

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN KERRY O'KEEFE,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Supreme Court Case No. 69036

E.S.D.C. Case No. CE50630

Dept. XVII

FILED

FEB 09 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

APPELLANT'S OPENING BRIEF
PROPER PERSON

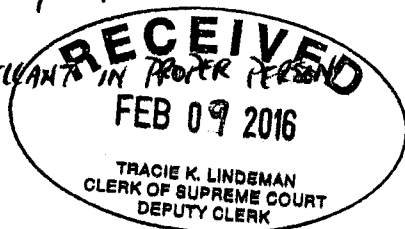
APPEAL FROM JUDGMENT DENYING WRIT OF HABEAS CORPUS AS TIME-BARRERD

PROPER PERSON APPELLANT'S APPENDIX
to APPELLANT'S OPENING BRIEF

"PPAA" (VOLUME 1 - 0001 - 0047)

BRIAN KERRY O'KEEFE
PROPER PERSON #90244
LOVELOCK CORRECTIONAL CENTER
1200 PRISON ROAD
LOVELOCK NEVADA 89419
February 4, 2016

APPELLANT'S IN PROPER PERSON



STEVEN B. WILSON
Clark County District Attorney
RYAN MACDONALD #12615
DEPUTY DISTRICT ATTORNEY
200 LEWIS AVENUE
LAS VEGAS NEVADA 89155
(702) 671-2500

ADAM PAUL LAXALT
ATTORNEY GENERAL
100 N. Carson Street
Carson City Nevada 89701
(775) 684-1265

Attorneys FOR RESPONDENT

16-04287

• INDEX (S.C.N. Case No. 69036)

(PROPER PERSON APPELLANT'S APPENDIX)

(hereinafter "PPAA")

VOLUME	DOCUMENT TITLE	FILE DATE	PAGE No.
1	CRIMINAL COMPLAINT	11/07/2008	0001
1	BATTERY ADMONISHMENT OF RIGHTS	11/07/2008	0002
1	INFORMATION (C250630)	12/19/2008	0003-0005
1	AMENDED INFORMATION (C250630)	02/10/2009	0006-0008
1	CLERK'S CERTIFICATE	05/06/2010	0009
1	ORDER OF REVERSAL / REMAND	04/07/2010	0010-0011
1	ORDER U.S. (2:11-cv-02109-GMN)	01/06/2012	0012-0017
1	ORDER 9 th Cir. (12-15271)	04/13/2012	0018-0021
1	U.S.S.C. DOCKET (13-6031)	08/19/2013	0022-0023
1	REQUEST APPT. OF COUNSEL; Declaration	01/15/2015	0024-0029
1	ORDER FOR WRIT (P.P.O.W.)	10/15/2014	0030
1	SECOND AMENDED INFO (C250630)	08/19/2010	0031-0033
1	STATEMENT OF FACTS SUPPLEMENT	04/08/2015	0034-0039
1	2 ND TRIAL TRANSCRIPT (DAY 7-8/3/10)	11/23/2010	0040-0044
1	MOTION FOR "COA"-9 th Cir.	03/12/2012	0045-0047

• CERTIFICATE OF MAILING

Pursuant NRS 208.165; 28 U.S.C. § 1746 by Brian L. O'Neil #90244, do
 swear, I, hereby certify that on the 5th day of February, 2016, I
 did serve a true and correct copy of the foregoing PROPER PERSON
 APPELLANT'S APPENDIX ("PPAA") by depositing same in U.S. mail,
 first class postage fully prepaid, addressed as follows: C.C. District
 Attorney, 200 Lewis Ave. Las Vegas 89155; A.G., 100 N. Carson St. Carson City NV. 89701.

SCN #69036

JUSTICE COURT, LAS VEGAS TOWNSHIP

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

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

Defendant.

CASE NO: 08F23348X

DEPT NO: 9

CRIMINAL COMPLAINT

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

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

11/7/200808F23348X/cb
LVMPD EV# 0811053918
(TK9)

PPAA 0001

P:\WPDOCS\COMPLTFCOMP\823\82334801.DOC

EOR 073

2:11-cv-02109-GMN-VCF

SCN #69036

Justice Court, Las Vegas TownshipCLARK COUNTY, NEVADATHE STATE OF NEVADA,
Plaintiff,

- vs. -

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

Defendant.

CASE NO.: 08F23348X

DEPT. NO.: 9

BATTERY/DOMESTIC VIOLENCE: ADMONISHMENT OF RIGHTS

I am the Defendant in this case. At this time, I am charged with battery constituting domestic violence in having willfully and unlawfully committed an act of force or violence upon my spouse, former spouse, a person to whom I am related by blood or marriage, a person with whom I am or was actually residing, a person with whom I have had or am having a dating relationship, a person with whom I have a child in common, my minor child, or the minor child of one of those persons (in violation of NRS 33.018/NRS 200.485).

