JNOT
Brian Kerry O'Keefe
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~~Indian Springs, NV. 89070-0650~~ LOVELOCK, NV. 89419
PRO SE - [#90244]

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * * * *

BRIAN KERRY O'KEEFE,

Appellant,

vs.

THE STATE OF NEVADA,

Respondents.

Supreme Court Case No.: ~~61631.~~ 69036

District Court Case No.: C-250630.

● N.R.Civ.P. Rule 5 and 15; F.R.Civ.P. Rule 5(d)(4)

● **FILING FOR JUDICIAL NOTICE, IN THE ALTERNATIVE, "SUBSTANTIAL JUSTICE" [Pursuant To N.R.S. 47.150(2) and SCOTUS S.C.R. 201(c)(2) as App. A-10]**

COMES NOW, Appellant *Pro Se*, A/K/A Mr. Triple Jeopardy, F/K/A Mr. Double Jeopardy, Brian Kerry O'Keefe (hereinafter Appellant or "Mr. O'Keefe"), "humbly for fair play," and hereby moves this Honorable Court to take Judicial Notice of the finally **provided** complete set of the "unlawful 3rd Trial" Jury Instructions ("JI") post haste contested in ground five of the Supreme Court of Nevada ("SCN") Order of Affirmance No. 61631, filed April 10th, 2013. (See Judicial Notice Supplemental Appendix Attached, Appendix of Exhibits[App.] #1) [footnote ("fn.") 1]. Court appointed stand-by counsel failed repeatedly to supply the needed, critical portion of the Record on Appeal ("ROA"), which omitted Mr. O'Keefe's Third Trial JI's noting in all the following instances:

- a) Upon filing the ROA, SCN #61631, coupled with the Fast Track Statement ("FTS")(11/01/12);

FN 1 -- Judicial Notice Supplemental Appendix contents contains 29 3rd Trial JI's/ Verdict Form. Emphasis on erroneous case number reflected on filed documents. Appellant's correct case number in District Court is C-250630. State filed instructions under wrong case # showing C250360.

16-26084

- b) Appellant's Reply to the Fast Track Response ("Reply To the FTR")(12/11/12); and
- c) Appellant's Petition For Rehearing ("PFR")(04/26/13)[Emphasis that the PFR naturally was filed (04/10/13) subsequent the SCN Affirmance Order, App. 6, against Mr. O'Keefe for failure to make a proper appellant record on direct appeal].

Easily, a supplemental appendix could have been filed for and in Mr. O'Keefe's behalf. What was once an excusable neglect logically now has been made manifest into an unexcusable neglect by this seemingly and questionably harmful act. Standby counsel's duty or "lack" or "failure of" to perform this simple standard task, even after mulitple requests, warnings, and admonishments [fn. 2], rises to the level, qualifying as malice, DEFINITELY EXPRESS. Acting for appointed counsel, Mr. O'Keefe feels it is his duty, under Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)[fn. 3] and being a decorated veteran, to make a rightful and lawful attempt to rectify this repeated egregious error mindful of *certiorari* to follow per 28 U.S.C. § 1257 and Supreme Court Of The United States ("SCOTUS") S.C.R. 10. • (See U.S.S.C. #13-6031) (den. 10/15/13) This Judicial Notice is made and based pursuant to the supporting Points And Authorities attached hereunder, N.R.S. 47.130 through 47.140; N.R.A.P. Rules 3(g)(1)(A)(bullet n. 3), 24 (Mr. O'Keefe was granted indigent status by Hon. Villiani in District Court), 30(b)(2)(D), and 40(c)(2); U.S.D.C. F.R.Civ.P. Rule 8("Pleadings must be construed so as to do justice"); Fed.R.Evid. 201; 9th Cir. R. 27-1, Cir. Ad. Com. Note § 7, and 30-1.4(a)(vi); 9th Cir. G.O., 4.2 and App'x A(35); SCOTUS S.C.R. 201; Nev. Const., Art. 1 § 8; U.S. Const., 5th, 6th, and 14th Amend. (Fair and Speedy Trial Rights), Smith v. Duncan, 297 F.3d 809, 815 (9th Cir. 2002)("We

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FN 2 -- By Mr. O'Keefe during: (1) conclusion of 3rd Trial; (2) contact visits [jail/prison once]; (3) letters; and (4) phone calls (recorded). Identified by State's FTR, issue E (No. 61631). And in SCN Affirmance Order, App. 6, pp. 3-4, Fifth Issue.

FN 3 -- The propriety of this is sound. *Cf.*, Andolino v. State, 99 Nev. 346, 662 P.2d 631 (1983); S.C.R. 253; N.R.A.P. 46(b). *Contra*, Blandino v. State, 112 Nev. 352, 355, 914 P.2d 624, 627 (1996)("At the most, requiring counsel only forces appellants to have counsel brief the merits of appeals and possibly appear for oral argument").

may take judicial notice of the relevant state court documents, because those documents have a direct relationship to Smith's appeal."), abrogation on other grounds as recognized in Moreno v. Harrison, 245 F. App'x 606, 608 (9th Cir. 2007), and Johnson v. Uribe, 700 F.3d 413, 423 n.4 (9th Cir. 2012)(taking judicial notice of a certified transcript that was submitted in support of opening brief because the accuracy of the document "cannot reasonably be questioned") (citing F.R.E. 201(b)), as well as all papers, pleadings, and documents on file herein, Exhibits appended hereto, and hereby incorporates all Exhibits included in the filing of Judicial Notice Supplemental Appendix of Exhibits.

Lastly, Mr. O'Keefe, countenanced in Haines v. Kerner, 404 U.S. 519 (1972), is praying for *pro se* leniency [fn. 4], Hughes v. Rowe, 449 U.S. 5, 14, 101 S. Ct. 173, 66 L. Ed. 2d 163

FN 4 -- Appellant, housed at H.D.S.P., only has law library on Wednesday in the morning (afternoon is only for Unit Six) for up to an hour each unless the computers are down or broken, institutional lockdown, printer out of ink, or other activities scheduled that day (*e.g.*, visiting, chapel, education, *etc.*). Failure to show is a write-up even if the inmate is unaware he has a visit or the like, but prejudice is automatically presumed because it encroaches Doctrine Of Unconstitutional Conditions per Wojtczak v. Cuyler, 480 F. Supp. 1288, 1303-06 (E.D. Pa. 1979), by impermissibly choosing between Constitutional rights and impinges 1st Amendment rights which are exempt under Canell v. Lightner, 143 F.3d 1210, 1213 (9th Cir.1998), from showing actual damages. The law library only allows up to 30 inmates per session out of 500+ inmates, but usually no more than 15 show up due to above said prior engagements. Requests must be submitted one week in advance for consideration to be placed on an approved list as do visits, but inmates are not privy if they're scheduled at the same time putting one at risk of a write-up. If their unit has access, they are required to attend the law library in order to check out cases, research materials, receive forms, obtain copies since staff law clerks refuse to log outgoing motions in the units daily, read the sparse outdated books (as of this writing, Pacific and Supreme Court Reporter, Shepard's, and U.S.C. books were removed), vie for time on the typewriters, seek assistance of the untrained law clerks, mail legal letters, *etc.*. No requests may be done by request forms, only physical presense. Some inmates waste the entire time on a form. Up to ten (10) items only may be checked out at a time, unless the items returned weren't properly crossed off their check out list. No books are available for checkout and cases and statutes are only available on a computer retrieval system which has approximately eight (8) available stations (one or two are usually down) for upwards of 25 inmates. First come, first serve. It's over eleven (11) dollars to certify mail, but the NDOC caps legals fees at merely $100. Gluth v. Kangas, 951 F.2d 1504, 1510 (9th Cir. 1991). Appeals have a ten day deadline, yet financial certificates to declare indigency take 3-4 weeks -- if actually completed -- on average to be returned or more. And LEXIS Nexus is wholly deficient compared to West's Law including the lack of key numbers and inability to print cases by subject The inadequacies of the NDOC law library maladministration have been litigated. Koerschner v. Nevada State Prison, 508 F. Supp. 2d 849 (2007); Felix v. McDaniel, 2012 U.S. Dist. LEXIS 25890, 2012 WL 666742, at *5-9 (D.Nev., Feb. 29, 2012)(citing Moxley v. Neven, No. 2:07-cv-01123-RLH-GWF, #25 (D. Nev., Sept. 30, 2008)). See Lewis v. State, S.C.N. No. 60522 (2012); Miller v. Evans, 108 Nev. 372; 832 P2d 786 (1992). As of June of 2013, outgoing legal mail is not logged at H.D.S.P.. If an inmate sends mail by a brass slip to cover the cost, a further delay of 1-3 days occurs while the brass slip is processed not including waiting for a senior c/o to sign it. There is no mailbox rule in Nevada for *habeas* petitions. If stamps are used to mail out legal mail, there is no record of it kept at H.D.S.P.. Inmate Accounting Services doesn't process "brass slips" (*i.e.*, inmate checks) for weeks at a time, so there's no confirmation that mail was received because the postage is not deducted that week. There is no access to PACER, neither U.S.D.C. ... [continued].

(1980), Haines, *id.* at 520, Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010), and liberal construing [fn. 5], Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007), Hebbe, *ibid.*, Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988), of this motion.

