER this appeal DISMISSED.

Saitta, J.
Saitta

Gibbons, J.
Gibbons

Pickering, J.
Pickering

¹The minutes indicate that the district court has appointed counsel for appellant and set the matter for a hearing in July 2015.

cc: Hon. Michael Villani, District Judge
Brian Kerry O'Keefe
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk
Matthew Carling

CERTIFIED COPY

This document is a full, true and correct copy of
the original on file and of record in my office.

DATE: March 9th, 2015

Supreme Court Clerk, State of Nevada

By [Signature] Deputy

005092

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Supreme Court No. 66956
District Court Case No. C250630

REMITTITUR

TO: Steven D. Grierson, Eighth District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: March 09, 2015

Tracie Lindeman, Clerk of Court

By: Joan Hendricks
Deputy Clerk

cc (without enclosures):
Hon. Michael Villani, District Judge
Brian Kerry O'Keefe
Clark County District Attorney
Attorney General/Carson City

RECEIPT FOR REMITTITUR


Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the
REMITTITUR issued in the above-entitled cause, on MAR 12 2015.

HEATHER UNGERMANN
Deputy District Court Clerk

RECEIVED

MAR 12 2015

CLERK OF THE COURT


CLERK OF THE COURT

1 SUPP

2 Matthew D. Carling

3 Nevada Bar No. 007302

4 1100 S. Tenth Street

5 Las Vegas, NV 89101

6 (702) 419-7330 (Office)

7 (702) 446-8065 (Fax)

8 CedarLegal@gmail.com

9 Court-appointed Attorney for Petitioner/ Defendant

10 BRIAN O'KEEFE

11
12 DISTRICT COURT
13 CLARK COUNTY, NEVADA
14

STATE OF NEVADA,

Plaintiff,

Case No.: 08C250630

Dept. No.: XVII

vs.

BRIAN K. O'KEEFE,

Defendant.

EVIDENTIARY HEARING REQUESTED

15
16 **SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS**
17 **(POST CONVICTION)**
18

19 COMES NOW Defendant Brian O'Keefe ("O'Keefe"), by and through his counsel

20 Matthew D. Carling and, pursuant to NRS. ANN. § 34.724, hereby submits this *Supplemental*
21 *Petition for Writ of Habeas Corpus* (the "Supplemental Petition"), which is supported by the
22 following:

23 1. Name of Institution and county in which Petitioner is presently
24 imprisoned or where and who Petitioner is presently retrained of his liberty:
25 Lovelock Correctional Center, Pershing County.

26 2. Name and location of court which entered the judgment of conviction
27 under attack: Eighth Judicial District Court, Regional Justice Center 200 Lewis Avenue
28 Las Vegas, NV 89155.

005094

3. Date of Judgment of Conviction: August 28, 2012.

4. Case Number: 08C250630.

5. (a) Length of Sentence: ten (10) to twenty-five (25) years consecutive eight (8) to twenty (20) years.

(b) If sentence is death, state any date upon which execution is scheduled: N/A

6. Is Petitioner presently serving a sentence for a conviction other than the conviction under attack in this motion? If "Yes", list the crime, case number and sentence being served at this time: No.

7. Nature of offense involved in conviction being challenged: Second-Degree Malice (implied) Murder W.D.W.

8. What was Petitioner's Plea? Not guilty.

9. If Petitioner entered a guilty plea to one count of an indictment or information, and a not guilty plea to another count of an indictment or information, or if a guilty plea was negotiated, give details: N/A

10. If Petitioner was found guilty after a plea of not guilty, the finding was made by: Jury.

11. Did the Petitioner testify at trial? No.

12. Did Petitioner appeal from his judgment of conviction? Yes, from both the First Trial and the Third Trial, both defined *post*.

13. If Petitioner appealed, answer the following:

(1) Name of the Court: Supreme Court of Nevada.

1 **(2) Case number or citation:** Case Nos. 53859 and 61631

2 **(3) Result:** The First Trial appeal in Case No. 53859 resulted in reversal and
3 remand. The Third Trial appeal in Case No. 61631 resulted in affirmance.

4 **(4) Date of Decision:** April 7, 2010 (First Trial), and April 10, 2013 (Third
5 Trial).

6 14. **If Petitioner did not appeal: explain briefly why he did not:** N/A

7 15. **Other than a direct appeal from the judgment of conviction and**
8 **sentence, has Petitioner previously file any petitions, applications or motion with**
9 **respect to this judgment in any court, state or federal? Yes.**

10 16. **If your answer to No. 15 was "Yes", give the following information:**

11 **(1) Name of the Court:** United States District Court of Nevada (Case No.
12 2:11-CV-02109-GMN);

13 **(2) Nature of Proceedings:** Double Jeopardy Pre-Trial §2241(C)(B) Habeas
14 Corpus Violation by second trial on same offense after acquittal.

15 **(3) Grounds raised:** Double Jeopardy Violation when second jury trial
16 ended in mistrial and State proceeded on continuing jeopardy doctrine, holding third trial
17 while second trial was on appeal.

18 **(4) Did Petitioner receive an evidentiary hearing on his petition, application**
19 **or motion? No. Result:** N/A **Date of result:** February 3, 2012. **If known, citations of**
20 **any written opinion or date of orders entered pursuant to such result:** The matter is
21 still pending argument on the merits of the petition. The Court has only entertained
22 procedural issues at present.

1 17. Has any ground being raised in this petition been previously presented
2 to this or any other court by way of petition for habeas corpus, motion or application
3 or any other post-conviction proceeding? If so, identify: No, it has not.

4 (a) Which of the grounds are the same: N/A

5 (b) The proceedings in which these grounds were raised: N/A

6 (c) Briefly explain why you are again raising these grounds: N/A

7 18. If any of the grounds listed in Nos. 23(a) *et seq.* or listed on any
8 additional pages you have attached, were not previously presented in any other
9 court, state or federal, list briefly what grounds were not so presented, and give your
10 reasons for not presenting them: N/A

11 19. Is Petitioner filing this petition more than one (1) year following the
12 filing of the judgment of conviction or the filing of a decision on direct appeal? If so,
13 state briefly the reasons for the delay: No. Petition timely filed.

14 20. Does Petitioner have a petition or appeal now pending in any court,
15 either state or federal, as to the judgment under attack? No. United States Court of
16 Appeals for the Ninth Circuit, No. 12-15271 was concluded.

17 21. Give the name of each attorney who represented you in the proceeding
18 resulting in your conviction and on direct appeal: Randy Pike, Patricia Pal, Jonell
19 Thomas, Lance Maningo, Brian O'Keefe – Pro Per, Amanda Gregory, Ryan Norwood
20 A.F.P.D.

21 22. Does Petitioner have any future sentences to serve after you complete
22 the sentence imposed by the judgment under attack? No.

1 **STATEMENT OF THE CASE**

2 The State charged O'Keefe with murder with use of a deadly weapon by way of an
3 *Amended Information* on February 10, 2009. A jury trial was held on March 16-20, 2009, in
4 which O'Keefe was found guilty of second degree murder with use of a deadly weapon.
5 ("First Trial"). On May 21, 2009, O'Keefe filed his notice of appeal from his conviction. He
6 filed a Fast Track Statement in the Nevada Supreme Court ("NSC") on August 19, 2009. In
7 his *Fast Track Statement*, O'Keefe argued, among other things, that the district court's ruling
8 on jury instructions was erroneous, and that the district court improperly allowed a jury
9 instruction regarding felony murder as an alternate theory of second degree murder when
10 felony murder had not been specifically alleged in the *Amended Information*. On April 7, 2010,
11 the NSC issued its *Order of Reversal and Remand*. The NSC stated that "the district court
12 abused its discretion when it instructed the jury that second-degree murder includes
13 involuntary killings that occur in the commission of an unlawful act because the State's
14 charging document did not allege that O'Keefe killed the victim while he was committing an
15 unlawful act and the evidence presented at trial did not support this theory of second-degree
16 murder." *O'Keefe v. State*, NSC Docket No. 53859 (April 7, 2010)(the "First Trial
17 Reversal").

18 On August 19, 2010, the State filed a second *Amended Information*. On August 23,
19 2012, the second trial was held on remand from the NSC for the charge of murder with use
20 of a deadly weapon (the "Second Trial"). On September 2, 2010, there was a mistrial based
21 upon a deadlock of the jury, and trial was reset for a third trial (the "Third Trial").

1 On April 8, 2011, after the second trial ended in mistrial, O'Keefe filed his *Petition for*
2 *Writ of Prohibition or Mandamus* (the "NSC Petition") with the NSC. He challenged the
3 district court's denial of his motion to dismiss the criminal charge on Double Jeopardy
4 grounds, among other things. The NSC determined Double Jeopardy posed no bar to
5 O'Keefe's retrial and declined to intervene.

6 Upon denial of his NSC Petition, O'Keefe filed a motion/petition in the United
7 States District Court of Nevada, Case No. 2:11-CV-021009, challenging the Double
8 Jeopardy pre-trial §2241(c)(3) habeas corpus violation by second trial on same offense after
9 acquittal. *O'Keefe v. Gillespie*, 2012 WL 367048 (February 2, 2012). That motion/petition was
10 dismissed on February 2, 2012, on grounds that O'Keefe had failed to exhaust his state
11 judicial remedies. *Id.* O'Keefe appealed that denial to the Ninth Circuit Court of Appeals
12 (the "Ninth Circuit Appeal"). *O'Keefe v. Gillespie*, 593 Fed.Appx. 626 (Case No. 12-15271;
13 Feb. 2, 2015). The Ninth Circuit found the appeal to be moot by the fact that the Third Trial
14 occurred in which O'Keefe was convicted in state court rendering O'Keefe's sought remedy
15 unavailable. However, the Ninth Circuit dismissal noted that its decision was without
16 prejudice to those claims being properly filed in a §2254 petition. *Id.* at 627.

17 During this procedural federal appeal process, the matter proceeded before the state
18 court on the Third Trial after the second trial was declared a mistrial. On October 3, 2011,
19 O'Keefe filed his *Pro Se Motion to Dismiss Appointed Counsel and for Faretta Hearing*. After a
20 *Faretta* canvas, the court granted O'Keefe's motion, finding him competent to waive his right
21 to counsel, and allowed him to represent himself, with Lance A. Maningo as standby
22 counsel.

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

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

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

Electronically Filed
Dec 01 2015 04:22 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

8 **APPELLANT'S APPENDIX – VOLUME XXVI – PAGES 5000-5199**

9 **MATTHEW D. CARLING**
10 51 East 400 North, Bldg. #1
11 Cedar City, Utah 84720
12 (702) 419-7330 (Office)
13 *Attorney for Appellant*

14 **STEVEN B. WOLFSON**
15 Clark County District Attorney
16 200 Lewis Avenue, 3rd Floor
17 Las Vegas, Nevada 89155
18 *Counsel for Respondent*

19 **CATHERINE CORTEZ MASTO**
20 Attorney General
21 100 North Carson Street
22 Carson City, Nevada 89701-4717
23 *Counsel for Respondent*

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O'Keefe, Brian

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"Evidentiary Hearing Request" (Amended Petition for Writ of Habeas Corpus Pursuant to NRS 34.360 Exclusive 1 Based on Subject-Matter of Amended Information Vested in Ninth Circuit by Notice of Appeal then "COA" Granted on a Double Jeopardy Violation with No Remand Issued Since) filed on 10/03/14	4995-5007
"Reply" to State's Response and Motion to Dismiss to Defendant's Pro Per Petition for Writ of Habeas Corpus 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
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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 Canvasea 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
29	Notice of Motion filed on 02/24/14	4810
30	Notice of Motion filed on 03/04/14	4833
31	Notice of Motion filed on 06/08/15	5154-5160
32	Notice of Motion filed on 07/23/14	4890
33	Notice of Motion filed on 08/29/14	4922
34	Notice of Motion filed on 09/15/14	4953
35	Notice of Witness and/or Expert Witnesses filed on 02/03/09	0166-0167
36	Notice of Witnesses and/or Expert Witnesses filed on 02/17/09	0178-0179
37	NV Supreme Court Clerks Certificate/ Judgment Affirmed filed on	
38	02/06/15	5072-5081
39	NV Supreme Court Clerks Certificate/Judgment Affirmed filed on	
40	07/26/13	4653-4661
41	NV Supreme Court Clerks Certificate/Judgment Dismissed filed on	
42	06/18/14	4866-4870
43	NV Supreme Court Clerks Certificate/Judgment Dismissed filed on	
44	03/12/15	5089-5093
45	NV Supreme Court Clerks Certificate/Judgment Dismissed filed on	

