

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's 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 LVPD 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 LVMPD 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 ("JJT3") 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 El

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 Whitmarsh, 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 I.VMPD 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.
15 195-215. 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 915-16.
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
25
26

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/s/ Matthew D. Carling
MATTHEW D. CARLING, ESQ.

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 61631

FILED

JUL 16 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *R. Malone*
DEPUTY CLERK

ORDER

Appellant has submitted a proper person motion to stay the remittitur pending his petition for a writ of certiorari to the United States Supreme Court. Appellant is represented by counsel in this appeal and has not been granted leave to file documents in proper person. *See* NRAP 46(b). The clerk of this court shall return, unfiled, the proper person motion received on July 12, 2013. Hereafter, appellant shall proceed by and through his counsel of record.

It is so ORDERED.

Pickering, C.J.

cc: Bellon & Maningo, Ltd.
Attorney General/Carson City
Clark County District Attorney
Brian Kerry O'Keefe

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.: 69036
District Court Case No.: 08CZ50630

Electronically Filed
Dec 09 2015 10:29 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

8 **APPELLANT'S APPENDIX - VOLUME XXIX - PAGES 5576-5639**

9 **MATTHEW D. CARLING**
10 1100 S. Tenth Street
11 Las Vegas, NV 89101
12 (702) 419-7330 (Office)
13 *Attorney for Appellant*

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

14 **ADAM PAUL LAXALT**
15 Attorney General
16 100 North Carson Street
17 Carson City, Nevada 89701-4717
18 *Counsel for Respondent*

INDEX
O'Keefe, Brian

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Motion for Reconsideration en Banc filed on 06/25/15	5578-5587
Supplemental Petition for Writ of Habeas Corpus filed on 04/08/15	5588-5639

LEAV

Brian Kerry O'Keefe

P.O. Box 650 [H.D.S.P.]

Indian Springs, NV. 89470-0650

PRO SE - [902443]

PROPER PERSON
RECEIVED/ENTERED

JUN 25 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

BRIAN KERRY O'KEEFE, Supreme Court Case No.: 61631.

Appellant,

) District Court Case No.: C-256630.

v.

THE STATE OF NEVADA,) NOTICE OF AND LEAVE TO

Respondents.

) APPEAR AND FILE MOTIONS

FILED

JUN 28 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY A. M. M. M.
DEPUTY CLERK

COMES NOW, humbly for fair play and substantial justice, Brian Kerry O'Keefe (hereinafter, "Mr. O'Keefe"), Appellant, pro se and canvassed pursuant to Foran v. G., 422 U.S. 806 (1975), Countenanced under Haines v. Kerner, 404 U.S. 519 (1972), backed into a Judicial Corner by Bellan & Maningo, LTD, and hereby moves this Honorable Court leave to appear propria persona per N.R.A.P. 46(b) so as to file a Motion For Reconsideration En Banc, attached hereto, and Judicial Notice, forthcoming the following Wednesday as of this writing, due squarely and precisely to the irretrievable breakdown in communication with court-appointed counsel.

Further, Mr. O'Keefe requests an enlargement of page limitation for Judicial Notice and Reconsideration thereof because of the importance of the Jury Instructions ("J1") and inadequate briefing heretofore.

This request for Leave is made and based upon the supporting Points And Authorities appended hereunder, N.R.A.P. 24 and 40A, U.S.D.C. F.R. Civ. P. Rule 8, Nev. Const. Amend. V, VI, XIV, as well as all papers, pleadings, and

JUN 24 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

1 - Leave

005576

12-19717

1 documentation on file herein, Exhibits in appurtenance to Judicial Notice hereafter
2 and incorporates hereto all Exhibits annexed to Fast Track Statement and Reply therein
3 in addition to Supplemental Appendix thereto.

4 5 POINTS AND AUTHORITIES

6
7 Compounded thereunto by the lack of law library access, the short timeframe to
8 file aforesaid motions, and not being in receipt of the denial of rehearing order, Mr.
9 O'Keefe is forced to handwrite these simple motions because of the gravity and
10 seriousness of the charge. Mr. Maningo's office hasn't been available to Mr. O'Keefe
11 during his several phone calls in the interim of the rehearing denial as prison phone
12 records will attest. The Rehearing itself wasn't brought up properly by failing to attach
13 JF's repeatedly with stand-by Counsel only asking if this Court received the
14 propounded Instruction. Yet, by not supplying the full set necessary for the
15 Comparison Test that this Court specifically cited in the Affirmance Order,
16 Mr. Maningo has foreclosed any possible and meaningful review based on, once
17 again, an incomplete record that is required, namely, having the JF's.

