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

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

No. 69036  
  
Electronically Filed  
Dec 09 2015 10:26 a.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

**FAST TRACK STATEMENT**

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*Attorney for Appellant*

STEVEN B. WOLFSON  
Clark County District Attorney  
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*Counsel for Respondent*

Brian K. O’Keefe #90244  
1200 Prison Road  
Lovelock, NV 89419  
Appellant

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BRIAN KERRY O'KEEFE,

No. 69036

Appellant,

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STATE OF NEVADA,

Respondent.

4  
5                   **FAST TRACK STATEMENT**

6           1.     **Name of party filing fast track statement:** Appellant Brian  
7 O'Keefe.

8           2.     **Name, address & telephone number of attorney submitting**  
9 **the fast track statement:** Matthew D. Carling, 1100 S. Tenth Street, Las  
10 Vegas, NV 89101, (702) 419-7330.

11          3.     **Name of appellate counsel if different from trial counsel:**  
12 Appellant represented himself at trial, with Lance A. Maningo, Esq., acting  
13 as standby counsel. Lance A. Maningo was also appellate counsel.

14          4.     **Judicial district, county and district court docket number of**  
15 **lower court proceedings:** Eighth Judicial District Court, Clark County,  
16 Docket No. 08C250630.

1           5.     **Name of judge issuing order appealed from:** Honorable  
2 Michael P. Villani.

3           6.     **Length of trial:** 5 days

4           7.     **Conviction appealed from:** One count of second degree  
5 murder with use of a deadly weapon.

6           8.     **Sentence:** ten (10) to twenty-five (25) years consecutive eight  
7 (8) to twenty (20) years.

8           9.     **Date district court announced decision appealed from:**  
9 September 4, 2015 hearing.

10          10.    **Date of entry of written order appealed from:** Entered  
11 October 2, 2015.

12          11.    **If this appeal is from an order granting or denying a**  
13 **petition for a writ of habeas corpus, indicate the date written notice of**  
14 **entry of judgment or order was served by the court and whether service**  
15 **was by delivery or by mail:** Served October 6, 2015 via mail.

16          12.    **If the time for filing the notice of appeal was tolled by a**  
17 **post-judgment motion,**

18           (a) **specify the type of motion, and the date of filing of the motion:**  
19 N/A; and

20           (b) **date of entry of written order resolving motion:** N/A.

- 1           13.   **Date notice of appeal filed:** October 21, 2015
- 2           14.   **Specify statute or rule governing the time limit for filing the**  
3 **notice of appeal:** NRAP 4(b)
- 4           15.   **Specify statute, rule or other authority which grants this**  
5 **court jurisdiction to review the judgment or order appealed from:** NRS  
6 177.015
- 7           16.   **Specify the nature of disposition below, *e.g.*, judgment after**  
8 **bench trial, judgment after jury verdict, judgment upon guilty plea,**  
9 **etc.:** Judgment of conviction entered pursuant to a jury verdict.
- 10          17.   **Pending and prior proceedings in this court. List the case**  
11 **name and docket number of all appeals or original proceedings**  
12 **presently or previously pending before this court which are related to**  
13 **this appeal (*e.g.*, separate appeals by co-defendants, appeal after post-**  
14 **conviction proceedings):**  
15 *Brian Kerry O’Keefe v. Nevada*, No. 53859 (Appeal from first jury trial);  
16 and *Brian Kerry O’Keefe v. Nevada*, No. 61631 (appeal from third jury  
17 trial). *Brian Kerry O’Keefe v. Nevada*, No. 69121 (*pro se* appeal from  
18 Petition for Writ of Habeas Corpus).
- 19          18.   **Pending and prior proceedings in other courts. List the**  
20 **case name, number and court of all pending and prior proceedings in**

1 other courts which are related to this appeal (*e.g.*, habeas corpus  
2 proceedings in state or federal court, bifurcated proceedings against co-  
3 defendants): United States District Court of Nevada (Case No. 2:11-CV-  
4 02109-GMN)

5 19. **Proceedings raising same issues. List the case name and**  
6 **docket number of all appeals or original proceedings presently pending**  
7 **before this court, of which you are aware, which raise the same issues**  
8 **you intend to raise in this appeal:** N/A

9 20. **Procedural history. Briefly describe the procedural history**  
10 **of the case (provide citations for every assertion of fact to the appendix,**  
11 **if any, or to the rough draft transcript):** The State charged O’Keefe with  
12 murder with use of a deadly weapon by way of an Amended Information on  
13 February 10, 2009. A jury trial was held on March 16-20, 2009, in which  
14 O’Keefe was found guilty of second degree murder with use of a deadly  
15 weapon (the “**First Trial**”). On May 21, 2009 O’Keefe filed a notice of  
16 appeal from the conviction stemming from the First Trial. He filed a Fast  
17 Track Statement in the Nevada Supreme Court (“**NSC**”) on August 19,  
18 2009. In his *Fast Track Statement*, O’Keefe argued, among other things,  
19 that the district court’s ruling on jury instructions was erroneous, and that the  
20 District Court improperly allowed a jury instruction regarding felony murder