1	09/28/15	5520-5524
2	NV Supreme Court Clerks Certificate/Judgment Dismissed filed on 10/29/14	5062-5066
3	O'Keefe's Reply to State's Opposition to Motion to Admit Evidence Showing LVMPD Homicide Detectives have Preserved Blood/Breath Alcohol Evidence in Another Recent Case filed on 08/13/10	1256-1265
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 Inigent 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 I Based On Subject-Matter of Amended Information Vested in Ninth Circuit by notice of Appeal Then "COA" Granted on a Double Jeopardy Violation with No Remand Issued Since filed on 09/15/14	4940-4949
17	Petitioner's Supplement with Exhibit of Oral Argument Scheduled by the Ninth Circuit Court of Appeals for November 17, 2014, Courtroom #1 filed on 10/01/14	4984-4988
18	Pro Se "Reply to State's Opposition to Defendant's Pro Se Motion to Modify and/or Correct Illegal Sentence filed on 03/04/14	4821-4832
19	ProSe "Reply" to State's Opposition to Defendant's (Ex-Parte) "Motion for Reimbursement of Incidental Costs Subsequent the Courts Declaring Defendant Indigent and Granting Forma Pauperis" filed on 02/24/14	4792-4799
20	Receipt of Copy filed on 01/03/11	2761
21	Receipt of Copy filed on 01/12/11	2812
22	Receipt of Copy filed on 01/12/11	2813
23	Receipt of Copy filed on 01/18/11	2876
24	Receipt of Copy filed on 01/27/09	0134
25	Receipt of Copy filed on 01/30/09	0146
26	Receipt of Copy filed on 02/06/09	0168
27		
28		

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

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

1	of Habeas Corpus and Evidentiary Hearing Request. "Motion for Leave to	
2	File Supplemental Petition Addressing all Claims in the First Instance	
3	Required by Statute for Judicial Economy with Affidavit." "Reply to	
4	State's Response to Defendant's Pro Per Post Conviction Petition for	
5	Habeas Corpus." and "Supplement with Notice Pursuant NRS 47.150(2);	
6	NRS 47.140(1), that the United States Supreme Court has Docketed (#14-	
7	10093) the Pretrial Habeas Corpus Matter Pursuant 28 USC 2241(c)(3)	
8	from the Mooting of Petitioner's Section 2241 Based on a Subsequent	
9	Judgment Obtained in Want of Jurisdiction While Appeal Pending" filed	
10	on 07/09/15	5455-5458
11	State's Response to Defendant's Reply in Support of Supplemental Post-	
12	Conviction Petition for Writ of Habeas Corpus filed on 09/03/15	5511-5516
13	State's Response to Defendant's Supplement to Supplemental Petition for	
14	Writ of Habeas Corpus (Post-Conviction) filed on 07/31/15	5473-5475
15	State's Supplemental Opposition to Motion to Seal Records filed on	
16	04/17/12	3436-3437
17	Stipulation and Order filed on 02/10/09	0173-0174
18	Substitution of Attorney filed on 06/29/10	1034-1035
19	Supplement to Supplemental Petition for Writ of Habeas Corpus (Post-	
20	Conviction) filed on 07/13/15	5459-5460
21	Supplement with Notice Pursuant NRS 47.150 (2); NRS 47.140 (1). That	
22	the United State's Supreme Court has Docketed (#14-10093) The Pretrial	
23	Habeas Corpus Matter Pursuant 28 U.S.C. § 2241 C(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

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) No.

AEDPA DOES NOT APPLY TO "2241" COA pending. SEE EXHIBIT "E"

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ☒ No ☐

If yes, state what court and the case number: SEE EXHIBITS "D" and "E" and "A." All
9th Circuit Court of Appeals No. 12-15271 on 28 U.S.C. § 2241(c)(3).

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: RANDY PIKE, PATRICIA PALM, JONELL THOMAS, LANCE MANNING,

AMANDA GREGORY, RYAN NORWOOD, BRIAN O'KEEFE PRO PER

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack? Yes ☐ No ☒

If yes, specify where and when it is to be served, if you know:

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

In preconsideration of the following ground, "Want of Jurisdiction," emphasis is placed on the authority WHITE v. Lambert, 370 F.3d 1002 at 1008, cited by the certificate of appealability panel in the "COA" granted.

With this authority, the court is advising that the Court looks only to a petitioner's custody status at the time petition is filed.

As in this instant case, Mr. O'Keefe was a true pretrial detainee when the notice of appeal was filed with the circuit court. Without a remand, the trial court had no authority of the subject-matter of the formal charging document already vested in the pending appeal. NOTE, 3rd trial used SAME amended-information litigated in pending appeal.

005000

• Trial Court committed "fundamental constitutional error" (same)

(a) Ground ONE: Petitioner received ineffective assistance of counsel, trial and appellate, guaranteed by the 6th and 14th Amendments to the U.S. Constitution caused by failing to present the "FUNDAMENTAL CONSTITUTIONAL ERROR" of the Trial Court's lack of jurisdiction of the subject-matter of the amended (second) information while appeal WAS PENDING WITH DEFENDANT PREJUDICED BY A CONVICTION.

Supporting FACTS (Tell your story briefly without citing cases or law.): • See MARTINEZ v. RIVA, 132 S.Ct. 139 (2022); U.S. v. CUTLER, 535 U.S. 625, 630; MILNER-EL v. Cockrell, 537 U.S. 322; NRS 177-155; GROGGS v. PROVIDENT CONSUMER DISC CO., 459 U.S. 56, 58 (1982) (Per Curiam); Gonzalez v. Thaler, 132 S.Ct. 641 (2022); U.S. v. Claiborne, 727 F.2d 842, 850; Abney v. U.S., 431 U.S. 651, 662; Borchert v. Estate, 463 U.S. 880, 893, n. 4; Braden v. 30th Judicial Cir. Court, 40 US 404, 489-93; CF. STURGES v. Williams, 461 F.3d 259.

Acting before a mandate is issued is acting in want of jurisdiction. See U.S. v. DeFries, 129 F.3d 1293, 1301-03 (D.C. Cir. 1997); Once a notice of appeal is filed, of a immediate appealable order, that filing "divests the district court of jurisdiction to proceed to trial" see Moriqui v. U.S., 570 Fed.2d 864 (9th Cir. 1977) see also United States v. Pharis, 2007 US Dist. LEXIS 74029, 2007 WL 279566 at * 1.

An exception to criminal cases becoming immediately appealable falls within the "collateral order" rule announced in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541.

Once O'Keefe filed his notice of appeal the 9th retained plenary jurisdiction which became exclusive by the clerk filing certificate that record was forwarded complete. Emphasis that then, subject-matter jurisdiction of the amended (second) information became completely vested by the granted "COA" on the named "valuable" double jeopardy violation determined by the circuit court (see ENL "A").

The same amended information, that the 9th Circuit already holds in their record, was also the formal charging document used for the third trial. This is a constitutional fundamental error. Stated by trial counsel filed a Motion to stay, but failed to raise this error at trial or on direct appeal. Counsel appointed failed to raise that O'Keefe's "2241" was a pretrial habeas matter, not post "2254", which entitled immediate review, guarantee of a "right not to be tried" until appeal was resolved. Trial court is required to know the law.

(Continued to dex)

IN addition to "COA", U.S. Judge G. Narman admits colorable double jeopardy claim. (see EXH. "C" page 5)

Petitioner was prejudiced by silence on jurisdiction. Court appointed Counsel's failure to raise issue also on direct appeal caused a large delay in vacating and setting aside this void judgment for "want of jurisdiction".

Noting also that in addition to petitioner giving a tangible copy of the "COA", the Ninth Circuit notified the Attorney General's office as clearly indicated in the "COA" itself. (see EXH. "A" page 2-3)

At this point the briefing schedule was also set.

Once the A.G.'s office was electronically notified, everyone was directed of jurisdiction. Setting a briefing schedule confirms this also.

• AGAIN, it did not matter what Mr. O'Keefe believed as a pro-se litigant.

• ALSO, it did not matter how many times the 9th Circuit denied any stay motion.

They already held jurisdiction. STOP THE RED HEADING play.

• Once notice of appeal filed jurisdiction vested (see 28 U.S.C. § 1257; 48 U.S.C. § 1201; 22 U.S.C. § 2201). In fact, the court is EXPECTED to raise the subject matter jurisdiction on its own motion AT ANY STAGE and EVEN if NO PARTY OBJECTS? FRCP 12(b); FRCP 12(h)(3); NRCP 12(b)

• see U.S. v. GONZALEZ, 34 F.3d 440 (2012) see also GONZALEZ v. TATE, 132 S.Ct. 641

Under the LAW OF THE CIRCUIT, (9th), once the special, and only, "Certificate of appealability panel" determined a "colorable" double jeopardy violation existed and issued the "COA", unless and UNTIL a case is REMANDED, the county trial court was and acted in complete lack of jurisdiction.

Noting now, an "ACKNOWLEDGMENT OF HEARING NOTICE" has been issued for ORAL argument. There is no other ORDER issued, i.e., mandate, remand, remittitur. Clearly, in between the issued

"COA" (EXH. "A") and the "NOTICE FOR ORAL ARGUMENT" (EXH. "E") the state proceeded with third trial on same charging document. IGNORANCE OF THE LAW is no excuse for court, state, attorneys. COURTS are to be reasonable.

PRAYER FOR RELIEF REQUESTED

WHEREFORE, petitioner prays that the court grant petitioner his relief entitled in this proceeding as follows: ORDER

a evidentiary hearing if further facts required;

b keenly seeing the subject-matter of the amended information underpinned the 9th Circuit's conclusion that a "colorable" double jeopardy violation existed and this same formal charging document was the basis for the third trial in which the state admits was premised on the "continuing jeopardy doctrine" making it factually still the second trial theoretically which is still pending appeal;

c recognize completely that the entire third trial proceedings were conducted in complete "Want of Jurisdiction" and must be voided and vacated;

d appoint counsel recognizing also authority KUERSNER V. WARDEN, N.S.P. et al., 508 F.Supp.2d 849 (D.Nev.2007) dictates a segregation unit with a law library system considered insufficient and being deemed inadequate is grounds to appoint counsel especially in light of this complex issue;

e allow petition to be supplemented once counsel is appointed or allow petitioner, if appointment of counsel is denied;

f EXPEDITE MATTER!

Dated September 30, 2014

B. J. O'K. 005003
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● CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing NOTICE OF MOTION to the below address(es) on this 30th day of September, 20 14, by placing same in the U.S. Mail via prison law library staff, pursuant to NRCP 5(b):

● BRASS SLIP No. 2003661

● STEVEN CRIPSEN, Clerk of the Court
210 Lewis Avenue, 3RD Floor
Las Vegas, Nevada 89135-1160

NOTE: All participants registered to the em/ef electronic filing system will be served by the court clerk using that perspective system.

● VERIFICATION

Under the penalty of perjury, the undersigned declares that the petition named in the foregoing has read, constructed and believes the pleading is true and sound and contains a valid "want of jurisdiction" violation.

Pursuant N.R.S. 208.165

By Brian L. O'Keefe
Brian L. O'Keefe # 90244
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se

#90244

● AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding NOTICE OF MOTION does not contain the social security number of any person.

Dated this 30th day of September, 20 14.

By Brian L. O'Keefe
Brian L. O'Keefe

Petitioner In Pro Se

#90244

Brian O'Keefe - #90244
LOVELOCK CORRECTIONAL CENTER
1200 PRISON ROAD
LOVELOCK, NV. 89419

Sept 30, 2014 (TUESDAY)

Dear Clerk,

Enclosed, please find my amended
Petition for Habeas Corpus with also
amended EXHIBITS to the amended petition.

Please file which becomes the new
petition.

However, petition still
needs to keep the ORIGINAL MOTION
TO APPOINT COUNSEL.

Please return
copy showing filed with current
minutes or Register of action.

Respectfully Submitted
Sincerely,

Brian O'Keefe
Brian O'Keefe
#90244

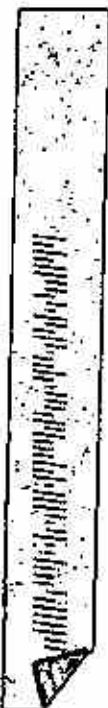


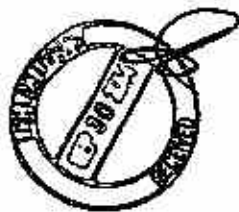
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Grass Slip No. 2005661

Steven Greenberg, Clerk of the Court
200 Lewis Ave., 3rd Floor
Las Vegas, NV. 89155-1160

LEGA MAIL





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Electronically Filed
10/03/2014 01:38:46 PM

Sharon L. Johnson
CLERK OF THE COURT

(Amended)

EXHIB
Brian Kerry O'Keefe # 90244
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se
Dated September 30, 2014.