PREAMBLE

This Notice is not to litigate new claims, but rather to corroborate existing issues with the necessary documentation, namely the JI's. Let us not forget, Mr. O'Keefe is charged solely with murder of the second degree by stabbing with a deadly weapon, to-wit: a knife. The State, with the chameleon-esque tactics, are trying to derive new theories when they are bound to stand by the law of the case. The Reversal Order issued the edict that no unlawful act (*i.e.*, the stabbing) occurred and no evidence to support it, yet the State's willful blindness ignored the rule and then re-tried Mr.O'Keefe twice more on 2nd degree murder. There was no other theories, period,

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FN 4 [continued] -- ...nor 9th Circuit and not SCOTUS. Inmates are also limited in the amount of stamps (only $0.46 forever stamps) that they are allowed to purchase and possess and there is no method in the units to determine sufficient postage for items which may require excess postage. *Cf.*, Myers v. Hundley, 101 F.3d 542, 543-45 (8th Cir. 1996). For reference, no store for the last week of June due to inventory check, none at the first week of July because of the holiday, and downed computers threaten cancellation of canteen the following week. Incoming legal mail, while obstensibly logged about half the time if at all, is subject to delays and is often delivered at the close of morning tier while the inmate is at law library. Therefore, any response is delayed as the outgoing mail is delivered to the post office for delivery the next business day placed in internal mailboxes. These state created impediments are hindering and hampering the filing hereof. See Lott v. Mueller, 304 F.3d 918, 924 (9th Cir. 2002); Spitsyn v. Moore, 345 F.3d 796, 799–802 (9th Cir. 2003); Downs v. McNeil, 520 F.3d 1311, 1323 (11th Cir. 2008)(conditions of confinement and reality of prison); Hebbe *id.* at 342-43; Bounds v. Smith, 430 U.S. 817, 831, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977)(law library viewed as a whole). Case-in-point, law library was cancelled on June 26th for Mr. O'Keefe's unit unbeknownstly obstructing the timely submission of this Notice, after notifying all parties in the Motions To Withdraw Counsel and Reconsider *En Banc* that it will be filed on the 26th, and the obfuscations in general have all contributed to inhibit docketing the JI's earlier. Interestingly, law library was also cancelled when the Affirmance Order came down a few days ago as of this writing. A few hours a week for law library, if Mr. O'Keefe is lucky, is simply not feasable and breaks U.S. Art. IV § 2, and U.S.C.A. I, V, VI, IX, and XIV.

FN 5 -- "Prisoners are often unlearned in the law and unfamiliar with the complicated rules of pleading. Since they act so often as their own counsel in habeas corpus proceedings, we cannot impose on them the same high standards of the legal art which we might place on the members of the legal profession. Especially is this true in a case like this where the imposition of those standards would have a retroactive and prejudicial effect on the prisoner's inartistically drawn petition."
- Price v. Johnston, 334 U.S. 266, 292, 68 S. Ct. 1049, 92 L. Ed. 1356 (1948).

and neither ways nor means, *etc.*, as to how this supposed crime was perpetuated.

So, §I bespeaks the procedural history that has long been overshadowed and forlorn. §II, then, accentuates the most key failures committed by all parties involved necessitating review. Following, §III delves into the main points just to add context as to why the JI's are so urgently needed. Parts A and B thereof are the standards for review to incorporate files through Judicial Notice. §IV thereafter ties everything together and the Coda is merely food for thought.

INTRODUCTION

Mr. O'Keefe's humble notice of frustration is not only proper but required by one's due dilligence (28 U.S.C. § 2244(b)(2)(B)(i)) to satisfy the requisite portion missing from the ROA not supplied by stand-by counsel. This especially holds true being simply based on the fact that one of the appellant's main issues of claimed error, in his Direct Appeal [No. 61631, specifically issue (E)], concerned the District Court abusing his discretion by refusing an ACCURATE defense proffered instruction, not covered by any other instruction at all [fn. 6] . App. 2. Simply, this Honorable Court could not complete and compare the standard stock instructions given at Mr. O'Keefe's 3rd Trial ("Comparison Test").

In addition, the State failed to give any theory of law on how (the "where", "when") malice of the second degree, implied, could be proven then sustained [fn. 7]. Clearly, he is a

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FN 6 -- Appellant in no manner stipulates that the denial of his proffered instruction is to be construed as any type of an admission of some commision of an unlawful act. Mr. O'Keefe committed no unlawful act period. Noting in any and all cases the State simply must instruct properly no matter how weak or incredible that evidence may be. *Cf.*, Kastigar v. United States, 406 U.S. 441, 453, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972).

FN 7 -- This explains again the alleged typographical error in the case number, simply called Prosecutorial Malfeasance. The correct case number is C-250630 (reflects wrongly as C-250360). As well, noting still there is no verdict returned on any theory returned under correct case number "C-250630". The verdict was also filed under the wrong case number. In original FTR filed by State in SCN No. 53859 (see Issue #2 in which the State admits "malice", how to show or prove such). See FTR attached in No. 53859; see also §III(B) *infra*. This was already filed in Appellant's First Trial and as another supporting document in the already filed supplemental appendix with current Appellant's Reply to the State's FTR and again in the PFR (SCN No. 61631). The State is Judicially Estopped from changing positions. "Mr. O'Keefe was not prosecuted for felony murder, only simple malice murder by the intentional unlawful act as argued ... [continued].

calumniator. Mr. Owens can only be telling the "truth" in one FTR, emphasizing, then, that makes the second FTR, No. 61631, an untruth. Judicial Estoppel applies to FTR, No. 53859. Mr. O'Keefe's Comparison Test must also be applied to the most critical error being argued contemporaneously in both courts: **Double Jeopardy**.

The alleged felony murder instruction versus the original judicial admission or position that the State argued irrefutably and even made a matter of the court record in the original FTR, No. 53859 [fn. 8]. App. 10. The piecemealing of these hypercritical documents causes confusion and delays. App. 3. Wherefrom both FTR's, Orders, Instructions, motions for Petrocelli hearings, and accusatory documents are hereby provided, *infra*, altogether in the Supplemental Appendix. Comparison Test now can be applied to all.

Appellant counsel will not dispute that at least a dozen times Mr. O'Keefe expressed the importance of the JI's being included in the ROA (via phone/mail). A mutual understanding had been established. Emphasis was placed on Mr. O'Keefe's awareness of the detrimental impact upon the State's case that would follow. 6th and 14th U.S. Amend. violations is an automatic reversal: failure to instruct on the mental component that one must KNOW his conduct endangers the life of another and one must have consciously disregarded the risk extremely and recklessly (see Defendant's accurate proffered instruction). [Emphasis again on fn. 6].

Mr. O'Keefe emphasizes these documents are already part of the record of the trial in which the SCN is now flooded with documents in this case from three (3) trials. Keeping in mind that Judicial Economy and Judicial Administration warrant such a notice, mostly because

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FN 7 [continued] -- ...and made an official matter of the Court record." Please recognize the State's initial Judicial Admission in SCN No. 53859. App. 10.

FN 8 -- Steven Owens filed both FTR's. Issue two in the first FTR, No. 53859, Mr. Owens argued that the government was prosecuting on simple malice implied murder; how to show. Issue six (which Patricia Palm surreptitiously omitted in her mandamus) discusses the instructions as a whole. In the latest FTR, No. 61631, on this topic, he reverses this to felony murder.

it is lawful, proper, and just, per N.R.S. 47.150(2). The Judicial Canons mandate integrity as such has been the (in)consistant standard of conduct by our SCN.

PRAYER FOR RELIEF

ACCORDINGLY, Mr. O'Keefe humbly prays that this Honorable Court will continue to be jurists of reason and utilize their sole discretion and authority, even *sua sponte* if desired, and not only file but consider and give great merit to this filing of Judicial Notice (with oral argument if need be) to prevent a gross miscarriage of justice before the door would wrongfully and improperly close in state court!

Reconsideration *En Banc* ought've been granted for the Good Conscious of the state Court, alongside this Notice therewith but was unjustly denied.

POINTS AND AUTHORITIES

I. Procedural History

The State doesn't get "the proverbial 'second bite at the apple,'" let alone thrice putting Mr. O'Keefe in jeopardy of life of limb for malice murder.
- Burks v. United States, 437 U.S. 1, 17, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978)(citations omitted); accord Green v. United States, 355 U.S. 184, 187-88 (1957).

A. First Trial.

The "Key" here is that Mr. O'Keefe was charged with murder based on the Battery constituting Domestic Violence ("D.V.") admonishment of rights charged. App. 3. Passing the test per Blockburger, the state's newly filed second amended information charges the same statutory offense. This was not a lower standard of proof. Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). The State merged the two per N.R.S. 173.115 properly at the First Trial, but following Reversal of this unlawful act, the State illegally chose to

bespeak creating an additional battery act at the Third Trial when there was no act period [fn. 6] -- which is the key foundation of the erstwhile murder charge. N.R.S. 173.115(2) is infringed if the State was charging Mr. O'Keefe on felony murder because the accusatory documents were not a duplicitious information with a seperate count for the unlawful act. Indeed, a misdemeanor can never be a felonious act and the State inarguably admits this. And § 1 is contravened if the D.A. was prosecuting on simple malice since the evidence didn't support the Battery D.V.. Not only would Jeopardy have fastened at the First Trial for malice, but there's neither the statute for battery listed nor a disjunctive allegation.

Yet, to summarize, the State has totally failed to evince the *modus operandi* ("*M.O.*")(the invisible alternative theory curiously not cited thereto in the Affirmance Order), *mens rea* (extreme voluntary intoxication negates intent for both degrees), *res gestae* (that is, the alleged stabbing), State v. Mangana, 33 Nev. 511, 519, 112 P. 693, 697 (1910), causation ("...mere presence in the home, without more, is insufficient as a matter of law to support her conviction..." - Labastida v. State, 986 P.2d 443, 447, 115 Nev. 298, 304-05 (1999)("Labastida II")), and the *actus reus* (2nd degree murder). Without this *corpus delicti*, the undergirdings of murder cannot stand. N.R.S. 47.230. *Cf.*, Commonwealth v. Comber, 374 Pa. 570, 584, 97 A.2d 343, 349, 37 A.L.R.2d 1058 (Penn. 1953). This is the *raison d'etre* that 2nd Degree was outright reversed mooting further prosecution and litigation based on *Stare Decisis*, Deliberate Process privilege, Law of the Case, Adequate State Grounds doctrine, *Ore Tenus* rule, Our Federalism, *etc.*. The State's repetitive action on 2nd Degree is frivolous. App. 3.