18 The petitions forthcoming are merely a treatment and not meant to be an all-
19 inclusive cure. Armed with only the cases in his boxes, Mr. O'Keefe is attempting
20 an emergency motion to compel current counsel or newly appointed counsel to
21 facilitate an impetus for full briefing and/or oral argument.

22
23 WHEREFORE, all premises considered, Mr. O'Keefe respectfully prays
24 for leave to Appear and be allowed to file Motion For Reconsideration En
25 Banc herewith and Judicial Notice thereafter with an enlargement of page
26 limitation in the furtherance of Justice.

27 DATED: June 20, 2013

28 By: *Brian K. O'Keefe*
BRIAN K. O'KEEFE
PRO SE #90244

RECON

Brian Kerry O'Keefe
P.O. Box 650 E.H.D.S.P.
Indian Springs, NV. 89470-0650
PRU SE - [90244]

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

BRIAN KERRY O'KEEFE,) Supreme Court Case No.: 68631.
Appellants,) District Court Case No.: C-250630.
v.)

THE STATE OF NEVADA,) MOTION FOR RECONSIDERATION
Respondents.) EN BANC

COMES NOW, Appellant, Brian Kerry O'Keefe (hereinafter Appellant or "Mr. O'Keefe"), prose and Faretta canvassed, and hereby moves this Honorable Court, En Banc, to please reconsider the Fast Track due to court appointed counsel's ineptitude and, if necessary, to comport with notions of fundamental fairness, order full briefing and/or oral argument per Lockett v. State, 541 P.2d 910 (1975), in the above-entitled Reconsideration action.

This Motion is made and based pursuant to the Points And Authorities hereunder, N.R.A.P. 24 and 40A, the denial of Rehearing (which, to date, Mr. O'Keefe has yet to receive) order, U.S.D.C. F.R. Civ.P. Rule 8, Nev. Const. Art. I §8, U.S. Const. Amend. V, VI, XIV, as well as all papers, pleadings, and documentation on file herein, Exhibits attached hereto, and Judicial Notice to be mailed by 06-26-13 for filing hitherward due to once-a-week law library access.



1 - Reconsideration

005578

POINTS AND AUTHORITIES

I. Statement Of Relevant Facts.

Mr. O'Keefe herewith incorporates the entirety of procedural history fully expounded in Judicial Notice thereto which will be filed hereafter, at next scheduled law library appointment on 06-26-13, as if specifically alleged herein.

II. Full Court Reconsideration Is Necessary To Secure And Maintain Uniformity Of This Court's Decisions.

A. There was no alternative theory to or cited in the Affirmance Order because there were no Jury Instructions ("JI") submitted with record for review (Instructions filed/hidden under deliberate erroneous case number).

The Order affirming the conviction for the above-mentioned case merely propositions that the State may recharge Mr. O'Keefe with an alternate theory yet no such "theory" was cited to. Neither the original charging document nor any of the Amended versions and not any of the Instructions list any other "theory." There is none.

Mr. O'Keefe was charged with Battery Constituting Domestic Violence ("B.D.V.") merged with homicide by a deadly weapon, to-wit: a knife. Nothing else.

If the supposed "alternate theory" was specified in the original charging document, then it underwent Jeopardy and ended with the Reversal and Remand Order in the Supreme Court of Nevada ("SCNV") No. 53859. To re-try Mr. O'Keefe would, thus, violate Double Jeopardy, upend every decision made by this Court, and rest asunder every principle of a fair and impartial Jury system in this Great Silver State.

1 B. The Ruling In Mr. O'Keefe's Case Is Contrary To Established Precedent.

2
3 The Affirmance and subsequent denial of Rehearing Orders are at odds with every
4 decision of this Court on the matter going as far back as 1895. Perhaps this is the
5 answer to the curiously cited Eighth Circuit case...