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

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

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

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

DEFENDANT'S INITIALS: _____

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

PAGE 1 of 2

PPAA

0002

SON # 69036

Electronically Filed
12/19/2008 01:36:04 PM

Edna H. Smith
CLERK OF THE COURT

1 INFO
2 DAVID ROGER
3 Clark County District Attorney
4 Nevada Bar #002781
5 PHILLIP N. SMITH, JR.
6 Deputy District Attorney
7 Nevada Bar #0010233
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

12 LA. 01/06/09
13 9:00 AM
14 PD

DISTRICT COURT
CLARK COUNTY, NEVADA

15 THE STATE OF NEVADA,
16
17 Plaintiff,
18
19 -vs-
20
21 BRIAN KERRY O'KEFFE,
22 #1447732
23 Defendant.

Case No: C250630
Dept No: V

INFORMATION

24 STATE OF NEVADA }
25 COUNTY OF CLARK } ss.

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

28 That BRIAN KERRY O'KEFFE, the Defendant(s) above named, having committed
the crime of MURDER WITH USE OF A DEADLY WEAPON (OPEN MURDER)
(Felony - NRS 200.010, 200.030, 193.165), on or about the 5th day of November, 2008,
within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes
in such cases made and provided, and against the peace and dignity of the State of Nevada,

///

///

///

///

SCN # 69036

1 VICTORIA WHITMARSH, a human being, by stabbing the said VICTORIA
2 WHITMARSH, with a deadly weapon, to-wit: a knife.

3
4
5 *David Roger*
6 DAVID ROGER
7 DISTRICT ATTORNEY
8 Nevada Bar #002781

9 Names of witnesses known to the District Attorney's Office at the time of filing this
10 Information are as follows:

11 <u>NAME</u>	12 <u>ADDRESS</u>
13 ARMBRUSTER, TODD	5001 OBANNON DR #34 LVNV
14 BALLEJOS, JEREMIAH	LVMPD #8406
15 BENJAMIN, JACQUELINE DR	ME 0081
16 BLASKO, KEITH	LVMPD #2995
17 BUNN, CHRISTOPHER	LVMPD #4407
18 COLLINS, CHELSEA	LVMPD #9255
19 CONN, TODD	LVMPD #8101
20 CUSTODIAN OF RECORDS	CDC
21 CUSTODIAN OF RECORDS	LVMPD COMMUNICATIONS
22 CUSTODIAN OF RECORDS	LVMPD RECORDS
23 FORD, DANIEL	LVMPD #4244
24 FONBUENA, RICHARD	LVMPD #6834
25 HATHCOX, JIMMY	5001 EL PARQUE AVE #C-36 LVNV
26 HUTCHERSON, CHRISTOPHER	LVMPD #12996
27 IVIE, TRAVIS	LVMPD #6405
28 KYGER, TERESA	LVMPD #4191
	5001 EL PARQUE AVE #38 LVNV

C:\PROGRAM FILES\WEBVIA.COM\DOCUMENT CONVERTER\TEMP\377946-47381

PPAA 0004

000002

EOR 076

2:11-cv-02109-GMN-VCF

SEN # 69036

1	LOWREY-KNEPP, ELAINE	DISTRICT ATTORNEY INVESTAGATOR
2	MALDONADO, JOCELYN	LVMPD #6920
3	MORRIS, CHERYL	UNKNOWN
4	MURPHY, KATE	LVMPD #9756
5	NEWBERRY, DANIEL	LVMPD #4956
6	PAZOS, EDUARDO	LVMPD #6817
7	RAETZ, DEAN	LVMPD #4234
8	SANTAROSSA, BRIAN	LVMPD #6930
9	SHOEMAKER, RUSSELL	LVMPD #2096
10	TAYLOR, SEAN	LVMPD #8718
11	TINIO, NORMA	2992 ORCHARD MESA HENDERSONNV
12	TOLIVER, CHARLES	5001 EL PARQUE #29 LVNV
13	TOLIVER, JOYCE	5001 EL PARQUE #C-29 LVNV
14	WHITMARSH, ALEXANDRA	7648 CELESTIAL GLOW LVNV
15	WHITMARSH, DAVID	7648 CELESTIAL GLOW LVNV
16	WILDEMANN, MARTIN	LVMPD #3516

17
18
19
20
21
22
23
24
25
26
27
28

DA#08F23348X/ts
LVMPD EV#0811053918
(TK9)

PPAA 0005

000003

EOR 077

2:14-cv-02109-GMN-VCF

SCN # 69036

ORIGINAL

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

FILED IN OPEN COURT

FEB 10 2009

EDWARD A. FRIEDLAND
CLERK OF THE COURT

BY

KRISTEN BROWN DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
 10 Plaintiff,

-vs-

12 BRIAN KERRY O'KEEFE,
 13 #1447732

Defendant.

Case No. C250630
Dept No. VAMENDED
INFORMATION

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

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

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

///

THE
KILLERS

PPAA 0006

P:\WPDOCS\INP\JUN13\001.DOC

000012

2:11-cv-02109-GMN-VCF

EOR 078

SCN # 69036

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

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

Names of witnesses known to the District Attorney's Office at the time of filing this
Information are as follows:

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

PPAA 0007

SN # 69036

1	LOWREY-KNEPP, ELAINE	DISTRICT ATTORNEY INVESTAGATOR
2	MALDONADO, JOCELYN	LVMPD #6920
3	MORRIS, CHERYL	UNKNOWN
4	MURPHY, KATE	LVMPD #9756
5	NEWBERRY, DANIEL	LVMPD #4956
6	PAZOS, EDUARDO	LVMPD #6817
7	RAETZ, DEAN	LVMPD #4234
8	SANTAROSSA, BRIAN	LVMPD #6930
9	SHOEMAKER, RUSSELL	LVMPD #2096
10	TAYLOR, SEAN	LVMPD #8718
11	TINIO, NORMA	2992 ORCHARD MESA HENDERSONNV
12	TOLIVER, CHARLES	5001 EL PARQUE #29 LVNV
13	TOLIVER, JOYCE	5001 EL PARQUE #C-29 LVNV
14	WHITMARSH, ALEXANDRA	7648 CELESTIAL GLOW LVNV
15	WHITMARSH, DAVID	7648 CELESTIAL GLOW LVNV
16	WILDEMANN, MARTIN	LVMPD #3516

DA#08F23348X/ts
LVMPD EV#0811053918
(TK9)

PPAA 0008

P:\PDOC\BIRN\61216114\882.DOC

SCN # 69036

FILED

MAY 06 2010

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN KERRY O'KEEFE

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

Supreme Court No. 53859

Supreme Court No. 53859

District Court Case No. C250630

Cliff L. Lindeman
Clerk of Court

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

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

JUDGMENT

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

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

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

Tracie Lindeman, Supreme Court Clerk

By: Deputy Clerk

A. Ingerson

PPAA 0009

2:11-cv-02109-GMN-VCF

SCN # 69036

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 53859

FILED

APR 07 2010

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

ORDER OF REVERSAL AND REMAND

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

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

SUPREME COURT
OF
NEVADA

(D) 197A

PPAA 0010

10-08450

SCN #69036

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

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

Cherry J.
Cherry

Saitta J.
Saitta

Gibbons J.
Gibbons

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

SEN # 69036

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BRIAN KERRY O'KEEFE,

Petitioner,

2:11-cv-02109-GMN-VCF

vs.

ORDER

SHERIFF DOUG GILLESPIE, *et al.*,

Respondents.

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

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

Background

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

PPAA 0012

EOR 001

ScN #69036

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

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

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

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

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

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

PPAA 0013

EOR 0013

SEN # 69036

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

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

6 Discussion

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

17 Exhaustion

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

PPAA 0014

SCN # 69036

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

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

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

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

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

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

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

26 ***Younger Abstention***

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

SCN # 69036

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

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

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

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

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

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

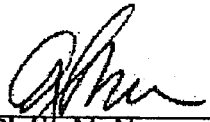
24 If petitioner does not timely and fully respond to this order, or does not show adequate
25 cause as required, the entire petition will be dismissed without further advance notice.¹

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

SCN # 69036

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

6 DATED this 6th day of January, 2012.

7
8 
9
10 Gloria M. Navarro
11 United States District Judge
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

FILED

SCN # 69036

APR 13 2012

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS**BRIAN KERRY O'KEEFE,****Petitioner - Appellant,****v.****DOUG GILLESPIE, Sheriff; et al.,****Respondents - Appellees.**

No. 12-15271

D.C. No. 2:11-cv-02109-GMN-VCf

District of Nevada,

Las Vegas

ORDER**Before: PAEZ and CLIFTON, Circuit Judges.**

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

PPAA. 0018

SEN #69036

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

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

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

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

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

SCN #69036

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

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

FINANCIAL AFFIDAVIT	
IN SUPPORT OF REQUEST FOR A FORTHWITH PAYMENT OF OTHER COURT SERVICES WITHOUT A TEST OF THE	
IN THE CASE OF	
IN UNITED STATES	
<input type="checkbox"/> MAGISTRATE	
<input type="checkbox"/> DISTRICT	
<input type="checkbox"/> APPEALS COURT or	
<input type="checkbox"/> OTHER PANEL (Specify below)	
FOR	
AT	
LOCATION NUMBER	
PERSON REPRESENTED (Show your full name)	
CHARGE/OFFENSE (describe if applicable & check box →)	
<input type="checkbox"/> Felony	
<input type="checkbox"/> Misdemeanor	
1 <input type="checkbox"/> Defendant—Adult	
2 <input type="checkbox"/> Defendant - Juvenile	
3 <input type="checkbox"/> Appellant	
4 <input type="checkbox"/> Probation Violator	
5 <input type="checkbox"/> Parole Violator	
6 <input type="checkbox"/> Habeas Petitioner	
7 <input type="checkbox"/> 2255 Petitioner	
8 <input type="checkbox"/> Material Witness	
9 <input type="checkbox"/> Other	
DOCKET NUMBERS	
Magistrate	
District Court	
Court of Appeals	

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

DEPENDENTS	{	MARITAL STATUS	Total	{	List persons you actually support and your relationship to them		
		_____ SINGLE	No. of				
		_____ MARRIED	Dependents				
		_____ WIDOWED					
		_____ SEPARATED OR					
		_____ DIVORCED					
OBLIGATIONS & DEBTS	{	DEBTS & MONTHLY BILLS (LIST ALL CREDITORS, INCLUDING BANKS, LOAN COMPANIES, CHARGE ACCOUNTS, ETC.)	{	APARTMENT OR HOME:	Creditors	Total Debt	Monthly Payment
				_____	_____	\$ _____	\$ _____
				_____	_____	\$ _____	\$ _____
				_____	_____	\$ _____	\$ _____
				_____	_____	\$ _____	\$ _____
				_____	_____	\$ _____	\$ _____

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

**SIGNATURE OF DEFENDANT
(OR PERSON REPRESENTED)**

PPAA 0021

SEN # 69036



SUPREME COURT OF THE UNITED STATES

Visiting the Court | Touring the Building | Exhibitions

Search: ☒ All Documents ☐ Docket

Advanced Search

Enter Search Text:

Search

Help

Home | Search Results

No. 13-6031

Title: Brian Kerry O'Keefe, Petitioner

v.