The felony murder (especially without a statement by Mr. O'Keefe) was a simple untruth, unlike Brian Rose's case which did not include "knowledge." N.R.S. 193.017. The alleged

homicide was based on an alleged unlawful act of battery and that act is the stabbing. App. 4. **See ROA 63, State's Opening Statement by Phillip Smith ("Mr. Smith"), 171:6-9, 14, 16, and 22 (the altercation resulting in the stabbing was the unlawful, intentional act -- the alleged battery act charged). App. 3.**

Issue two of the 18th JI elucidates how to prove the first issue thereof. The "or" disjunctive term is sheer formalistic fallacy. Compare State v. Brian Rose, 8th Jud. Dist. Ct. No. C-234346, SCN No. 53813, 255 P.3d 291, 294 (2011)(instructions to the jury, filed 09/26/08)(Mr. Rose has the felony murder rule while Mr. O'Keefe does not), App. 5, with Labastida II, 986 P.2d at 447-48, 115 Nev. at 305-06 (1999)(citing Sheriff v. Morris, 99 Nev. 109, 118, 659 P.2d 852, 859 (1983))(mirroring Rose, considering these are the prevailing norms), but see Mr. O'Keefe's instructions nn. 18 and 24. This is an improper bifurcation of the statute. #18 is nothing but simple malice (N.R.S. 193.0175) murder. Accord Linares v. Evans, No. CV 09-2128-DDP (JEM), 2010 U.S. Dist. LEXIS 142900, n.7 (C.D. Cal., Nov. 4, 2010) (how to imply malice). App. 1.

Subsequent the Jury's verdict but preceding sentencing colloquy, concerning the settling of the record hearing, the State and Judge concurs there's no intent, *ergo*, no express malice. This is akin to an informal Bill Of Particulars that they are bound by as law of the case. See ROA, vol. 2, 387-390, pp. 5-6 (04/07/09). App. 7.

Stephanie Graham ("Ms. Graham"), plus defense counsel, trial Judge Villiani, *et al.*, were all gearing toward 2nd degree simple malice murder implied, solidifying Mr. Smith's opening statement, with great emphasis to Instruction #18, ROA 298-299, pp. 137-140, simultaneously creating a false 2nd degree felony murder theory based on the 2nd degree felony murder rule.

Id. at 299 (03/20/09, filed 07/10/09), 139:21-23 (the act of stabbing was willful and intentional); *id.* at 140:2-3 (it was malice, definitely implied). The undercarriage of the homicide, *i.e.*, Battery D.V., App.3, was filed at the same time of the complaint on an Admonishment Of Rights form. An Admonishment, in this context, is the admissibility of evidence for consideration. And when one is prosecuting on murder with malice aforethought, implied, it is only 2nd degree in the State of Nevada. Attached is the whole trial in ROA 63, 297-301, and 308-309 -- just eight pages describes the entire 1st Trial proceeding. App. 4, 8.

The State made several Judicial Admissions per N.R.C.P. 36(b). One on the pre-trial Motion To Settle Record (first trial heard on 04/07/09), ROA 387-390, App. 7, also, for the second trial, the state irrebutably admits "the Defendant is only charged with **a** malice murder." (Emphasis added). App. 9.

On the FTR (filed in No. 53859 on 09/08/09), 8:4-21, Steven Owens ("Mr. Owens") mistranscribed N.R.S. 200.070 as 200.700 which may seem like a seedy alternative *M.O.*. This was transposed five (5) times in just two paragraphs. Again, in the 3rd Trial FTR, also by Mr. Owens in privity, 6:11-14, the same wanton numerical misrepresentations designed to hide the alleged unlawful act, charged and filed, which we know is the battery. This is a blatent falsehood and utter misapprehension of the facts at hand. App. 10. [F.Y.I., Mr. O'Keefe didn't even own a computer nor have internet service. Nonetheless, *arguendo*, this is not an inherently dangerous act].

On line 18, "upon a closer review of NRS 200.700 [*sic*], it is clear that the State deliberately omitted the language of the statute that discussed felony murder. See NRS 200.700(1) ("or is committed in the prosecution of a felonious intent")[*sic*]." Thus, no felony murder instruction provided to the jury. See Noonan v. State, 115 Nev. 184, 980 P.2d 637, (1999), distinguished in Jennings v. State, 116 Nev. 488, 491 (2000)(involuntary second degree is a subset in felony

murder, *arguendo*, if it was a felony murder, then Jeopardy binded thereto); Labastida II, *ibid.*, *supra*. The sole underlying offense charged is Battery DV. App. 3. "Furthermore, the State was also instructed not to argue felony murder" nor "discuss it... ." *Id.* at 8:24-25. Concluding, "the State was well within its rights to state that murder can be found upon a showing of implied malice." *Id.* at 9:5-6. App. 10. See Jennings, 116 Nev. at 490, 998 P.2d at 559 (citing State v. Dist. Ct., 116 Nev. 374, 377, 997 P.2d 126, 129 (2000)). Unlike Jennings, the unlawful act was in the charging documents via Admonishment Of Rights. See, *e.g.*, Barone v. State, 109 Nev. 778, 780, 858 P.2d 27, 28 (1993)(requiring Defendant to negate unlawfulness element of Battery by proving self-defense violates Due Process by diluting State's burden of proving every element of charged crime).

The Reversal by this Honorable Court ordered, adjudged, and decreed no unlawful act, nor evidence thereof, on April 7th, 2010. App. 11. Respectfully, the request therein for a new trial was *obiter dicta* since the Clerk's Certificate (sent May 3rd, received May 6th) knowingly struck that advisement. This would comply with comity between courts and allow the D.A. leeway to dismiss per N.R.S. 178.562, *nolle prosequi*, or a motion for acquittal pursuant to 175.381(2) by defense counsel. App. 12.

B. Second Trial.

Christopher J. Lalli ("Mr. Lalli") announced that Mr. O'Keefe was charged with malice murder. D.A. Lalli's motion -- heard just six days *ante* the second trial -- for Opposition To Motion To Admit Evidence Showing LVMPD Homicide Detective Have Preserved Blood/Breath Alcohol Evidence In Another Recent Case (filed 08/12/10, heard 08/17/10), 4:6-7 (emphasis on wrong case #C-2500630, masking State's position), declared incontrovertably that Mr. O'Keefe

was "only charged with malice murder". See *id.* at 3:13-17 (only general intent, so it's implied). This hides their charging statement because it doesn't show up on case searches for files. App. 9. Now they're Judicially Estopped from changing their indefeasable standing.

Patricia A. Palm ("Ms. Palm"), towards the end of that trial, attempted to supply the instruction for **only** the lawful act on involuntary manslaughter [fn. 9] solely to comport with Mr. O'Keefe's right to a "Fair Trial" under the U.S. 6th Amend. [fn. 6] and appealed it on Mandamus but the SCN pretermitted the constitutional violations proceedurally. See Order Denying Petition, No. 58109 (filed 05/10/11)(recognizing involuntary instruction); see also Petition For Writ Of Mandamus Or, In The Alternative, Writ Of Prohibition, Document #2011-10453 (04/08/11), pg. 29*ff* (on instructions).

In a more recent motion, Mr. Lalli reaffirmed that the 1st Trial was instructed on a felony murder. This declaration predicated their theory, now, on N.R.S. 200.070 and that they are free to proceed on malice murder. See State's Opposition To Motion To Dismiss (filed 03/21/12), 3:9-21. App. 13.

It is on the record and settled: no unlawful act notice (**which all parties stipulated to**) because there was none -- it was fictitious. See Ms. Palm's Motion To Dismiss (filed 01/07/11, heard 01/20/11), pp. 18-19. The initial jeopardy ended at the 1st Trial on appeal by legal acquittal, State failed to challenge reversal which again became final after 30 day window to appeal commonly refered to as the discretionary period expired, and Order was nonappealable under United States v. Scott, 437 U.S. 82, 91, 57 L. Ed. 2d 65, 98 S. Ct. 2187 (1978). Jeopardy truly ended. Note Grass v. State, 2009 WL 1491173, *1, S.C.N. No. 52002 (2009)

FN 9 -- This too was circumlocuted as N.R.S. 200.700 several times in the 3rd trial State's FTR, 6:11-14, which misleadingly gives the appearance of a sexual ulterior motive.

(quoting State v. Haberstroh, 119 Nev. 173, 188-89, 69 P.3d 676, 686 (2003)).

Simply put, it's a legal absurdity to espouse that a murder occured without the underpinnings of the battery [fn. 10] stabbing and the intent. *Cf.*, Mangana, 112 P. at 696, 33 Nev. at 518 (battery is not one of the delineated unlawful acts in N.R.S. 200.030) But for the Star Chamber tactics, this matter should've been resolved by use of a directed verdict of not guilty or *autrefois acquit*. Ms. Palm didn't even object to Ms. Graham's opening statement of "...a murder, a stabbing, and the intent to do the act." Rough Draft Transcripts ("RDT"), Day 3 (08/28/10), 91:31 to 92:1-5.

On day 7, at the close of the case at chief, hashing out JI's, after Mr. O'Keefe declined to testify, Mr. Lalli (being a representative of the government) opined on his objections and made unimpeachable Judicial Admissions and officially a "matter of record" the lack of an unlawful act. RDT, pp. 56-58, part of the record for 28 U.S.C. § 2241 at EOR 97-101 (case no.: 2:11-cv-02109-GMN-VCF):

1) SCN already determined the law of the case such Mr. O'Keefe comitted no unlawful act, being the battery, that was initially charged in this case;
2) No evidence supported it and still at the conclusion of the 2nd Trial the evidence presented yet again did not support any unlawful act; and
3) Mr. Lalli also stated his position that, if the trial court wanted to override the law of the case established, he had no qualms or reservations doing so.

Please see Saylor v. Cornelius, 845 F.2d 1401, 1403-04 (6th Cir. 1988); see also Byford v. State, 116 Nev. 215, 232, 994 P.2d 700, 711-12 (2000). Since the evidence didn't support involuntary manslaughter binded to felony murder, then the totem pole of greater offenses is hewn down. See, e.g., Ny Nourn v. Lattimore, 2010 U.S. Dist. LEXIS 58318 (S.D. Cal., June 14, 2010).

FN 10 -- Even an unreasonable amount of self defense nullifies any type of malice. Kelso v. Nev., 95 Nev. 37, 588 P.2d 1035 (1979); Givens v. Housewright, 786 F.2d 1378, 1380 (9th Cir. 1986).