1 as an alternate theory of second degree murder when felony murder had not  
2 been specifically alleged in the *Amended Information*. On April 7, 2010, the  
3 NSC issued its *Order of Reversal and Remand*. The NSC stated that “the  
4 district court abused its discretion when it instructed the jury that second-  
5 degree murder includes involuntary killings that occur in the commission of  
6 an unlawful act because the State’s charging document did not allege that  
7 O’Keefe killed the victim while he was committing an unlawful act and the  
8 evidence presented at trial did not support this theory of second-degree  
9 murder.” *O’Keefe v. State*, NSC Docket No. 53859 (April 7, 2010)(the  
10 “**First Trial Reversal**”).

11 On August 19, 2010, the State filed a second *Amended Information*.  
12 On August 23, 2012, the second trial was held on remand from the NSC for  
13 the charge of murder with use of a deadly weapon (the “**Second Trial**”). On  
14 September 2, 2010, the district court declared a mistrial based upon a  
15 deadlock of the jury, and trial was reset for a third trial (the “**Third Trial**”).

16 On April 8, 2011, after the second trial ended in mistrial, O’Keefe  
17 filed his *Petition for Writ of Prohibition or Mandamus* (the “**NSC Petition**”)  
18 with the NSC. He challenged the district court’s denial of his motion to  
19 dismiss the criminal charge on Double Jeopardy grounds, among other

1 things. The NSC determined Double Jeopardy posed no bar to O’Keefe’s  
2 retrial and declined to intervene.

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

17       During this procedural federal appeal process, the matter proceeded  
18 before the state court on the third trial after the second trial was declared a  
19 mistrial. On October 3, 2011, O’Keefe filed his *Pro Se Motion to Dismiss*  
20 *Appointed Counsel and for Faretta Hearing*. After a *Faretta* canvas, the

1 court granted O’Keefe’s motion, finding him competent to waive his right to  
2 counsel, and allowed him to represent himself, with Lance A. Maningo  
3 appointed as standby counsel.

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

13 On June 1, 2012, O’Keefe filed his *Motion to Continue Trial*.  
14 Continuance was denied on June 5, 2012 at calendar call. During calendar  
15 call, O’Keefe informed the trial court that he was not ready to proceed to  
16 trial, and requested that the matter be stayed because of the Ninth Circuit  
17 Court of Appeals was reviewing his case in regards to violations of his  
18 constitutional rights in these proceedings. O’Keefe argued he was not  
19 totally prepared for trial at this time because he had been devoting much of  
20 his time to his federal case. After denying the continuance, the Third Trial



1 commenced June 11, 2012. On June 15, 2012, the jury returned a verdict  
2 finding O’Keefe guilty of second degree murder with use of a deadly  
3 weapon. O’Keefe filed a *Notice of Appeal* on September 5, 2012 from the  
4 conviction stemming from the Third Trial.

5 O’Keefe filed a deficient *Fast Track Statement* in the NSC on  
6 November 1, 2012. He filed an *Amended Fast Track Statement* on  
7 November 2, 2012. In his *Amended Fast Track Statement*, O’Keefe argued,  
8 among other things, that the district court erred in denying O’Keefe’s  
9 request to stay the trial based upon his pending writ in federal court, and that  
10 he was not prepared for trial to begin. O’Keefe also argued that the district  
11 court erred in not allowing defense’s jury instruction for the malignant heart  
12 element of the crime. On April 10, 2013 the NSC entered its *Order of*  
13 *Affirmance* (the “**Third Trial Affirmance**”) regarding these two arguments.  
14 The NSC faulted O’Keefe and found that “the district court did not abuse its  
15 discretion by denying O’Keefe’s request for an extended continuance where  
16 the delay was his fault.... Because O’Keefe has not provided this court with  
17 the instructions given at trial, he fails to demonstrate that the district court  
18 abused its discretion by rejecting his proposed instruction.” *O’Keefe v. State*,  
19 2013 WL 1501038, NSC Docket No. 61631 (April 10, 2013).

1           On August 19, 2013, O’Keefe filed a petition for writ of certiorari in  
2           the United States Supreme Court with regard to the Third Trial Affirmance,  
3           in Case No. 13-6031, which was denied on October 15, 2013. *O’Keefe v.*  
4           *Nevada*, 134 S.Ct. 444, 187 L.Ed.2d 297 (Case No. 13-6031; October 15,  
5           2013).