Nevada

Docketed: August 26, 2013

Lower Ct: Supreme Court of Nevada

Case Nos.: (61631)

Decision Date: April 10, 2013

Rehearing Denied: June 13, 2013

---Date--- ~~~~~Proceedings and Orders~~~~~

Aug 19 2013 Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed.
(Response due September 25, 2013)

Sep 13 2013 Waiver of right of respondent Nevada to respond filed.

Sep 26 2013 DISTRIBUTED for Conference of October 11, 2013.

Oct 15 2013 Petition DENIED.

TPAA 0022

---Name-----

-----Address-----

---Phone---

Attorneys for Petitioner:

Brian K. O'Keefe

#90244

P.O. Box 650

Indian Springs, NV 89070-0650

Party name: Brian Kerry O'Keefe

Attorneys for Respondent:

C. Wayne Howle

Counsel of Record

Solicitor General

(775) 684-1261

Office of Attorney General

State of Nevada

100 N. Carson Street

Carson City, NV 89701-4717

WHowle@ag.nv.gov

Party name: Nevada

December 14, 2015 | Version 2014.1

[Home](#) | [Help](#) | [Site Map](#) | [Contact Us](#) | [About Us](#) | [FAQ](#) | [Jobs](#) | [Links](#) | [Building Regulations](#)
[Website Policies and Notices](#) | [Privacy Policy](#) | [USA.GOV](#)

Supreme Court of the United States

PPAA 0023

SON # 69036

1 RENE L. VALLADARES
Federal Public Defender
2 District of Nevada
Nevada State Bar No. 11479
3 RYAN NORWOOD
Assistant Federal Public Defender
4 New Hampshire State Bar No. 15604
411 E. Bonneville Avenue, Suite 250
5 Las Vegas, Nevada 89101
(702) 388-6577
6 (702) 388-6261 (FAX)

7 Attorneys for Petitioner

8 UNITED STATES DISTRICT COURT
9 DISTRICT OF NEVADA

10 BRIAN KERRY O'KEEFE,
11 Petitioner,
12 vs.
13 ROBERT LEGRAND, et al.,
14 Respondents.

Case No. 3:14-cv-00477-RCJ-VPC

**REQUEST FOR APPOINTMENT OF
COUNSEL TO REPRESENT
PETITIONER**

16 The Federal Public Defender hereby requests that counsel be appointed to represent Petitioner
17 Brian O'Keefe in this matter. 18 U.S.C. § 3006A(a)(2)(B). This request is based upon the attached
18 declaration of Assistant Federal Public Defender Ryan Norwood.

19 Respectfully submitted this 15th day of January, 2015.

20 LAW OFFICES OF THE
21 FEDERAL PUBLIC DEFENDER

23 By: /s/ Ryan Norwood
24 RYAN NORWOOD
Assistant Federal Public Defender

25
26
27
28
PPAA 0024

SEN # 69036

DECLARATION OF RYAN NORWOOD

STATE OF NEVADA)

) ss:

COUNTY OF CLARK)

RYAN NORWOOD, being first duly sworn, deposes and says that:

1. I am counsel for the petitioner in this matter, Brian O'Keefe, in CA No. 12-15271, a case which is currently pending before the Ninth Circuit Court of Appeals. Following the grant of a Certificate of Appealability, the Circuit directed the appointment of counsel for Mr. O'Keefe, in an order entered on May 9, 2012. See Attachment 1. I have represented Mr. O'Keefe in this matter for 2 ½ years. The case was briefed, and was argued before the Ninth Circuit on November 20, 2014. The parties are now awaiting a decision from that court.¹ I am familiar with the record and proceedings in CA No. 12-15271 as well as the record in Mr. O'Keefe's related state court proceedings.

2. CA No. 12-15271 concerns a challenge of the same prosecution at issue in the instant matter. Mr. O'Keefe filed a petition pursuant to 28 U.S.C. § 2241 in 2011, alleging that his then-pending retrial would violate the double-jeopardy clause of the United States Constitution. This Court denied the petition on the grounds that it was not exhausted. The Circuit subsequently certified two procedural issues on appeal: (1) whether Mr. O'Keefe had exhausted the double jeopardy claim and (2) whether he needed to exhaust the claim to present it in a pretrial 2241 petition. In the same order, the Circuit found that the underlying double jeopardy claim (which was the only claim remaining in the petition) was at least "debatable among jurists of reason." See Attachment 2 (April 13, 2012 Order).

3. During the pendency of the appeal, and despite Mr. O'Keefe's requests for stays in both the state court and in the Ninth Circuit, the State forced him to stand trial. Mr. O'Keefe represented himself, with Attorney Lance Maningo serving as "stand-by" counsel. The jury convicted him of second-degree murder with use of a deadly weapon, and he was sentenced to 120-300 months, with a consecutive term of 8-20 years for the weapon enhancement.