C. Third Trial.

Because the 9th Circuit (12-15271) failed to stay, on June 11th, 2012, Mr. O'Keefe made a continual standing objection on Double Jeopardy, the unlawful act, and to all evidence therein. Trial court made this a matter of the record. The State may not retry the defendant after the conviction was reversed on insufficient evidence. Greene v. Massey, 437 U.S. 19, 24-25, 98 S. Ct. 2151, 57 L. Ed. 2d 15 (1978); United States v. Bibbero, 749 F.2d 581, 586 (9th Cir. 1984); King v. State, 216 Tenn. 215, 391 S.W.2d 637 (1965). The entire trial was "*coram non judice*." Frank v. Magnum, 237 U.S. 309, 35 S. Ct. 582, 59 L. Ed. 969, 974-75 (1915).

June 14th, settling of the JI's and objections were placed on the record simply with the State saying the revisions would be made and, as a courtesy, provide a copy of the changes that Friday. Mr. O'Keefe wasn't given a copy as promised, just the same copy with the penciled corrections from the prior day was mailed to prison nine (9) months later.

June 15th, Mr. O'Keefe requested a directed verdict. Subsequent the instructions were finally filed. To date, this Esteemed Court has yet to review the mandatory request for directed acquittal based on the evidence. *Cf.*, N.R.S. 178.602 (the Court may review plain error affecting substantial rights or constitutional errors *sua sponte*).

Carol Donahoo ("Ms. Donahoo") filed the instructions at 1:58 P.M. after the verdict was returned because she wasn't present that morning. App. 1. It's not apparent if the jury was served with a file stamped copy or not. To prevent the same staff physically rehearing verdict, for Double Jeopardy purposes, there was no party present from the First Trial jurors returning the second degree murder (implied) guilty jury verdict. All parties that morning of the 15th of June were swapped out: Court Reporter, Bailiff, Court Clerk, Chief D.A.'s, stand-by counsel, and Judge Bonaventure replaced Judge Villiani (who went on unscheduled vacation, howbeit 3 days earlier

at a calender call chastised Mr.O'Keefe and reminded him that trial was to start Monday [06/11/12] -- even verifying the start time with his Court Clerk Ms. Donahoo and angrily stated he personally had cleared his docket and had two weeks preserved for the 3rd Trial). This was because Mr. O'Keefe chose to represent himself and exercise his Constitutional rights.

Although seperated by two (2) years, the same identical error (C-250360) [fn. 1] plagued the case number and want of unlawful act. This rendered the JI's lost amongst seasoned state and federal attorney's and likely the Clerk of this Most Respectful Court as inferred in their lack of Transmission Of Records. All the following quotes are from legal correspondence and dictated official letterhead from stand-by counsel, Bellon & Maningo, LTD ("Mr. Maningo"), and Mr. O'Keefe's federal court appointed attorney ordered by the 9th Circuit Court Of Appeals, Ryan Norwood, AFPD ("Mr. Norwood"). All parties have retained copies of these correspondences in which *ipsissima verba* will and can not be disputed. Letters ##1, 2, and 3 are all from Mr. Maningo:

- "We truly believe that in typing out 'NRS 200.700' **the State simply made a typographical error** and wrote that instead of 'NRS 200.070'"..."**the language the State quoted was from 'NRS 200.070'**." "...Additionally, you re-stressed the importance of the jury instructions... ." Letter # 1, signed Lance A. Maningo, Esq. (02/14/13);
- "Dear Brian, per your request, enclosed please find a complete copy of the jury instructions filed relative to the third trial for the above referenced matter that were erroneously filed in Case No.: C250360 [fn. 1] . Also, I have enclosed a copy of the jury instructions filed in the case State Of Nevada v. Brian Rose, Case NO. 07c234346." Letter # 2, signed Lance A. Maningo, Esq. (03/12/13); and
- "...We received your correspondences ... the rules are clear that the Petition must just be a brief concise statement of what we believe the court overlooked. We are not allowed to make any new argument, or reargue what we already did. All we are able to do is point out for the court that we believe they did not consider our reply to the State's Response to our Fast Track Statement... ." Letter # 3, signed Amanda Gregory for Lance A. Maningo, Esq. (04/26/13). To clarify, their "new argument" stance is *non sequitur*. N.R.A.P. 40(c) does not prohibit Mr. Maningo from sending the JI's as "new argument". *Res ipsa loquitur.*

Letters 4 and 5 are from the law offices of the Federal Public Defender, Mr. Norwood:

- "...We have tried several times to locate the jury instructions at your third trial, but they have not been filed. They were not transcribed either. I do not know why this is, but we are unable to get you this information... ." Letter #4, signed Ryan Norwood, AFPD (03/04/13); and
- "Dear Mr. O'Keefe; enclosed please find copies of your jury instructions and verdict, filed June 15, 2012." Letter # 5, signed Ryan Norwood, AFPD (03/07/13).

Afterwards, Mr. O'Keefe did ask twice to correct the minutes on recorded phone calls once he received the instructions in March of 2013.

The last set of instructions is constitutionally devoid of mandated statutory language (*i.e.*, N.R.S.'s and the weapon enhancement) and, thusly, void for vagueness because it tends to support Selective Enforcement in the law. This misfiling under C-250360 [fn. 7] was not happenstance but a course of conduct. Moreso, there's no theory on how to imply malice or judicial interpretation of the Abandoned and Malignant Heart ("A&MH") malice murder.

These hotly debated laws of the case weren't filed until the verdict was returned, instead of before, so as to deny stand-by counsel or Mr. O'Keefe adequate time to prepare and litigate properly -- notwithstanding the deliberately incorrect case number.

Pg. 2 of Mr. Lalli's closing argument instructs on recklessness but he refused to give an instruction on the mental element. This is in furtherance to adding the instruction orally (among other legal fictions such as express malice being 2nd degree) to enter it into the record and infect the jury deceptively. See People v. Watson, 30 Cal. 3d 290, 296-97, 179 Cal. Rptr. 43, 47, 637 P.2d 279, 283 (1981). Express cannot coexist with 2nd degree, implied, based on an unlawful act. See Byford, 116 Nev. at 235, 247, 994 P.2d at 713, 721-22 (citing State of Nevada v. Lopez, 15 Nev. 407, 414 (1880)). SCN No. 61631, ROA, Vol. 5, 1209:9-13. Contrast this with the physical instruction given at the 1st Trial. Mr. Owens has direct

knowledge of and is *scienter* to the falsely and inauthentically propounded felony murder theory.

Mr. Owens FTR asserted felony murder but they're estopped under the Doctrine of Inconsistant Positions Preclusion from "playing fast and loose with the courts." Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990) (quotations omitted); see also NOLM, LLC v. County of Clark, 120 Nev. 736, 743, 100 P.3d 658, 663 (2004), quoted in Schindler Elevator Corp. v. Eighth Judicial Dist. Court, SCN No. 58456 (2012); see also Price v. Uchikura, No. 57622 (2012)(quoting Mainor v. Nault, 120 Nev. 750, 765, 101 P.3d 308, 318 (2004)); Countrywide Home Loans, Inc. v. Hoopai (In re Hoopai), 581 F.3d 1090, 1097-1098 (9th Cir. 2009). And, *per se*, the entire 2nd Degree is estopped under *Res Judicata*. The phantom instructions is what begot the mistrial. Being the very same State litigator who filed every state and federal motion, he has actual knowledge. This pattern of mischief fails the comparison test of the nonexistant theory and, furthermore, the overtry is sanctionable under Fed.R.Civ. P., Rule 11(b)(1-4), *et alibi*, because the excessive opposition is unneccesary and the prolixity is merely taken for delay. *E.g.*, January 18th, calendar call, after Mr. Lalli's junior confederate filed the Motion for the Petrocelli (evidentiary) hearings on the 6th. It was scheduled late to be heard on the 20th -- two days after the initial calendar call for trial arranged half a year ago against E.D.C.R. rules [fn. 11] . This vitiates Mr. O'Keefe's Speedy Trial (U.S.C.A. VI, XIV; N.R.S. 178.556) rights *in terrorem* through no fault of his own. The vacatur turned into another six months three times over. See comparison

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FN 11 -- For more instances of their campaign of harrassment, note that, in this flurry of pre-trial motions in the midst of trial, they altered the numbers of the misdemeanors using the police event numbers. Moreover, there was no notice given of the prior bad acts since the 3rd trial was continuation of the former for there was none in the 2nd. This jactitation gives the illusionary effect of new evidence since the previous bad acts were dismissed for basically less than a scintilla of evidence was brought forth.

of the two Petrocelli hearings, motions titled and filed as such. Notice Of Motion And Motion To Admit Evidence Of Other Crimes (filed 02/02/09)(note: all cases are misdemeanors and the cites to all cases are by Justice Court case numbers); Notice Of Motion And Motion In Limine To Admit Evidence Of Other Bad Acts Pursuant To NRS 40.045 And Evidence Of Domestic Violence Pursuant To 48.061 (filed 01/06/11, heard 01/20/11). Compare App. 15, with 16 **(same acts)**.

In and of itself, 14 months later, the Petrocelli hearings were further scare tactics lest Mr. O'Keefe testify or plead out. Furthermore, they were no longer needed as motive or intent because there's no 1st degree on the table. Character evidence was not needed as it was in the 1st Trial because it was irrelevant. Moreover, the bad acts claim was already decided on Issue 2 of the 1st FTS, so collateral estoppel applies to all unlawful batteries due to insufficient evidence. See Five Star Capital Corp. v. Ruby, 124 Nev. 1048, 1051-56, & nn. 27, 29, 194 P.3d 709, 711-14, & nn. 27, 29 (2008); United States v. Castillo-Basa, 483 F.3d 890 (9th Cir. 2007); Wilson v. Belleque, 554 F.3d 816, 830 (9th Cir. 2009)(quoting Santamaria v. Horsley, 133 F.3d 1242, 1244-45 (9th Cir. 1998)). Evincing the commission of an unlawful act to sustain malice implied with knowledge and extreme recklessness is by proving the act. Keys v. State, 766 P.2d 270, 272 (1988). See Defendant O'Keefe's Opposition To [State's] Motion To Admit Evidence Of Other Bad Acts Pursuant To NRS 48.045 And Evidence Of Domestic Violence To 48.061 (filed 01/18/11, heard 01/20/11).