6 In State v. Rose, 255 P.3d 291 (col), citing Ramirez v. State, 235 P.3d 619
7 (2010), the felony murder JJ is mandated to be conjoined with the involuntary
8 manslaughter. If this is so, then involuntary manslaughter was in jeopardy and
9 recharging Mr. O'Keefe based upon N.R.S. 200.070 is nothing short of Double
10 Jeopardy again. See also Rose, id. at 294 n.1 (note the missing "or" between the
11 first two paragraphs of Rose's Instruction No. 17 and contrast the No. 18 of Mr.
12 O'Keefe's First Trial JJ to be filed henceforth). The illegal dissection of No. 18
13 does not an "alternate theory" make.

14 The Reversal Order of No. 53859 specifically declared that the evidence didn't
15 support the unlawful act. While Rose's error was instructional, on a abuse of discretion
16 constitutes insufficient evidence and is therefore tantamount in nature. This act was the
17 Battery P.V. stabbing. Pursuant to State v. Mangano, 31 Nev. 511, 518, 112 P. 693, 696 (1910),
18 battery is inherent to murder by stabbing and therefore, is not part of the enumerated
19 felonies. So, if there was no evidence to support this unlawful act, and the Rule of
20 Lenity construes any and all ambiguities in favor of Appellant, then any other murder
21 -2nd Degree or otherwise - would be an impossibility without the res gestae. See
22 Mangano, 33 Nev. at 519, 112 P. at 697. In addition, Jeopardy attached and ended to
23 Battery as well.

24 The Court in Labastida v. State, 986 P.2d 1143, 115 Nev. 298 (1999), held that the
25 unlawful act, malice, and Felony murder didn't hold water. Aside from the specifically
26 delineated act of child abuse in Labastida, this case is on point with Mr. O'Keefe
27 because the only available "theory" ostensibly left was malice murder. But if this

GROUND II.B CONTINUED

were true, then this culpability undertaken Tegarely too when the 1st Amended Info. listed every mental element conjoined by "and" altogether. See id., 115 Nev. at 305-06, 986 P.2d at 1147-48 (citing Sheriff v. Morris, 99 Nev. 109, 118, 659 P.2d 852, 859 (1983) (mirroring Rose)).

While it may or may not be true that one who's had an Acquittal of 1st Degree murder with a reversal on 2nd may be re-tried under 2nd, the trial court cannot recharge 2nd Degree murder after it's been reversed prior to based on insufficient evidence. See K-Mart v. Washington, 109 Nev. 1180, 866 P.2d 274 (1993), West v. State, 119 Nev. 410, 420, 75 P.3d 808, 817 (2003); Morse, 231 P.2d 478, 480 (1951); Wilson v. Bellegue, 554 F.3d 816, 820 (8th Cir. 2009); Schad v. Ariz., 501 U.S. 624, 629, 640 (1991). The mode of commission does not matter per the Sullivan Rule. See Schad, id. at 649-50 (Scalia, Jr. concurring) (citing People v. Sullivan, 173 N.Y. 122, 65 N.E. 489 (1902)). Accordingly, this Court may not reverse one "theory" of 2nd Degree murder if the evidence presented at trial would have supported the other phantom "theory." By doing such, the evidence, then, must not have supported any "theory" of 2nd Degree at all.

Assuming, arguendo, that it did, this conflicts with other case law. Evidencing the commission of a unlawful act to sustain malice implied with knowledge and extreme recklessness is done by proving the intent. Key v. State, 766 P.2d 270, 272 (1988). Malice is defined in Colman v. State, 116 Nev. 687, 713-20, 7 P.3d 426, 443-47 (2000), and Springer's dissent in Lubotkin v. State, 112 Nev. 1503, 1515-32, 931 P.2d 1331, 1343-54 (1996) (Springer, Jr. dissenting). Besides the lack of any instruction whatsoever giving all the elements and requisite judicial interpretation of the Abandoned and Malignant heart measures per People v. Sarin, 203 P.3d 425, 434 (2000), self-defense (even on a reasonable amount) negates malice. Kelso v. State, 95 Nev. 37, 588 P.2d 1035 (1979); Vaughan v. State, 22 Nev. 285, 39 P. 737 (1895). Speculating that liability counts as a "theory" (if culpability doesn't), there's no other disjunctive allegation in the charging document. Cf. Jennings v. State, 116 Nev. 488, 490-91, 998 P.2d 557, 559 (2000) (discussing Neuman v. State, 115 Nev. 184, 188-89, 980 P.2d 637, 639