¹ The State is represented by Chief Deputy District Attorney Steve Owens of the Clark County District Attorney in CA No. 12-15271.

SCN # 69036

1 4. Attorney Maningo was appointed to represent O'Keefe on an appeal of this conviction
2 to the Nevada Supreme Court, where he raised, *inter alia*, a double jeopardy claim similar to the one at
3 issue in CA No. 12-15271, and which also appears to be raised in Mr. O'Keefe's current amended 2254
4 petition. The Nevada Supreme Court denied all of O'Keefe's claims, and affirmed the conviction. See
5 Attachment 3. After several unsuccessful requests for rehearing, remittitur was issued on July 23, 2013.
6 Mr. O'Keefe has since submitted, amongst other pleadings, a state petition for post-conviction relief,
7 which remains pending in the state district court. See Attachment 4 (minutes from state district court in
8 November 2014).

9 5. In the Ninth Circuit, the State moved to dismiss CA No. 12-15271, on the grounds that
10 O'Keefe's conviction rendered the appeal of the pre-trial 2241 petition moot. The Ninth Circuit
11 originally granted this motion, but then vacated the order following O'Keefe's request for
12 reconsideration. The State continues to maintain that the 2241 appeal should be dismissed and that Mr.
13 O'Keefe's remedy should now be limited to a 2254 petition.

14 6. During the argument on November 20, 2014, the Ninth Circuit asked counsel about the
15 status of Mr. O'Keefe's other proceedings. Counsel was aware of the proper person habeas corpus
16 petition that Mr. O'Keefe had filed on September 15, 2014 in this matter (CR 1), and represented that
17 Mr. O'Keefe had a "2254" petition pending in this Court.²

18 7. The Ninth Circuit expressed particular concern during the argument over whether Mr.
19 O'Keefe would have counsel to assist him with a 2254 petition. Counsel represented to the Ninth
20 Circuit that he would do what he could to assist Mr. O'Keefe with the appointment of counsel.

21 8. Since the argument, Mr. O'Keefe has filed an amended petition in this matter (as
22 described in fn.2) and made clear to both myself, and this Court (see CR 6) that he wishes to be
23 represented by counsel in this matter.

24 ///

25 ///

26 _____
27 ² In fact, Mr. O'Keefe submitted that petition on a §2241 form. (CR 1). This Court
28 ordered Mr. O'Keefe to file a new petition on a § 2254 form. (CR 4). Mr. O'Keefe submitted an
amended petition on the 2254 form on November 26, 2014, which was filed on December 1. CR 7, pg.
1.

PPAA 0026

SCN # 69036

9. Section 3006A(a)(2)(B) provides for appointment of counsel for financially eligible, non-capital habeas corpus petitioners when "the interests of justice so require."³ Counsel would respectively suggest that the interests of justice support the appointment of counsel here, where (1) Mr. O'Keefe is serving a lengthy sentence for a second-degree murder offense; (2) the issues involved with the conviction are potentially complex, and (3) the Ninth Circuit has already determined that one of Mr. O'Keefe's claims has some merit, and has appointed counsel to assist him with that claim in a different proceeding.

10. As counsel represented to the Ninth Circuit, it would be best that an attorney outside of the Federal Public Defender be appointed to represent Mr. O'Keefe with respect to his 2254 petition. The Federal Defender represented O'Keefe before and during the time he underwent the trial and direct appeal that led to his allegedly unconstitutional conviction. Although undersigned counsel did not represent O'Keefe in state court, he monitored the trial, and had substantial contact and discussions with his stand-by, and eventual appellate attorney, Lance Maningo, for purposes of coordinating litigation strategy. In the likely event that Mr. O'Keefe wishes to raise claims of ineffective assistance of counsel concerning Mr. Maningo,⁴ counsel believes that he may have a conflict of interest, given his contemporaneous strategy discussions with that attorney. This Court has relieved the Federal Defender as counsel in several recent habeas corpus cases where concerns arose over a conflict of interest involving counsel's ability to raise an ineffective assistance of counsel claim involving his own conduct.

³ 18 U.S.C. § 3006A(a)(2) provides:

Whenever the United States magistrate or the court determines that the interests of justice so require, representation may be provided for any financially eligible person who . . .

(B) is seeking relief under section 2241, 2254, or 2255 of title 28.

⁴ It does not appear that O'Keefe's current amended federal petition (CR 7) includes an ineffective assistance of counsel claim. Effective investigation and presentation of such claims, however, often requires the assistance of counsel, and must normally be done in the first instance in the state courts. See e.g. *Martinez v. Ryan*, 132 S.Ct. 1309, 1317-19 (2012). The Eighth Judicial District Court has recently granted Mr. O'Keefe's request for appointment of counsel in his pending state petition, and it is expected that counsel will investigate and file a supplemental petition on his behalf. See Attachment 4. In Nevada, state post-conviction petitions are generally limited to claims of ineffective assistance of counsel. Once Mr. O'Keefe has developed and presented his claims in state court, he would likely seek to add them to his federal petition.

PPAA 0027

SCN # 69036

1 See e.g. Smith v. McDaniel, 3:08-cv-335-RCJ-WCG (CR 65, August 26, 2014); Bergna v. Benedetti,
2 3:10-cv-00389-RCJ-WGC (CR 53); Huebler v. Vare, 3:05-cv-00048-RCJ-VPC (CR 79).

