

# IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN KERRY O'KEEFE,  
Appellant(s),

vs.

THE STATE OF NEVADA,  
Respondent(s),

Electronically Filed  
Dec 05 2022 02:53 PM  
Elizabeth A. Brown  
Clerk of Supreme Court

Case No: A-20-820374-W  
*Related Case 08C250630*  
Docket No: 85610

## RECORD ON APPEAL

**ATTORNEY FOR APPELLANT**

BRIAN O'KEEFE #90244,  
PROPER PERSON  
1200 PRISON RD.  
LOVELOCK, NV 89419

**ATTORNEY FOR RESPONDENT**

STEVEN B. WOLFSON,  
DISTRICT ATTORNEY  
200 LEWIS AVE.  
LAS VEGAS, NV 89155-2212

A-20-820374-W    Brian O'Keefe, Plaintiff(s) vs. Nevada State of, Defendant(s)

**I N D E X**

**VOLUME:**        **PAGE NUMBER:**

1                    1 - 133

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER:</u>
1	8/28/2020	Application to Proceed in Forma Pauperis (Confidential)	52 - 53
1	8/28/2020	Certificate of Inmate's Institutional Account (Confidential)	54 - 54
1	12/5/2022	Certification of Copy and Transmittal of Record	
1	12/5/2022	District Court Minutes	132 - 133
1	8/28/2020	Ex Parte - Motion for Appointment of Counsel - (Covid-19)	49 - 51
1	12/30/2020	Memorandum of Points and Authorities in Support of Petition Where this Court Must Recognize Law of First Appeal Where State Made Judicial Admission of Self Defense Claim and Failed the Burden of Proof by Res Judicata	97 - 108
1	1/7/2021	Motion for Leave of Court for Supplemental Point with Authorities Supporting Petition Where True Purpose of Remand was Reexamination Where Failure of Proof on a Theory That Holds Equal Culpability to Any Remaining Theory by Due Process *(See Attached Exhibit 1 and Affidavit.)	109 - 119
1	9/23/2020	Motion to Compel and for Clarification Requesting Court to Issue Order for Clerk of Court to File as Complaint and Serve to All Appropriate Parties; Hearing Requested	57 - 61
1	9/23/2020	Notice of Hearing	62 - 62
1	12/8/2020	Notice of Hearing	73 - 73
1	12/8/2020	Notice of Hearing	93 - 93
1	12/8/2020	Notice of Motion	63 - 64

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER:</u>
1	12/8/2020	Notice of Motion and Plaintiff's Motion Requesting Plaintiff to be Advised of This Court's Decision of Hearing Held October 27, 2020 at 8:30 AM; Hearing Requested	65 - 72
1	12/12/2020	Order	94 - 96
1	8/28/2020	Petition to Establish Factual Innocence Based on New Evidence Supporting Claim of Factual Innocence Where Attorney General's Judicial Admission Means Intended Felony Devoid Resulting in Actual Innocence of Implied Malice; In the Matter of Case No. C250630 - NRS 34.960(9); Hearing Requested	1 - 48
1	12/8/2020	Plaintiff's Motion for Declaratory Judgment Pertaining to Rights Affected by NRS 174.085 Subsequent Order of Reversal and Remand as Law of Case and Another Information Charging Included Offense (*See A.] NRS 30.040, Two Questions at 4-5.); Hearing Requested	74 - 92
1	1/11/2021	Unfiled Document(s) - Default Department Memo w/Copy of Unfiled Motion for Leave of Court for Supplemental Point with Authorities Supporting Petition Where True Purpose of Remand was Reexamination Where Failure of Proof on a Theory that Holds Equal Culpability to Any Remaining Theory by Due Process *(See Attached Exhibit 1 and Affidavit.) (Vexatious Notice Fwd to DC17 re: 12-08-2020 Submission)	120 - 131
1	8/28/2020	Unfiled Document(s) - Order Appointing Counsel (Forwarded to Department for Review)	56 - 56

A-20-820374-W

Brian O'Keefe, Plaintiff(s)

vs.

Nevada State of, Defendant(s)

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER:</u>
1	8/28/2020	Unsigned Document(s) - Order to Proceed in Forma Pauperis (Forwarded to Department for Review) (Confidential)	55 - 55

PP  
DA

Electronically Filed  
08/28/2020

*Heather S. Sturges*  
CLERK OF THE COURT

PETN - (NRS 34.960)  
Brian Kerry O'Keefe # 90244  
Lovelock Correctional Center  
1200 Prison Road  
Lovelock, Nevada 89419

Plaintiff/Petitioner In Pro Se

Brian K. O'Keefe dated 7/25/2020,  
pursuant to NRS 208.165.

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

\* \* \* \* \*

BRIAN KERRY O'KEEFE , )  
Plaintiff , )  
-vs- , )  
THE STATE OF NEVADA , )  
Defendants . )

Case No. A-20-820324-W

Dept. No. \_\_\_\_\_

HEARING REQUESTED

PETITION TO ESTABLISH FACTUAL INNOCENCE  
BASED ON NEW EVIDENCE SUPPORTING CLAIM OF  
FACTUAL INNOCENCE WHERE ATTORNEY GENERAL'S  
JUDICIAL ADMISSION MEANS INTENDED FELONY DEVOID  
RESULTING IN ACTUAL INNOCENCE OF IMPLIED MALICE

IN THE MATTER OF CASE NO. C250630 - NRS 34.960 (9)

[SUBSTANTIVE RIGHTS] - New law provides protected liberty interest, procedural rights.  
I. JURISDICTION Pursuant new law promulgated July 1, 2019 (NRS 34.960 et seq.)  
(see EXHIBIT 1) by the Nevada Legislature, Plaintiff O'Keefe becomes eligible,  
pursuant NRS 34.960 (5), by presentation of new and different prima facie  
evidence<sup>1</sup> to establish his claim of factual innocence where as a true  
matter of law, the judicial admissions by the Attorney General, District  
Attorney and Court ultimately amount to factual innocence. Based on  
deprivation and lack of enforcement of Due Process of Law and Federal  
Rights, Plaintiff suffers from manifest injustice "caused" by external  
forces. Moreover, a miscarriage of justice exists warranting a hearing.

FN 1 SEE AFFIDAVIT; NRS 34.960 2(a)(b); NRS 34.950 (CLAIM SEPARATE FROM A HABEAS CLAIM)  
INVOKE CASTRO v. UNITED STATES, 540 U.S. 375, 377 (2003) citing *Haines v. Kerner*, 404 U.S. 59 (1972)

LCC LL FORM 24.014  
RECEIVED  
JUL 30 2020  
CLERK OF THE COURT

AFFIDAVIT OF Brian Kerry O'Keefe #90244STATE OF NEVADA )  
 ) SS:  
COUNTY OF PERSHING )PETITION TO ESTABLISH FACTUAL INNOCENCE  
IN THE MATTER OF CRIMINAL CASE NO. 08CZ50630

I, Brian O'Keefe, the undersigned, do hereby swear that all the following statements are true and correct, to the best of my own knowledge and of my own volition.

1. My name is Brian O'Keefe,

2. I am over 18 years of age, I reside at Lovelock Correctional Center, 1200 Prison Road, Lovelock, Nevada 89419. I am fully competent to make this affidavit and I have personal knowledge of the facts stated herein.

3. I aver that I committed no unlawful act in any manner and that I am factually innocent of second degree murder WDW. (see NRS 34.960(2))

4. I aver that newly discovered and newly presented credible documents attached as EXHIBITS 2, 5, 6, 7, 8 and 11 become material and establish true factual innocence that the conviction is devoid of an intentional unlawful act (actus reus) and mens rea for implied malice. (see NRS 34.960(2)(a)(i))

5. I aver exhibits 1, 2, 5, 6, 7 and 8 are new evidence. (see NRS 34.960(3)(a))

6. I aver the State's conduct in the three trials was based on duplicity where despite any theory of implied malice the fact remains that either theory requires the same physical component unfounded by res judicata.

I declare under penalty of perjury that the foregoing is true and correct, and that this document is executed without benefit of a notary pursuant to NRS 208.165 and/or 28 U.S.C.A § 1746 as I am a prisoner to state custody.

Dated this Monday 27<sup>th</sup> day of July, 2020

7. I verify said petition and constructed: Brian K. O'Keefe  
Brian K. O'Keefe

II. OVERVIEW (CLAIM OF FACTUAL INNOCENCE, NRS 34.950 (LACK OF ACTUS REUS))

• (Actual innocence means factual innocence, not mere legal insufficiency.)

O'Keefe claims he is actually innocent (see NRS 34.960(2)) and presents new documents combined with the "judicial admissions" manifesting and supporting O'Keefe committed no intentional felony resulting in death as a natural consequence, as a matter of law determined by facts.

• see Mitchell vs. NEVADA, 122 Nev. 1269, 1274 (2006) citing Bousky v. U.S., 523 U.S. 614 (1998)

Therefore, plaintiff hereby requests this court to take proper notice of all supplied documents (see NRS 47.150(2)) involving matters of law (NRS 47.140(2)) and matters of fact (NRS 47.130(1)) derived from "judicial admissions."