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK

Brian Kerry O'Keefe)
Petitioner)
-vs-)
Warden Robert L. G. G. G.)
Respondent)

Case No. OR - 1250630
Dept. No. IX - C.J. Foglietti

(total of 23 actual exhibits)

"AMENDED"

EXHIBITS TO "AMENDED" PETITION FOR WRIT
OF HABEAS CORPUS BY A TRUE PETITOR
DETAINED

- EXHIBIT "A" • Certificate of Appealability
(4 pages)
- EXHIBIT "B" • ORDER OF AFFIRMANCE (61631)
(4 pages)
- EXHIBIT "C" • U.S.D.C. ORDER 2:11-cv-02109-GMM-VCF, Jan. 6, 2012
(6 pages)
- EXHIBIT "D" • General Docket 9th Cir. (Case No. 12-15271)
(8 pages) (See PG. 2 fn. 5)
- EXHIBIT "E" • ACKNOWLEDGMENT OF HEARING NOTICE (San Francisco)
(1 page) ORAL ARGUMENT SCHEDULED 11-17-2014
COURTROOM # 1 - 09:00 AM

DATED: September 29, 2014
Brian L. O'Keefe - PRO - PER
#90244

DA
PP

RECEIVED
LCC FORM 24.014
OCT 03 2014

CLERK OF THE COURT

EXHIBIT "A"

9th Circuit Case No. 12-15271

CERTIFICATE OF APPEALABILITY

66 CoA (4 pages)

08-C250630
Sept. 30, 2014

EXHIBIT "A"

005009

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APR 13 2012

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

BRIAN KERRY O'KEEFE,

Petitioner - Appellant,

v.

DOUG GILLESPIE, Sheriff; et al.,

Respondents - Appellees.

No. 12-15271

D.C. No. 2:11-cv-02109-GMN-VCF
District of Nevada,
Las Vegas

ORDER

Before: PAEZ and CLIFTON, Circuit Judges.

After reviewing the underlying petition and concluding that it states at least one federal constitutional claim debatable among jurists of reason, namely, a double jeopardy violation, we grant the request for a certificate of appealability with respect to the following issues: (1) whether the district court properly determined that appellant's double jeopardy claim was unexhausted, and (2) whether appellant, as a state pre-trial detainee, was required to exhaust his claim in state court before filing his 28 U.S.C. § 2241 petition, *compare Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 489-91 (1973) (emphasizing that the § 2241 petitioner "exhausted all available state court remedies for consideration of [his speedy trial] constitutional claim") with *White v. Lambert*, 370 F.3d 1002, 1008 (9th Cir. 2004) ("If we were to allow White to proceed under 28 U.S.C. §

005010

2241, he would not be subject to . . . state court exhaustion requirements."'). See 28 U.S.C. § 2253(c)(3); *Gonzalez v. Thaler*, 132 S. Ct. 641 (2012); *Slack v. McDaniel*, 529 U.S. 473, 483-85 (2000); *Lambright v. Stewart*, 220 F.3d 1022, 1026 (9th Cir. 2000); see also 9th Cir. R. 22-1(e).

A review of this court's docket reflects that the filing and docketing fees for this appeal remain due. Within 21 days of the filing date of this order, appellant shall either (1) pay to the district court the \$455.00 filing and docketing fees for this appeal and file in this court proof of such payment; or (2) file in this court a motion to proceed in forma pauperis, accompanied by a completed CJA Form 23. Failure to pay the fees or file a motion to proceed in forma pauperis shall result in the automatic dismissal of the appeal by the Clerk for failure to prosecute. See 9th Cir. R. 42-1.

If appellant moves to proceed in forma pauperis, appellant may simultaneously file a motion for appointment of counsel.

The Clerk shall serve a copy of CJA Form 23 on appellant.

If appellant pays the fees, the following briefing schedule shall apply: the opening brief is due June 25, 2012. There was no appearance by the appellees in the district court. The Clerk shall serve a copy of this order on the Office of the Attorney General, Grant Sawyer Bldg., 555 E. Washington Ave. Suite 3900, Las

Vegas, Nevada 89101, who is requested to enter a notice of appearance on behalf of appellees in this case. If Doug Gillespie, State of Nevada, and Attorney General are no longer the appropriate appellees in this case, counsel for appellees is directed to file simultaneously a motion to substitute party. *See* Fed. R. App. P. 43(c).

By July 25, 2012, appellees shall file an answering brief or a letter indicating that no answering brief will be filed. If appellees file an answering brief, the optional reply brief will be due 14 days after service of the answering brief. If appellant files a motion to proceed in forma pauperis, the briefing schedule will be set upon disposition of the motion.

FINANCIAL AFFIDAVIT

IN SUPPORT OF REQUEST FOR ATTORNEY FEE OR OTHER COURT SERVICES WITHOUT PAYMENT OF FEE

IN THE CASE OF _____ V.S. _____

FOR _____ AT _____

IN UNITED STATES ☐ MAGISTRATE ☐ DISTRICT ☐ APPEALS COURT or ☐ OTHER PANEL (Specify below)

LOCATION NUMBER

PERSON REPRESENTED (Show your full name)

- 1 ☐ Defendant - Adult
 2 ☐ Defendant - Juvenile
 3 ☐ Appellant
 4 ☐ Probation Violator
 5 ☐ Parole Violator
 6 ☐ Habeas Petitioner
 7 ☐ JWS Petitioner
 8 ☐ Material Witness
 9 ☐ Other

DOCKET NUMBERS
Magistrate
District Court
Court of Appeals

CHARGE/OFFENSE (describe if applicable & check box --)

- ☐ Felony
☐ Misdemeanor

ANSWERS TO QUESTIONS REGARDING ABILITY TO PAY

ASSETS	EMPLOYMENT	Are you now employed? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Am Self-Employed		
		Name and address of employer: _____		
		IF YES, how much do you earn per month? \$ _____	IF NO, give month and year of last employment How much did you earn per month? \$ _____	
		IF married is your Spouse employed? <input type="checkbox"/> Yes <input type="checkbox"/> No	If a minor under age 21, what is your Parents or Guardian's approximate monthly income? \$ _____	
OTHER INCOME	Have you received within the past 12 months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, retirement or annuity payments, or other sources? <input type="checkbox"/> Yes <input type="checkbox"/> No			
	IF YES, GIVE THE AMOUNT RECEIVED & IDENTIFY THE SOURCES	RECEIVED	SOURCES	
	CASH	Have you any cash on hand or money in savings or checking accounts? <input type="checkbox"/> Yes <input type="checkbox"/> No IF YES, state total amount \$ _____		
PROPERTY	Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? <input type="checkbox"/> Yes <input type="checkbox"/> No			
	IF YES, GIVE THE VALUE AND DESCRIBE IT	VALUE	DESCRIPTION	
OBLIGATIONS & DEBTS	DEPENDENTS	MARITAL STATUS	Total No. of Dependents	List persons you actually support and your relationship to them
		SINGLE MARRIED WIDOWED SEPARATED OR DIVORCED		
	DEBTS & MONTHLY BILLS	APARTMENT OR HOME	Creditors	Total Debt Monthly Payment

I certify under penalty of perjury that the foregoing is true and correct. Executed on (date) _____

SIGNATURE OF DEFENDANT
(OR PERSON REPRESENTED)

005013

EXHIBIT "B"³⁰

• ORDER OF AFFIRMANCE

Supreme Court of Nevada No. 61631
(4 pages)

08- C250630
Sept. 30, 2014

EXHIBIT "B"³⁰

005014

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 61631

FILED

APR 10 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

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

First, appellant Brian O'Keefe argues that his conviction violates double jeopardy because this court reversed his prior conviction for the same offense after concluding that insufficient evidence was presented at trial. O'Keefe is mistaken. This court reversed his prior conviction because the jury was erroneously instructed regarding a theory that the killing occurred during the commission of an unlawful act, which was not alleged in the charging document and was not supported by the evidence. O'Keefe v. State, Docket No. 53859 (Order of Reversal and Remand, April 7, 2010). Double jeopardy does not preclude O'Keefe's instant conviction under an alternate theory of second-degree murder which was presented at his first trial and alleged in the charging document. See Parker v. Norris, 64 F.3d 1178, 1180-82 (8th Cir. 1995) (finding no double jeopardy violation where defendant's conviction for felony murder was reversed due to error and defendant was convicted at a second trial under an alternative theory of murder); see also Stephens v.

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13-10505

005015

State, 127 Nev. ___, ___, 262 P.3d 727, 734 (2011) (the remedy for errors unrelated to sufficiency of the evidence is reversal and remand for a new trial, not an acquittal).

Second, O'Keefe argues that the district court abused its discretion by allowing him to represent himself at trial because his decision to do so was not knowing, voluntary, and intelligent. Before granting O'Keefe's request, the district court conducted an appropriate canvass pursuant to Faretta v. California, 422 U.S. 806 (1975), during which O'Keefe stated that he spent several years studying the law and understood the nature of the charges against him, the potential penalties he faced, and the dangers of self-representation. Although O'Keefe asserts that his poor performance at trial demonstrates his decision was unknowing, "a criminal defendant's ability to represent himself has no bearing upon his competence to choose self-representation," Vanisi v. State, 117 Nev. 330, 341, 22 P.3d 1164, 1172 (2001) (quoting Godinez v. Moran, 509 U.S. 389, 400 (1993)), and the record reflects that O'Keefe voluntarily chose to represent himself despite full knowledge of the risks. We conclude that the district court did not abuse its discretion by granting O'Keefe's request for self-representation. See Hooks v. State, 124 Nev. 48, 55, 176 P.3d 1081, 1085 (2008) (reviewing the record as a whole and giving deference to a district court's decision to allow a defendant to waive his right to counsel).

Third, O'Keefe argues that the district court abused its discretion by denying his request to stay or continue trial for approximately nine months because he had pending proceedings in federal court and was unprepared for trial. The district court rejected O'Keefe's assertion that his federal proceedings in any way limited his ability to

prepare for trial and noted that O'Keefe asked to represent himself and was given ample time to do so effectively. We conclude that the district court did not abuse its discretion by denying O'Keefe's request for an extended continuance where the delay was his fault. See Rose v. State, 123 Nev. 194, 206, 163 P.3d 408, 416 (2007).

Fourth, O'Keefe argues that the district court erred by allowing a substitute judge to preside over his trial because the original judge was more familiar with the case and its complex procedural posture. O'Keefe does not demonstrate how he was prejudiced by the substitution of a different judge. See generally United States v. Lane, 708 F.2d 1394, 1398 (9th Cir. 1983) (error involving substitution of judges is harmless if the defendant has not been prejudiced). We conclude that O'Keefe fails to demonstrate that the district court erred.

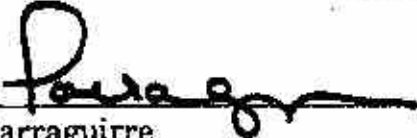
Fifth, O'Keefe argues that the district court abused its discretion by rejecting his proposed instructions and by giving instructions over his objection. "The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error." Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). Because O'Keefe has not provided this court with the instructions given at trial, he fails to demonstrate that the district court abused its discretion by rejecting his proposed instruction. See generally Vallery v. State, 118 Nev. 357, 372, 46 P.3d 66, 77 (2002) (noting that a district court does not err by refusing an accurate instruction related to the defendant's theory of the case if it is substantially covered by other instructions); see also Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a proper appellate record rests on appellant."). O'Keefe also does not identify which

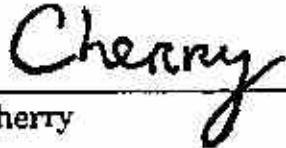
instructions he contends were erroneously given. We conclude that he fails to demonstrate that the district court abused its discretion.

Having considered O'Keefe's contentions and concluded that no relief is warranted, we

ORDER the judgment of conviction AFFIRMED.¹


Hardesty J.


Parraguirre J.


Cherry J.

cc: Hon. Michael Villani, District Judge
Bellon & Maningo, Ltd.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

¹O'Keefe's fast track statement does not comply with NRAP 3C(h)(1) and 32(a)(4) because it does not have 1-inch margins on all four sides. We caution counsel that future failure to comply with formatting requirements when filing briefs with this court may result in the imposition of sanctions. NRAP 3C(n).

We deny O'Keefe's request for full briefing because it does not comply with NRAP 3C(k)(2), as it was not filed separate from the fast track statement. Further, although O'Keefe explains that full briefing is requested so that each issue may be adequately set forth and appropriate legal authority cited, we note that he did not file a motion for excess pages. See NRAP 3C(k)(2)(C).