GROUND II. B CONTINUED

1 (1999); Alford v. State, 111 Nev. 1409, 1415, 906 P.2d 714, 717 (1995); Sheriff v. Levinson, 95 Nev.
2 436, 437, 596 P.2d 232, 233 (1979) citing "established principles" in Simpson v. Dist. Ct., 88
3 Nev. 654, 659, 503 P.2d 1225, 1229 (1972), and Earlywine v. Sheriff, 94 Nev. 100, 575 P.2d 599
4 (1978) (conversely, if the JT was reached solely in conclusory, ^{statutory} language, then it must be
5 insufficient). The information was quite clear and rather straightforward: one theory unlike
6 West. Sea id. 849 Nev. at 419, 75 P.3d at 814 nn. 25-31.

7 Concludingly, when the Court in SCN No. 58859 established the law of the case, Byford
8 v. State, 994 P.2d 700, 711-12 (2000), State Decisis prohibits any deviation thereof. Legal
9 acquittals based on insufficient evidence are nonappealable, U.S. v. Scott, 437 U.S. 82, 91 (1978),
10 and not retriable under Green v. Murray, 437 U.S. 19, 24-25 (1978), and U.S. v. Bibbero, 749 F.2d
11 581, 586 (9th Cir. 1984). This was just affirmed in the U.S. Supreme Court in Evans v. Mich.
12 335 U.S. 1069, 185 L. Ed. 2d 124, 133-35 (2013). Even if incorrect, the State is still bound
13 by the decision. U.S. v. Martin Linen Supply, 430 U.S. 564, 571 (1977). And when the Order
14 adjudged and decreed that the evidence didn't support one "theory" of 2nd Degree,
15 that constructively meant Mr. O'Keefe was not guilty of any other surmised "theory"
16 therein. E.F. Furlani, 79 Nev. 146, 150, 379 P.2d 945, 947 (1963). Accord Saylor v. Cornelius,
17 845 F.2d 1401, 1403-04 (6th Cir. 1988). Heedlessly, the D.A. disregarded the weight of these
18 decisions and instigated three (3) trials based on malice murder. See Emerson v.
19 State, 98 Nev. 158, 164 (1982) (quoting Burger v. U.S., 295 U.S. 78, 88 (1935)); s.p. Thompson
20 v. Calderon, 120 F.3d 1045, 1057-58 (9th Cir. 1997).

21
22 III. This Petition Is Based On Substantial Grounds.

23
24 A. Precedential issues.

25
26 As thoroughly briefed ante, the State is attempting to cut a broad swath of new
27 law pointing precisely to nowhere and diametrically opposed to longstanding bedrock
28

GROUND III-A CONTINUED

1 fundamentals of Double Jeopardy and 6th Amendment Trial Rights such as J.I.s (which will
2 be filed herewith).

3 Hypothetically, a D.A. could have an endless number trials for falsely obtaining
4 money starting with Robbery and working their way down the totem pole of burglary,
5 thievery, all the shades of larceny, embezzlement, fraud, defalcation, stealing, pick-
6 pocketing, etc., etc., There's no end. The State is only free to re prosecute on different
7 statutory provisions. V.S. v. Poll, 538 F.2d 845, 847 (9th Cir. 1976). Here, Mr. O'Keefe
8 was convicted of N.R.S. 200.010 and 200.030 at both the First and Third Trial.

9 10 B. Constitutional issues.

11
12 Practically the entire U.S. 6th Amendment and virtually all of §8 of Art. I,
13 New Const. is violated and rendered nugatory by the D.A.'s immoral actions to retry Mr.
14 O'Keefe, et al., ~~there~~ endlessly until a conviction sticks.

15 The law of Double Jeopardy is perfectly concise, as spelled out above. Res
16 Judicata is the son of the 5th U.S. Amend. when the issue was definitively decided,
17 collateral estoppel prohibits the State from relitigating on the same issue. When the
18 D.A. violates State Decisis, every trial protection is towed in and nullified by
19 unceasing trials and unyielding prosecutorial misconducts.