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

17          O’Keefe filed his *Petition for Writ of Habeas Corpus* (“**Petition**”) on  
18          September 15, 2014, challenging that the trial court lacked jurisdiction to  
19          hear the Third Trial because the Ninth Circuit Appeal remained pending.  
20          (APP 4940-4949) On October 10, 2014, the state filed its *State’s Response*

1 *and Motion to Dismiss to Defendant's Pro per Petition for Writ of Habeas*  
2 *Corpus Pursuant to NRS 34.360 Exclusive Based on Subject-Matter of*  
3 *Amended Information Vested in Ninth Circuit By Notice of Appeal Then*  
4 *"COA" Granted on A Double Jeopardy Violation With No Remand Issued*  
5 *Since (Post conviction), Amended Petition and Accompanying Exhibits,*  
6 *Opposition to Request for Evidentiary Hearing, and Opposition to Pro Per*  
7 *Motion to Appoint Counsel. (APP 5041-5050)*

8       On November 6, 2014 the district court appointed undersigned  
9 counsel to file a *Supplemental Petition for Writ of Habeas Corpus*, (APP  
10 5588-5639), which was filed on April 8, 2015, and argued that appellate  
11 counsel was ineffective for failing to provide the appellate court with the  
12 challenged jury instruction resulting in the appellate court's inability to  
13 reach the merits of the district court's rejection of a jury instruction defining  
14 an element of the crime. On June 2, 2015, the *State's Response to*  
15 *Defendant's Pro Per Post-Conviction Petition for Writ of Habeas Corpus*  
16 (APP 5145-5147) was filed. In the response the state argued that the Habeas  
17 Corpus petition was procedurally barred as it was untimely filed and no  
18 good cause or prejudice had been shown. On July 13, 2015 O'Keefe's  
19 counsel filed a *Supplement to Supplemental Petition for Writ of Habeas*  
20 *Corpus* setting forth a timeline of the various appeals and remittiturs. (APP

1 5459-5460) On July 31, 2015, the state filed its *Response to Defendant's*  
2 *Supplement to Supplemental Petition for Writ of Habeas Corpus* stating that  
3 the remittitur for the direct appeal is NSC Docket 61631 which issued on  
4 July 23, 2013. The state claimed the remittitur cited by defendant was from a  
5 pro per motion to consolidate Defendant's appeals. (APP 5473-5475)

6 On August 25, 2015 O'Keefe's counsel filed a *Reply in Support of*  
7 *Supplemental Petition For Writ of Habeas Corpus* (APP 5500-5510) arguing  
8 that O'Keefe timely sought both reconsideration and stay of the remittitur  
9 before the Nevada Supreme Court in the Appeal; however, the Court failed  
10 to acknowledge them given that he was represented by counsel at the time.  
11 O'Keefe's counsel failed to re-file those pleadings on O'Keefe's behalf.  
12 Thus, the *Remittitur* issued July 23, 2013. O'Keefe argued that his appellate  
13 counsel's ineffectiveness at failing to re-file the Motion to Stay or  
14 Reconsideration Motion was sufficient "good cause" to excuse the delay in  
15 the filing of the Second Petition. Alternatively, O'Keefe argued that his First  
16 Petition was filed December 6, 2013; however, it mistakenly addressed only  
17 items pertaining to a companion case for O'Keefe and denial *without*  
18 *prejudice* entered January 28, 2014. This constitutes fifty-three (53) days  
19 where the time for filing may have been tolled given that a petition was  
20 timely before the court. This would extend the deadline for filing for habeas

1 relief to September 15, 2014, to allow the Second Petition to be considered  
2 timely. O’Keefe argued that, given that the denial of the First Petition was  
3 without prejudice, the merits of the Second Petition should be entertained.  
4 As a second alternative, O’Keefe argued that the Modification Denial  
5 entered March 25, 2014, found that the sentence itself was not illegal.  
6 O’Keefe raises a similar issue in the Second Petition that could be  
7 considered timely filed from that denial rather than from the initial  
8 conviction or the remittitur in the Appeal, allowing the Court to reach the  
9 merits of the issues raised in the Second Petition.

10 On September 4, 2015 a hearing was held regarding the Petition. The  
11 court found the petition was untimely and no good cause had been shown.  
12 The *Findings of Fact, Conclusions of Law and Order* denying the Petition  
13 was entered October 2, 2015. (APP 5528-5536) A *Notice of Appeal* was  
14 filed on October 21, 2015, by counsel herein; however, O’Keefe additionally  
15 filed a pro per notice of appeal on November 3, 2015, indicating  
16 typographical errors in the prior notice and seeking to appeal from the denial  
17 of the motion to withdraw as counsel stemming from the hearing held  
18 October 20, 2015.