EXHIBIT "C"

- U.S.D.C. ORDER 2:11-cv-02109-GMN-VCF
DATED 6th day of January 2012
(6 pages)

08-C250630
Sept 30, 2014

EXHIBIT "C"

005019

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

BRIAN KERRY O'KEEFE,

Petitioner,

vs.

SHERIFF DOUG GILLESPIE, et al.,

Respondents.

2:11-cv-02109-GMN-VCF

ORDER

This habeas matter under 28 U.S.C. § 2241 comes before the court for initial review under Rules 1(b) and 4 of the Rules Governing Section 2254 Cases. The filing fee has been paid.

Petitioner seeks to present constitutional claims regarding his pending Nevada state prosecution, including a double jeopardy claim. On initial review, a substantial question exists on the face of the petition and accompanying papers as to whether the claims in the petition have been exhausted. Moreover, it appears that Ground 3 further should be dismissed without prejudice under the abstention doctrine in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). Petitioner therefore must show cause in writing why the petition should not be dismissed without prejudice for lack of exhaustion and/or based upon *Younger* abstention as to Ground 3.

Background

Petitioner Brian O'Keefe currently is being prosecuted in Nevada state court for the murder of his girlfriend. A third trial on the murder charge currently is scheduled.

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1 In the first trial, the jury found O'Keefe guilty of one count of second-degree murder
2 with the use of a deadly weapon. On direct appeal, the Supreme Court of Nevada reversed
3 and remanded on the following basis:

4
5 Appellant Brian Kerry O'Keefe contends that the district
6 court erred by giving the State's proposed instruction on second-
7 degree murder because it set forth an alternative theory of
8 second-degree murder, the charging instrument did not allege this
9 alternate theory, and no evidence supported this theory. We
10 agree. . . . Here, the district court abused its discretion when it
11 instructed the jury that second-degree murder includes
12 involuntary killings that occur in the commission of an unlawful act
13 because the State's charging document did not allege that
14 O'Keefe killed the victim while he was committing an unlawful act
15 and the evidence presented at trial did not support this theory of
16 second-degree murder. Cf., Jennings v. State, 116 Nev. 488,
17 490, 998 P.2d 557, 559 (2000) (adding an additional theory of
18 murder at the close of the case violates the Sixth Amendment
19 and NRS 173.075(1)). The district court's error in giving this
20 instruction was not harmless because it is not clear beyond a
21 reasonable doubt that a rational juror would have found O'Keefe
22 guilty of second-degree murder absent the error. See Neder v.
23 United States, 527 U.S. 1, 18-19 (1999); Wegner v. State, 116
24 Nev. 1149, 1155-56, 14 P.3d 25, 30 (2000), overruled on other
25 grounds by Rosas v. State, 122 Nev. 1258, 147 P.3d 1101
26 (2006). . . .

27 April 7, 2010, *Order of Reversal and Remand*, at 1-2 (#1, at electronic docketing pages 10-
28 11).

The second trial ended in a mistrial after the jury deadlocked on a verdict.

Petitioner thereafter moved to dismiss on double jeopardy grounds. The state district
court denied the motion, and petitioner filed an original writ petition in the Supreme Court of
Nevada. The state supreme court denied relief on the following basis:

O'Keefe claims that pervasive prosecutorial
misconduct in the second trial and the State's efforts to call
different witnesses in his upcoming trial operate as an exception
to the well-settled proposition that double jeopardy poses no
obstacle to a retrial following a hung jury. See Arizona v.
Washington, 434 U.S. 497, 509 (1978). We disagree. First, the
district court, in resolving O'Keefe's motion to dismiss, concluded
that there was no prejudicial misconduct by the State in the last
trial. Moreover, the fact that the district court declared a mistrial
because the jury was hopelessly deadlocked remains dispositive.
See United States v. Perez, 22 U.S. 579, 580 (1824). We
therefore conclude that double jeopardy poses no bar to
O'Keefe's retrial and decline to intervene in this matter. (5)

1 May 10, 2011, *Order Denying Petition*, at 1-2 (#1, at electronic docketing pages 12-13)
2 (footnote declining to reach non-double jeopardy claims omitted).

3 Petitioner mailed the present federal petition for filing on or about December 20, 2011.
4 He seeks federal intervention to bar the third trial, which is currently scheduled according to
5 the petition for on or about June 11, 2012.

6 **Discussion**

7 As backdrop, petitioner appears to rely upon *Stow v. Murashige*, 389 F.3d 880, 888
8 (9th Cir. 2004), as support for the proposition that he can seek federal intervention in the
9 pending state criminal proceedings under § 2241 prior to a judgment of conviction because
10 he is raising a double jeopardy challenge. However, while a petitioner may pursue a double
11 jeopardy claim in federal habeas proceedings before the conclusion of the state proceedings,
12 the claim raised in federal court still must have been exhausted in the state courts. *See, eg.,*
13 *Mannes v. Gillespie*, 967 F.2d 1310, 1312 & 1316 n.2 (9th Cir. 1992). Moreover, as
14 discussed, *infra*, the exception to the general rule that federal courts do not intervene in
15 pending state criminal proceedings extends only to double jeopardy claims, not also to other
16 constitutional claims.

17 **Exhaustion**

18 Under 28 U.S.C. § 2254(b)(1)(A), a habeas petitioner first must exhaust his state court
19 remedies on a claim before presenting that claim to the federal courts. To satisfy this
20 exhaustion requirement, the claim must have been fairly presented to the state courts
21 completely through to the highest court available, in this case the Supreme Court of Nevada.
22 *E.g., Peterson v. Lampert*, 319 F.3d 1153, 1156 (9th Cir. 2003)(*en banc*); *Vang v. Nevada*, 329
23 F.3d 1069, 1075 (9th Cir. 2003). In the state courts, the petitioner must refer to the specific
24 federal constitutional guarantee and must also state the facts that entitle the petitioner to relief
25 on the federal constitutional claim. *E.g., Shumway v. Payne*, 223 F.3d 983, 987 (9th Cir.
26 2000). That is, fair presentation requires that the petitioner present the state courts with both
27 the operative facts and the federal legal theory upon which his claim is based. *E.g., Castillo*
28 *v. McFadden*, 399 F.3d 993, 999 (9th Cir. 2005). The exhaustion requirement insures that the

1 state courts, as a matter of federal-state comity, will have the first opportunity to pass upon
2 and correct alleged violations of federal constitutional guarantees. See, e.g., *Coleman v.*
3 *Thompson*, 501 U.S. 722, 731, 111 S.Ct. 2546, 2554-55, 115 L.Ed.2d 640 (1991).

4 In the present case, petitioner concedes in the petition that he did not present any of
5 the grounds of the petition to the state courts through to the Supreme Court of Nevada.

6 In Ground 1, petitioner raises a double jeopardy claim. Petitioner acknowledged in the
7 responses to the exhaustion queries in the petition that Ground 1 was not raised on a direct
8 appeal, in a post-conviction petition, or in any other proceeding. He either checked "no" or
9 indicated "not applicable" as to each such situation.

10 The double jeopardy claim raised in Ground 1 is not the same claim as the double
11 jeopardy claim considered by the Supreme Court of Nevada on the petition filed in that court.
12 The state supreme court considered a double jeopardy claim based upon an assertion that
13 double jeopardy should bar a third trial because the State allegedly engaged in prosecutorial
14 misconduct in and after the second trial. The double jeopardy claim in Ground 1 instead is
15 based upon different operative facts. In Ground 1, petitioner claims that the state supreme
16 court's reversal after the first trial was based upon a finding of insufficient evidence is
17 tantamount to a dismissal. Presentation of the double jeopardy claim considered by the state
18 supreme court in the petition there did not exhaust the double jeopardy claim based on
19 different operative facts that is presented in Ground 1.

20 Ground 1, as conceded by petitioner, thus plainly is unexhausted.

21 Petitioner further expressly concedes that the claims in Grounds 2 and 3 also are
22 unexhausted, indicating "no," "n/a," and "not this issue" in the appropriate spaces in response
23 to the exhaustion inquiries in the petition.

24 Petitioner therefore must show cause why the wholly unexhausted petition should not
25 be dismissed without prejudice for lack of exhaustion.

26 ***Younger Abstention***

27 As a general rule, even when the claims in a petition, *arguendo*, otherwise have been
28 fully exhausted in the state courts, a federal court will not entertain a habeas petition seeking

1 intervention in a pending state criminal proceeding, absent special circumstances. See, e.g.,
2 *Sherwood v. Tomkins*, 716 F.2d 632, 634 (9th Cir. 1983); *Carden v. Montana*, 626 F.2d 82,
3 83-85 (9th Cir. 1980); *Davidson v. Klinger*, 411 F.2d 746 (9th Cir. 1969). This rule of restraint
4 ultimately is grounded in principles of comity that flow from the abstention doctrine of *Younger*
5 *v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). Under the *Younger* abstention
6 doctrine, federal courts may not interfere with pending state criminal proceedings absent
7 extraordinary circumstances. As noted previously, however, consideration of pretrial double
8 jeopardy claims constitutes an exception to this abstention doctrine. E.g., *Mannes, supra*.

9 In the present case, Ground 1 is a double jeopardy claim, and the collateral estoppel
10 claim in Ground 2 would appear to be based upon double jeopardy protections.

11 Ground 3, in contrast, asserts a claim of ineffective assistance of trial counsel. Ground
12 3 thus would appear to be subject to the general rule of *Younger* requiring that the federal
13 court abstain from interfering with the pending state criminal proceeding.

14 Petitioner therefore must show cause why Ground 3, even if *arguendo* exhausted,
15 should not be dismissed without prejudice under the *Younger* abstention doctrine.

16 IT FURTHER IS ORDERED that, within thirty (30) days of entry of this order, petitioner
17 shall SHOW CAUSE in writing why: (a) the petition should not be dismissed without prejudice
18 for lack of exhaustion; and (b) why Ground 3 also is not subject to dismissal without prejudice
19 based upon the *Younger* abstention doctrine.

20 IT FURTHER IS ORDERED that, if petitioner maintains that any claims in the petition
21 have been exhausted, petitioner shall attach with his show cause response copies of any and
22 all papers that were accepted for filing in the state courts that he contends demonstrate that
23 the claims are exhausted.

24 If petitioner does not timely and fully respond to this order, or does not show adequate
25 cause as required, the entire petition will be dismissed without further advance notice.¹

26
27
28 ¹The Court has not completed initial review herein as to other potential issues, and this order does not explicitly or implicitly hold that the petition otherwise is free of deficiencies.

1 The Clerk of Court shall send the petitioner a copy of his petition and attachments
2 together with this order. The motion for appointment of counsel will remain under submission
3 pending receipt and consideration of a response to this order. The Court does not find that
4 the interests of justice require the appointment of counsel prior to consideration of any show
5 cause response filed.

6 DATED this 6th day of January, 2012.

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10 Gloria M. Navarro
United States District Judge
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EXHIBIT "D"

- GENERAL 9th CASE NO. 12-15271
DOCKET
(8 pages)

08-C250630
Sept. 30, 2014

005026

BRIAN KERRY O'KEEFE,

Petitioner - Appellant,

v.

DOUG GILLESPIE, Sheriff, STATE OF NEVADA; ATTORNEY GENERAL,

Respondents - Appellees.

005027

General Docket
United States Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 12-15271
Nature of Suit: 3530 Habeas Corpus
Brian O'Keefe v. Doug Gillespie, et al
Appeal From: U.S. District Court for Nevada, Las Vegas
Fee Status: IFP

Docketed: 02/09/2012

Case Type Information:

- 1) prisoner
2) state
3) 2254 habeas corpus

- 1) pretrial detainee
2) state
3) 2241 habeas corpus

Originating Court Information:

District: 0978-2 : 2:11-cv-02105-UMN-VCF
Trial Judge: Gloria M. Navarro, Chief District Judge
Date Filed: 12/29/2011
Date Order/Judgment: 02/02/2012

Date Order/Judgment EOD: 02/03/2012

Date NOA Filed: 02/08/2012

Date Rec'd COA: 02/08/2012

Prior Cases:

None

Current Cases:

None

BRIAN KERRY O'KEEFE (- 90244)
Petitioner - Appellant,

Ryan Norwood, Assistant Federal Public Defender
Direct: 702-388-6577
[COR NTC Assist Fed Pub Def]
Federal Public Defender's Office Las Vegas
411 E. Bonneville Avenue
Las Vegas, NV 89101

v.