20 21 C. Public policy issues.

22
23 An impartial jury trial protects both the public and the accused. See
24 Powers v. Ohio, 499 U.S. 400, 402 (1990).

25 Every concept of a fair trial is thrown out the proverbial window when
26 the State is allowed a mulligan for any acquittal or mistrial. As T. Stark, Evidence
27 756 (1982), once said, "The maxim of law is... that it is better that ninety nine...

GROUND III-C CONTINUED

1 offenders should escape than one innocent man should be condemned." This axiom has
2 been echoed in numerous U.S. Supreme Court cases hitherto. Public confidence in elected
3 D.A.s is lost when their citizens are illegally confined with everlasting trials and the
4 stress, anxiety, irritation, worry, etc., that comes with Double Jeopardy — not to
5 mention the cost of trials levied onto the taxpayers. That is the quintessential
6 definition of vexatiousness and is a crime under the laws of Barratry. There can be no
7 faith in a Justice system that is willfully blind to the laws of this State and Country
8 and hellbent on unlawfully detaining the very civilians they're meant to protect under the
9 U.S. 14th Amendment.

10
11 IV. Prayer For Relief

12
13 Mr. O'Keefe is requesting answers to several key questions:

- 14 1) What is the alternate theory and where is it located?
- 15 2) Does not Jeopardy attach to this illusive theory?
- 16 3) If not, isn't the state precluded from retrying the accused
17 based on insufficient evidence?
- 18 4) How is the State, standby counsel, and this Court not permitted to
19 produce the law of the case when every case challenging J.I.s has required a
20 Comparison Test? Where are they?
- 21 5) Why wasn't a Transmission of Records not sent to the lower court
22 to send for the J.I.s? Can this Court even rule without the J.I.s once the burden
23 of proof has been established for an error in the laws of the case?

24
25 Ultimately, where does it end? How many iterations must the defendant suffer
26 through? Simply put, Mr. O'Keefe was legally acquitted of the elements necessary to
27 uphold 2nd Degree — notwithstanding the fact that 2nd Degree has already been overruled.

GROUND IV. CONTINUED

1 in case no. 33859. This embodies every variation of prosecutorial misconduct bases
2 by the 4th, 5th, 6th, and 14th Amendments: malicious prosecution, vindictive prosecution,
3 selective enforcement, selective prosecution, prosecutorial intransigence, etc. etc. etc.
4 This absolutely cannot stand and, as such, Mr. O'Keefe's conviction is infirm.

5
6 WHEREFORE, all premises considered, Mr. O'Keefe respectfully prays for this
7 Honorable Court, En Banc, to grant an ORDER to Reconsider the denial of his
8 Fast Track direct appeal to comply with the pursuit of Justice and demand for
9 equality to all.

10
11 DATED: this 20th day of June, 2013.

12
13 BY: B. K. O'Keefe

14 Brian Kerry O'Keefe #90244

15 Appellant / In Propria Persona

16 ///

17 ///

18 ///

19 ///

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding _____

MOTION FOR RECONSIDERATION EN BANC

(Title of Document)

S.C.N.
filed in ~~District Court~~ Case number 61631

☒ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

(State specific law)

-or-

B. For the administration of a public program or for an application
for a federal or state grant.

Bruce K. O'Keefe
Signature

JUNE 20, 2013
Date

Bruce K. O'Keefe
Print Name

PRO SE - APPELLANT
Title

Page 9-Reconsideration

005586

CERTIFICATE OF SERVICE BY MAILING

I, Brian Kerry O'Keefe, hereby certify, pursuant to NRCP 5(b), that on this 20
day of JUNE, 2013, I mailed a true and correct copy of the foregoing, "NOTICE OF
AND LEAVE TO APPEAR AND FILE MOTIONS; NOTICE OF AND MOTION TO"
by depositing it in the High Desert State Prison, Legal Library, First-Class Postage, fully prepaid,
addressed as follows: WITHDRAW AND SUBSTITUTE COUNSEL;
MOTION FOR RECONSIDERATION EN BANC.