3 11. In requesting that counsel be appointed with regard to the instant petition, counsel is not
4 representing that the appeal of the denial of the § 2241 petition in CA No. 12-15271 will be
5 unsuccessful. Counsel's position is that the § 2241 petition is not moot, that it should be heard on its
6 merits, and that Mr. O'Keefe should obtain relief on the double jeopardy violation alleged therein.
7 Should that appeal be unsuccessful, however, the instant § 2254 proceeding will become Mr. O'Keefe's
8 only means for securing federal relief for his allegedly unconstitutional conviction. Counsel believes
9 the interests of justice support the appointment of independent counsel to assist Mr. O'Keefe in this
10 proceeding.

11 I declare under penalty of perjury that the foregoing is true and correct and that this declaration
12 was executed on January 15, 2015 in Las Vegas, Nevada.

13 FEDERAL PUBLIC DEFENDER

14
15 By: /s/ Ryan Norwood
16 RYAN NORWOOD
17 Assistant Federal Public Defender
18
19
20
21
22
23
24
25
26
27
28

PPAA 0028

SEN # 69036

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is an employee in the office of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on January 15, 2015, he served a true and accurate copy of the foregoing **REQUEST FOR APPOINTMENT TO REPRESENT PETITIONER** to the United States District Court, who will e-serve the following addressee:

Adam Laxalt
Attorney General
Criminal Justice Division
100 North Carson Street
Carson City, NV 89701-4717

That on January 15, 2015, he provided a courtesy copy of the foregoing **REQUEST FOR APPOINTMENT TO REPRESENT PETITIONER** to:

Steven S. Owens
Clark County District Attorney's Office
Regional Justice Center, 3rd Floor
200 Lewis Ave.
Las Vegas, NV 89155

/s/ Adam Dunn
An employee of the Federal Public
Defender's Office

PPAA 0029

FILED

2014 OCT 15 P 2:20

DISTRICT COURT
CLARK COUNTY, NEVADA

CLERK OF THE COURT

Brian Kerry O'Keefe,

Petitioner,

vs.

Warden Robert LeGrard,

Respondent,

Case No: C250630

Dept No: 17

ORDER FOR PETITION FOR
WRIT OF HABEAS CORPUS

Petitioner filed a petition for writ of habeas corpus (Post-Conviction Relief) on

September 15, 2014. The Court has reviewed the petition and has determined that a response would assist the Court in determining whether Petitioner is illegally imprisoned and restrained of his/her liberty, and good cause appearing therefore,

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

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

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

8:15 o'clock for further proceedings.

[Signature]

District Court Judge

[Signature]

PPAA 0030

RECEIVED BY
DEPT 17 ON
SEP 17 2014

SCN # 69036

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

FILED IN OPEN COURT
AUG 19 2010

20
CHARLES J. SHORT
CLERK OF THE COURT

BY CAROL DONAHOO
DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

10 THE STATE OF NEVADA,

11 Plaintiff,

12 -vs-

13 BRIAN KERRY O'KEEFE,
14 #1447732

15 Defendant.

Case No. C250630
Dept No. XVII

SECOND AMENDED
INFORMATION

16 STATE OF NEVADA }

17 COUNTY OF CLARK }

ss:

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

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

27 ///

28 ///

PPAA 0031

SEN # 69036

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

3
4 DAVID ROGER
DISTRICT ATTORNEY
5 Nevada Bar #002781

BY

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

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

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

PPAA 0032

SEN # 69036

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

18
19
20
21
22
23
24
25
26
27
28

DA#08F23348X/ts
LVMPD EV#0811053918
(TK9)

PPAA 0033

SCN # 69036
Ann L. Blum

CLERK OF THE COURT

1 SUPP

2 Matthew D. Carling

3 Nevada Bar No. 007302

4 1100 S. Tenth Street

5 Las Vegas, NV 89101

6 (702) 419-7330 (Office)

7 (702) 446-8065 (Fax)

8 CedarLegal@gmail.com

9 Court-appointed Attorney for Petitioner/ Defendant

10 BRIAN O'KEEFE

11
12 DISTRICT COURT
13 CLARK COUNTY, NEVADA
14

STATE OF NEVADA,

Plaintiff,

vs.

BRIAN K. O'KEEFE,

Defendant.

Case No.: 08C250630

Dept. No.: XVII

EVIDENTIARY HEARING REQUESTED

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

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

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

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

PPAA 0034

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

3 **STATEMENT OF THE FACTS**

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

5 **Outside presence of jury**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 Mr. Lalli argued there was not more than the implied malice murder. Instruction
 17 15 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 later. *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.

COPY

FILED

SON # 69036

Nov 23 10 24 AM '10

DISTRICT COURT
CLARK COUNTY, NEVADA

John L. Schuman
CLERK OF THE COURT

THE STATE OF NEVADA,
Plaintiff,
vs.
BRIAN KERRY O'KEEFE,
Defendant.