DOUG GILLESPIE, Sheriff
Respondent - Appellee,

STATE OF NEVADA
Respondent - Appellee,

Steven S. Owens
Direct: 702-671-2750
[COR NTC District Attorney]
Clark County District Attorney
200 Lewis Avenue
P.O. Box 552212
Las Vegas, NV 89155-2212

Dennis Cavanagh Wilson, Senior Deputy Attorney General
Direct: 702-486-3086
[COR NTC Dep State Atty Gen]
AGNV - OFFICE OF THE NEVADA ATTORNEY GENERAL (LAS VEGAS)
Suite 3900
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Las Vegas, NV 89101

ATTORNEY GENERAL
Respondent - Appellee,

Dennis Cavanagh Wilson, Senior Deputy Attorney General
Direct: 702-486-3086
[COR NTC Dep State Atty Gen]
(see above)

005028

02/09/2012 ☐ 1 Open 9th Circuit docket: needs certificate of appealability. Date COA denied in DC: 02/02/2012. Record on appeal included: Yes. [8062215] (GR)
15 pg, 207.27 KB

02/09/2012 ☐ 2 Filed certificate of record on appeal. RT filed in DC [8062216] (GR)

02/17/2012 ☐ 3 Received letter dated 02/14/12 from Brian O'Keefe pro se re: Request for Rules book (sent copy of rules) [8073807] (RL)
1 pg, 79.39 KB

03/12/2012 ☐ 4 Received Appellant Brian Kerry O'Keefe motion for certificate of appealability. Served on 03/05/2012 [8102158] (RL)
15 pg, 876.66 KB

03/15/2012 ☐ 5 Received Appellant Brian Kerry O'Keefe addendum to motion for certificate of appealability. Served on 03/05/2012 [8106087] (RL)
15 pg, 1.06 MB

04/13/2012 ☐ 6 Filed order (RICHARD A. PAEZ and RICHARD R. CLIFTON) After reviewing the underlying petition and concluding that it states at least one federal constitutional claim debatable among jurists of reason, namely, a double jeopardy violation, we grant the request for a certificate of appealability. A review of this court's docket reflects that the filing and docketing fees for this appeal remain due. Within 21 days of the filing date of this order, appellant shall either (1) pay to the district court the \$455.00 filing and docketing fees for this appeal and file in this court proof of such payment; or (2) file in this court a motion to proceed in forma pauperis, accompanied by a completed CJA Form 23. Failure to pay the fees or file a motion to proceed in forma pauperis shall result in the automatic dismissal of the appeal by the Clerk for failure to prosecute. See 9th Cir. R. 42-1. If appellant moves to proceed in forma pauperis, appellant may simultaneously file a motion for appointment of counsel. The Clerk shall serve a copy of CJA Form 23 on appellant. If appellant pays the fees, the following briefing schedule shall apply: the opening brief is due June 25, 2012. There was no appearance by the appellees in the district court. The Clerk shall serve a copy of this order on the Office of the Attorney General, Grant Sawyer Bldg., 555 E. Washington Ave. Suite 3900, Las Vegas, Nevada 89101, who is requested to enter a notice of appearance on behalf of appellees in this case. If Doug Gillespie, State of Nevada, and Attorney General are no longer the appropriate appellees in this case, counsel for appellees is directed to file simultaneously a motion to substitute party. See Fed. R. App. P. 43(c). By July 25, 2012, appellees shall file an answering brief or a letter indicating that no answering brief will be filed. If appellees file an answering brief, the optional reply brief will be due 14 days after service of the answering brief. If appellant files a motion to proceed in forma pauperis, the briefing schedule will be set upon disposition of the motion. [8140198] (AG)
4 pg, 239.79 KB

04/24/2012 ☐ 7 Filed Appellant Brian Kerry O'Keefe application to proceed In Forma Pauperis. Served on 04/19/2012. [8151892] (RL)
5 pg, 365.47 KB

04/24/2012 ☐ 8 Filed Appellant Brian Kerry O'Keefe motion for appointment of federal counsel. Served on 04/18/2012. [8151899] (RL)
4 pg, 289.61 KB

04/24/2012 ☐ 9 Filed Appellant Brian Kerry O'Keefe motion for a stay of state court proceedings. Served on 04/19/2012. [8152004] (RL)
4 pg, 271.34 KB

05/09/2012 ☐ 10 Filed order (SIDNEY R. THOMAS and CONSUELO M. CALLAHAN) The motion to proceed in forma pauperis is granted. The Clerk shall amend the docket to reflect this status: Appellant's motion for appointment of counsel in this appeal from the denial of a 28 U.S.C. § 2254 petition for writ of habeas corpus is granted. See 18 U.S.C. § 3006A(a)(2)(B); Weygant v. Look, 718 F.2d 952, 954 (9th Cir. 1983) (per curiam). Counsel will be appointed by separate order. The Clerk shall electronically serve this order on the appointing authority for the District of Nevada, who will locate appointed counsel. The district court shall send notification of the name, address, and telephone number of appointed counsel to the Clerk of this court at counselappointments@ca9.uscourts.gov within 14 days of locating counsel. If new counsel identifies uncertified issues that should be raised on appeal, counsel shall include them in the opening brief as permitted by Ninth Circuit Rule 22-1(e). The opening brief and excerpts of record are due July 30, 2012; the answering brief is due August 29, 2012; and the optional reply brief is due within 14 days after service of the answering brief. The motion to stay state court proceedings is denied. [8170878] (DL)
2 pg, 33.06 KB

05/09/2012 ☐ 11 Fee status changed ([Case Number 12-15271: IFP]). [8171146] (DL)

05/15/2012 ☐ 12 Filed (ECF) notice of appearance of Steven S. Owens for Appellee State of Nevada. Date of service: 05/15/2012. [8178288] (SSO)
2 pg, 78.55 KB

05/15/2012 ☐ 13 Added attorney Steven S. Owens for State of Nevada. [8178311] (RL)

05/18/2012 ☐ 14 Sent 5/9/12 order to appointing authority. [8183168] (DL)
2 pg, 43.4 KB

05/18/2012 ☐ 15 Filed (ECF) notice of appearance of Dennis C. Wilson for Appellees Attorney General and State of Nevada. Date of service: 05/18/2012. [8184463] (DCW)
2 pg, 41.61 KB

05/18/2012 ☐ 16 Added attorney Dennis Cavanagh Wilson for State of Nevada Attorney General. [8184470] (RL)

05/23/2012

Compare this text to actual ORDER as EXHIBIT "A".
Someone removed ALL TEXT IDENTIFYING AS A PETITIONER.
#2241

COMPARE EXHIBIT "A" to this text!
THE TEXT IN ORDER SAYING #2241 is omitted here.

WARNING!
SHOULD BE #2241
PRE-TRIAL

005029

☐ 17
2 pg, 42.79 KB
05/23/2012
Filed (ECF) notice of appearance of Ryan Neil Norwood for Appellant Brian Kerry O'Keefe. Date of service: 05/23/2012. [8188454] (RN)

☐ 18
05/29/2012
Added attorney Ryan Norwood for Brian Kerry O'Keefe. [8188460] (RL)

☐ 19
1 pg, 110.63 KB
06/01/2012
Received letter dated 05/23/12 from appellant Brian Kerry O'Keefe re: Request for docket sheet & copy of 05/09/12 order (Sent copy of docket sheet & copy of Order. Appellant has counsel) [8194554] (RL)

☐ 20
8 pg, 51.73 KB
06/01/2012
Filed (ECF) Appellant Brian Kerry O'Keefe Motion for miscellaneous relief [Motion for an Extension of Time for Motion to Reconsider Denial of Stay]. Date of service: 06/01/2012. [8199685] (RN)

☐ 21
43 pg, 1.19 MB
06/01/2012
Filed (ECF) Appellant Brian Kerry O'Keefe EMERGENCY Motion for miscellaneous relief [Emergency Motion Under Circuit Rule 27-3 for Reconsideration of Denial of Stay]. Date of service: 06/01/2012. [8199693] (RN)

☐ 22
1 pg, 25.78 KB
06/05/2012
Filed order (SIDNEY R. THOMAS and CONSUELO M. CALLAHAN) The untimely motion for an extension of time to file a motion for reconsideration is granted. The emergency motion for reconsideration is denied. See 9th Cir. R. 27-10. In addition, the court construes the emergency motion for reconsideration as a renewed motion for a stay of proceedings. So construed, the motion is denied. The briefing schedule established previously shall remain in effect. [8203422] (KD)

☐ 23
2 pg, 192.49 KB
06/06/2012
Received letter dated 06/03/12 from appellant Brian O'Keefe re: letter for judicial notice, clerical error. (Appellant has Assist Fed Pub Def) [8204723] (RL)

☐ 24
4 pg, 229.12 KB
06/13/2012
Filed clerk order (Deputy Clerk: DV): The court is in receipt of appellant's pro se letter, received on June 6, 2012. Because appellant is represented by counsel, only counsel may submit filings, and this court therefore declines to entertain the submission. The Clerk shall serve a copy of appellant's letter on Assistant Federal Public Defender Ryan Norwood. The previously established briefing schedule shall remain in effect. The Clerk shall also serve this order on appellant individually at Reg. No. 1447732, Clark County Detention Center, 330 South Casino Center Boulevard, Las Vegas, Nevada 89101. [8212351] (SM)

☐ 25
8 pg, 53.48 KB
07/20/2012
Filed (ECF) Appellant Brian Kerry O'Keefe Unopposed Motion to extend time to file Opening brief until 12/12/2012 at 11:59 pm. Date of service: 07/20/2012. [8257950] (RN)

☐ 26
1 pg, 23.08 KB
07/23/2012
Filed order (Appellate Commissioner) Appellant's unopposed motion for an extension of time to file the opening brief is granted. The opening brief is due December 12, 2012. The answering brief is due January 11, 2013. The optional reply brief is due within 14 days after service of the answering brief. (Pro Mo) [8259557] (MS)

☐ 27
1 pg, 39.42 KB
09/21/2012
Received notice of change of address dated 09/15/2012 from Brian Kerry O'Keefe. Current new address: High Desert State Prison, PO Box 850, Indian Springs, NV 89070. [8334020] (RL)

☐ 28
32 pg, 847.6 KB
11/09/2012
Filed (ECF) Appellees Doug Gillespie and State of Nevada Motion for miscellaneous relief [Motion to Dismiss Appeal]. Date of service: 11/09/2012. [8396634] (SSO)

☐ 29
12 pg, 81.09 KB
11/20/2012
Filed (ECF) Appellant Brian Kerry O'Keefe response opposing motion (.motion for miscellaneous relief (to be used only if no other relief applies)). Date of service: 11/20/2012. [8410013] (RN)

☐ 30
7 pg, 88.88 KB
11/26/2012
Filed (ECF) Appellees Doug Gillespie and State of Nevada reply to response (.motion for miscellaneous relief (to be used only if no other relief applies)). Date of service: 11/26/2012. [8414343] (SSO)

☐ 31
5 pg, 46.74 KB
12/05/2012
Filed (ECF) Appellant Brian Kerry O'Keefe Unopposed Motion to extend time to file Opening brief until 12/20/2012 at 11:59 pm. Date of service: 12/05/2012. [8426859] (RN)

☐ 32
33 pg, 169.76 KB
12/20/2012
Submitted (ECF) Opening brief for review. Submitted by Appellant Brian Kerry O'Keefe. Date of service: 12/20/2012. [8448006] (RN)

☐ 33
12/24/2012
Filed Appellant Brian Kerry O'Keefe excerpts of record in 2 volumes. Served on 02/20/2012. [8452289] (GV)

☐ 34
28 pg, 205.03 KB
01/11/2013
Submitted (ECF) Answering brief for review. Submitted by Appellees Doug Gillespie and State of Nevada. Date of service: 01/11/2013. [8470573]-(COURT UPDATE: Attached corrected brief (pagination). Resent NDA. 01/15/2013 by RY) (SSO)

☐ 35
1 pg, 51.53 KB
01/22/2013
Filed order (WILLIAM C. CANBY, RICHARD R. CLIFTON and N. RANDY SMITH) Appellees' motion to dismiss this appeal as moot is granted. See *Calderon v. Moore*, 518 U.S. 149, 150 (1996) (per curiam) (an appeal is moot "when, by virtue of an intervening event, a court of appeals cannot grant 'any effectual relief whatever' in favor of the appellant"); see, e.g., *Harrison v. Gillespie*, 640 F.3d 888 (9th Cir. 2011) (a § 2241 petition for habeas corpus is the proper vehicle for asserting a double jeopardy claim prior to (or during the pendency of) a successive trial). All pending motions are denied as moot. DISMISSED. [8482817] (SM)