When all was said and done, every bad act was thrown out except for one -- stressing that this actual act brought in the State's case-in-chief ("CIC") was in fact a misdemeanor conviction that should have been barred by N.R.S. 50.095 and F.R.E. 609(a)(1). This

misdemeanor, police event (#040402-3158), was enhanced to a felony based on being a third misdemeanor in seven (7) years, Specht v. Patterson, 386 U.S. 605, 608-610, 87 S. Ct. 1209, 18 L. Ed. 2d 326 (1967), only true felonies can be used to impeach, then, if one testifies at trial. *Cf.*, Barron v. State, 105 Nev. 767, 779, 783 P.2d 444, 451-52 (1989). It's clear and convincing that C-207835 (not C-205165) battery DV is the the very same character evidence wrongfully used in the 1st Trial. App. 14. There is no new acts and DV's cannot be used. See Order Granting, In Part, The State's Motion To Admit Evidence Of Other Bad Acts, 1:25-28. App. 17. Most importantly, Mr. O'Keefe did not testify in the 2nd and 3rd Trials.

This Upright Court denied the FTS on April 10th, 2013, *Q.E.D.*, without citing the specific alternative theory in question alluded to by the State. If the "alternate theory" was in the 1st or 2nd Amended Info., then the 3rd Trial is a nugatory proceeding because Mr. O'Keefe only pled not guilty to the original Info.. If Mr.O'Keefe would have properly been afforded the opportunity to replead, he would of pled either *Autrefois Acquit* for 1st Degree (and all the elements therein) or *Autrefois Convict* for 2nd Degree (encompassing all of the mental states equally that were later dismissed for insufficient evidence altogether in the Reveral Order). On the other hand, if the "theory" was in the original charging document which is what the SCN asserverates on their Affirmance Order (being open murder, Jeopardy would have latched equally thereto), then this is the quintessential definition of Double Jeopardy: same charge filed, same elements, same mental components, same theory (as there was and has always been one mode of commission in the complaint), and same charge of 2nd Degree. "Indeed, sometimes the members of the court issuing an unexplained order will not themselves have agreed upon its rationale, so that the basis of the decision is not merely undiscoverable but nonexistent." Ylst v. Nunnemaker, 501 U.S. 797, 803,

111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991). Instead, an out-of-Circuit case [fn. 12] was relied upon in a general context likely to remain neutral and ambivalent. "[S]ilence implies consent[.]" Ylst, *id.* at 804. There wasn't even a Blockburger elements test. *Cf.*, Jackson v. State, 291 P.3d 1274 (2012), cert. filed 12-9118 (*vide* 12-1100).

Mr. Maningo filed for Rehearing on April 26th per N.R.A.P. 40. Court appointed counsel had three (3) chances to supply the JI's and willfully disregarded doing so. They could've based their petition on N.R.A.P. 60(b) or even file a Judicial Notice as Mr. O'Keefe has done. Appellant has not recieved this Order.

To clarify, Mr. Maningo's office would have no logical reason to adduce that this Utmost Trustworth Court would not have the JI's since they're specifically enumerated in the Rules. Nevertheless, there is unique circumstances running afoul here since the D.A. erroneously hid them under a fake case number. Therefore, this Court may or may not have received them from the inferior court's clerk via a Transmission of Records and, accordingly, Mr. Lalli's intrinsic fraud falls under Rule 60(b)(3). *Cf.*, 9th Cir. R. 10-2(a, b), 10-3.2(d), 11-1.1 to 1.3, 4.4, 6.1, and 30-1(a, b); E.D.C.R. 7.40(a).

Finally, on the 13th of June, Rehearing was denied as was expected despite numerous phone calls to attach the JI's with the farce case number. This culminated into a complete irretrievable breakdown of communication with Mr. Maningo's office. Mr. O'Keefe was forced to

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FN 12 -- As opposed to say: 1) Nevada - Desai v. Eighth Judicial Dist. Court Of Nev., SCN No. 61230 (2012); Alford v. State, 111 Nev. 1409, 906 P2d 714 (1995);
2) Sister Courts - People v. Brown, 210 Cal. App. 4th 1, 11-14, 147 Cal Rptr 3d 848 (2012); and/or
3) 9th Circuit - Suniga v. Bunnell, 998 F.2d 664, 667-68 (9th Cir. 1993); Ho v. Carey, 332 F.3d 587, 591-94 (9th Cir. 2003).

Even an unpublished 9th Circuit case such as Damian v. Vaughn, 186 Fed. App'x 775 (9th Cir. 2006), would surely meet the "law of the case, res judicata or collateral estoppel" exception to S.C.R. 123 or "double jeopardy" under 9th Cir. R. 36-3(c)(ii) over an 8th Circuit case. This is accountable to the SCOTUS under their S.C.R. 14.1(g)(i).

withdraw counsel because of the substantial irreconcilable differences, but this too was denied on June 28 along with the proper person N.R.A.P. 40A Reconsideration *En Banc.* *Cf.*, E.D.C.R. 3.70 (citing E.D.C.R. 7.40 (a)("The court in its discretion may hear a party in open court...") and (b)(2)(ii)); N.R.S. 34.750 and 175.383; S.C.R. 250(3)(b); N.R.A.P. 46(b); U.S.D.C. L.R. IA 10-6(a); 9th Cir. G.O. 6.3.e, paras. 3-4 (citing 9th Cir. R. 4-1(d)), and App'x A(57)(d). Then, on July 19th, Chief Judge Pickering denied the Stay and filing of any more motions. And, on July 23rd, the case was officially closed out completely and absolutely against Mr. O'Keefe's will with counsel fully abdicating their role as advocate for the defense. Then, adding insult to injury, appointed counsel files to withdraw after Remittitur is filed with highest level of professionalism assuredly.

II. Errors Nessitating Notice

A. State.

"Prosecutorial Intransigence, a galling inability to acknowledge that initial judgment were incorrect, is the hallmark of almost every wrongful conviction case I am familiar with." Scott Turow, Lawyer and author.

On pg.13 of the State's FTR, No. 61631, issue E., concerning the failure to provide the J.I.'s by Mr. O'Keefe's appointed counsel, the state cited mistated volume numbers albeit giving the correct page numbers. Ultimately, they cite the discussion of the exact J.I.'s the trial court failed to give on the A&MH. The state cited volume 9, pgs. 1150-51 (see lines 23*ff*), when in fact it's volume 5. This is a critical misdescription because this volume contains the state's oral instruction (as opposed to the tangible instruction that was rejected) on the Judicial Interpretation of the A&MH type malice implied. App. 2. The state is giving that instruction partially however

omitting the other crucial required elements, on top of defiantly objecting to giving that instruction physically. Clearly, the shared ROA appendix was submitted and docketed with the SCN on 11/1/12 indicating CD-ROM with FTS Vols. 1-5 . See 12-34501. The state is nefariously misleading the High Court on the error in the single instruction proffered by O'Keefe (which was an accurate instruction) giving all the elements and the requisite judicial interpretation of the A&MH malice implied, mens rea. People v. Sarun Chun, 45 Cal. 4th 1172, 91 Cal. Rptr. 3d 106, 203 P.3d 425, 434 (2009). See Ho, *ibid.*; Suniga, *ibid.*; Ny Nourn, *ibid.*. The High Court was primarily concerned with the entire set for the Comparison Test to see if the elements have been in any other instruction. Collman v. State, 116 Nev. 687, 713-20, 7 P.3d 426, 443-47(2000) (On Malice); Labastida v. State, 112 Nev. 1502, 1515-32 931 P2d 1334, 1343-54 (1996) (SPRINGER, J., dissenting)(defining malice as unintentional, unpremeditated, and undeliberated) ("Labastida I"). *E.g.*, Instruction No. 14 ("Malice as applied to murder does not necessisarily import ill will toward the victim, but signifies general malignant recklessness of others' lives and safety or disregard of social duty"). This was the other instruction supporting No. 18, making them malice implied, and not felony murder, in the First Trial (**pointing out that the charge was open murder**). Without the underlying battery D.V. by stabbing [unlawful act] discussed at length in Labastida I, *ibid.*, and the absence of malice, 2nd Degree murder must be rescinded. It's Mr.O'Keefe's firm belief that, starting with Mr. Smith's master scheme to persecutor Lalli and cemented by Mr.Owens, *sic semper tyranus*, and supported by the failings of those appointed zealous guardians of the Sixth Amendment who are sworn to uphold the Constitution and defend one's rights, only in theory, predeliberated an overbreadth unlawful act as a propensity to skirt their fealty to *Stare Decisis* owed to this Righteous Court. How many

others have been or will be afflicted by this calculated and predesigned predeliction to facilitate convictions at the cost of innocent citizens?

B. Counsel.

Tersly, there are, but not limited to, the inadvertances [fn. 13] made by Mr. Maningo's office:

1) First FTS was deficient, on November 1st, 2012, and required to file an amended FTS the next day with the Certificate of Compliance (12-34493);

2a) No seperate motion for full briefing as was promised to Mr. O'Keefe in written correspondence (13-10505, pg. 4, n.1, para.2);

2b) Requested Full Briefing in issues for preservation (12-34658);

3) No oral argument requested under Luckett v State, 541 P.2d 910-11 (1975), considering that the record is vastly insufficient. Since briefing is clearly warranted, argument is a necessity under NRAP 34 (f)(3);

4) No motion for excess pages (13-10505, pg.4, n.1, para. 2);

5a) No FTR from the original trial attached spawning piecemeal litigation (12-34501, 12-38855);

5b) Appendices of exhibits are severely lacking;

6a) No J.I.'s attached to first amended brief (13-10505, pg.3);

6b) No instructions in appurtenance to Rehearing Motion (13-12312);

6c) Didn't contact clerk to order the instructions to be sent via Transmission Of Records (12-29534, 12-30817, 12-38852);

7) Filed the reply late (12-38852);

8) Margins were incorrect (13-10505, pg. 4, n.1, para. 2);

9) Played cat-and-mouse games by asking the S.C.N. if they received the proffered instruction in place of providing the total set (see denial order);

FN 13 -- This list is not meant to be all inclusive.