• (STATE'S OPENING, CASE-IN-CHIEF, CLOSING ARGUMENT; MOTION TO SET ASIDE RECORD)

Plaintiff satisfies the requirements of the new law becoming eligible where in the first instance this court must take all allegations as truthful warranting a response and hearing. (NRS 34.970(1))

• see Bell Atlantic v. Twombly, 550 U.S. 544, 570 (2007); Nev. R. Civ. P. 8(2)

Additionally, this becomes a matter of law where without the actus reus, the physical component unfounded, without a hearing, cannot be established where O'Keefe would be entitled to relief by law.

This results in the mens rea being devoid, as a matter of law.

The problem exists where O'Keefe's procedural and substantive due process, too include equal protection of law, are not enforced upon the state by the U.S. 14 Constitutional Amendment; the State continues this manifest injustice by semantics and procedural-duplicity!

Therefore, "SCOTUS" in 1914 properly defined DUE PROCESS as - "The fundamental requisite of due process of law is the opportunity to be heard."

• see NRS 34.960; • see also Wolff v. McDonnell, 418 U.S. 539, 558 (1974)

FN 2 A formal waiver of proof that relieves an opposing party from having to prove the admitted fact and bars the party who made the admission from disputing it.



III. STATEMENT OF FACTS - NRE 47.130(1) - RELEVANT TO CLAIM

1. O'Keefe charged via "SHORT FORM" OPEN MALICE MURDER W.D.W. INFORMATION.

• see EXHIBIT (hereinafter "EXH") 2 (6-1-2018 ANSWER BY A.G. see pg. 1, lines 22-28)

• see EXH 3 (BATTERY/DOMESTIC VIOLENCE: ADMONISHMENT OF RIGHTS INTENTIONAL UNLAWFUL - "STABBING" ACT WHICH ESTABLISHES CRIMINAL CULPABILITY, CONDUCT CONTRARY TO LAW)

• NOTE - RELEVANT PROCEDURAL HISTORY BY A.G.; id at EXH 2, lines 22-28.

2. First trial - judicial estoppel to apply. State's OPENING. ("... stabbed Victoria and she died. ... death was unlawful... death in this case was nothing less than an intentional act COMMITTED... and "... burden of proving beyond a reasonable doubt that this was an intentional act.") (Monday March 16, 2009)

INCORPORATE HERE BY REFERENCE RDT filed July 10, 2009 Case No. C250630 Dep. 17

• see EXH 9 (RDT page 171, lines 2-25) (ROA page 00063)

3. First trial Closing Argument by State, (FRIDAY March 20, 2009).

"Where the involuntary killing occurs in the commission of an unlawful act which in its consequences naturally tends to destroy the life of a human being the offense is murder."

"The act of stabbing Victoria was willful."

"And there was definitely malice aforethought, either express, definitely implied."

"That's certainly circumstantial evidence of a battery or something that precipitated a stabbing."

"The law says you determine a person's intent at the moment they commit the act." • see EXH 10 (RDT, ROA pgs. 298, 299, 308, 309)

4. Defendant's Motion to SETLE RECORD, April 7, 2009, heard 18 days subsequent jury guilty verdict of second-degree murder. Setting the record for first direct appeal. (LAW OF OASE, STARE DECISIS)

• see EXH 4 (RDT at page 5, line 22) ("too drunk to form the intent.")

Court concurred with state.

5. LAS VEGAS SUN, prints and publisher, as evidence, that the conviction was overturned by the Nevada Supreme Court and the state failed to factually prove second degree murder.  
• see EXH 11 (April 13 2010, By Cy Ryan Las Vegas Sun Article)

6. Ninth Circuit decides appeal of Charles Jennings v. Nevada. (MARCH 7, 2013 FILED) (Court may properly designate felony murder and malice murder as alternatives to satisfy mental element of a single offense). • see SCHAD v. ARIZONA, 501 U.S. 624, 644 (1991)  
• see EXH 5 (AUTHORITY OF JENNINGS) (FILED MARCH 7, 2013)  
• (Theories of malice murder and felony murder are equivalent.)

7. O'Keefe's court appointed habeas counsel manifests no new evidence was presented in all (3) trials. Rehashed with bested opped argument. • see EXH 6 (April 22, 2015) (Matthew Carlin, PC)

8. O'Keefe discovers new research that Murder in the Second Degree is by a felony, i.e. BATTERY, ASSAULT.  
• see EXH 7 (ARTICLE OF CRIMINAL HOMICIDE JULY 2020)

9. CRIMINAL LEGAL NEWS explains that for second degree felony murder, you have to intend the felony and then death be the result - without necessarily having it be the intent.  
• see EXH 8 (JULY 2020 - CRIMINAL LEGAL NEWS - PG 4)

10. Nevada Attorney General, as Chief Executive law officer for State in its entirety makes judicial admission O'Keefe was acquitted of second degree felony murder alternative theory, never req.  
• see EXH 2 (ANSWER filed 6/1/2018)

#### IV. POINTS AND AUTHORITIES (AS A MATTER OF LAW)

Once the "judicial admission" was made by the chief officer (Attorney General) that, as a factual matter, the state failed to prove the intentional act of stabbing, actual innocence is made manifest as a matter of law. • see EXH 2 ("... did not support this theory...")

• see Mitchell v. Nevada, 122 Nev 1274, id. (2006) citing "Bousley", "Sawyer"

Here, jury instruction 18 (MURDER OF THE SECOND DEGREE IS: ) ("VERBATIM")

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 intent to kill.

In Nevada, second-degree murder is a general intent crime where the focus is based on the intent to commit the act of stabbing charged separately as a noticed battery act attaching criminal culpability ultimately resulting in the death, the non-target crime.

• see EXH. 3 (Battery - "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, ...")

• see EXH. 7 (SECOND DEGREE MURDER - HOMICIDE BY BATTERY)

• see EXH. 8 (CRIMINAL LEGAL NEWS JULY 2020 - FOR SECOND DEGREE FELONY MURDER, YOU HAVE TO INTEND THE FELONY AND THEN DEATH BE THE RESULT - WITHOUT NECESSARILY HAVING IT BE THE INTENT.)

The state argued in closing argument that as a matter of law: -  
"the law says you determine a person's intent at the moment they commit the act." • see EXH 10 (Ruf p. 000309, id at p. 118)

To "prove" implied malice in Nevada, the state needs to prove only the commission of wrongful acts from which the archaic but essential abandoned and malignant heart can be inferred in law.

• see Leys v. STATE OF NEVADA, 104 Nev. 736, 766 P.2d 210 (1988)

Moreover, the prosecutor argued also that the jury instruction 18(2) was a correct statement of the law in Nevada and was specifically the factors defining implied malice for depraved heart murder.

Common law of Labastida v. Nevada, 112 Nev. 1502 (1996) recognizes that unlawful acts as in commission of unlawful acts is harmonious with abandoned and malignant heart language of NRS 200.020(2).

To prove and sustain a implied malice mens rea the state was required to prove the intentional act as the physical component.

Additionally with emphasis, regardless of which theory of implied malice, which encompasses unintentional deaths,

both theories of mens rea embody the same physical component, actus reus.<sup>3</sup> For the stabbing to occur as a battery, criminal culpability therefore attaches.

Pursuant common law of Jennings, supra (see EXH 5) and pursuant the federal rights bestowed by SCHAD v. ARIZONA, supra, equal culpability attaches to both alternative theories for the single crime of second degree murder.

Both theories hold equal culpability and Blameworthiness by law.

FN 3 People v. Chun, 203 P.3d 425, 430 (Cal. 2009) (Physical component remains same in theories)

The "Sullivan rule" applies to alternative theories of implied malice that amount or result in the single crime of second-degree murder, by Due Process enforceable by the 14<sup>th</sup> U.S. Const. Amendment.

- see Marquez v. Gunn, 1994 U.S. App. LEXIS 16085 (9<sup>th</sup> Cir. 1994) citing State of Utah v. Russell, 733 P.2d 162, 167-68 (Utah 1997) (pre-SCHAD decision)
- SCHAD v. ARIZONA, 501 U.S. 624 (1991); see also Jonings, supra (EXH. 5)

Plaintiff's entire error results in his Equal Protection of the Law, with procedural and substantive due process of law not being respected and enforced. • see Fundamental Fairness Doctrine, 5<sup>th</sup>, 14<sup>th</sup> Amendments. (see also Nev. Const., Articles I § 8(5) and 4 § 21) If the result of the reversal, in the first instance, was based on the dispositive fact that the State failed to prove all the elements of the charged offense of the single crime of second-degree murder, then — as a matter of law, the State failed to prove not only the actus reus but abandoned and malignant heart pursuant to NRS 200.020(2), where the element of one who "KNOWS" his "conduct" endangers the life of another is also debited.

The State failed to prove the natural consequences doctrine by failing to prove the unlawful direct act that would have resulted only in the single crime of depraved heart murder — second degree.

- see EXH 8 (CRIMINAL LEGAL NEWS).

- see Kelsey v. Nevada, 2014 Nev. Unpub. LEXIS 343 (Filed 2/27/2014) (consequences of his act naturally tended to take human life.) citing Anderson v. State, 121 Nev. 511, 515 (2005) citing "SCHAD", "EVANS".

The State has failed to prove the mens rea by failing to prove the actus reus.