☐ 36
24 pg, 245.58 KB
01/29/2013
Filed (ECF) Appellant Brian Kerry O'Keefe petition for panel rehearing and petition for rehearing en banc (from 01/22/2013 memorandum). Date of service: 01/29/2013. [8493199] (RN)

☐ 37
1 pg, 36.73 KB
04/08/2013
Filed order (WILLIAM C. CANBY, RICHARD R. CLIFTON and N. RANDY SMITH) Appellant's petition for panel rehearing is construed as a motion for reconsideration of this court's January 22, 2013 order.

dismissing this appeal as moot. So construed, the motion raises issues that warrant a response. See 9th Cir. R. 27-10. Accordingly, within 14 days after the filing date of this order, appellees shall file and serve a response. An optional reply is due within 7 days after service of the response. The pending motion for reconsideration is held in abeyance pending further order of the court. [8581572] (SM)

- 04/19/2013 ☐ 38
15 pg, 1.05 MB Filed (ECF) Appellees Doug Gillespie and State of Nevada response opposing motion (.for panel and en banc rehearing for panel and en banc rehearing (statistical entry)). Date of service: 04/19/2013. [8596275] (SSO)
- 04/26/2013 ☐ 39
29 pg, 324.01 KB Filed (ECF) Appellant Brian Kerry O'Keefe reply to response (. Date of service: 04/26/2013. [8606572] (RN)
- 05/21/2013 ☐ 40
1 pg, 32.88 KB Filed order (WILLIAM C. CANBY, RICHARD R. CLIFTON and N. RANDY SMITH) The court sua sponte vacates the January 22, 2013 order granting the motion to dismiss this appeal as moot. This appeal is reinstated. Appellant's December 5, 2012 unopposed motion to extend time to file the opening brief is granted. The Clerk shall file the opening brief, submitted on December 20, 2012, and the answering brief, submitted on January 11, 2013. The optional reply brief is due within 14 days after the filing date of this order. Appellant's motion for reconsideration with suggestion for rehearing en banc is denied as moot. [8638195] (SM)
- 05/21/2013 ☐ 41
2 pg, 83.06 KB Filed clerk order: The opening brief [32] submitted by Brian Kerry O'Keefe is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: blue. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. [8638221] (RH)
- 05/21/2013 ☐ 42
2 pg, 83.24 KB Filed clerk order: The answering brief [34] submitted by Doug Gillespie and State of Nevada is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: red. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. [8638227] (RH)
- 05/24/2013 ☐ 43
Received 7 paper copies of Answering brief [34] filed by Doug Gillespie and State of Nevada. [8642362] (SD)
- 05/28/2013 ☐ 44
Received 7 paper copies of Opening brief [32] filed by Brian Kerry O'Keefe. [8645096] (SD)
- 05/31/2013 ☐ 45
22 pg, 129.32 KB Submitted (ECF) Reply Brief for review. Submitted by Appellant Brian Kerry O'Keefe. Date of service: 05/31/2013. [8651105] (RN)
- 06/03/2013 ☐ 46
2 pg, 83.27 KB Filed clerk order: The reply brief [45] submitted by Brian Kerry O'Keefe is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: gray. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. [8651593] (GV)
- 06/06/2013 ☐ 47
Received 7 paper copies of Reply brief [45] filed by Brian Kerry O'Keefe. [8658212] (SD)
- 07/08/2013 ☐ 48
138 pg, 4.84 MB Filed Appellant Brian Kerry O'Keefe judicial notice [Pursuant to F.R.E. 201(b)(2)]. Served on 07/03/2013. [8695983] (RL)
- 07/22/2013 ☐ 49
2 pg, 77.77 KB Received Appellant Brian Kerry O'Keefe erratum to judicial notice. Served on 07/17/2013 [8713330] (RL)
- 07/22/2013 ☐ 50
1 pg, 86.55 KB Received letter dated 07/17/13 from pro se Brian O'Keefe re: Case status (sent copy of docket sheet) [8713341] (RL)
- 09/16/2013 ☐ 51
3 pg, 220.48 KB Received Appellant Brian Kerry O'Keefe addendum to motion for judicial notice. Served on 09/11/2013 [8784309] (RL)
- 11/15/2013 ☐ 52
6 pg, 358.94 KB Received Appellant Brian Kerry O'Keefe motion Ex parte motion to voluntary dismiss appointed counsel Ryan Norwood; served on 11/10/2013 [8865628] (SW)
- 12/03/2013 ☐ 53
313 pg, 13.33 MB Filed Appellant Brian Kerry O'Keefe motion to take judicial notice Served on 12/04/2013. [8888711] Appellant has Counsel. [8888711] (SW)
- 12/11/2013 ☐ 54
1 pg, 58.3 KB Received letter dated 12/05/13 from appellant Brian O'Keefe re: Case status (Sent copy of docket sheet. Appellant has Assist Fed Pub Def) [8898030] (RL)
- 12/30/2013 ☐ 55
3 pg, 147.81 KB Received copy of District Court order filed on 12/30/2013 ORDER denying without prejudice ex parte motion withdrawal of appointed counsel. [8919864] (RL)
- 01/15/2014 ☐ 56
7 pg, 282.94 KB Received letter dated 1/10/14 from appellant Brian O'Keefe re: Advising clerk 21 months since COA was issued on the the merits. (Appellant has Assist Fed Pub Def) [8939892] (RL)
- 01/21/2014

005031

<input type="checkbox"/> <u>57</u> 2 pg, 35.14 KB	<p>Filed clerk order (Deputy Clerk: AT): On November 15, 2013, this court received appellant's pro se motion to voluntarily dismiss appointed counsel, which the court served electronically on counsel. Because appellant is represented by counsel, only counsel may file motions. This court therefore declines to entertain the pro se submission. Within 21 days after the date of this order, counsel shall consult with appellant and file in this court a response to appellant's pro se submission. Appellant's pro se motions to take judicial notice shall be addressed by separate order. The Clerk shall serve this order on counsel and appellant individually: at ID #90244, High Desert State Prison, 22010 Cold Creek Road, P.O. Box 650, Indian Springs, NV 89018. [8944538] (WL)</p>
01/30/2014 <input type="checkbox"/> <u>56</u> 5 pg, 219.78 KB	<p>Received copy of amended notice of appeal from district court, as to order on ex parte motion by petitioner Brian Kerry O'Keefe. Filing fee (not paid). [8961878] (RL)</p>
02/06/2014 <input type="checkbox"/> <u>59</u> 5 pg, 384.12 KB	<p>Received Appellant Brian Kerry O'Keefe motion the court with affidavit to inform the court of complaint initiated and state of Nevada's contumacy of the supremacy clause and warrant of COA by want of jurisdiction in proceeding with third trial. Served on 01/30/2014 (Appellant has Assist Fed Pub Def) [8969440] (RL)</p>
02/11/2014 <input type="checkbox"/> <u>60</u> 8 pg, 60.41 KB	<p>Filed (ECF) Appellant Brian Kerry O'Keefe response to Court order dated 01/21/2014. Date of service: 02/11/2014. [8974711] (RN)</p>
02/24/2014 <input type="checkbox"/> <u>61</u> 9 pg, 595.86 KB	<p>Filed Appellant Brian Kerry O'Keefe motion the court for leave to file prose informal opening brief subsequent the granted voluntary unappointment of counsel. Served on 02/11/2014. (Appellant has Assist Fed Pub Def) [8991528] (RL)</p>
02/24/2014 <input type="checkbox"/> <u>62</u> 9 pg, 691.73 KB	<p>Filed Appellant Brian Kerry O'Keefe reply to response to prose submission. Served on 02/15/2014. (Appellant has Assist Fed Pub Def) [8991543] (RL)</p>
02/24/2014 <input type="checkbox"/> <u>63</u> 4 pg, 235.65 KB	<p>Filed Appellant Brian Kerry O'Keefe prose petition for publication based on a matter of first impression additionally clarifying. Served on 02/17/2014. (Appellant has Assist Fed Pub Def) [8991555] (RL)</p>
03/05/2014 <input type="checkbox"/> <u>64</u> 1 pg, 63.75 KB	<p>Filed letter from appellant Brian O'Keefe re: Case status (Sent copy of docket sheet. Appellant has Assist Fed Pub Def.) [9003541] (RL)</p>
03/21/2014 <input type="checkbox"/> <u>65</u> 9 pg, 635.46 KB	<p>Filed Appellant Brian Kerry O'Keefe pro se motion to correct fundamental constitutional judicial error(s) on appointment of counsel; request for copy of Order. Served on 03/17/2014. Notice sent to Pro Se. [9026296] (RL)</p>
05/09/2014 <input type="checkbox"/> <u>66</u> 22 pg, 1.34 MB	<p>Filed Appellant Brian Kerry O'Keefe motion for summary judgment. Deficiencies: None. Served on 05/01/2014. [9091026] (JFF)</p>
05/14/2014 <input type="checkbox"/> <u>67</u> 2 pg, 34.67 KB	<p>Filed order (Appellate Commissioner): The court has reviewed the February 11, 2014 response to the court's January 21, 2014 order. Appellant's February 24, 2014 motion "for leave to file pro se informal opening brief" is construed as a motion to proceed pro se and to file a pro se opening brief. So construed, the request is granted to the extent that the February 24, 2014 pro se brief is lodged for whatever consideration the panel assigned to hear the merits of this appeal deems appropriate. Appellant's pro se filings dated July 8, 2013, July 22, 2013, September 16, 2013, December 3, 2013, February 6, 2014, February 24, 2014, March 21, 2014, and May 9, 2014 are also referred to the panel assigned to hear the merits of this appeal for whatever consideration the panel deems appropriate. Briefing is complete. (MOATT) [9094362] (WL)</p>
05/15/2014 <input type="checkbox"/> <u>68</u> 1 pg, 84.99 KB	<p>Filed Appellant Brian Kerry O'Keefe letter dated 03/31/2014 re: status on case (sent docket sheet). Paper filing deficiency: None. [9102211] (JFF)</p>
05/15/2014 <input type="checkbox"/> <u>69</u> 38 pg, 1.78 MB	<p>Filed Appellant Brian Kerry O'Keefe motion for summary judgment. Deficiencies: None. Served on 04/01/2014. [9102324] (JFF)</p>
06/03/2014 <input type="checkbox"/> <u>70</u> 1 pg, 55.38 KB	<p>Received notice of Brian O'Keefe change of address dated 05/28/2014 from. Current new address: Lovelock Correctional Center 1200 Prison Road Lovelock, Nevada 89419. [9118349] (JFF)</p>
06/09/2014 <input type="checkbox"/> <u>71</u> 1 pg, 32.35 KB	<p>Filed clerk order (Deputy Clerk: AT): Appellant's pro se filing, dated May 15, 2014, is referred to the panel assigned to hear the merits of this appeal for whatever consideration the panel deems appropriate. Briefing is complete. [9123985] (WL)</p>
06/23/2014 <input type="checkbox"/> <u>72</u> 5 pg, 302.67 KB	<p>Filed Appellant Brian Kerry O'Keefe motion for joinder docket entries 66 and 69. Deficiencies: None. Served on 06/18/2014. [9143244] (SW)</p>
07/11/2014 <input type="checkbox"/> <u>73</u> 1 pg, 32.44 KB	<p>Filed clerk order (Deputy Clerk: AT): Appellant's pro se filing, dated June 23, 2014, is referred to the panel assigned to hear the merits of this appeal for whatever consideration the panel deems appropriate. Briefing is complete. [9165462] (WL)</p>
07/30/2014 <input type="checkbox"/> <u>74</u> 2 pg, 116.73 KB	<p>Filed Appellant Brian Kerry O'Keefe declaration for entry of default. Deficiencies: None. Served on 07/28/2014. [9188769] (JFF)</p>
07/31/2014 <input type="checkbox"/> <u>75</u> 1 pg, 32.71 KB	<p>Filed Appellant Brian Kerry O'Keefe letter re: request docket sheet(sent copy). Paper filing deficiency: None. [9189816] (JFF)</p>