19 21. **Statement of facts. Briefly set forth the facts material to the**  
20 **issues on appeal:**

1           On April 10, 2013 the NSC entered its *Order of Affirmance* (the  
2   “**Third Trial Affirmance**”) regarding these two arguments. The NSC  
3   faulted O’Keefe and found that “the district court did not abuse its discretion  
4   by denying O’Keefe’s request for an extended continuance where the delay  
5   was his fault.... Because O’Keefe has not provided this court with the  
6   instructions given at trial, he fails to demonstrate that the district court  
7   abused its discretion by rejecting his proposed instruction.” *O’Keefe v. State*,  
8   2013 WL 1501038, NSC Docket No. 61631 (April 10, 2013)(the “**Appeal**”).

9           On June 25, 2013, O’Keefe filed pro per in the Appeal his *Notice and*  
10   *Motion to Withdraw and Substitute Counsel* and his *Notice of and Leave to*  
11   *Appear and File Motions* with a *Motion for Reconsideration En Banc*. (APP  
12   5578-5587)

13           On June 28, 2013, the NSC directed the clerks to file O’Keefe’s pro  
14   per motions; however, it filed its order denying these pro per motions  
15   presumably on the basis that O’Keefe was represented by counsel, indicating  
16   that appellant’s counsel would have 10 days from the date of the order to file  
17   the petition for en banc reconsideration if warranted.

18           On July 16, 2013, O’Keefe filed his pro per *Motion to Stay Mandate*  
19   *in the S.C.N. Pending Appellate’s Petition for Certiorari to the United States*  
20   *Supreme Court* (Case 61631; Document unavailable online) however, the

1 Nevada Supreme Court directed by order entered that same date that the  
2 clerk return such Motion to Stay to O’Keefe unfiled indicating that O’Keefe  
3 is to proceed through his counsel of record. O’Keefe’s counsel did not re-file  
4 the Reconsideration Motion nor the Motion to Stay on O’Keefe’s behalf.  
5 (APP 5639)

6 On July 23, 2013, the Nevada Supreme Court issued its *Remittitur* for  
7 the direct appeal in Case No. 61631. However, on August 19, 2013, O’Keefe  
8 filed a petition for writ of certiorari to proceed in forma pauperis in the  
9 United States Supreme Court with regard to the Third Trial Affirmance, in  
10 Case No. 13-6031, which was denied October 15, 2013. *O’Keefe v. Nevada*,  
11 134 S.Ct. 444, 187 L.Ed.2d 297 (Case No. 13-6031; October 15, 2013) (the  
12 “**Certiorari Denial**”).

13 On December 6, 2013, O’Keefe filed his pro per *Petition for a Writ of*  
14 *Mandamus or, in the Alternative, Writ of Corum Nobis* (the “**First**  
15 **Petition**”). (APP 4663-4694) O’Keefe also filed a similar petition in his  
16 other case, C202793.

17 On January 28, 2014, the court entered its *Order Denying Defendant’s*  
18 *petition for Writ of Mandamus or, in the Alternative, Writ of Corum Nobis;*  
19 *Order Denying Defendant’s Motion to Waive Filing Fees for Petition for*  
20 *Writ of Mandamus; and Order Denying Defendant’s Motion to Appoint*

1 *Counsel* indicating that, “[t]he allegations complained of in Defendant’s  
2 Petition relate to Case Number C202793; therefore, the Petition and the  
3 Motions were filed under the wrong case number and Defendant will need to  
4 re-file said pleadings in Department XXIII so they may be heard before the  
5 appropriate Judge.” (APP 4761-4763) The First Petition was thereby  
6 denied without prejudice.

7 On January 27, 2014, O’Keefe filed his *Motion to Modify and/or*  
8 *Correct Illegal Sentence* (the “**Modification Motion**”). (APP 4749-4759)  
9 On February 24, 2014, the State filed the *State’s Opposition to Defendant’s*  
10 *Pro Per Motion to Modify and/or Correct Illegal Sentence* (the  
11 “**Modification Response**”). (APP 4811-4817) On March 4, 2014, O’Keefe  
12 filed his *Pro Se “Reply” to State’s Opposition to Defendant’s Pro Se Motion*  
13 *to Modify and/or Correct Illegal Sentence* (the “**Modification Reply**”).  
14 (APP 4821-4832)

15 On March 25, 2014, the Court entered its *Order Denying Defendant’s*  
16 *Pro Per Motion to Modify and/or Correct Illegal Sentence* (the  
17 “**Modification Denial**”), officially denying the Modification Motion on the  
18 basis that the court found it was not an illegal sentence. (APP 4852-4854)

19 On September 15, 2014, O’Keefe filed his *Petition for Writ of Habeas*  
20 *Corpus* (the “**Second Petition**”) wherein he alleged that the Third Trial had



1 been conducted without jurisdiction given that the matter remained on  
2 appeal in federal court during the interim from the second trial, faulting his  
3 counsel for failing to seek and obtain a stay of the state proceedings on this  
4 basis. (APP 4940-4949)

5 **Rough Draft Transcript of Proceedings re: Defendant's Petition for**  
6 **Writ of Habeas Corpus - dated September 4, 2015:**  
7

8       There had been some disagreement in the briefing as to when the  
9 remittitur was issued. Defense believed it was August or September 2014  
10 but the state believed it was July 2013. The court pulled it up that morning  
11 stating the remittitur from the Supreme Court on Docket 61631 was July 6,  
12 2013. The state agreed and commented that maybe defense counsel had  
13 been looking at the wrong remittitur.