## LEGAL ARGUMENT TO CLAIM (NRS 24.950)

Pursuant Nev. R. Civ. P. 8(c), the affirmative defense of res judicata would apply where simply, implied malice (NRS 200.020(2)) was determined unfounded as a matter of law.<sup>4</sup>

However, the State utilized "duplicity" by proceeding on a Second-Amended Information ultimately based on the language of only malice-aforethought which does not even approximate its literal meaning.

• see GRAHAM v. NEVADA, 116 Nev. 23, 992 P.2d 255, 257 (2000);

Collman v. Nevada, 116 Nev. 687, 713 (2000)

Plaintiff O'Keefe contends by law that "this theory", that the Nevada Supreme Court stated was unfounded, pursuant to SONIA v. ARIZONA, supra holds equal culpability and blameworthiness to any possible malice theory. The two mens rea are completely harmonious. Both mens rea still require the same actus reus to boot.

Additionally, when invoking NRS 174.085(2), the sufficiency of evidence review by the "Jackson Standard" applied by the Nevada Supreme Court on first direct appeal on issues 1 and 2, resulted in an acquittal on the merits where despite any defect in the form or substance of the information in which the trial was had would be irrelevant.

The State's case was based on the unlawful act, charged and noticed as the battery act where criminal culpability would attach by proving the target crime that would then result in death,

FN 4 Jackson v. Virginia, 443 U.S. 307, 319 (1979) (Standard of review on direct appeal.)

here charged as the single crime of second degree murder as the consequence. As a principal, the natural consequences doctrine applies to general intent crimes that would result in the crime of second degree murder based on implied malice.

Newly discovered and presented by O'Keefe as true new evidence attached as EXHIBIT 8 - July 2000 - manifest true depraved heart murder and/or felony murder which bolsters O'Keefe's claim of factual innocence with or without the explanation of "SCHAD" supra.

O'Keefe can not aver enough the fact remains in that he was attacked by Victoria who possessed and acquired her own Kitchen Knife in his home where Victoria was not on my lease. This is the honest explanation and truth. Yet, the state disavows the "Castle Doctrine" and the fact that proof of self defense negates all malice by law where this affirmative defense was raised and preserved on direct appeal but quickly omitted in all arguments by the State.

The entire problem exists where the Rule of Law is not enforced to include O'Keefe's inalienable "RIGHTS" to "CIVIL DUE PROCESS" broken down into separate components as the right to procedural and substantive due process with also "EQUAL PROTECTION OF THE LAW" pursuant Nev. Const., Article 4 § 21. • see Nev. Const., Articles I §§ 2, 8 (S) ; • see also Nev. Const., Art. 15 § 2 (Oath of Office); • see also U.S. Const., Amendments 5, 6, 14<sup>th</sup> (Due Process Clauses and Equal Protection Clause)

SUMMATION (IMPLIED MALICE - unintentional, unpremeditated, undeliberated death)

Any theory the State claims remaining here is the malice theory, by law is harmonious and in equal degree of blameworthiness and or culpability.

If it doesn't support this theory, it can never by law support any malice theory.

As "a fortiori", if it doesn't support the lesser, it can never support a higher, as food for thought and greater logic.

This Court must apply its "legal duty" which also involves its "duty to speak" by its legal "duty to act".

In "Mitchell", the state conceded "Mitchell" lacked specific intent.

Here, the NSC and the Attorney General made judicial admissions there was no implied malice by failure to prove the actus reus with intent and knowledge.

This constitutes a waiver with "res judicata" applying.

This manifest injustice must end where this court applies fundamental fairness to this petition - NRS 34.960.

This wrongful conviction was procured by the act of duplicity!

V. PRAYER AND DEMAND FOR RELIEF (NRS 34.970 et seq.)

Apply LAW-OF-CASE-OF-FIRST-APPEAL WITH RES JUDICATA AND STARE DECISIS; and

1.) APPOINT COUNSEL FOR COUNSELED PETITION;

2.) ORDER STATE TO RESPOND;

3.) HOLD HEARING;

4.) VACATE UNLAWFUL CONVICTION AND ISSUE ORDER OF FACTUAL INNOCENCE.



CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing Petition to Establish Factual Innocence to the below address(es) on this 27<sup>th</sup> day of July, 2020, by placing same in the U.S. Mail via prison law library staff, pursuant to NRCP 5(b) :- (Brass Slip No. 232 7771)  
INVOKE EDCR 8.05 (a) and (f): All participants of the CM/ECF system who are registered will be served by clerk of court.

NRCP 5  
SERVICE LIST (ECCR 8.05(f)) - Registered Participants:

- 1) Clark County District Attorney;
- 2) Attorney General of Nevada.

NON-REGISTERED PARTICIPANT: PAPER COPY

Brian O'Keeffe # 90244  
 LOVELOCK CORRECTIONAL CENTER  
 1200 Prison Road  
 Lovelock Nevada 89419

Brian K. O'Keeffe  
Brian K. O'Keeffe # 90244  
 Lovelock Correctional Center  
 1200 Prison Road  
 Lovelock, Nevada 89419

Plaintiff In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding Petition to Establish Factual Innocence filed in District Court Case No. \_\_\_\_\_ does not contain the social security number of any person.

Dated this 27<sup>th</sup> day of July, 2020.

Brian K. O'Keeffe  
Brian K. O'Keeffe  
Plaintiff In Pro Se

# **EXHIBIT**

1

Chapter 34 - STATUTES NR8 34.900  
TO NR8 34.990

PROMULGATED July 1, 2019

(3 pages)

PROCURED January 8, 2020

# **EXHIBIT**

1

**NRS 34.900 Definitions.** As used in NRS 34.900 to 34.990, inclusive, unless the context otherwise requires, the words and terms defined in NRS 34.910, 34.920 and 34.930 have the meanings ascribed to them in those sections.  
(Added to NRS by 2019, 2976)

**NRS 34.910 "Bona fide issue of factual innocence" defined.** "Bona fide issue of factual innocence" means that newly discovered evidence presented by the petitioner, if credible, would clearly establish the factual innocence of the petitioner.  
(Added to NRS by 2019, 2977)

**NRS 34.920 "Factual innocence" defined.** "Factual innocence" means that a person did not:

1. Engage in the conduct for which he or she was convicted;
2. Engage in conduct constituting a lesser included or inchoate offense of the crime for which he or she was convicted;
3. Commit any other crime arising out of or reasonably connected to the facts supporting the indictment or information upon which he or she was convicted; and
4. Commit the conduct charged by the State under any theory of criminal liability alleged in the indictment or information.

(Added to NRS by 2019, 2977)

**NRS 34.930 "Newly discovered evidence" defined.** "Newly discovered evidence" means evidence that was not available to a petitioner at trial or during the resolution by the trial court of any motion to withdraw a guilty plea or motion for new trial and which is material to the determination of the issue of factual innocence, including, without limitation:

1. Evidence that was discovered before or during the applicable period for any direct appeal or postconviction petition for a writ of habeas corpus pursuant to this chapter that served in whole or in part as the basis to vacate or reverse the petitioner's conviction;
2. Evidence that supports the claims within a postconviction petition for a writ of habeas corpus that is pending at the time of the court's determination of factual innocence pursuant to NRS 34.900 to 34.990, inclusive; or
3. Relevant forensic scientific evidence, other than the expert opinion of a psychologist, psychiatrist or other mental health professional, that was not available at the time of trial or during the resolution by the trial court of any motion to withdraw a guilty plea or motion for new trial, or that undermines materially forensic scientific evidence presented at trial. Forensic scientific evidence is considered to be undermined if new research or information exists that repudiates the foundational validity of scientific evidence or testimony or the applied validity of a scientific method or technique. As used in this subsection:
  - (a) "Applied validity" means the reliability of a scientific method or technique in practice.
  - (b) "Foundational validity" means the reliability of a scientific method to be repeatable, reproducible and accurate in a scientific setting.

(Added to NRS by 2019, 2977)

**NRS 34.940 Determination of when evidence is "material."** For the purposes of NRS 34.900 to 34.990, inclusive, evidence is "material" if the evidence establishes a reasonable probability of a different outcome.  
(Added to NRS by 2019, 2977)

**NRS 34.950 Claim of factual innocence is separate from state habeas claim.** Any claim of factual innocence that is made pursuant to NRS 34.900 to 34.990, inclusive, is separate from any state habeas claim that alleges a fundamental miscarriage of justice to excuse procedural or time limitations pursuant to NRS 34.726 or 34.810.  
(Added to NRS by 2019, 2977)

**NRS 34.960 Filing of petition; notice and copy of petition to be served on district attorney and Attorney General; contents; review by court; grounds for dismissal; explanation of decision by court; preservation of evidence; proceedings governed by Nevada Rules of Civil Procedure.**

1. At any time after the expiration of the period during which a motion for a new trial based on newly discovered evidence may be made pursuant to NRS 176.515, a person who has been convicted of a felony may petition the district court in the county in which the person was convicted for a hearing to establish the factual innocence of the person based on newly discovered evidence. A person who files a petition pursuant to this subsection shall serve notice and a copy of the petition upon the district attorney of the county in which the conviction was obtained and the Attorney General.