10) Concerning the JI's there were 2 claims of error *in corpore* at hand: first, (i) standby counsel's failure to supply the JI's as a whole (3rd Trial complete set); and (ii) aforesaid counsel used the proffered or late filing of the supplemental record as the main issue on Rehearing when the SCN explicitly stated and identified in the Affirmance Order, fifth issue, that they failed to supply the record. This aggrevated ploy was the nexus that undercut the Rehearing into a nonstarter and, ultimately, manifest constitutional error against the aggrieved Mr. O'Keefe; and

11) Counsel failed to file anything since April when Mr. O'Keefe provided this Court with a Reconsideration motion evidencing his desire to ameliorate the above deficiencies.

By multiple letters and phone calls, Mr. O'Keefe stressed the dire need to attach the highly controverted JI's. Mr. O'Keefe has letters from counsel highlighting this, including a Feb. 14th, 2013, missive emphasizing the urgent need to attach these instructions heavily. Owens even hinted to the incomplete record. See FTR,13:8-10 ("in absence of an appropiate record"), 13:15-18 ("limited record"), 14:2-4 ("failed to include them in the record"). App. 10. Aggregated altogether, these perversions of law are undeniably an abuse of discretion. Thomas v. State, 94 Nev. 605, 607-08, 584 P.2d 674, 675 (1978)(citing Good v. United States, 378 F.2d 934, 935 (9th Cir. 1967)); United States v. Gonzalez-Lopez, 548 U.S. 140, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006). Unlike the petitioner in Thomas v. Wainwright, 767 F.2d 738, 742 (11th Cir. 1985)(relying on Brown v. Craven, 424 F.2d 1166, 1169-70 (9th Cir. 1970)), Mr. O'Keefe is not recalcitrant, silent, or obstinant.

Notwithstanding that at the onset of breifing no one *sua sponte* sought these contested instructions, both state and federal counsel were unable to locate them until they were found on March 12, 2013 (six weeks prior to filing PFR) under the deliberately false case number. The State, *obiter*, points to the Comparison Test in a vain attempt to ask for the full set of J.I.'s. See FTR 13:23-26.

Mr. O'Keefe begged and pleaded standby counsel to append these instructions on rehearing because of the short window of time, so this Just Court is aware, but is *incommunicado*.

In totality, this has the net effect of helping out the State as *Amicus Curiae* rather than advocate for the defense. Jones v. Barnes, 463 U.S. 745, 758 (1983); Anders v. Cal., 386 U.S. 734, 738 (1967); Ellis v. US, 356 U.S. 674, 675 (1958); see as well, Jones, *id.* 751 (defendant possesses a constitutionally protected right to participate in the making of certian decisions which are fundamental to his or her defense). For example, Ms. Palm, *agent provacatur*, perfidiously misalleged that there's "new other bad act evidence" listed by police event numbers and did not challenge the absence of an unlawful act. Counsel also allowed the State to introduce prior acts first, in their CIC, when Mr. O'Keefe didn't even testify at the last Trial.

C. District Court.

Lastly, the entire second Petrocelli hearing was a Kangaroo Court. It was needlessly drawn out for fourteen months, Ms. Palm withdrew in the interim, N.R.S. 50.095 states that only felonies can be used for impeachment, and this Fair Court already ruled out any unlawful act. This sham proceeding ignored the order of reversal stating there was no unlawful act, *viz.*, Battery D.V. charged from N.R.S. 33.018 (1)(a) and expounded in N.R.S. 200.481 (1)(a). The alleged unlawful act "can be had for either " the murder or D.V. "..., but not both." Fairman v. State, 83 Nev. 137, 143, 425 P.2d 342, 345 (1967). However, the SCN already determined the law of the case in that Mr. O'Keefe committed no unlawful act. The district court has no authority to redetermine the law of the case.

III. Argument

The D.A.'s job is to seek justice and "prosecute with earnest and vigor," and they shall not use "improper methods calculated to produce wrongful convictions."
- Berger v. United States, 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (1935), cited in Emerson v. State, 98 Nev. 158, 164, 643 P.2d 1212, 1216 (1982).

Pertaining to the fifth issue, the written decision in the affirmance order (No.61631)

confirmed that the instruction was accurate but the complete set of J.I.'s wasn't provided to compare/contrast, App. 6, because the perjurious case number thereon was wrong and a ruse. Typographical errors such as this (*e.g.*, the coversheet for the J.I.'s, verdict form, *etc.*) cannot simply be construed as scrivener's error but instead reflect express prosecutorial misconduct [fn. 14] that spawned Double Jeopardy because their concealment is the proximate catalyst behind the Affirmance.

The first reversal, No.53859, legally acquitted Mr. O'Keefe of malice implied as precedent *sub silentio*, by the commission of any unlawful act. Trial court instructional errors are irrelevant for double jeopardy purposes - Stow v. Murashige, 389 F.3d 880, 891, HN[10][11] (9th Cir. 2004); Evans v. Mich., 133 S. Ct. 1069; 185 L Ed 2d 124,133-35(2013); Blueford v. Ark.,132 S. Ct. 2044, 2053-55 (2012)(Sotomayor, J., Dissent).

In addition, stand by counsel is asking the court if they received the instructions and pointing precisely to nowhere for the third trial J.I.'s weren't attached. *Cf.*, N.R.S. 175.161(5).

A. These Documents Have Direct Relationship.

Foremost, after direct review, the S.C.N. explicitly stated in their Order of Reversal and Remand (No. 53589) that, *inter alia*, "the evidence presented at trial did not support this theory of second degree murder." So, let's examine the elements listed and construction thereof for instructions nos. 14, 18, and 24 "where the instruction[s] 'by [them]sel[ves] so infected the entire

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FN 14 -- For further evidence of the D.A.'s sprawling, pervasive, and systemic malversions of justice in providing inaccurate case numbers , please see Apps. 1, 9, 14. D.A. Lalli's periphrasis is legion. Cortinas v. State, 124 Nev. 1013, 1025, 195 P.3d 315, 323 (2008); Ariz. v. Fulminate, 499 U.S. 279,309-10 (1991); Brecht v. Abrahamson, 507 U.S. 619, 623 (1993); Ny Nourn, *id.*at *9. This has a cumulative prejudicial effect. Byford, 116 Nev. at 241-42; DeChant v. State, 116 Nev. 918, 927, 10 P.3d 108, 113 (2000); Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007) (recognizing claims of cumulative error in federal habeas, stating that "the Supreme Court has clearly established that the combined effect of multiple trial errors may give rise to a due process violation if it renders a trial fundamentally unfair, even where each error considered individually would not require reversal" (citing Donnelly v. DeChristoforo, 416 U.S. 637, 643, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974); Chambers v. Mississippi, 410 U.S. 284, 290 n.3, 298, 302-03, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973))).

trial that the resulting conviction violates due process,'" Quigg v. Crist, 616 F.2d 1107, 1111 (9th Cir. 1980) (quoting Cupp v. Naughten, 414 U.S. 141, 147, 94 S. Ct. 396, 38 L. Ed. 2d 368 (1973)), of the first trial:

Instruction No. 14.

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

Instruction No. 18.

- "Murder of the Second Degree is murder which:
  1) An unlawful killing of a human being with malice aforethought, but without deliberation and premeditation, or
  2) Where an involuntary killing occurs in the commission of an unlawful act, the natural consequences of which are dangerous to life, which act is intentionally performed by a person who knows that his conduct endangers the life of another, even though the person has not specifically formed an intention to kill."

Instruction No. 24.

- "Involuntary manslaughter is the killing of a human being, without any intent to do so, in the commission of an unlawful act or a lawful act which probably might produce such a consequence in an unlawful manner; but where the involuntary killing occurs in the commission of and unlawful act, which, in its consequences, naturally tends to destroy the life of a human being."

The specific portion of J.I. no.18 is arranged in such a format that phrases the ending of provision one with " or " leading into provision two making this a disjunctive allegation. State v. Kirkpatrick, 94 Nev. 628, 630, 584 P.2d 670, 672 (1978). "OR" is defined at In re Mutchler, 95 B.R. 748, 756 (1989), and AGO 86-3 (1-24-1986). Note, J.I. no.18 of the first trial disjunctive (" or ") preceding a conjunctive (" where") is purely unworkable and repugnant. This is an aleatory pretext designed to hide their arbitrary and capricious prosecutorial theories. Labastida II, 115 Nev. at 306, 986 P.2d at 448.

Moreover, when the SCN said, "the evidence presented at trial did not support this theory of second degree murder," we need to specifically pay close attention to the elements incorporated. Here we have: (a) [unintentional] involuntary killing; (b) unlawful; (c) intent; (d) knowledge; and

(e) act. See Ny Nourn, *id.* at *9. This is absolutely simple malice murder, **implied**. This is not a felony murder instruction.

Here, however, the "but where," clause of the first trial J.I. no. 24 is atextual and inventive. There are two provisions to J.I. no. 18 seperated by a disjunctive term. Compare Rose's J.I. no. 17. App. 5 ("... in a unlawful manner. Where ... "," ... of a human being, or is committed in the prosecution of felonious intent, the offense is second degree murder.") (Emphasis Added), with N.R.S. 200.070, and contrast no. 24 ("... manner; but where...). The semicolon in # 24 denotes a break in the liability, but #18 is seperated only by a comma because #18 is just ONE THEORY. This is a sly attempt to frankenstein second-degree murder as involuntary manslaughter by a crafty excising of the final modifier, *i.e.*, "the offense is second-degree murder". Felony murder is tripartite. If Mr. O'Keefe is not an expert on hermeneutics, how is the jury *a fortiori* to decipher the state trials "mischief" being "employed as a formidable engine in the hands of a dominent administration[?]" Blueford, *id.* at 2060. Under sylogistic reasoning, it would have been better defined as "or in practical terms" to allow the jurors, as laymen, to easily understand a correct law of the case clearly. Labastida II, 986 P.2d at 448, 115 Nev. at 305 ("In practical application..."); *s.p.*, Ho *id.* at 598 ("Murder of the second-degree is also ..."). *Cf.*, West, 119 Nev. 410, 419-20, 75 P.3d 808, 814 (2003)("... by asphyxiation by suffocation and/or manner or means unknown.")(emphasis added *passim*). This is where the *post hoc, ergo propter hoc*, surmisement begins to fail.