14       Defense counsel clarified that O'Keefe had moved to stay the  
15 remittitur in the case and there was some discussion at the Supreme Court  
16 about that. On appeal O'Keefe did have appellate counsel, but he tried to  
17 have appointed counsel removed. O'Keefe tried to do things on his own  
18 while counsel was still on the record, but was barred from doing so while  
19 represented. Defense counsel argued that if the court found the petition to  
20 be untimely filed, there was good cause to excuse such time bar since  
21 O'Keefe had tried to stay the *Remittitur* but was barred by the NSC because  
22 appellate counsel was still of record. Defense counsel also pointed out that

1 the State's Response was just on the time bar issue and did not look at any of  
2 the merits of the argument.

3 The district court determined that it did not have jurisdiction to hear  
4 the Petition.

5 Jurisdiction is jurisdiction. [W]hether it's timely or untimely, I  
6 don't have jurisdiction to hear this. Again, that's the bottom  
7 line saying the Supreme Court said if you don't file notice of  
8 appeal within time frame, there's nothing you can really do  
9 about it.

10  
11 The court found that the notice of remittitur was July 2013 and the petition  
12 was filed September 24, 2014. "I think the problem here was he filed so  
13 many motions ... and he appealed ever[y] single denial. And we probably  
14 have three or four remittiturs from the Supreme Court on this particular  
15 case." The court further found that it was time barred under NRS 34.726 and  
16 that good cause had not been shown. The court denied the request for an  
17 evidentiary hearing because "it's a jurisdictional bar on this particular  
18 matter."

19 22. **Issues on appeal. State concisely the principal issue(s) in**  
20 **this appeal:**

21 **I. TRIAL COURT ERRONEOUSLY DETERMINED THAT IT**  
22 **LACKED JURISDICTION AND THAT NO GOOD CAUSE TO**  
23 **EXCUSE THE TIME BAR EXISTED, RESULTING IN**  
24 **DISMISSAL RATHER THAN THE APPROPRIATE**  
25 **EVIDENTIARY HEARING AND DETERMINATION ON THE**  
26 **MERITS OF THE CASE.**

1  
2 NRS 34.726 states as follows:

3 1. Unless there is good cause shown for delay, a petition that  
4 challenges the validity of a judgment or sentence must be  
5 filed within 1 year after entry of the judgment of conviction  
6 or, if an appeal has been taken from the judgment, within 1  
7 year after the appellate court of competent jurisdiction  
8 pursuant to the rules fixed by the Supreme Court pursuant to  
9 Section 4 of Article 6 of the Nevada Constitution issues its  
10 remittitur. For the purposes of this subsection, good cause  
11 for delay exists if the petitioner demonstrates to the  
12 satisfaction of the court:

13 (a) That the delay is not the fault of the petitioner; and

14 (b) That dismissal of the petition as untimely will unduly  
15 prejudice the petitioner.  
16

17 NRAP 41(3) is the “rule[ ] fixed by the Supreme Court pursuant to Section 4  
18 of Article 6 of the Nevada Constitution” that governs motions for stay of  
19 remittiturs pending application to the United States Supreme Court for  
20 certiorari review of decisions from the Nevada Supreme Court. Rule 41(b)  
21 states in pertinent part as follows:

22 **(b) Stay of Remittitur.**

23 **(1) Petition for Rehearing or En Banc Reconsideration.** The  
24 timely filing of a petition for rehearing or en banc  
25 reconsideration stays the remittitur until disposition of the  
26 petition, unless the court orders otherwise. If the petition is  
27 denied, the remittitur shall issue 25 days after entry of the order  
28 denying the petition, unless the time is shortened or enlarged by  
29 order.

30 ...

31 **(3) Application for Certiorari to the United States Supreme**  
32 **Court.**

1 (A) A party may file a motion to stay the remittitur pending  
2 application to the Supreme Court of the United States for a writ  
3 of certiorari. The motion must be served on all parties.

4 (B) The stay shall not exceed 120 days, unless the period is  
5 extended for cause shown. If during the period of the stay there  
6 is filed with the clerk of the Supreme Court of Nevada a notice  
7 from the clerk of the Supreme Court of the United States that  
8 the party who has obtained the stay has filed a petition for the  
9 writ in that court, the stay shall continue until final disposition  
10 by the Supreme Court of the United States.

11 (C) The court may require a bond or other security as a  
12 condition to granting or continuing a stay of the remittitur.