2. A petition filed pursuant to subsection 1 must contain an assertion of factual innocence under oath by the petitioner and must aver, with supporting affidavits or other credible documents, that:

(a) Newly discovered evidence exists that is specifically identified and, if credible, establishes a bona fide issue of factual innocence;

(b) The newly discovered evidence identified by the petitioner:

(1) Establishes innocence and is material to the case and the determination of factual innocence;

(2) Is not merely cumulative of evidence that was known, is not reliant solely upon recantation of testimony by a witness against the petitioner and is not merely impeachment evidence; and

(3) Is distinguishable from any claims made in any previous petitions;

(c) If some or all of the newly discovered evidence alleged in the petition is a biological specimen, that a genetic marker analysis was performed pursuant to NRS 176.0918, 176.09183 and 176.09187 and the results were favorable to the petitioner; and

(d) When viewed with all other evidence in the case, regardless of whether such evidence was admitted during trial, the newly discovered evidence demonstrates the factual innocence of the petitioner.

3. In addition to the requirements set forth in subsection 2, a petition filed pursuant to subsection 1 must also assert that:

(a) Neither the petitioner nor the petitioner's counsel knew of the newly discovered evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or postconviction petition, and the evidence could not have been discovered by the petitioner or the petitioner's counsel through the exercise of reasonable diligence; or

(b) A court has found ineffective assistance of counsel for failing to exercise reasonable diligence in uncovering the newly discovered evidence.

4. The court shall review the petition and determine whether the petition satisfies the requirements of subsection 2. If the court determines that the petition:

(a) Does not meet the requirements of subsection 2, the court shall dismiss the petition without prejudice, state the basis for the dismissal and send notice of the dismissal to the petitioner, the district attorney and the Attorney General.

(b) Meets the requirements of subsection 2, the court shall determine whether the petition satisfies the requirements of subsection 3. If the court determines that the petition does not meet the requirements of subsection 3, the court may:

(1) Dismiss the petition without prejudice, state the basis for the dismissal and send notice of the dismissal to the petitioner, the district attorney and the Attorney General; or

(2) Waive the requirements of subsection 3 if the court finds the petition should proceed to a hearing and that there is other evidence that could have been discovered through the exercise of reasonable diligence by the petitioner or the petitioner's counsel at trial, and the other evidence:

- (I) Was not discovered by the petitioner or the petitioner's counsel;
- (II) Is material upon the issue of factual innocence; and
- (III) Has never been presented to a court.

5. Any second or subsequent petition filed by a person must be dismissed if the court determines that the petition fails to identify new or different evidence in support of the factual innocence claim or, if new and different grounds are alleged, the court finds that the failure of the petitioner to assert those grounds in a prior petition filed pursuant to this section constituted an abuse of the writ.

6. The court shall provide a written explanation of its order to dismiss or not to dismiss the petition based on the requirements set forth in subsections 2 and 3.

7. A person who has already obtained postconviction relief that vacated or reversed the person's conviction or sentence may also file a petition pursuant to subsection 1 in the same manner and form as described in this section if no retrial or appeal regarding the offense is pending.

8. After a petition is filed pursuant to subsection 1, any prosecuting attorney, law enforcement agency or forensic laboratory that is in possession of any evidence that is the subject of the petition shall preserve such evidence and any information necessary to determine the sufficiency of the chain of custody of such evidence.

9. A petition filed pursuant to subsection 1 must include the underlying criminal case number.

10. Except as otherwise provided in NRS 34.900 to 34.990, inclusive, the Nevada Rules of Civil Procedure govern all proceedings concerning a petition filed pursuant to subsection 1.

11. As used in this section:

- (a) "Biological specimen" has the meaning ascribed to it in NRS 176.09112.
- (b) "Forensic laboratory" has the meaning ascribed to it in NRS 176.09117.
- (c) "Genetic marker analysis" has the meaning ascribed to it in NRS 176.09118.

(Added to NRS by 2019, 2977)

**NRS 34.970 Order by court requiring response to petition; contents of order; time for response; reply; consideration of petition by court; hearing on petition; stipulation of factual innocence of petitioner; issuance of order of factual innocence; explanation by court; appeal.**

1. If the court does not dismiss a petition after reviewing the petition in accordance with NRS 34.960, the court shall order the district attorney or the Attorney General to file a response to the petition. The court's order must:

- (a) Specify which claims identified in the petition warrant a response from the district attorney or the Attorney General; and
- (b) Specify which newly discovered evidence identified in the petition, if credible, might establish a bona fide issue of factual innocence.

2. The district attorney or the Attorney General shall, not later than 120 days after receipt of the court's order requiring a response, or within any additional period the court allows, respond to the petition and serve a copy upon the petitioner and, if the district attorney is responding to the petition, the Attorney General.

3. Not later than 30 days after the date the district attorney or the Attorney General responds to the petition, the petitioner may reply to the response. Not later than 30 days after the expiration of the period during which the petitioner may reply to the response, the court shall consider the petition, any response by the district attorney or the Attorney General and any reply by the petitioner. If the court determines that the petition meets the requirements of NRS 34.960 and that there is a bona fide issue of factual innocence regarding the charges of which the petitioner was convicted, the court shall order a hearing on the petition. If the court does not make such a determination, the court shall enter an order denying the petition. For the purposes of this subsection, a bona fide issue of factual innocence does not exist if the petitioner is merely relitigating facts, issues or evidence presented in a previous proceeding or if the petitioner is unable to identify with sufficient specificity the nature and reliability of the newly discovered evidence that establishes the factual innocence of the petitioner. Unless stipulated to by the parties, the court may not grant a hearing on the petition during any period in which criminal proceedings in the matter are pending before any trial or appellate court.

4. If the court grants a hearing on the petition, the hearing must be held and the final order must be entered not later than 150 days after the expiration of the period during which the petitioner may reply to the response to the petition by the district attorney or the Attorney General pursuant to subsection 3 unless the court determines that additional time is required for good cause shown.

5. If the court grants a hearing on the petition, the court shall, upon the request of the petitioner, order the preservation of all material and relevant evidence in the possession or control of this State or any agent thereof during the pendency of the proceeding.

6. If the parties stipulate that the evidence establishes the factual innocence of the petitioner, the court may affirm the factual innocence of the petitioner without holding a hearing. If the prosecuting attorney does not stipulate that the evidence establishes the factual innocence of the petitioner, a determination of factual innocence must not be made by the court without a hearing.

7. If the parties stipulate that the evidence establishes the factual innocence of the petitioner, the prosecuting attorney makes a motion to dismiss the original charges against the petitioner or, after a hearing, the court determines that the petitioner has proven his or her factual innocence by clear and convincing evidence, the court shall:

- (a) Vacate the petitioner's conviction and issue an order of factual innocence and exoneration; and
- (b) Order the sealing of all documents, papers and exhibits in the person's record, minute book entries and entries on dockets and other documents relating to the case in the custody of such other agencies and officers as are named in the court's order.

8. The court shall provide a written explanation of its determination that the petitioner proved or failed to prove his or her factual innocence by clear and convincing evidence.

9. Any order granting or denying a hearing on a petition pursuant to this section may be appealed by either party.

(Added to NRS by 2019, 2979)

**NRS 34.980 Appointment of counsel.** If the court grants a hearing on the petition pursuant to NRS 34.970, the court may, after determining whether the petitioner is indigent pursuant to NRS 171.188 and whether counsel was appointed in the case which resulted in the conviction, appoint counsel for the petitioner.

(Added to NRS by 2019, 2981)

**NRS 34.990 Notice to victim.** After a petition is filed pursuant to NRS 34.960, if any victim of the crime for which the petitioner was convicted has indicated a desire to be notified regarding any postconviction proceedings, the district attorney shall make

1/8/2020

Page 3

NRS: CHAPTER 34 - WRITS; PETITION TO ESTABLISH FACTUAL INNOCENCE

reasonable efforts to provide notice to such a victim that the petition has been filed and that indicates the time and place for any hearing that may be held as a result of the petition and the disposition thereof.  
(Added to NRS by 2019, 2981)

**EXHIBIT**

2

NEVADA  
ATTORNEY GENERAL'S  
JUDICIAL ADMISSION

JUNE 1, 2018  
(Pages 1 and 19)

**EXHIBIT**

2

1 ADAM PAUL LAXALT  
Attorney General  
2 Michael J. Bongard (Bar. No. 7997)  
Deputy Attorney General  
3 State of Nevada  
Office of the Attorney General  
4 1539 Avenue F, Suite 2  
Ely, NV 89301  
5 (775) 289-1632 (phone)  
(775) 289-1653 (fax)  
6 [mbongard@ag.nv.gov](mailto:mbongard@ag.nv.gov)

7 Attorney for Respondents

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

**ANSWER TO REMAINING CLAIMS IN  
SECOND AMENDED PETITION FOR WRIT  
OF HABEAS CORPUS**

(ECF NO. 50)

15  
16 Respondents, through legal counsel, Adam Paul Laxalt, Attorney General of The State of Nevada,  
17 and Michael J. Bongard, Deputy Attorney General, hereby answer the remaining claims in Brian Kerry  
18 O'Keefe's (O'Keefe) second amended petition for writ of habeas corpus. (ECF No. 50). Respondents  
19 base this answer upon the following points and authorities, the exhibits filed in this matter, and all the  
20 documents and pleadings on file in this case.