08/11/2014	<input type="checkbox"/> 76 6 pg, 322.8 KB	Filed Appellant Brian Kerry O'Keefe motion for default judgment. Deficiencies: None. Served on 08/06/2014. [9201723] (JFF)
08/13/2014	<input type="checkbox"/> 77 9 pg, 455.75 KB	Filed Appellant Brian Kerry O'Keefe motion motion by " Appendix A" , correct caption. Deficiencies: None. Served on 08/08/2014. [9204927] (JFF)
08/15/2014	<input type="checkbox"/> 78 3 pg, 195.59 KB	Received Appellant Brian Kerry O'Keefe designation of reporter's transcript form and case information. [9208020] (JFF)
08/18/2014	<input type="checkbox"/> 79 1 pg, 85.19 KB	Sent Notice requesting electronic excerpts in 14 days. [9209061] (SOS)
08/18/2014	<input type="checkbox"/> 81 4 pg, 237.32 KB	Filed Appellant Brian Kerry O'Keefe pro se motion by the clerk pursuant circuit rule 27-7 appendix "a" (38) provide information on jurisdiction of cause, and summary disposition.(appellant has counsel) Served on 08/13/2014. Notice sent to Pro Se. [9209948] (JFF)
08/19/2014	<input type="checkbox"/> 80 153 pg, 8.79 MB	Submitted (ECF) excerpts of record. Submitted by Appellant Brian Kerry O'Keefe. Date of service: 08/19/2014. [9209597] (RN)

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005034

EXHIBIT "E"

9th Circuit Case No. 12-15271

• ACKNOWLEDGMENT OF HEARING
(1 page) NOTICE OF ORAL ARGUMENT

SCHEDULED NOVEMBER 17, 2014

COURTROOM # 1 - 09:00 am

San Francisco, California

08 - C250630

Sept. 30, 2014

EXHIBIT "E"

005035

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
ACKNOWLEDGMENT OF HEARING NOTICE (SAN FRANCISCO)

I acknowledge receipt of the notice of assignment showing my case:

Case Number 12-15271

Case Title O'Keefe v. Gillespie

assigned for hearing:

Date 11-17-2014

Time 9:00am

Courtroom 1

Location San Francisco, CA

Counsel to argue (or, if argument to be presented "In pro per" enter party information):

Name Ryan Norwood

Address 411 E. Bonneville Ave. Ste.#250

City Las Vegas

State NV

Zip Code 89101

Phone 702-388-6577

Email Address ryan_norwood@fd.org

Party/parties represented Brian O'Keefe

Special needs you may require in the courtroom

N/A

☒ Counsel who have not entered an appearance in the case(s) listed above must file a separate Notice of Appearance using Appellate ECF.

Admission status (to be completed by attorneys only):

☒ I certify that I am admitted to practice before this Court.

☐ I certify that I am generally qualified for admission to practice before the bar of the Ninth Circuit and that I will immediately apply for admission (forms available at <http://www.ca9.uscourts.gov>).

Signature (use "s/" format) /s/ Ryan Norwood

Date 9/10/2014

Filing Instructions

Electronically: Print the filled-in form to PDF (File > Print > PDF Printer/Creator), then, in Appellate ECF, choose Forms/Notices/Disclosures > File an Acknowledgment of Hearing Notice.

-or-
US Mail: Office of the Clerk, U.S. Court of Appeals, P.O. Box 193939, San Francisco CA 94119
Overnight: James R. Browning U.S. Courthouse, 95 Seventh Street, San Francisco CA 94103
Phone: 415-355-8190

005036



CLERK OF THE COURT

1 ORDER

2 EIGHTH JUDICIAL DISTRICT COURT
3 CLARK COUNTY, NEVADA

4 STATE OF NEVADA

5 Plaintiff,

6 vs.

Case No.

C250630

7 BRIAN O'KEEFE

8 Dept. No.

IX

9 Defendant.

10 **ORDER DENYING MOTION TO DISQUALIFY**

11 This Court, having reviewed "Motion to Chief Judge to Reassign Case to Jurist of Reason
12 Based on Pending Suit Against Judge Michael Villani for Proceeding in Clear 'Want of Jurisdiction'
13 Thereby Losing Immunity, Absolutely!" and all related pleadings, notes that this matter is decided in
14 chambers without oral argument pursuant to EDCR 2.23. Defendant's Motion, which is handwritten
15 and incognizable at times, requests the disqualification of Judge Villani because he allegedly made
16 several errors during Defendant's trial and because Defendant named the Judge as a defendant in a
17 suit filed in federal court. Neither of these reasons are sufficient to warrant disqualification, and the
18 Motion must be DENIED.

19 First, Defendant alleges that, during his jury trial that took place in 2012, Judge Villani
20 committed a "conspiracy, civil in nature," and that he forced Defendant to go to trial, which violated
21 "the right not to be tried." Defendant offers no admissible evidence of these allegations. Further,
22 "[j]udicial rulings alone *almost never* constitute a valid basis for a bias or partiality motion." Liteky
23 v. United States, 510 U.S. 540, 114 S. Ct. 1147, 1150 (1994). Therefore, any of Judge Villani's
24 rulings during the trial, even if the rulings were incorrect, cannot be used as evidence of the Judge's
25 bias or prejudice. Second, this claim is untimely. NRS 1.235 (1) states that the affidavit in support
26 of a motion to disqualify must be filed "[n]ot less than 20 days before the date set for trial or hearing
27 of the case." Disregarding the fact that Defendant did not file an affidavit, his allegations refer to a
28 trial that took place in 2012, two years before the instant Motion was filed. This renders the instant

JENNIFER TOGLIATTI
DISTRICT JUDGE
DEPARTMENT IX

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CLERK OF THE COURT

1 Motion untimely, as it was filed years after the 20 day period allowed by statute. Finally, Judge
2 Villani's affidavit notes that he did not preside over Defendant's trial, and that Judge Joseph
3 Bonaventure was the presiding trial judge. Therefore, any claims regarding Judge Bonaventure's
4 bias or prejudice toward Defendant cannot be used to disqualify Judge Villani.

5 Second, Defendant requests disqualification because he has named Judge Villani as a
6 defendant in a federal suit. Although Defendant does not offer any details of that suit, the mere
7 existence of the suit does not have any bearing over the issue of disqualification at hand. A judge is
8 not required to recuse in response to a party's own actions that the party claims creates an inference
9 of bias or prejudice. Hymon v. State, 121 Nev. 200, 210 (2005). In Hymon, a criminal defendant
10 mailed a threatening letter to the district court judge presiding over his trial and then requested
11 disqualification, alleging that the judge's receipt of the threatening letter created a prejudice against
12 him in the judge's mind. However, the Nevada Supreme Court ruled that the threatening letter,
13 which was a device created by the defendant, could not be used to demonstrate bias or prejudice on
14 the judge's part. Likewise, regarding the instant Motion, Defendant's filing of a federal lawsuit
15 naming Judge Villani as a defendant is a creation of the Defendant and cannot be used to show an
16 inference of bias or prejudice on the part of Judge Villani pursuant to Hymon. This claim, therefore,
17 is without merit.

18 Finally, Judge Villani's Affidavit states that he denies "any and all of the allegations
19 contained in Defendant's Motion suggesting bias and actual prejudice due to a conspiracy, and
20 notes that he rules "based on the individual facts, applying them to the law, and not based upon the
21 personalities of any of the parties." Further, he unequivocally states: "I am able to remain impartial
22 in this case." When a judge refuses to disqualify himself, "his decision should be given 'substantial
23 weight,' and should not be overturned in the absence of a clear abuse of discretion." Matter of
24 Dunleavy, 104 Nev. 784 (1988). As such, this Court gives Judge Villani's choice not to recuse
25 "substantial weight."

26 /
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2 Overall, because Defendant's Motion is meritless and untimely, and because it lacks any legally
3 cognizable claims that would support disqualification, it is hereby ORDERED DENIED.

4 DATED this 6th of OCTOBER, 2014.

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7 JENNIFER P. TOGLIATTI
8 CHIEF DISTRICT COURT JUDGE
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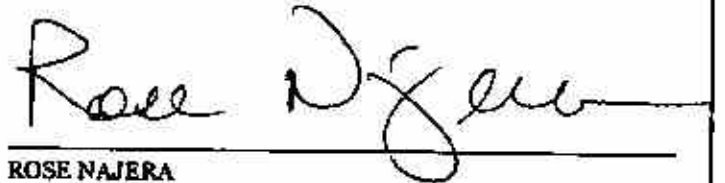
JENNIFER TOGLIATTI
DISTRICT JUDGE
DEPARTMENT IX

CERTIFICATE OF SERVICE

I hereby certify that on about the date filed, a true copy of the foregoing ORDER DENYING DEFENDANT'S MOTION TO DISQUALIFY (08C250630) was served via email and/or first class mail upon the following:

Michael Villani
District Court Judge
Department XVII
degreec@clarkcountycourts.us

Brian O'Keefe
#90244 C/O LCC
1200 Prison Road
Lovelock NV 89419



ROSE NAJERA
JUDICIAL EXECUTIVE ASSISTANT, DEPARTMENT IX

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Decision and Order filed in District Court case number 08C250630 DOES NOT contain the social security number of any person.

/s/ Rose Najera Date 10/8/14
Judicial Executive Assistant

JENNIFER TOGLIATTI
DISTRICT JUDGE
DEPARTMENT IX



CLERK OF THE COURT

RSPN
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
H. LEON SIMON
Chief Deputy District Attorney
Nevada Bar #000411
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

BRYAN O'KEEFE,
aka Brian Kerry O'Keefe, #1447732

Defendant.

CASE NO: 08C250630

DEPT NO: XVII

**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 ACCOMPANYING EXHIBITS,
OPPOSITION TO REQUEST FOR EVIDENTIARY HEARING, AND OPPOSITION TO
PRO PER MOTION TO APPOINT COUNSEL**

DATE OF HEARING: OCTOBER 28, 2014

TIME OF HEARING: 8:15 AM

**COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
District Attorney, through H. LEON SIMON, Chief Deputy District Attorney, and hereby
submits the attached Points and Authorities in Response to Defendant's Pro Per Post-
Conviction "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,"
(hereinafter "Post-Conviction Writ of Habeas Corpus"), "Evidentiary Hearing Request"
(Amended Petition for Writ of Habeas Corpus Pursuant to NRS 34.360 Exclusive Based on**

1 Subject-Matter of Amended Information Vested in Ninth Circuit by Notice of Appeal then
2 'COA' Granted on a Double Jeopardy Violation with No Remand Issued Since)" (hereinafter
3 "Amended Petition") and "Exhibits to 'Amended' Petition for Writ of Habeas Corpus by a
4 True Pretrial Detainee" (hereinafter "Accompanying Exhibits"), Motion to Dismiss,
5 Opposition to Request for Evidentiary Hearing, and Opposition to "Pro Per Ex Parte Motion
6 for Appointment of Counsel Pursuant to NRS 34.750" (hereinafter "Motion to Appoint
7 Counsel").

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

11 **POINTS AND AUTHORITIES**

12 **STATEMENT OF THE CASE**

13 BRYAN O'KEEFE, aka Brian Kerry O'Keefe (hereinafter "Defendant"), was charged
14 by way of Information on December 19, 2008 with one (1) count of Murder with Use of a
15 Deadly Weapon (Open Murder) (Felony - NRS 200.010, 200.030, 193.165).¹

16 Defendant proceeded to trial on March 17, 2009. On March 20, 2009, the jury returned
17 a verdict of guilty on the charge of Second Degree Murder with Use of a Deadly Weapon.
18 Defendant appealed to the Nevada Supreme Court and on April 7, 2010 the Court reversed
19 and remanded his case for a new trial due to a jury instruction issue; Remittitur issued May 3,
20 2010.

21 Defendant proceeded to trial for a second time on August 23, 2010. On September 2,
22 2010, the court declared a mistrial on account of a hopelessly deadlocked jury at a ten (10) to
23 two (2) vote.

24 On October 3, 2011, Defendant filed a Motion to Dismiss Appointed Counsel and for
25 a Faretta Hearing. The court conducted the Faretta Canvass on December 16, 2011, and
26 dismissed Defendant's counsel, thus allowing Defendant to represent himself. Lance Maningo
27 was appointed as stand-by counsel.

28

¹ An Amended Information was also filed February 10, 2009, containing the same charge.

1 On May 9, 2012, the federal court denied Defendant's Motion to Stay the State court
2 Proceedings. The federal court denied Defendant's renewed Motion on June 5, 2012.
3 Defendant proceeded to trial for a third time on June 11, 2012. On June 15, 2012, the jury
4 returned a guilty verdict to Second Degree Murder With Use of a Deadly Weapon (Category
5 A Felony – NRS 200.010, 200.030, 193.165).

6 On August 28, 2012, the court sentenced Defendant as follows: a minimum of one
7 hundred twenty (120) to a maximum of three hundred (300) months, plus a consecutive term
8 of eight (8) to twenty (20) years for use of a deadly weapon, with one thousand three hundred
9 ninety-four (1,394) days credit for time served.

10 Defendant filed a Pro Per Notice of Appeal on August 31, 2012. The Judgment of
11 Conviction was filed September 5, 2012. Lance Maningo, Esq., was confirmed as appellate
12 counsel on September 6, 2012, and filed a Notice of Appeal on September 13, 2012. The
13 Supreme Court affirmed on April 10, 2013, and Defendant was denied rehearing on June 13,
14 2013. Remittitur issued July 23, 2013.