CASE NO. C-250630

DEPT. NO. 17

Transcript of
Proceedings

BEFORE THE HONORABLE MICHAEL VILLANI, DISTRICT COURT JUDGE

ROUGH DRAFT TRANSCRIPT OF
JURY TRIAL - DAY 7

TUESDAY, AUGUST 31, 2010

APPEARANCES:

FOR THE PLAINTIFF:

CHRISTOPHER LALLI, ESQ.
Assistant District Attorney

STEPHANIE GRAHAM, ESQ.
Deputy District Attorney

FOR THE DEFENDANT:

PATRICIA PALM, ESQ.
Special Deputy Public Defender

COURT RECORDER:

MICHELLE RAMSEY
District Court

TRANSCRIPTION BY:

VERBATIM DIGITAL REPORTING, LLC
Littleton, CO 80120
(303) 798-0890

Proceedings recorded by audio-visual recording, transcript
produced by transcription service.

PPAA 0040

2:11-cv-02109-GMN-VCF

SEN # 69036

56

1 the jury can consider alcohol intoxication or not.

2 THE COURT: Okay. All right, let's deal with the
3 voluntary instruction.

4 MR. LALLI: The voluntariness?

5 THE COURT: Involuntary.

6 MR. LALLI: Oh, and just -- just for the court's
7 edification, the modifications that we had discussed at the
8 last break on the voluntariness, I've made those and I e-mailed
9 the version to the court.

10 THE COURT: Yes, I do have those.

11 MS. PALM: And your Honor, my involuntary instruction
12 is at Page 13 of my instruction packet.

13 THE COURT: All right. Do you have that one, Mr.
14 Lalli?

15 MR. LALLI: I do.

16 THE COURT: All right. Do you have any objection to
17 the giving of the instruction?

18 MR. LALLI: Yes.

19 THE COURT: Okay.

20 MR. LALLI: A number of objections. Number one, it's
21 not their theory of the case. And I think throughout these
22 proceedings and pleadings, while settling instructions, it is
23 abundantly clear it is not their theory of the case. Their
24 theory is that this was an accident and/or it was some form of
25 or some ilk of self-defense. That's their defense, not

ROUGH DRAFT TRANSCRIPT

PPAA 0041

2:11-cv-02109-GMN-VCF

EOR 098

SCN # 69034

57

1 involuntary manslaughter.

2 The problem with the involuntary manslaughter is what
3 the defense is attempting to do in this instruction, and part
4 of it is taking -- taken from NRS 200.070, they're only citing
5 a portion of the instruction. They're -- they're not citing
6 the complete statute on -- on involuntary manslaughter.

7 They've -- they've removed a section. When this case
8 was reversed by the Supreme Court, they looked at this issue of
9 involuntary manslaughter and how it operated with second degree
10 murder. Obviously, the court well knows those two things are
11 related. Has to do with when does an involuntary manslaughter
12 become a second degree murder.

13 I'm entitled to the entire instruction if it's given.
14 The problem is that is precisely the reason it got reversed.
15 And our Supreme Court said there is no evidence to support
16 this. Not only is the instruction improper, but there's no
17 evidence to support it. They said that in their opinion
18 reversing the case.

19 So it's not their theory, there's no evidence to
20 support it, and -- and just as a matter of the record as -- as
21 we've seen it thus far, there is no evidence to support it.
22 And finally, it creates this issue, this legal issue that the
23 -- the -- the Supreme Court has already said is a problem. So
24 you can't just give part of the statute. You've gotta give all
25 of it. And that is going to create a problem.

ROUGH DRAFT TRANSCRIPT

PPAA 0042

2:11-cv-02109-GMN-VCF

EOR 099

SCH # 69036

58

1 THE COURT: All right, thank you. Ms. Palm.

2 MS. PALM: Well, your Honor, when the reversal came
3 back it was because the instruction had gone to the jury, which
4 we objected to, and the court had determined not to give, but
5 ended up in the packet anyway addressing a second degree murder
6 based on a felony murder theory unlawful act.

7 And the court said there's no notice of such a theory
8 and there was no evidence of such an unlawful act. So that's
9 the problem when -- why it got reversed. As far as the
10 involuntary goes, the statute has two alternative ways you can
11 have an involuntary. You can have the lawful act involuntary
12 or the unlawful act involuntary.

13 What I did with this instruction is I took out the
14 language from the statute for the unlawful act because that's
15 what would be a problem in this case. There's been no notice
16 that he did an unlawful act. But you still have the regular
17 involuntary that's based on recklessness doing a lawful act.
18 And I think that we do have evidence in this case from which
19 the jury could find that.

20 There's evidence that she was coming at him with a
21 knife. And there was evidence that he was extremely
22 intoxicated. The jury could determine that -- that if there
23 was a killing, it happened as a result of his recklessness. So
24 that is our theory that there is not a murder in this case.
25 However, if there's anything at all, it would be an

ROUGH DRAFT TRANSCRIPT

PPAA 0043

2:11-cv-02109-GMN-VCF

SEN # 69036

59

1 involuntary. That's hour theory.

2 So we are entitled to instructions on our theory of
3 the case. I'm just defining involuntary manslaughter based on
4 the lawful act manslaughter that's set forth in the statute.
5 And instructions are supposed to be tailored, specifically to
6 the facts of the case.

7 Mr. Lalli is not entitled to instruction based on
8 theories that are not related to the facts of the case and
9 theories upon which we haven't had any notice for an unlawful
10 act involuntary. So we are entitled to those tailored
11 instructions. The State has a burden of -- of proving malice
12 beyond a reasonable doubt. And if they don't prove malice,
13 that they prove something less than malice, there's two types
14 of recklessness. You have either the extreme malignant
15 recklessness, which is malice for murder. Or you have just
16 regular recklessness, which is enough for involuntary.