21 **RELEVANT PROCEDURAL HISTORY**

22 **I. Justice Court Proceedings, Las Vegas Township Justice Court.**

23 On November 7, 2008, the State filed a criminal complaint charging O'Keefe with murder with  
24 use of a deadly weapon charging O'Keefe with stabbing Victoria Whitmarsh to death. (ECF No. 57-8).  
25 The State filed an amended complaint on December 17, 2008. (ECF No. 57-10).

26 On December 17, 2008, the justice court conducted a preliminary hearing. (ECF No. 57-9). At  
27 the conclusion of the hearing, the justice of the peace bound O'Keefe to district court for murdering the  
28 victim with a deadly weapon. *Id.* at 97-98.

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 State*, 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.

(ECF No. 59-20 at 2-3).

That court held that the evidence did not support second-degree felony murder, not second-degree murder under a malice theory. The court's order specifically held that "the evidence presented at trial did not support this theory of second-degree murder." *Id.* at 3 (emphasis added). The Nevada Supreme Court did not hold that the evidence presented at trial did not support *any* theory of second-degree murder. Therefore, the court remanded the matter for a new trial on theories of second-degree murder other than the felony-murder theory of second-degree murder.

**C. The Nevada Supreme Court's Rejection of Ground 3 was not an Objectively Unreasonable Application of United States Supreme Court Case Law.**

O'Keefe failed to demonstrate that the Nevada Supreme Court's order of reversal barred his retrial under a second-degree murder theory other than second-degree felony murder.

In a case dealing with first-degree murder theories, the Ninth Circuit held that a retrial for first-degree felony murder was not prohibited because the jury found the defendant not guilty of premeditated murder. *Sivak v. Hardison*, 658 F.3d 898, 919-21 (9<sup>th</sup> Cir. 2011). The panel in *Sivak* stated "*In Ashe v. Swenson*, 397 U.S. 436 (1970), the Supreme Court 'held that the Double Jeopardy Clause precludes the Government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial.' *Yeager v. United States*, 557 U.S. 110, 119 (2009)." *Sivak*, at 918. Again, quoting from *Ashe*, the *Sivak* panel stated "When determining the preclusive effect of a jury verdict, we must 'examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'" *Id.* at 919, citing *Ashe*, 397 U.S. at 444.

In the order of reversal, the Nevada Supreme Court held that the evidence did not support the second-degree felony murder because the evidence did not support "that O'Keefe killed the victim while



**EXHIBIT**

3

COMPLAINT

BATTERY / Case No. 08 FZ33 48X

**EXHIBIT**

3

#001

LCC

## 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

### BATTERY/DOMESTIC VIOLENCE: ADMONISHMENT OF RIGHTS

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

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

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

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

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

DEFENDANT'S INITIALS: \_\_\_\_\_

DEFENDANT'S ATTORNEY'S INITIALS (if applicable): \_\_\_\_\_

PAGE 1 of 2

**BATTERY/DOMESTIC VIOLENCE ADMONISHMENT OF RIGHTS (PAGE 2 of 2) CASE NO: 08P23348X**

**FIRST OFFENSE WITHIN 7 YEARS (MISDEMEANOR):**

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

**SECOND OFFENSE WITHIN 7 YEARS (MISDEMEANOR):**

At least 10 days in jail but not more than 6 months; at least 100 hours, but not more than 200 hours, of community service; a fine of not less than \$550, but not more than \$1,000, in addition to certain fees and assessments that are required by statute; mandatory participation in weekly counseling sessions of not less than 1 1/2 hours per week for 12 months, at my expense, in the Court's discretion, the Court may order me to participate in an alcohol or drug treatment program at my expense; and, in the Court's discretion, if it appears from information presented to the Court that a child under the age of 18 years may need counseling as a result of the commission of a battery which constitutes domestic violence, the Court may refer the child to an agency which provides protective services, and, if that occurs, the Court will require me to reimburse the agency for the costs of any services provided, to the extent of my ability to pay.

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

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

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

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

\_\_\_\_\_  
DEFENDANT'S SIGNATURE

\_\_\_\_\_  
DATE OF BIRTH

\_\_\_\_\_  
DATE

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

\_\_\_\_\_  
DEFENDANT'S ATTORNEY (if applicable)

\_\_\_\_\_  
BAR NUMBER

# **EXHIBIT**

4

Rough Draft Transcript

C-250680

Pages 1-6

see Id. at page 5, line 22

ROA PAGE 000387

# **EXHIBIT**

4

COPY

DISTRICT COURT  
CLARK COUNTY, NEVADA  
\* \* \* \* \*

COPY

THE STATE OF NEVADA,

Plaintiff,

vs.

BRIAN KERRY O'KEEFE,

Defendant.

CASE NO. C-250630 FILED

DEPT. NO. 17 JUL 10 2009

TRANSCRIPT OF  
PROCEEDINGS  
CLERK OF COURT

BEFORE THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE

TUESDAY, APRIL 7, 2009

ROUGH DRAFT TRANSCRIPT OF  
DEFENDANT'S MOTION TO SETTLE RECORD

APPEARANCES:

FOR THE PLAINTIFF:

PHILLIP SMITH, ESQ.  
Deputy District Attorneys

FOR THE DEFENDANT:

RANDALL H. PIKE, ESQ.  
PATRICIA A. PALM, ESQ.  
Special Public Defenders

COURT RECORDER:

MICHELLE RAMSEY  
District Court

TRANSCRIPTION BY:

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

1  
2 LAS VEGAS, NEVADA, TUESDAY, APRIL 7, 2009, 9:07 A.M.  
3 THE COURT: State of Nevada versus Brian O'Keefe.  
4 This is defendant's motion to settle the record, and if I can  
5 sort of paraphrase here, it's Mr. Pike's position that on some  
6 of the jury instructions that perhaps all of his -- from the  
7 arguments of the instructions you wanted to give as well as  
8 some that you objected to were not completely stated on the  
9 record. Is that correct?  
10 MS. PALM: Well, your Honor, it's -- we're settling  
11 the record as to the second degree murder instruction which was  
12 instruction number 18. It's spelled out in my declaration. I  
13 believe as to that instruction we had agreed in chambers that  
14 it would not be given as written. And then when the Court got  
15 the final instructions to us right before the reading of them,  
16 the Court called us up to the bench having realized that it was  
17 supposed to be altered to delete the second degree felony  
18 murder theory, and the State had indicated, well, we won't  
19 argue that theory, and they did not argue it.  
20 But it was our position at the bench that that would  
21 not correct it because the jury could still find it having been  
22 instructed in it. And so we just wanted to make we made a  
23 clear rod of that one issue. And if the State doesn't recall  
24 that any different, I'll move onto the other issue.  
25 MR. SMITH: Well, how the State recalls it, Judge,

Page 2

ROUGH DRAFT TRANSCRIPT

1 THE COURT: Okay.  
2 MS. PALM: -- and my contention exactly, your Honor,  
3 is that the Court was not going to give that instruction as  
4 written. It was a mistake at that it ended up in the final  
5 packet, and I don't think it was corrected by the State simple  
6 yeah not arguing the second degree felony murder. And I do  
7 think that was a second degree felony murder instruction, and  
8 so that would be --  
9 THE COURT: Okay.  
10 MS. PALM: And then as to the other issue, it was  
11 Detective Mogg's testimony, and we had -- if the Court recalls  
12 that we had called Detective Mogg to testify as a witness. He  
13 was not relate today this case, but it was that in 2007 he had  
14 another case which actually was my case. It was State versus  
15 Francis Bill Franco Ardonias (phonetic) was a murder suspect  
16 who claimed to be intoxicated, and Detective Mogg arranged for  
17 him to have a Beth test for alcohol, and I was going to ask the  
18 detective, you know, was that possible to be done, how was it  
19 done, what's the training for Metro on that, and did it, in  
20 fact, happen in that case, and did you arrange it, and you  
21 know, why did you arrange it.  
22 And Court ruled on the State's objection that it was  
23 collateral and not relevant to this case. Our argument that it  
24 was relevant because it showed the bad faith of the State -- or  
25 the lack of good faith State investigation and the State's

Page 4

ROUGH DRAFT TRANSCRIPT

1 was that we had a dispute whether or not the language that was  
2 contained in the instruction that was ultimately submitted to  
3 the jury was, in fact, a felony second degree murder  
4 instruction. And it was our understanding that your Honor  
5 instructed us not to argue that the defendant committed the  
6 homicide in the commission of any felony, and we didn't, and  
7 that there wouldn't be a problem.  
8 So I just want to make sure that the record's clear  
9 we have with the State that it was our contention that the  
10 precise language that was submit that in the instruction that  
11 actually went to the jury did not rise to the second degree  
12 felony murder instruction.  
13 THE COURT: I think that was the Court's recollection  
14 that I kept the language in over the objection of the defense  
15 attorneys, but I did admonish the prosecutor that they were not  
16 going to argue felony murder rule on the case, and that's my  
17 recollection, they did not in closing.  
18 MR. SMITH: And that's correct. Now, if the defense  
19 is contending that not with stand being the Court's decision  
20 that the language that was actually contained in that  
21 instruction, in fact, arose to a second degree felony murder  
22 instruction, then I mean, all I can say is the State  
23 respectfully disagrees and we can just let an appellate court  
24 determine that.  
25 MS. PALM: Well --

Page 3

ROUGH DRAFT TRANSCRIPT

1 motive most minimize the alcohol intoxication in Mr. O'Keefe at  
2 the time of the offense. So the Court overruled our objection  
3 to it, and then I had no more questions for Detective Mogg. He  
4 stepped down as a witness. I just wanted to make sure our  
5 record was clear on that.  
6 MR. SMITH: I actually have two replies. If I  
7 remember correctly, it was the State's position that the  
8 detective in question, which I believe it was Detective Marty  
9 Wildemann, simply testified that to his knowledge there was no  
10 other case where a homicide detective took a breath test from a  
11 suspect or defendant prior to conducting an interview. And it  
12 was -- if I recall correctly, it was our position that simply  
13 because another detective in an independent case of his own  
14 accord decided to take a breath test from a suspect, which  
15 clearly was not any part of any established protocol, that they  
16 couldn't simply use that to say well, the Government acted in  
17 bad faith because Detective Wildemann didn't do in this case.  
18 Furthermore, I would suggest that the issue was  
19 actually entirely moot because it stands to reason that the  
20 reason why they didn't find the defendant guilty of first  
21 degree murder was because they bought into the defense's  
22 contention that he was too drunk to form the intent.  
23 MS. PALM: And your Honor, I'm not arguing the appeal  
24 here so it doesn't matter if it's moot or not.  
25 THE COURT: All right.