13 (D) The clerk of the Supreme Court shall issue the remittitur  
14 immediately when a copy of a United States Supreme Court  
15 order denying the petition for writ of certiorari is filed.

16  
17 As it pertains to the showing of “good cause” as required by NRS  
18 34.726(1) under the first requirement, “a petitioner must show that an  
19 impediment external to the defense prevented him or her from complying  
20 with the state procedural default rules.” *State v. Huebler*, 128 Nev. Adv. Op.  
21 19, 275 P.3d 91, 94-95 (2012) *quoting Hathaway v. State*, 119 Nev. 248,  
22 252, 71 P.3d 503 (2003) (citing *Lozada v. State*, 110 Nev. 349, 353, 871  
23 P.2d 944 (1994)) This may be demonstrated by showing “ ‘that the factual or  
24 legal basis for a claim was not reasonably available to counsel, or that some  
25 interference by officials, made compliance impracticable.’ ” *Id. quoting*  
26 (*Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397  
27 (1986). “Petitioner must show that errors in the proceedings underlying the  
28 judgment worked to the petitioner’s actual and substantial disadvantage.”

1 *State v. Huebler*, 128 Nev. Adv. Op. 19, 275 P.3d 91, 94-95 (2012) *quoting*  
2 *Hogan v. Warden*, 109 Nev. 952, 959–60, 860 P.2d 710, 716 (1993).

3       If a petitioner cannot show sufficient good cause “to overcome the  
4 bars to an untimely petition, habeas relief may still be granted if the  
5 petitioner can demonstrate that a constitutional violation has probably  
6 resulted in the conviction of one who is actually innocent.” *Mitchell v. State*,  
7 2006, 149 P.3d 33, 122 Nev. 1269, 1274. “Actual innocence means factual  
8 innocence, not mere legal insufficiency.” *Id.* If the procedural bar will result  
9 in a fundamental miscarriage of justice then the petitioner is entitled to raise  
10 an untimely petition. *State v. Bennett*, 2003, 81 P.3d 1, 119 Nev. 589.

11       This Court has long recognized that Petitioner is entitled to a post-  
12 conviction evidentiary hearing if “he raises claims supported by sufficient  
13 factual allegations that, if true, would entitle him to relief and that are not  
14 belied by the record.” *Toston v. State*, 127 Nev. Adv. Op. 87, 267 P.3d 795,  
15 799 (2011) *referencing* *Hargrove v. State*, 100 Nev. 498, 502–03, 686 P.2d  
16 222, 225 (1984). “Where something more than a naked allegation has been  
17 asserted, it is error to resolve the apparent factual dispute without granting  
18 the accused an evidentiary hearing.” *Mann v. State*, 118 Nev. 351, 354, 46  
19 P.3d 1228, 1230 (2002).

1 Malice aforethought is an essential element of “Murder.” NRS  
2 200.010. Every element of an offense charged must be in the jury  
3 instructions. Failure to do so violates a defendant’s due process rights and  
4 results in constitutional error. *Ho v. Carey*, 332 F.3d 587, 592 (9<sup>th</sup> Cir.,  
5 2003) and *Cordova v. State*, 116 Nev. 664, 666, 6 P.3d 481, 483 (2000).

6 O’Keefe timely sought both reconsideration and stay of the remittitur  
7 before the NSC in the Appeal; however, the NSC failed to acknowledge  
8 them given that he was represented by counsel at the time, directing that the  
9 pleadings be returned to O’Keefe as unfiled. O’Keefe’s counsel, however,  
10 failed to re-file these pleadings on O’Keefe’s behalf. Thus, the *Remittitur*  
11 issued July 23, 2013.

12 The First Petition was filed December 6, 2013; however, it mistakenly  
13 addressed only items pertaining to a companion case for O’Keefe and denial  
14 *without prejudice* entered January 28, 2014.

15 On January 27, 2014, O’Keefe filed his Modification Motion arguing  
16 that the court had lacked jurisdiction to proceed on the Third Trial due to the  
17 pending case before the 9<sup>th</sup> Circuit. O’Keefe’s arguments therein were  
18 focused on the idea that his sentence was illegal due to the Third Trial being  
19 held without jurisdiction. The Modification Denial entered March 25, 2014,  
20 finding that the sentence itself was not illegal.

1           On September 15, 2014, the Second Petition was filed challenging the  
2 same issue raised in the Modification Motion, only instead seeking habeas  
3 relief for a violation of his constitutional rights. Although the Second  
4 Petition was filed fourteen (14) months after the Nevada Supreme Court's  
5 *Remittitur* issued, it was only eleven (11) months after Certiorari Denial in  
6 the United States Supreme Court, and only six (6) months following the  
7 Modification Denial. Additionally, O'Keefe had attempted to stay the  
8 *Remittitur* and was only unsuccessful since he was represented by counsel  
9 (although a request to substitute and for withdrawal had also been filed and  
10 denied for being submitted pro per). Counsel rendered ineffective assistance  
11 by never re-filing them as required by the NSC.