17 So it's a subset of that type of murder. It's a
18 lesser included under these circumstances. It's Mr. O'Keefe's
19 theory of the case. We're entitled to tailor instructions and
20 that's all this is -- this is setting forth. This is the
21 instruction we're requesting.

22 MR. LALLI: In not one document that she's filed with
23 the court has she ever said it's her theory of the case. In
24 fact, in pleadings she said just the opposite. Yesterday it's
25 my recollection she -- I mean, she was incapable of coming up

ROUGH DRAFT TRANSCRIPT

PPAA 0044

EOR 101

2:11-cv-02109-GMN-VCF

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

MAR 12 2012

CASE No. 12-15271

FILED _____
DOCKETED _____ DATE _____ INITIAL _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Brian Kerry O'Keefe,
1447732 Appellant,

VS.

Sheriff Doug Gillespie,
Respondent, et al.

D.C. 2:11-cv-02109-GMN-VCF
(DISTRICT OF NEVADA)

● MOTION FOR COA
DIRECTED TO THE
HONORABLE S. REINHARDT

● DEAR CLERK of the U.S. COURT OF APPEALS

When my Notice of Appeal was Filed, appellant received his
temporary instructions guide by mail from your court. Thank you.

So, as exactly per your instructions the following are as;

1. District court denied cca. Request by Judge Reinhardt FRAP 22(b)(1), (2)
CIVIL JUDGMENT OF DENY FEB. 3, 2012 MAILBOX RULE APPLIES PLACED IN
HANDS OF OFFICER FOR MAILING MARCH 6, 2012 - (WITHIN 35 DAYS OF DENIAL)
CIRCUIT RULE 22-1 (d)

2. pg. 9 of your instructions. File ORIGINAL MOTION. Certificate of Service also attached.
Titled - After Opening a Case - Pro SE Appellants (revised July 2011)

3. Sent only the cover to my copy of Motion For CoA for 9th Stamp.
PLEASE after stamping filed return to me.

DATED: MARCH 6, 2012

PPAA 00,45
Bless You & Yours!
Brian O'Keefe
C.C.D.C.
330 S. Casino Dr Blvd.
Las Vegas Nevada 89101

SCN # 69036

1 The State prosecuted the case on the theory that the Battery act,
2 of the intentional unlawful stabbing with knife, caused the death.

3 The state argued in closing that there is,

4 "Circumstantial evidence
5 of a BATTERY or something that precipitated the stabbing."

6 So the
7 jury's second-degree implied malice murder, by the unlawful act,
8 was the only remaining basis that could sustain a second-degree
9 murder verdict. The UNINTENTIONAL, UNPREMEDITATED, AND
10 UNDELIBERATED murder cannot be sustained without the unlawful
11 act. Battery by N.R.S. 200.481 is defined as any intentional
12 unlawful act of force upon another. The act was described in the
13 amended information as the intentional stabbing with knife.

14
15 Petitioner was not interested in a deal so the State charged
16 same offense. Second trial commenced and ended with a hung
17 jury. State wrongfully used same evidence, theory of intentional
18 stabbing to boot. State set third trial.

19 Petitioner's attorney
20 then Files writ on wrong operative facts on double jeopardy claim.
21 Does not even claim res judicata or challenge theory on remand.

22 Actions are nothing but what is referred to in the military
23 as a, "RED HERRING."

24 O'Kare finally goes PRO SE.
25 Entire issue now is, I'm not claiming the State will possibly
violate the Double Jeopardy Protection Clause. I'm proving they
HAVE VIOLATED IT.

SCR # 69036

if the CREGAN COURTS decisions didn't matter then exhaustion wasn't absolutely required under a § 2241. Again, my double jeopardy violation on the SAME OFFENCE HAS OCCURRED. MORESO, I'M UNLAWFULLY BEING DETAINED. I WAS ACQUITTED. Question: Is not in fact a double jeopardy violation, regardless of the OPERATIVE FACTS, still a double jeopardy violation? All double jeopardy claims are still EMBODIED in the FIFTH AMENDMENT, enforceable upon the States by the 14th AMENDMENT. Jeopardy means the exposure to death, loss, or injury. ~~Q~~ • The JEOPARDY arises then from the actual danger of CONVICTION when subjected to the physical trial, for the alleged offence. (SAME)

• The FIFTH AMENDMENT of the U.S. Constitution forbids DOUBLE JEOPARDY for the SAME OFFENCE. Multiple trials, physical.

Now in the instant case, C250630, petitioner has ALREADY SUFFERED through 2 trials on the same offence, after an acquittal. The offence was Second Degree Murder.

- For Double Jeopardy purposes, Second Degree Murder is still one offence even though there may be alternate theories by which criminal liability may be charged and prosecuted in the State.

EMPHASIS also being placed that it's called a FIFTH AMENDMENT VIOLATION. Not an operative facts violation.

* In SCHWAB v. DENZARD they discuss the fact that the Sullivan rule applies being that the means to the murder was irrelevant. Murder was Murder. The means to the end didn't matter. EXAMPLE: SHOOTING OR DROWNING someone to death. The operative facts to the MODE of Commission was irrelevant.