Page 5

ROUGH DRAFT TRANSCRIPT

000388

1 MR. SMITH: Oh, I know. I'm just making a record for  
2 --  
3 MS. PALM: I'm settling the record.  
4 MR. SMITH: I'm just making a record for the law  
5 clerk who's ultimately going to get this.  
6 THE COURT: All right, well, I think the record is  
7 clear in that regard, and, you know, I think that's why the  
8 jury did come back with a second as opposed to a first because  
9 of alcohol issue. All right, record's clear?  
10 MS. PALM: Thank you.  
11 MR. SMITH: Thank you, Judge.  
12 THE COURT: Thank you very much.  
13 MR. SMITH: Have a good day.  
14 THE COURT: You too.  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

Page 6  
ROUGH DRAFT TRANSCRIPT

ROUGH DRAFT TRANSCRIPT

000389

317

121

**EXHIBIT**

5

AUTHORITY OF  
CHARLES JENNINGS v. NEVADA

9TH CIRCUIT MARCH 7, 2013

**EXHIBIT**

5



**CHARLES JENNINGS, Petitioner - Appellant, v. RENEE BAKER; ATTORNEY GENERAL OF THE  
STATE OF NEVADA, Respondents - Appellees.**

**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

**2013 U.S. App. LEXIS 4658**

**No. 10-16012**

**October 18, 2012, Argued and Submitted, San Francisco, California**

**March 7, 2013, Filed**

**Notice:**

**PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE  
CITATION TO UNPUBLISHED OPINIONS.**

**Editorial Information: Subsequent History**

US Supreme Court certiorari denied by *Jennings v. Baker*, 2013 U.S. LEXIS 5895 (U.S., Oct. 7, 2013)

**Editorial Information: Prior History**

Appeal from the United States District Court for the District of Nevada, D.C. No. 3:06-cv-00267-JCM-RAM.  
James C. Mahan, District Judge, Presiding. *Jennings v. State*, 116 Nev. 488, 998 P.2d 557, 2000 Nev.  
LEXIS 61 (2000)

**Disposition:**

**AFFIRMED.**

**Counsel**

For CHARLES JENNINGS (-: J-12596), Petitioner - Appellant: John C.  
Lambrose, Assistant Federal Public Defender, FEDERAL PUBLIC DEFENDER'S OFFICE  
(LAS VEGAS), Las Vegas, NV.

For RENEE BAKER, ATTORNEY GENERAL OF THE STATE  
OF NEVADA, Respondents - Appellees: Michael Bongard, Deputy Attorney General,  
ATTORNEY GENERALS OFFICE, Ely, NV.

**Judges:** Before: D.W. NELSON, MURGUIA, and CHRISTEN \*\*, Circuit Judges.

**Opinion**

**MEMORANDUM \***

Nevada state prisoner Charles Jennings appeals from the district court's judgment denying his petition for a writ of habeas corpus under 28 U.S.C. § 2254. We have jurisdiction under 28 U.S.C. § 2553. We review de novo, *Brown v. Horell*, 644 F.3d 969, 978 (9th Cir. 2011), and we affirm.

Jennings was convicted by a jury of first-degree murder with the use of a deadly weapon. The jury indicated by special verdict that ten of twelve jurors found Jennings committed first-degree murder under a felony murder theory, eleven jurors found Jennings committed first-degree murder under a premeditated murder theory, and eleven found Jennings committed first-degree murder under a lying in wait theory. Jennings was sentenced to serve two consecutive life terms without the possibility of parole. Jennings argues that he is entitled to habeas relief because the Nevada court violated his due process and fair trial rights by allowing him to be convicted of first-degree murder without jury

A09CASES

1

© 2015 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved. Use of this product is subject to the restrictions and terms and conditions of the Matthew Bender Master Agreement.

unanimity as to the theory of guilt.

The Nevada court's rejection of Jennings's claim on direct appeal was neither contrary to nor involved an unreasonable application of clearly established federal law as determined by the United States Supreme Court. 28 U.S.C. § 2254(d)(1). The Supreme Court has determined that states may properly designate felony murder and premeditation theories as "alternative means to satisfy the mental element of a single offense." *Schad v. Arizona*, 501 U.S. 624, 644, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991) (plurality opinion). Nevada has made such a designation; it includes kidnapping as a predicate for felony murder convictions. Nev. Rev. Stat. § 200.030(1)(b) (1995). The *Schad* court approved of split theory first-degree murder convictions under an Arizona murder statute materially indistinguishable from Nevada's. See *Schad*, 501 U.S. at 628 n.1.

The distinction between the felony murder conviction in *Schad* and the one at issue here did not compel a contrary result. As in *Schad*, Nevada has a long history of treating felony murder as the "legal equivalent" of premeditation. See, e.g., *Ex parte Dela*, 25 Nev. 346, 60 P. 217, 220 (Nev. 1900) (internal quotations omitted). Nevada continues to apply this rule in the twenty-first century. *Crawford v. State*, 121 Nev. 746, 121 P.3d 582, 586 (Nev. 2005). No state legislature or court has determined subsequent to *Schad* that kidnapping is an insufficient underlying offense for felony murder. Jennings's intentional act of kidnapping while brandishing a gun is no less the "moral equivalent" of premeditation than *Schad*'s act of robbery. See *Schad*, 501 U.S. at 643.

The Nevada Supreme Court did not unreasonably apply *Schad* by affirming Jennings's conviction and Jennings is therefore ineligible for habeas relief. 28 U.S.C. § 2254(d)(1).

Jennings also raised the uncertified issue of ineffective assistance of counsel on appeal, arguing that his appellate counsel violated his right to a fair trial by failing to appeal the trial court's decision to allow the admission of Jennings's prior trial testimony. Jennings has not made "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and has not "demonstrate[d] that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Doe v. Woodford*, 508 F.3d 563, 567 (9th Cir. 2007) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983)). We decline to expand the certificate of appealability and, therefore, dismiss Jennings's uncertified issue for lack of jurisdiction. *Doe*, 508 F.3d at 569.

**AFFIRMED.**

#### Footnotes

\*\*  
\*

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

A09CASES

2

© 2015 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved. Use of this product is subject to the restrictions and terms and conditions of the Matthew Bender Master Agreement.

# **EXHIBIT**

6

LETTER DATED April 22, 2015

Page 2 of 4

LAW OFFICES OF MATTHEW D. CARLING, PC

# **EXHIBIT**

6

#001

LCC

\* You are absolutely correct that the evidence in all the trials is the same, albeit rehashed with "more beefed up argument." You haven't cited any case law that suggests that this is illegal. What is insufficient to one jury may not necessary be insufficient to another. The concept of sufficiency of the evidence is addressed to the court's function, not the jury's. Generally, the court will not submit a case to the jury unless it decides as an initial matter that the State has proven each of the elements essential to its charge by sufficient evidence to justify a finding in its favor upon it. The State's burden for sufficient evidence in a criminal matter is beyond a reasonable doubt. The jury may not presume or infer any fact that has not been presented into

\*

**EXHIBIT**

7

CRIMINAL HOMICIDE

July 2020

ELEMENTS OF SECOND DEGREE  
MURDER

**EXHIBIT**

7

July 2020

# CRIMINAL HOMICIDE

TYPE OF HOMICIDE	HOMICIDE WITH MALICE (Malice is hatred, ill will, with the intent to kill or to do great bodily harm.)	HOMICIDE WITH PREMEDITATION (Premeditation is a plan to do the act, no matter how quickly thought out.)	OR	HOMICIDE IN CERTAIN SITUATIONS	HOMICIDE WITH ADEQUATE PROVOCATION
MURDER IN THE FIRST DEGREE	YES	YES	↔	During a dangerous felony, such as rape, burglary, robbery, and arson. If a death occurs during these felonies, it may be a first degree murder, also known as <i>felony murder</i> .	NO
MURDER IN THE SECOND DEGREE	YES	NO. Sometimes, the accused acts in the face of known danger, such as when throwing a bomb into a crowd. While he may not plan to kill anyone in particular, if someone dies, the homicide may be a second degree murder.	↔	During a felony such as an assault and battery.	NO
VOLUNTARY MANSLAUGHTER	NO, while there is no malice, there is the intent to kill, usually just before the killing.	NO			YES. (For example, the accused kills his spouse found in the act of adultery. The provocation is acute, as he acts in the "heat of passion," before cooling off.) The provocation may reduce the homicide from a possible murder to manslaughter.
INVOLUNTARY MANSLAUGHTER	NO	NO		During a misdemeanor or a legal act done with criminal negligence. (For example, the accused fights with the victim, who then falls and dies. Fighting is a legal act.)	NO
AUTOMOBILE (VEHICULAR) HOMICIDE	NO	NO		During the grossly negligent operation of a car. (For example, the accused may be drunk, speeds, and kills a pedestrian.)	NO

See  
118

death (capital punishment), in states having the death penalty.