12           At the September 4, 2015, hearing the district court determined that it  
13 did not have jurisdiction to hear the Petition.

14           Jurisdiction is jurisdiction. [W]hether it's timely or untimely, I  
15 don't have jurisdiction to hear this. Again, that's the bottom  
16 line saying the Supreme Court said if you don't file notice of  
17 appeal within time frame, there's nothing you can really do  
18 about it.

19  
20           The court found that the notice of remittitur issued in July of 2013, and the  
21 petition was filed September 24, 2014. "I think the problem here was he  
22 filed so many motions ... and he appealed ever[y] single denial. And we  
23 probably have three or four remittiturs from the Supreme Court on this

1 particular case.” The court further found that it is time barred under 34.726  
2 and good cause is not shown. It denied the request for an evidentiary hearing  
3 because “it’s a jurisdictional bar on this particular matter.”

4 NRS 34.726(1) required that O’Keefe’s habeas corpus petition be  
5 filed within 1 year after the Nevada Supreme Court issued its remittitur  
6 under the rules of appellate procedure governing such. However, an  
7 appellant planning to seek certiorari review in the United States Supreme  
8 Court, such as O’Keefe did, can seek a stay of the remittitur so as to avoid  
9 remitting jurisdiction to the trial court during such process. NRAP 41(b).  
10 O’Keefe timely sought stay of the remittitur prior to its entry, but did so pro  
11 per. The relationship between O’Keefe and his counsel had diminished, as  
12 evidenced by O’Keefe’s request to allow such counsel to withdraw and  
13 allow him to proceed pro per. This request was also denied, and his counsel  
14 thereafter failed to perfect the filing of both the Reconsideration Motion and  
15 the Motion to Stay prior to issuance of the *Remittitur*, foreclosing such  
16 matters. Had counsel acted diligently in protecting O’Keefe’s rights, the  
17 timeliness of the Second Petition would not be at issue since the remittitur  
18 would not have issued until after decision on the Reconsideration Motion or  
19 after entry of the Certiorari Denial. NRAP 41(b)(1) and (3)(D). Thus, the



1 Second Petition having been filed on September 15, 2014, would have been  
2 deemed timely within the one year requirement of NRS 34.726.

3 O’Keefe’s appellate counsel’s ineffectiveness at failing to re-file the  
4 Motion to Stay or Reconsideration Motion was sufficient “good cause” to  
5 excuse the delay in the filing of the Second Petition. The delay was not  
6 O’Keefe’s fault since he timely filed the Reconsideration Motion, the  
7 Motion to Stay, and proceeded to file for certiorari with the United States  
8 Supreme Court in forma pauperis. NRS 34.726(1)(a). Clearly, his state  
9 appellate counsel did not continue to represent O’Keefe after the Appeal  
10 issued in the Nevada Supreme Court due to the breakdown in their  
11 relationship, evident by the fact that O’Keefe filed for certiorari without  
12 counsel. The trial court’s dismissal of the Second Petition has unduly  
13 prejudiced O’Keefe in that it has deprived him of the opportunity to be heard  
14 on the merits of the issues contained therein, which resulted from the  
15 breakdown in his relationship with appellate counsel, even though he  
16 attempted to have him removed and filed the proper pleadings to protect his  
17 rights in this regard. NRS 34.726(1)(b).

18 Appellate counsel’s failures were an impediment external to O’Keefe  
19 preventing him from complying with NRS 34.726. *Huebler* at 94-95 *quoting*  
20 *Hathaway*, 119 Nev. at 252 (*citing Lozada*, 110 Nev. at 353). The legal

1 basis for the claim was not reasonably available to O’Keefe, and interference  
2 by his counsel made compliance impracticable. *Id. quoting Murray*, 477  
3 U.S. at 488, 106 S.Ct. 2639. The NSC’s rejection of the filing of his  
4 Reconsideration Motion and Motion for Stay based only on his represented  
5 status when he had contemporaneously requested removal of his attorney,  
6 worked to O’Keefe’s actual and substantial disadvantage. *Huebler*, 275 P.3d  
7 at 94-95 *quoting Hogan*, 109 Nev. at 959–60. Thus, good cause existed to  
8 excuse the procedural time bar on his Second Petition.

9       Alternatively, O’Keefe’s First Petition was filed December 6, 2013;  
10 however, it mistakenly addressed only items pertaining to a companion case  
11 for O’Keefe and denial *without prejudice* entered January 28, 2014. This  
12 constitutes fifty-three (53) days where the time for filing may have been  
13 tolled given that a petition was timely before the court. This would extend  
14 the deadline for filing for habeas relief to September 15, 2014, to allow the  
15 Second Petition to be considered timely. Given that the denial of the First  
16 Petition was without prejudice, the merits of the Second Petition should have  
17 been entertained.