Since the Affirmance Order never reached the merits on this issue and the authority relied upon was "untenable or amounts to subterfuge to avoid federal review of a constitutional violation," Oxborrow v. Eikenberry, 877 F.2d 1395, 1399 (9th Cir.1989), Aponte v. Gomez, 993 F.2d 705,

707 (9th Cir. 1993), any reviewing panel who "looks through", Ylst, *id.* at 802-05, must do so through "the last reasoned decision" which is the Reveral Order. The Eighth Circuit rationale was "unexpected and indefensible by reference to the law which had been expressed prior to the conduct at issue." Oxborrow, *ibid.* (internal quotations omitted).

If the laws are void for vagueness, then the Rule of Lenity applies. State v. Lucero, 127 Nev.___,___, 249 P.3d 1226, 1230-31 (2011). Under the state's fatalistic conjecture, in the first trial, there is supposedly two ways to satisfy the single allegation howsoever spurious they may be. In essence, First Trial Instruction #18, provision #1, is the statutory definition of the alleged crime of murder of the second-degree malice implied and provision #2 includes the mental/physical aspect of how to show and prove how provision #1 can be committed. It was the only remaining alleged "theory" for murder. [The jury acquitted O'Keefe of first-degree intentional murder.] OR, in other words, provision #1 is the lesser included offense of provision #2. The first clause is subsumed in the second with the exception of "KNOWS." N.R.S. 193.017. The first is defined statutory second, whilst the second subdivision of the instruction embodies the language of decisions interpreting the cryptic statutory requirement of an A&MH. But as the D.A. would have us believe, they must be seperate means because there is no other theory listed in the charging document. A trier of fact cannot draw an inference unless there is a factual basis therefor. Provision #1 of J.I. #18 is simply the state's statutory definition (N.R.S. 200.010, 030) whereas provision #2 is the elements of #1 with the additions of the *mens rea*. Plainly #1 is #2 with "KNOWLEDGE" superimposed. This theory, pulled out of thin air, that wasn't alleged in the charging document would make the former simple malice and the latter felony murder (the lesser). The State is acutely aware of their subornation of perjury. See 1st Trial FTR, title of

second issue split atwain by "or." App. 10. Lending credence to the this supposition, *reductio ad absurdum*, if this elusive theory was in the original charging file, jeopardy underwent rending the 5th Amendment nugatory. The D.A.'s proposition *ignoratio elenchi* is a material fallacy. "If this instruction stood alone, subdivided as it was, and was not supported by other instructions in forming the jury as to the element of intent to inflict grievous bodily harm, there would be much merit to the criticism made." State v. Ternan, 203 P.2d 342, 345 (1949). If Mr. O'Keefe was convicted of felony murder, his first JOC would reflect N.R.S. 200.070 and possibly the actual felony alluded to.

When the reversal announced that the evidence didn't support provision #2 of J.I.#18, (53859), that *a priori* constructively meant Mr. O'Keefe was found not guilty of provision #1 thereof -- Fogliani v. Carter, 79 Nev 146, 150, 379 P.2d 945, 947 (1963). The ruling was an affirmative pregnant to any other on 2nd Degree.

Since jeopardy appended onward heretofore because they are equal culpability per K-Mart v. Washington, 109 Nev. 1180, 866 P.2d 274 (1993); Schad v. Arizona, 501 U.S. 624, 629, 640, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991); West, *ibid.*; Morse, 234 P.2d 478, 480 (1951); Wilson, *id.* at 820, if the evidence would have supported provision #1, the SCN would not have reversed provision #2 under the Alternate Means Doctrine. **IN OTHER WORDS**, if the evidence presented at trial would have supported provision #1, of J.I. #18, on direct review of # 53859, the SCN would have been barred from reversing the case. Proceeding onward subsequent heedlessly would have been an express abuse of discretion which is exactly what the State did. Hence, the genesis of Double Jeopardy was born. The mode of commission does not matter per the Sullivan Rule. See Schad, *id.* at 649-50(Scalia, J., concurring in part and

concurring in the judgment)(citing People v Sullivan, 173 N.Y. 122, 65 N.E. 989 (1903)). **MUST SEE App 10, State's FTR, page 6** (quoting Scott, *ibid.*, in turn quoting U.S. v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977)(a reversal "actually represents a resolution in the defendant's favor, correct or not")). If the culpability was the means behind the mysterious "theory," then Jeopardy adhered to all the elements at the First Trial in the First Amended Information by use of an "and" conjoining them. See Hern v. State, 97 Nev. 529, 531, 635 P.2d 278, 279 (1981)(citing N.R.S. 200.030 and State v. Wong Fun, 22 Nev. 336, 40 P. 95 (1895)). "Where the accused cannot be convicted of both crimes, both convictions are reversible when the reviewing court cannot ascertain what verdict would have been returned by a properly instructed jury. Milanovich v. United States, 365 U.S. [551,] at 551 [(1961)]; Heflin v. United States, 358 U.S. [415,] at 415 [(1958)]; Shepp v. State, 87 Nev. [179,] at 179, 484 P.2d [563,] at 563 [(1971)]." Point v. State, 102 Nev. 143, 147, 717 P.2d 38, 41 (1986), disapproved of on other grounds by Stowe v. State, 109 Nev. 743, 746-47, 857 P.2d 15, 17 (1993). "These statutes are harmonious." Labastida I, 112 Nev. at 1510, 931 P.2d at 1339-40.

Mr. O'Keefe has a "right not to be haled into court at all upon the felony charge. The very initiation of proceedings against him...thus operated to deny him due process of law," Blackledge v. Perry, 417 U.S. 21, 30-31(1974), once he was legally acquitted of the alleged D.V. stabbing; the crux of the charge. Without the lynchpin, these misdeeds amount to vindictive prosecution. Mr. O'Keefe has thrice repeated jeopardy of the first provision of J.I. #18 since the first trial. This being established, the law of the case applies where the facts of the case remains the same. The state's *mentition* is not justiciable, but instead these issues are firm, fit, and ripe for review. Now Mr. O'Keefe must reargue these red herrings. The first trial

represented the state's best case. If the evidence didn't support the unlawful act at the first trial, it *a fortiori* cannot support the case now because the definitions of malice and battery both include "willful," which Nevada defines in criminal proceedings as an "intentional, unlawful, act" under the common understanding rule per Ternan, *supra.* Accord, United States v. Murdock, 290 U.S. 389, 394-95, 78 L. Ed. 381, 54 S. Ct. 223 (1933). How can the deadly weapon enhancement even endure direct review *a posteriori* when it wasn't accurately tendered to the jury? Compare App.1, 1st Trial, Instruction #3 ("...with use of a deadly weapon") (capitalization removed)(citing N.R.S. 193.165), with 3rd Trial, Instruction #3 ("...committed Murder of the Second Degree on or about..."); *contra* App. 18, 3rd Trial JOC, pg. 1, ("...with the use of a deadly weapon")(capitalization removed)(citing N.R.S. 193.165). This is a legal fiction and a factual impossibility; standing by itself, this warrents reversal. How can Mr. O'Keefe possibly serve eight (8) to twenty (20) years for a deadly weapon when it facially wasn't properly instructed and was reversed prior to?

If there is no battery by stabbing, how can the unlawful killing withstand scrutiny?! If the felonious act is, *arguendo*, lawful, it must be instructed as involuntary manslaughter, Suniga, *id.* at 666, and not judicially re-written as Second-Degree. Initial jeopardy has, then, been against Mr. O'Keefe three times with the last two trials missing the mental component (under a misstated case number) for the State used DA-made-law and juxtaposition of the theories. Thompson v. Calderon, 120 F.3d 1045, 1056-1057. This severance, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 183 L. Ed. 2d 450, 545 (2012)(quoting Grenada County Supervisors v. Brogden, 112 U.S. 261, 269, 5 S. Ct. 125, 28 L. Ed. 704 (1884))(joint dissent), N.R.S. 0.020, frustrates the criminal justice system, obfuscates the statutory intent, and defeats the purpose in enforcing crime and punishment. Instruction #18 impermissably creates two theories out of one crime and instruction

#24 malevolently merges two types of murder into one. This is more than disingenuous.

The State is speciously proposing Second-Degree with the use of a knife by severing the felony portion because evidence of the unlawful act of stabbing was *de minimis*. This type of cannibalization judically re-writes the law. To prove and sustain the conviction the state must prove, beyond a reasonable doubt, the unlawful act, Keys, *ibid.*, but if the self defense invalidates malice the act cannot stand. Kelso v. State, 95 Nev. 37, 588 P.2d 1035 (1979); State v. Vaughan, 22 Nev. 285, 39 P.733 (1895). Homicide by means of battery D.V. (alleged act) is infirm. All-in-all, it tends to effectuate selective prosecution and produces an unconsionable result. The U.S. Amendment **V** doesn't bar triple jeopardy because double jeopardy shant happen in the first instance. The Honorable SCN must ask themeselves if double jeopady has not been violated, then the D.A.'s crafty and illogical prevarication would have to equate to this statement and be factual: "simply Mr. O'Keefe is still undergoing initial Jeopardy from his First Trial which attached at the swearing in of the first jury panel on March 16th, 2009, in the wrongful case number C2500360." That is ludicrous. See Thompson, *id.* at 1057-58.

B. The Accuracy Of These Documents Cannot Reasonably Be Questioned.

Mr. O'Keefe's topmost desire is not to complain about, but to remedy the lacking law of the case, being the aforementioned JI's. These instructions are imperative to all parties involved: The defendant, State, Jurors, the SCN, the public, *inter alios*.

The excusable neglect now becomes inexcusable.

This Honorable Court is squarely aware that the lacking record of the complete set of JI's could cause a manifest injustice, extreme and unnecessary judicial hearings on post-conviction writs with much wasted judicial resources and docket time spent.