Reason, the most severe crime, goes on a person's criminal record, and is punishable by death, or by prison for not less than five years.

As for the places to which criminals are confined, here's a general rule: Jails and reformatories are usually reserved for less severe crimes and often are run by the city or county. Prisons and penitentiaries are usually used for more severe crimes and are run by states or by the federal government.

## LARCENY: IN HOW MANY WAYS CAN SOMEONE STEAL?

Larceny is a crime made up of several elements: the taking of property (something) which belongs to someone else, without his consent and with the intent of permanently depriving him of it. Also known as *theft*, *stealing*, and *purling*. The taking—from one place to another—is called "asportation."

**Grand Larceny:** If the property is valuable (usually over two hundred dollars).

**Pettit Larceny:** If the property is of low value—as found in the state statute.

There are many types of larceny, as Larcenous Larry and Vicky Victim will now demonstrate:

**Robbery:** If Larry takes something from Vicky di-

# EXHIBIT

8

CRIMINAL LEGAL NEWS

JULY 2020, Page 4

SECOND DEGREE FELONY MURDER

YOU HAVE TO INTEND THE FELONY  
AND THEN DEATH BE THE RESULT!

# EXHIBIT

8

## Nation on the Brink (cont.)

(i.e., a heart attack) and the manner of death as a homicide. The press release explains that Floyd "experienced a cardiopulmonary arrest while being restrained by law enforcement officer(s)" and noted the other significant conditions as "[a]rteriosclerotic and hypertensive heart disease; fentanyl intoxication; recent methamphetamine use."

The private autopsy was performed by Drs. Michael Baden and Allecia Wilson. Dr. Baden, the University of Michigan Medical School director of autopsy and forensic sciences, is the former chief medical examiner of New York City and had previously been retained to conduct independent autopsies on Eric Garner and Michael Brown. The independent autopsy findings, while not yet released, were detailed during a news conference.

"The compressive pressure of the neck and back are not seen at autopsy because the pressure has been released by the time the body comes to the medical examiner's office," said Dr. Baden. "It can only be seen – serious compressive pressure on the neck and back can only be seen while the pressure is being

applied or when, as in this instance, it is captured on video."

In stark contrast to the county medical examiner's opinion, Dr. Baden explained, "The cause of death, in my opinion, is asphyxia due to compression of the neck." His autopsy also concluded that Floyd was healthy and had no evidence of heart disease. He also said that toxicology reports had not yet returned.

Benjamin Crump, the attorney representing the Floyd family, explained that the private autopsy report found that the officers' actions restricted the blood flow to Floyd's brain and that the pressure exerted from the officers' knees on Floyd's back made it impossible for him to breathe.

### Officers Fired, Criminally Charged

THE DAY FOLLOWING FLOYD'S KILLING (MAY 26), all four officers were fired from the Minneapolis Police Department. The next day (May 27), Minneapolis Mayor Jacob Frey called for Chauvin to face criminal charges. The following day (May 28), local officials announced they had launched an investigation into Floyd's death.

On May 29, Chauvin was arrested by local authorities and charged with third-degree murder and second-degree manslaughter with culpable negligence. The same day, the U.S. Department of Justice announced its own investigation into Floyd's death. On June 3, Chauvin was charged with the additional crime of unintentional second-degree murder

while in the commission of a felony.

Also on June 3, former officers Kueng, Lane, and Thao were charged with aiding and abetting second-degree murder while committing a felony and aiding and abetting second-degree manslaughter with culpable negligence.

"[Y]ou have to have premeditation and deliberation to charge first-degree murder," explained Minnesota Attorney General Keith Ellison. "Second-degree murder, you have to intend for death to be the result. For second-degree felony murder, you have to intend the felony and then death be the result – without necessarily having it be the intent."

"We would contend that George Floyd was assaulted, so that would be the underlying felony," Ellison said.

Second-degree murder in Minneapolis carries a maximum penalty of up to 40 years in prison. Third-degree murder carries a maximum sentence of 25 years in prison. Charges of aiding and abetting carry the same criminal penalties.

While not directly relevant to the underlying criminal conduct, both Chauvin and Thao have previously been the subject of numerous complaints.

Chauvin, an 18-year police veteran, has been the subject of 18 complaints filed with internal affairs and been involved in three police shootings, one of which resulted in a fatality. Two of the 18 complaints were "closed with discipline," meaning he received a letter of reprimand in each case for his conduct. Also unrelated to the pending criminal charges, Chauvin's wife, Kellie Chauvin, filed for divorce the day after his arrest.

Thao has been the subject of six complaints filed with internal affairs, including a 2017 lawsuit over excessive force in which Thao settled with the victim for \$25,000.

## \$\$\$ ATTENTION \$\$\$

### Mushfakers, Artists, and Craftsmen

Our company, "Sticks From the Yard", is seeking to purchase a variety of items made by prison inmates. We are looking for anything handmade and built with those materials your prison has made available for you to purchase and use. We are interested in all items (example: wood boats, picture frames, light houses, cars, jewelry boxes, planes, ships, cars, motorcycles, animals, clocks, banks, etc.) We ask that you take a picture of your item via the JPay kiosk or other means and send it to:

Sticks From the Yard  
2283 Sunset Drive  
Wickliffe, Ohio 44092

Don't forget to include your own name and number and your prison address along with your asking price for your item. If we find there is enough interest in your item we will accept your price or make an alternative offer. When a price is agreed on we will make arrangements for you to mail the item to us and we will deposit the funds. Along with the item, you will send the name and address you want your funds directed to. Some prisons allow for deposit directly into your prison account but that would be your decision. All funds would be paid out by our attorney. Please address any questions to the address above and allow two weeks for a response.

## The LITT Group, LLC

### Executive Clemency and Pardon Experts

Sentence reduction and other sentence modification through executive clemency or a pardon.

Please contact our offices or have a family member contact our offices:

The LITT Group, LLC  
P.O. Box 358  
Nellysford, VA 22958  
www.LITTfreedom.com  
littfreedom@gmail.com  
917-940-8055

Serving inmates in all fifty states as well as federal inmates.

Unsolicited documents not returned.  
Not a pro bono group.

### NEWMEN PENPALS

Newmen penpals is an affordable pen pal service delivering the BEST customer experience and results in the industry, working with our members via Jpay and Corlinks. We repost your ad weekly on 50+ Facebook pen pal groups, Instagram and Twitter. Sorry no SOs, no crimes against women, children, or the elderly. Rates \$25/2 months, \$5/additional month, or \$65/year. For an application via Jpay, or Corlinks email joenewmen2020@gmail.com, or write Newmen Penpals P.O. BOX 5555 Kennewick, WA. 99336.

**Ask Joe about a free one year membership!**



# EXHIBIT

9

CASE Q250630

MARCH 16, 2009

STATE'S OPENING STATEMENT

THEORY OF THE CASE WHICH

ATTACHES CRIMINAL CULPABILITY

• see page 171

# EXHIBIT

9

**COPY**

DISTRICT COURT  
CLARK COUNTY, NEVADA  
\*\*\*\*\*

**FILED**  
**JUL 10 2009**  
*[Signature]*  
CLERK OF 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 P. VILLANI, DISTRICT COURT JUDGE

MONDAY, MARCH 16, 2009

ROUGH DRAFT TRANSCRIPT OF  
JURY TRIAL - DAY 1

APPEARANCES:

FOR THE PLAINTIFF:

PHILLIP SMITH, ESQ.  
STEPHANIE GRAHAM, ESQ.  
Deputy District Attorneys

FOR THE DEFENDANT:

RANDALL H. PIKE, ESQ.  
PATRICIA A. PALM, ESQ.  
Special Public Defenders

COURT RECORDER:

MICHELLE RAMSEY  
District Court

TRANSCRIPTION BY:

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

Page 1

ROUGH DRAFT TRANSCRIPT

333

000020 137

1 defendant guilty beyond a reasonable doubt, the State has a  
2 right to open and close the arguments. After the arguments  
3 have been completed, you will retire to deliberate your  
4 verdict. At this time, is the State ready for their opening?  
5 MR. SMITH: Yes, Judge.  
6 THE COURT: All right, go ahead.  
7 MR. SMITH: May it please the Court, counsel. Folks,  
8 despite the fact that this is a murder trial, I don't really  
9 have a long and orate opening statement because fundamentally  
10 the facts of this case are pretty simple.