18       As a second alternative, on January 27, 2014, O’Keefe filed his  
19 Modification Motion arguing that the court had lacked jurisdiction to  
20 proceed on the Third Trial due to the pending case before the 9<sup>th</sup> Circuit.

1 O’Keefe’s arguments therein were focused on the idea that his sentence was  
2 illegal due to the Third Trial being held without jurisdiction. The  
3 Modification Denial entered March 25, 2014, finding that the sentence itself  
4 was not illegal. O’Keefe raised a similar issue in the Second Petition that  
5 could be considered timely filed from that denial rather than from the initial  
6 conviction or the remittitur in the Appeal, allowing the trial court to reach  
7 the merits of the issues raised in the Second Petition.

8 The trial court erred in determining that it did not have jurisdiction to  
9 hear the Second Petition and that no good cause was shown to overcome the  
10 time bar. O’Keefe adequately set forth facts showing there was good cause  
11 to overcome the time bar on several grounds. *Supra*. The district court  
12 should have at least heard and addressed the merits of the Second Petition.

13 O’Keefe raised a substantial question in his Second Petition pertaining  
14 to whether his appellate counsel had been ineffective for failing to provide  
15 the NSC with the proposed jury instructions that had been rejected, thereby  
16 depriving the NSC of the ability to review the challenge raised. On direct  
17 appeal, appellate counsel had only broadly argued that the district court  
18 erred in rejecting O’Keefe’s jury instructions, to wit: one defining an  
19 “abandoned and malignant heart,” one pertaining to non-flight, one on  
20 intoxication, and one defining reasonable doubt. Although appellate counsel

1 made a broad challenge to these on the direct appeal, he failed to provide a  
2 copy of them to the NSC in the appeal appendix. Thus, O’Keefe was  
3 specifically faulted in the NSC’s decision where it states, “O’Keefe does not  
4 identify which instructions he contends were erroneous” and “has not  
5 provided this court with the instructions given at trial”. O’Keefe argued that,  
6 “[t]his exclusion is not within the range of competence demanded of  
7 appellate attorneys in criminal cases, since it is common knowledge that any  
8 appellate challenge to a specific pleading or document presented in trial  
9 below will not be supported absent that document or pleading.” *See*, Second  
10 Petition at p. 47. Further, the Second Petition argued that, “[t]here can be no  
11 ‘objective reasonableness’ found in such an omission.” As it pertained to the  
12 “abandoned and malignant heart” instruction, O’Keefe pointed out that this  
13 went towards an actual element of the crime itself and impacted the level of  
14 the State’s burden causing a Due Process error. Had O’Keefe’s counsel  
15 properly presented the argument to the NSC, there was a substantial  
16 likelihood of a different outcome than denial based upon failure to present  
17 an adequate appendix.

18 O’Keefe would have been entitled to an evidentiary hearing on the  
19 matter. He had plead sufficient factual allegations that, if true, would entitle  
20 him to relief, and those facts are not belied by the record. *See Toston supra*.

1 “Where something more than a naked allegation has been asserted, it is error  
2 to resolve the apparent factual dispute without granting the accused an  
3 evidentiary hearing.” *Mann v. State*, 118 Nev. 351, 354, 46 P.3d 1228, 1230  
4 (2002). The district court erred in denying the Second Petition without  
5 holding an evidentiary hearing and reaching the merits of the case. Therefore  
6 this Court should reverse the denial and remand for an evidentiary hearing  
7 on the Second Petition.

8       **23. Preservation of issues. State concisely how each enumerated**  
9 **issue on appeal was preserved during trial. If the issue was not**  
10 **preserved, explain why this court should review the issue:** *See argument*  
11 *supra.*

12       **24. Issues of first impression or of public interest. Does this**  
13 **appeal present a substantial legal issue of first impression in this**  
14 **jurisdiction or one affecting an important public interest: If so, explain:**  
15 N/A

## 16 **CONCLUSION**

17       **WHEREFORE,** O’Keefe prays that the Court will reverse the trial  
18 court’s Findings of Fact and Conclusions of Law and Order dismissing the  
19 Habeas Corpus Petition and remand with direction that he be provided an  
20 evidentiary hearing on his Petition.

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DATED this 3<sup>rd</sup> day of December, 2015.

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## VERIFICATION

1. I hereby certify that this fast track statement complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This fast track statement has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point New Times Roman font; or

2. I further certify that this fast track statement complies with the page- or type-volume limitations of NRAP 3C(h)(2) because it is:

Proportionately spaced, has a typeface of 14 points or more, and contains 6,099 words (7,000 max); or

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

DATED this 3<sup>rd</sup> day of December, 2015.

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