SUPREME COURT OF NEVADA
OFFICE OF THE CLERK
201 S. CROWN STREET, Suite 201
CROWN CITY, NEVADA 89001

NOTE: REQUEST CLERK TO UTILIZE CM/ECF
FOR PARTICIPANTS IN THE CASE WHO ARE
REGISTERED, TO SERVE ALL (3) MOTIONS UPON.

CC:FILE

DATED: this 20 day of JUNE, 2013

Brian K. O'Keefe
BRIAN KERRY O'KEEFE

/In Propria Personam
Post Office box 650 [HDSP]
Indian Springs, Nevada 89018
IN FORMA PAUPERIS

///

///

///

///


CLERK OF THE COURT

SUPP
Matthew D. Carling
Nevada Bar No. 007302
1100 S. Tenth Street
Las Vegas, NV 89101
(702) 419-7330 (Office)
(702) 446-8065 (Fax)
CedarLegal@gmail.com
Court-appointed Attorney for Petitioner/ Defendant
BRIAN O'KEEFE

**DISTRICT COURT
CLARK COUNTY, NEVADA**

STATE OF NEVADA,

Plaintiff,

vs.

BRIAN K. O'KEEFE,

Defendant.

Case No.: 08C250630

Dept. No.: XVII

EVIDENTIARY HEARING REQUESTED

SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS
(POST CONVICTION)

COMES NOW Defendant Brian O'Keefe ("**O'Keefe**"), by and through his counsel Matthew D. Carling and, pursuant to NRS. ANN. § 34.724, hereby submits this *Supplemental Petition for Writ of Habeas Corpus* (the "**Supplemental Petition**"), which is supported by the following:

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

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

- 1 3. **Date of Judgment of Conviction:** August 28, 2012.
- 2 4. **Case Number:** 08C250630.
- 3 5. **(a) Length of Sentence:** ten (10) to twenty-five (25) years consecutive eight
4 (8) to twenty (20) years.
- 5 **(b) If sentence is death, state any date upon which execution is**
6 **scheduled:** N/A
- 7 6. **Is Petitioner presently serving a sentence for a conviction other than the**
8 **conviction under attack in this motion? If "Yes", list the crime, case number and**
9 **sentence being served at this time:** No.
- 10 7. **Nature of offense involved in conviction being challenged:** Second-
11 **Degree Malice (implied) Murder W.D.W.**
- 12 8. **What was Petitioner's Plea?** Not guilty.
- 13 9. **If Petitioner entered a guilty plea to one count of an indictment or**
14 **information, and a not guilty plea to another count of an indictment or information,**
15 **or if a guilty plea was negotiated, give details:** N/A
- 16 10. **If Petitioner was found guilty after a plea of not guilty, the finding was**
17 **made by:** Jury.
- 18 11. **Did the Petitioner testify at trial?** No.
- 19 12. **Did Petitioner appeal from his judgment of conviction?** Yes, from both
20 the First Trial and the Third Trial, both defined *past*.
- 21 13. **If Petitioner appealed, answer the following:**
- 22 **(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.

STATEMENT OF THE CASE

The State charged O'Keefe with murder with use of a deadly weapon by way of an *Amended Information* on February 10, 2009. A jury trial was held on March 16-20, 2009, in which O'Keefe was found guilty of second degree murder with use of a deadly weapon. ("First Trial"). On May 21, 2009, O'Keefe filed his notice of appeal from his conviction. He filed a Fast Track Statement in the Nevada Supreme Court ("NSC") on August 19, 2009. In his *Fast Track Statement*, O'Keefe argued, among other things, that the district court's ruling on jury instructions was erroneous, and that the district court improperly allowed a jury instruction regarding felony murder as an alternate theory of second degree murder when felony murder had not been specifically alleged in the *Amended Information*. On April 7, 2010, the NSC issued its *Order of Reversal and Remand*. The NSC stated that "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." *O'Keefe v. State*, NSC Docket No. 53859 (April 7, 2010)(the "First Trial Reversal").

On August 19, 2010, the State filed a second *Amended Information*. On August 23, 2012, the second trial was held on remand from the NSC for the charge of murder with use of a deadly weapon (the "Second Trial"). On September 2, 2010, there was a mistrial based 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 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; *US. 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 I.VMPD. 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 1/2 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 **Elynne 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.