15 On December 6, 2013, Defendant filed a Petition for Writ of Mandamus or, in the
16 Alternative, Writ of Coram Nobis and a Motion to Appoint Counsel. The State filed its
17 Response on December 31, 2013. The Court denied the Petition and Motion without prejudice
18 as the allegations therein related to another of Defendant's cases, Case Number 04C202793.
19 The written Order was filed on January 28, 2014.

20 On January 13, 2014, Defendant filed an Ex-Parte Motion for Production of
21 Documents, (Specific) Papers, Pleadings and Tangible Property of Defendant. The State did
22 not file an opposition. At the February 4, 2014, hearing, the court granted in part Defendant's
23 motion as it pertained to his request for his file from previous counsel but denied in part the
24 motion without prejudice as it pertained to Defendant's specific requests as Defendant failed
25 to demonstrate any reason why the documents were needed.

26 On January 21, 2014, Defendant filed an (Ex-Parte) "Motion for Reimbursement of
27 Incidental Costs Subsequent the Court Declaring Defendant Indigent and Granting Forma
28

1 Pauperis." The State filed its Opposition on February 7, 2014. The court denied the motion
2 at a hearing on February 11, 2014.

3 On January 27, 2014, Defendant filed a Motion to Modify and/or Correct Illegal
4 Sentence. The State filed the Opposition on February 24, 2014. The court denied Defendant's
5 Motion to Modify and/or Correct Illegal Sentence on February 27, 2014. On March 4, 2014,
6 Defendant filed an untimely Reply. The court denied the Motion on March 25, 2014.

7 On July 23, 2014, Defendant filed a "Motion for Relief from Judgment Based on Lack
8 of Jurisdiction for U.S. Court of Appeals has Not Issued any Remand, Mandate or Remittitur."
9 The State filed a Response on August 7, 2014. The Motion was denied on August 14, 2014.
10 The Order was entered on September 4, 2014.

11 Defendant filed a Notice of Appeal on the denial of his "Motion for Relief from
12 Judgment Based on Lack of Jurisdiction for U.S. Court of Appeals has Not Issued any
13 Remand, Mandate or Remittitur" on August 29, 2014. Defendant's appeal was dismissed on
14 September 24, 2014 pursuant to an Order from the Nevada Supreme Court.

15 On August 28, 2014 Defendant filed a Pro Per Motion to "Chief Judge to Reassign Case
16 to Jurist of Reason Based on Pending Suit Against Judge Michael Villani for Proceeding in
17 Clear 'Want of Jurisdiction' Thereby Losing Immunity, Absolutely!." On August 29, 2014
18 Defendant filed a notice of Motion and "Motion for Leave of Court to File Motion for
19 Rehearing - Pursuant to EDCR, Rule 2.24." The State filed Oppositions to both motions on
20 September 12, 2014. Defendant's Pro Per Motion to "Chief Judge to Reassign Case to Jurist
21 of Reason Based on Pending Suit Against Judge Michael Villani for Proceeding in Clear 'Want
22 of Jurisdiction' Thereby Losing Immunity, Absolutely!" was referred to Judge Jennifer
23 Togliatti and denied by Order on October 6, 2014.

24 Defendant filed a Post-Conviction Petition for Writ of Habeas Corpus on September
25 15, 2014, as well as Motion to Appoint Counsel. On October 3, 2014, Defendant filed an
26 Amended Petition and Accompanying Exhibits. The State's Response and Motion to Dismiss
27 to the Post-Conviction Petition for Writ of Habeas Corpus, Amended Petition and
28

Accompanying Exhibits, the State's Opposition to Request for Evidentiary Hearing, and the State's Opposition to Defendant's Motion to Appoint Counsel is below.

ARGUMENT

I. Defendant's Petition is Time Barred

Defendant's Petition for Writ of Habeas Corpus is time barred with no good cause shown for delay. Pursuant to NRS 34.726(1):

Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year of the entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:

- (a) That the delay is not the fault of the petitioner; and
(b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

The Supreme Court of Nevada has held that NRS 34.726 should be construed by its plain meaning. Pellegrini v. State, 117 Nev. 860, 873-74, 34 P.3d 519, 528 (2001). As per the language of the statute, the one-year time bar prescribed by NRS 34.726 begins to run from the date the Judgment Of Conviction is filed or a remittitur from a timely direct appeal is filed. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998).

The one-year time limit for preparing petitions for post-conviction relief under NRS 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002), the Nevada Supreme Court rejected a habeas petition that was filed two (2) days late despite evidence presented by the defendant that he purchased postage through the prison and mailed the Notice within the one-year time limit.

In the instant case, Remittitur was issued from Defendant's timely direct appeal on July 23, 2013. Thus, the one-year time bar began to run from that date. The Defendant's Post-Conviction Writ of Habeas Corpus was filed on September-15, 2014. This is over one year after the date of Remittitur and in excess of the one-year time frame. Absent a showing of good cause for this delay and undue prejudice, Defendant's claim must be dismissed because of its tardy filing.

1 **II. Defendant has Not Shown Good Cause**

2 A showing of good cause and prejudice may overcome procedural bars. Defendant has
3 not shown good cause for the late filing per Pellegrini. "To establish good cause, appellants
4 *must* show that an impediment external to the defense prevented their compliance with the
5 applicable procedural rule. A qualifying impediment might be shown where the factual or
6 legal basis for a claim was not reasonably available at the time of default." Clem v. State, 119
7 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added). The Court continued, "appellants
8 cannot attempt to manufacture good cause[.]" Id. at 621, 81 P.3d at 526. In order to establish
9 prejudice, the defendant must show "not merely that the errors of [the proceedings] created
10 possibility of prejudice, but that they worked to his actual and substantial disadvantage, in
11 affecting the state proceedings with error of constitutional dimensions." Hogan v. Warden,
12 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152,
13 170, 102 S. Ct. 1584, 1596 (1982)). To find good cause there must be a "substantial reason;
14 one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506
15 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Clearly,
16 any delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).
17 Defendant has not shown good cause as to why he is late in filing this petition. Defendant has
18 not shown any external impediment that would explain his failure to comply with the
19 procedural rule, and in fact does not address the procedural rule anywhere in either his Post-
20 Conviction Writ of Habeas Corpus, Amended Petition, or Accompanying Exhibits.²

21 **III. Application of the Procedural Bars is Mandatory**

22 Defendant's petition is procedurally barred. Without a showing of good cause and
23 prejudice or actual innocence to overcome procedural bars, Nevada law requires the dismissal
24 of Defendant's petition. The Nevada Supreme Court has held that the district court has a *duty*
25 to consider whether a defendant's post-conviction petition claims are procedurally barred.
26 State v. Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The Riker Court
27

28 ² However, should this court find good cause to excuse the untimely filing, the State respectfully requests additional time to address
the prejudice prong of NRS 34.726. See State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003) (stating that a defendant has the
burden of pleading and proving specific facts that demonstrate both good cause and prejudice to overcome the procedural bars).

1 found that "[a]pplication of the statutory procedural default rules to post-conviction habeas
2 petitions is mandatory," noting:

3 Habeas corpus petitions that are filed many years after conviction
4 are an unreasonable burden on the criminal justice system. The
5 necessity for a workable system dictates that there must exist a
time when a criminal conviction is final.

6 Id. Additionally, the Court noted that procedural bars "cannot be ignored [by the district court]
7 when properly raised by the State." Id. at 233, 112 P.3d at 1075. The Nevada Supreme Court
8 has granted no discretion to the district courts regarding whether to apply the statutory
9 procedural bars; the rules *must* be applied. This position was recently reaffirmed by the
10 Nevada Supreme Court in State v. Greene, 129 Nev. Adv. Op. 58, 307 P.3d 322 (2013). There
11 the court ruled that the defendant's petition was "untimely, successive, and an abuse of the
12 writ" and that the defendant failed to show good cause and actual prejudice. Id. at 326.
13 Accordingly, the court reversed the district court and ordered the defendant's petition
14 dismissed pursuant to the procedural bars. Id. at 322-23.

15 **IV. Defendant is Not Entitled to an Evidentiary Hearing**

16 Defendant is not entitled to an evidentiary hearing in this matter. NRS 34.770
17 determines when a defendant is entitled to an evidentiary hearing. It reads:

18 1. The judge or justice, upon review of the return, answer and
19 all supporting documents which are filed, shall determine whether
20 an evidentiary hearing is required. A petitioner must not be
discharged or committed to the custody of a person other than the
respondent unless an evidentiary hearing is held.

21 2. If the judge or justice determines that the petitioner is not
entitled to relief and an evidentiary hearing is not required, he shall
dismiss the petition without a hearing.

22 3. If the judge or justice determines that an evidentiary
23 hearing is required, he shall grant the writ and shall set a date for
the hearing.

24 The Nevada Supreme Court has held that if a petition can be resolved without
25 expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev.
26 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A
27 defendant is entitled to an Evidentiary Hearing if his petition is supported by specific factual
28 allegations, which, if true, would entitle him to relief unless the factual allegations are repelled

1 by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; See also Hargrove v. State, 100
2 Nev. 498, 503, 686 P.2d 222, 225 (1984) (1984) (holding that "[a] defendant seeking post-
3 conviction relief is not entitled to an Evidentiary Hearing on factual allegations belied or
4 repelled by the record"). "A claim is 'belied' when it is contradicted or proven to be false by
5 the record as it existed at the time the claim was made." Mann, 118 Nev. at 354, 46 P.3d at
6 1230 (2002).

7 In the instant case, Defendant's request for an Evidentiary Hearing is premature. This
8 court has not yet determined whether Defendant's writ has merit. See NRS 34.770.
9 Furthermore, as demonstrated above, Defendant's Post-Conviction Writ of Habeas Corpus
10 may be resolved without an expansion of the record, as the petition is time barred and thus
11 does not necessitate an Evidentiary Hearing. Therefore, this court should deny Defendant's
12 request for an Evidentiary Hearing.

13 **V. Defendant is Not Entitled to Counsel**

14 Defendant is not entitled to have counsel appointed to represent him in post-conviction
15 proceedings. In Coleman v. Thompson, 501 U.S. 722, 752 (1991), the United States Supreme
16 Court ruled that the Sixth Amendment provides no right to counsel in post-conviction
17 proceedings. In McKague v. Warden, 112 Nev. 159, 912 P.2d 255 (1996), the Nevada
18 Supreme Court similarly observed that "[t]he Nevada Constitution . . . does not guarantee a
19 right to counsel in post-conviction proceedings, as we interpret the Nevada Constitution's right
20 to counsel provision as being coextensive with the Sixth Amendment to the United States
21 Constitution." NRS 34.750 provides, in pertinent part:

22 [a] petition may allege that the Defendant is unable to pay the costs
23 of the proceedings or employ counsel. If the court is satisfied that
24 the allegation of indigency is true and the petition *is not dismissed*
25 *summarily*, the court may appoint counsel at the time the court
26 orders the filing of an answer and a return. In making its
27 determination, the court may consider whether:

- 28 (a) The issues are difficult;
(b) The Defendant is unable to comprehend the
proceedings; or
(c) Counsel is necessary to proceed with discovery.

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(emphasis added). Under NRS 34.750, it is clear that the court has discretion in determining whether to appoint counsel. McKague specifically held that with the exception of NRS 34.820(1)(a) [entitling appointed counsel when petition is under a sentence of death], one does not have “[a]ny constitutional or statutory right to counsel at all” in post-conviction proceedings. 112 Nev. at 164, 912 P.2d at 258. Further, the Nevada Supreme Court has observed that a petitioner “must show that the requested review is not frivolous before he may have an attorney appointed.” Peterson v. Warden, Nevada State Prison, 87 Nev. 134, 483 P.2d 204 (1971) (citing former statute NRS 177.345(2)).

Defendant cannot make the threshold showing that is necessary under Peterson. Defendant's Petition for Writ of Habeas Corpus was filed on September 15, 2014 and the date of Remittitur from his direct appeal was filed on July 23, 2013. Defendant is outside the one-year time frame. NRS 34.726. Defendant has not met the burden in the instant case, and thus to the extent Defendant requests appointed counsel, his Motion should be denied.

CONCLUSION

Based on the foregoing reasons, the State asks that Appellant's Post-Conviction Petition for Writ of Habeas Corpus and Amended Petition be DISMISSED and Defendant's Request for Evidentiary Hearing and Motion to Appoint Counsel be DENIED.

DATED this 10th day of October, 2014.

Respectfully submitted,

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