Therefore, Appellant's argument is that these documents are *prima facia* already as a part of the record, without question. Adamantly, Mr. O'Keefe wishes to submit, having recognized this urgent portion of the record. Must appellant suffer actions of his court-appointed counsel who themselves are overworked? Again, Mr. O'Keefe should not be held to harm for the piecemealing of the record that this Court should already have by the clerks. Furthermore, it's rather questionable that Mr. Owens did not adhere the JI's to refute the Appellant's grounds.

The SCN is faulting O'Keefe for an act that he had no control over, "again." Court appointed counsel had the primary function to file the entire record for the appeal and was consciously indifferent. Woods v. State, SCN No. 57481 (2013). As such Mr. O'Keefe at H.D.S.P. is forced to forward these instructions to comport with Due Dilligence. The judicious comedy here is that counsel has had almost a year to find, prepare, and file these instructions and failed. On the other hand, Mr. O'Keefe was able to do so in a matter of weeks. With the J.I.'s in this addendum, the *onus probandi* is back in Owens' hands. A lie can make it halfway around the world before the truth can get its boots on. Mark Twain. But for the states dilatory and illusory subterfuge the issue -- Already Decided -- would not be inveigled to the point to which it stands today. It's all smoke and mirrors.

IV. Conclusion

ENOUGH IS ENOUGH. THREE STRIKES AND YOU'RE OUT!

To paraphrase, "an acquittal precludes retrial even if it is premised upon an erroneous decision to exclude evidence, [...]: a mistaken understanding of what evidence would suffice to sustain a conviction, [...]: or a 'misconstruction of the statute' defining the requirements to convict, [...]." Evans, 185 L. Ed. 2d at 134 (citation omitted).

In summary, Mr. O'Keefe again -- with much emphasis -- is only providing the governments law of the case as was settled over O'Keefe's objections. There are many reasons defendant feels, in all honesty, why these instructions were not submitted in the first instance: counsel committing numerous, flagrant infractions and playing a scam with the S.C.N. by asking if they received the single J.I. in place of the long sought after full set plus all the State's monkey business. Conspiritorial *vel non*, the J.I.'s were not filed and this is a major due process violation and it's just judically unsound and morally wrong.

Mr. O'Keefe only prays that the Honorable Court will be **JURIST OF REASON**, playing fair under their jurisdiction, and file this notice accepting the law of the case, *scil.*, the third trial's J.I.'s that were ironically filed under the incorrect case number. Haberstroh, *ibid.* (law of the case).

Moreover, Mr. O'Keefe is only providing a copy of this notice to the clerk because it appears that every party already has a copy of these instructions, save for this Honorable Reviewing Court. We must not forget that the fundamental purpose of a trial is discovery of the truth! **People v. Perry**, 460 Mich. 55, 595 N.W. 2d. 477 (1977) (Brickley, J. Dissenting).

V. Coda

"Take no part in the fruitless works of darkness; rather expose them, for it is shameful even to mention the things done by them in secret; but everything exposed by the light becomes visible, for everything that becomes visible is light."
- Ephesians 5:11-14 (New American Bible).

"Counsel often encourages judges to do the wrong thing. In fact, in every case, there is one of the two counsel urging the court to do the wrong thing, right?" - Scalia, J., on Evans, *ibid.*.

Janus-faced Owens and his *particeps criminis* Lalli have shown their true colors.

A wise scholar of Rome was once asked, "how many sides of a story are there?" The young student retorted, "two," but the wise man pontificated, "No, there are three sides: yours, theirs and somewhere in the middle -- the truth adjudicated." or to-wit:

1) (Yours) ours - FTS;

2) Theirs - FTR's; and

3) The Truth - # 53859 Reversal order under *res judicata*; Honor *Stare Decisis* -- The Law of the Case.

In Lalli's and Owen's mischiveous wisdom, like the pompus Senators of Rome, there would be four or more sides. Inconsistantly the state identified simple malice on # 53859, then conversly re-stated in # 61631 as second degree felony murder. They were trying to pull the wool over this Honorable Court's eyes.

Well, here's the the stark truth: **App.18** word-for-word, line-for-line, these two JOC's are absolutely identical, except for the date filed. To be sure, when the first conviction has been reversed and the matter remanded, the slate has been wiped clean, *tabula rasa*, but the government is only free to prosecute the defendant on **a different statutory violation** - U.S. v. Poll, 538 F.2d 845, 847 (9th Cir. 1976). What is really going on here?...who's on first base?

The improvidently granted Affirmance Order did not factor in the bamboozeling by court appointed counsel nor the State's hoodwinking. The D.A. pulled the ol' bait and switch by fudging the J.I. case numbers, *inter multo alia.* Tactics, antics, and misguidings like this caused even Rome to fall. Everybody else has failed Mr. O'Keefe. Can this Court of Last Resort please take notice of this filing before a grave injustice finalizes?

Is justice so blind that it's causing prosecutorial intransigence? Or can we take cognizance

of the widespread piecemealing and compartmentalizationism? See Sanders v. United States, 373 U.S. 1, 18, 83 S. Ct. 1068, 10 L. Ed. 2d 148 (1963). For this Courts edification, Mr. O'Keefe hereafter presents all the necessary and proper judicial documents, *N.B.*, the entire set of J.I.'s, both of the FTR's, Petrocelli motions, and both the accusatory charging documents, not piecemealed.

In sigining off, a quick thought emphasizing **"JEOPARDY"** [the event of actual 'physical trials'].

Only the state would be foolish and obtuse enough to argue that in this instant case, correctly identified as C250630, that Mr. O'Keefe is still proceeding under the original jeopardy that attached upon the swearing in of the first jury that was sworn and empaneled on March 16, 2009, (SCN # 53859), following then with two subsequent trials on the same statutory offense rehashing the exact evidence (?). Crist v. Bretz, 437 U.S. 28, 38, 57 L. Ed. 2d 24, 98 S. Ct. 2156 (1978); United States v. Williams, 717 F.2d 473, 475 (9th Cir. 1983). Has everyone failed to recognize that the original ORDER OF REVERSAL AND REMAND became final when the state correctly did and could not appeal during the 30 day discretionary period, then with former jeopardy ending on the statutory offense of murder of the second degree being the **same offense** that seems to have jeopardy, *ad infinitum*?

Alternatively phrased, "and have no fellowship with the unfruitful works of darkness, but rather reprove them. For it is a shame even to speak of those things which are done of them in secret. But all things that are reproved are made manifest by the light: for whatsoever doth make manifest is light.
- Ibid. *(King James ed.).*

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VI. Prayer For Relief

"I adhere to my view that the Double Jeopardy Clause requires that except in extremely limited circumstances not present here, 'all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction' be prosecuted in one proceeding. Ashe v Swenson, 397 US 436, 457-458, 25 L Ed 2d 469, 90 S Ct 1189 (1970) (Brennan, J., concurring)." Morris v. Mathews, *475 U.S. 237, 246-47, 89 L. Ed. 2d 187, 106 S. Ct. 1032 (1986)(Brennan, J., dissenting)(collecting cases).*

Wherefore, all premises considered, Mr.O'Keefe respectfully prays that this most Honorable of Honorable Courts take the attached JI's annexed hereof under Judicial Cognizance in the final decision to reconsider *En Banc* the Fast Track Direct Appeal and subsequent denial of rehearing thereto and issue an *Additur* for the ends of Justice and basic tenets of fundamental fairness.

VII. Certificate Of Service By Mailing S.C.N. No. 69036

I, Brian Kerry O'Keefe, hereby certify, pursuant to N.R.C.P. 5(b), that I am the Appellant, and that on this 18th day of August, 2016, I mailed [fn. 15] a true and correct copy of the foregoing "**Judicial Notice**" by giving it to a prison official [fn. 16] at the LOVELOCK ~~H.D.S.P.~~ law library to deposit in the U.S. Mail, sealed in a manilla envelope, legal mail, postage fully prepaid through the use of a brass slip, and addressed as follows: ~~Brass~~ Slip No. 959436.

Supreme Court Of Nevada
Office Of The Clerk
201 S. Carson St., Ste. 201
Carson City, NV. 89701

FN 15 -- Invoking the Mailbox Rule. Robles v. Scillia, 2011 U.S. Dist. LEXIS 67642, *2 (D. Nev. 2011); Campbell v. Henry, 614 F.3d 1056, 1058-59 (9th Cir. 2010); Douglas v. Noelle, 567 F.3d 1103, 1107 (9th Cir. 2009)("All of the rationales articulated by the Supreme Court in Houston [v. Lack, 487 U.S. 266, 276, 108 S. Ct. 2379, 101 L. Ed. 2d 245 (1988)] for applying the mailbox rule to prisoners' notices of appeal apply equally, if not more strongly, to § 1983 complaints."); see also Davis v. Woodford, 446 F.3d 957, 960 (9th Cir. 2006); Jones v. Blanas, 393 F.3d 918, 926 (9th Cir. 2004); Faile v. Upjohn Co., 988 F.2d 985, 988 (9th Cir. 1993).

FN 16 -- Per Caldwell v. Amend, 30 F.3d 1199 (9th Cir. 1994).

Participants in the case who are registered users of the Electronic Service and/or CM/ECF will be served by the clerk using that respective system:

- Joseph T. Bonaventure, J., 8th Jud. Dist. Ct. of Nev.;
- Amanda Gregory, Esq., of Bellon & Maningo, LTD:
- Christopher Lalli, Chief D.A.:
- James Mahan, J., U.S. Dist. Ct., D. of Nev.;
- ~~Catherine Cortez Masto~~, A.G. of Nev.; ADAM PAUL LAXALT, A.G. of Nev.
- Ryan Norwood, A.F.P.D.;
- Steven S. Owens, Chief D.D.A.;
- Patricia A. Palm, Esq.; and
- Michael Villani, J., 8th Jud. Dist. Ct. of Nev..

It was probably P.T. Barnum who once said, "you can fool most of the people most of the time, but not all the people all the time".

S.C.N. No. 69036

Cordially Submitted,

Brian K O'K

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