11 The State anticipates that the evidence that you're  
12 going to see throughout this trial is going to show that on  
13 November 5th, 2008 here in Clark County, Nevada, the defendant  
14 was living with his on again, off again girlfriend, a woman by  
15 the name of Victoria Witmarsh. They had been seeing each other  
16 for several years dating back to 2001.

17 I say on again and off again, but obviously in  
18 November 2008 they were on again, and in fact, they were living  
19 together at a residence located off a street called El Parque.  
20 Now, Ms. Witmarsh was actually estranged from her husband. Her  
21 actual legal name was Mrs. Victoria Witmarsh. But at the time  
22 she was in a relationship with the defendant, Brian O'Keefe.

23 Mrs. Witmarsh had been estranged for her husband for  
24 several years, and in fact, she had a daughter with that  
25 husband. The daughter's name was Alexandra. Now, on the night

Page 170

ROUGH DRAFT TRANSCRIPT

1 THE COURT: All right, thank you. Mr. Pike, do you  
2 wish to exercise your right for opening at this time?  
3 MR. PIKE: Yes, your Honor.  
4 THE COURT: All right.  
5 MR. PIKE: May it please the Court, ladies and  
6 gentlemen of the jury, counsel. Ms. Palm and Brian, this is an  
7 opportunity that I have to preview the defense's version of Mr.  
8 O'Keefe's version and try to pull together some of the evidence  
9 that's going to be produced to you so that when it comes  
10 forward to you, it will -- it goes in context. Sometimes we  
11 have to call witnesses out of order so the best thing I can  
12 describe in opening statement is like a picture on a puzzle box  
13 because sometimes we put a piece over here in the corner, and  
14 it isn't until we bring in the other pieces that that makes  
15 sense and it all kind of fits in.

16 So once you understand the theory of the State as  
17 they presented it, now we're going to show you what the  
18 evidence is going to show in this case and why it would be  
19 appropriate to come back not with a verdict of guilty of murder  
20 in this case.

21 This is the case of the State versus Brian O'Keefe.  
22 It is a case about tragedy and not about murder. It starts out  
23 with the State alleging this premeditation. That he thought  
24 about it. He had the malice, the ill will that they talked  
25 about. But it's not supported by the physical evidence that's

Page 172

ROUGH DRAFT TRANSCRIPT

1 in question, November 5th, 2008, it's the State's position that  
2 the defendant and Victoria Witmarsh got into what we'll call  
3 for now an argument or an altercation.

4 Now, by no means are we conceding this was mutual  
5 combat but something happened, and the evidence is going to  
6 show you what exactly happened. At the conclusion of this  
7 altercation, it's State's position that the evidence is going  
8 to show you that the defendant, in fact, stabbed Victoria  
9 Witmarsh and that she died.

10 We also anticipate that the evidence is going to  
11 prove to you this was no self-defense, this was not an  
12 accident, and it was not a suicide. And that's what we have to  
13 prove. We have to prove that the death of Ms. -- Mrs. Witmarsh  
14 was unlawful.

15 We anticipate that we are going to prove that the  
16 death in this case was nothing less than an intentional act  
17 committed by the defendant against Mrs. Witmarsh. You're also  
18 going to hear evidence indicating that the defendant had a  
19 motive to kill Mrs. Witmarsh and that he had what we'll  
20 describe as an underlying ill will towards Mrs. Witmarsh, which  
21 we submit is going to help us meet our burden of proving beyond  
22 a reasonable doubt that this was an intentional act.

23 And at the conclusion of all the evidence in this  
24 case, we are going to ask you to return a verdict of guilty to  
25 the crime of first degree murder. Thank you.

Page 171

ROUGH DRAFT TRANSCRIPT

1 going to come in. This is the apartment where all these events  
2 occurred. It was not done in a secret or a premeditated or  
3 where somebody snuck to where someone was at and then killed  
4 them and tried to get away from what was happening.

5 It was this on again, off again girlfriend. They  
6 were living together. They were living in this apartment and  
7 neighbors were around. They walked up. This is where they  
8 came. The door was open. The evidence is going to show that  
9 when the neighbors came, they came in the door. It was open.  
10 This is not something that was done in secret, which is what  
11 you would reasonably expect or would interpret as a  
12 premeditation or planning.

13 They were a couple. They lived together. He gave  
14 her flowers. They had their clothing together. They kept an  
15 apartment. They kept a clean apartment. They had gotten over  
16 their past problems. They were hoping for that happy ending  
17 that we heard about. And they were back together.

18 The physical evidence will show that this is a couple  
19 that was bearing for a future together. (Indiscernible) the  
20 bathroom, the closet space. It appears to be equally divided.  
21 They're working side by side with the union. We'll bring in  
22 union members to show that as a couple they were open. This is  
23 not something where anybody was keeping a secret. They were  
24 back together.

25 Victoria and Brian were inseparable around the union

Page 173

ROUGH DRAFT TRANSCRIPT

# EXHIBIT

10

STATE'S CLOSING ARGUMENT

MARCH 20, 2009

Case No. CZ50630

FIVE - ROA pages, 264, 298, 299, 308, 309

RELEVANT FACTS

# EXHIBIT

10

#001

LCC

COPY

DISTRICT COURT  
CLARK COUNTY, NEVADA  
\* \* \* \* \*

COPY

THE STATE OF NEVADA,  
Plaintiff,  
vs.

BRIAN KERRY O'KEEFE,  
Defendant.

CASE NO. C-250630

DEPT. NO. 17

TRANSCRIPT OF  
PROCEEDINGS

FILED

JUL 10 2009

*Em AT*  
CLERK OF COURT

BEFORE THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE

~~FRIDAY~~ MARCH 20, 2009

ROUGH DRAFT TRANSCRIPT OF  
JURY TRIAL - DAY 5

APPEARANCES:

FOR THE PLAINTIFF:

PHILLIP SMITH, ESQ.  
STEPHANIE GRAHAM, ESQ.  
Deputy District Attorneys

FOR THE DEFENDANT:

RANDALL H. PIKE, ESQ.  
PATRICIA A. PALM, ESQ.  
Special Public Defenders

COURT RECORDER:

MICHELLE RAMSEY  
District Court

TRANSCRIPTION BY:

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

1 instruction that says you bring your common sense and life  
2 experience in. You don't leave it at the door. That's why  
3 there's so many -- you know, on each side of you, you're all  
4 different. You all have different life experience. You're to  
5 bring that life experience and your common sense into that  
6 deliberation room. Don't forget it, okay.

7 Punishment. Your duty at this point right now when  
8 you go back in the deliberation room is confine to the guilt of  
9 the defendant. Whether or not he's guilty and what he's guilty  
10 of. You were not to discuss punishment. The judge instructed  
11 you on that. Or consider the subject of punishment during your  
12 deliberations as to his guilt. That cannot be a factor in your  
13 determination of what he's guilty for. The judge has  
14 instructed you on that, and that is the law in Nevada. You  
15 need to put that aside.

16 What is murder? I'm going to try to break it down.  
17 I mean, it's so complicated. There's just -- you know, you --  
18 I was watching some of you. It's like well, what does all that  
19 mean? Well, murder is the unlawful killing of a human being  
20 with malice aforethought. Malice aforethought can be expressed  
21 or implied. What is malice aforethought? We know what killing  
22 another human being is, right? Okay. But what's malice  
23 aforethought? Intentional killing without legal cause or  
24 excuse or what the law would consider adequate provocation.

25 Okay, so it's intentional. An intentional killing

Page 134

ROUGH DRAFT TRANSCRIPT

1 What happened to my Power Point?

2 The intent to kill, though, can be a certain or  
3 deduced from the facts and circumstances of the killing. So  
4 the intention of the person that killed, you can deduce that  
5 from all of the facts and circumstance of the evidence that we  
6 presented to you today or throughout the week. Most  
7 importantly, such as the use of a weapon that's calculated a  
8 deduced detective in the manner that it was used and the  
9 circumstances surrounding that act. That can be inferred.

10 Deduced. There doesn't have to be an amount of time,  
11 a (indiscernible) amount of time needed between the formation  
12 of the intent to kill and the act of killing itself, okay.

13 What is deliberation? You think about it first, you weigh the  
14 options, consider the consequences, you make a decision. That  
15 decision, folks, can be made very, very quickly by  
16 premeditation, decision to kill, formed in the mind of the  
17 killer, before the killing. It can be as instantaneous as  
18 successive thoughts of the mind. Less than a minute.

19 The law doesn't measure the length of time of  
20 premeditation, okay. It doesn't require how long that thought  
21 must be pondered in the mind before it's premeditated. That's  
22 really important for you to understand. Time can be varied  
23 based on the individual and the circumstances of the evidence  
24 that is presented to you. Instantaneous just is successive  
25 thought in the mind. The law doesn't look at the duration of

Page 136

ROUGH DRAFT TRANSCRIPT

1 without legal cause or excuse. Anger, hatred, revenge, ill  
2 will or spite is not required for malice, okay. That's in your  
3 injury instructions, so don't feel like you're going to have to  
4 remember everything that I tell you. Expressed malice is the  
5 deliberate intention to take away the life of another.

6 Deliberately do it. Implied malice. Malice can be implied  
7 just kind of like the circumstantial evidence kind of thing.

8 You know, you can imply malice when no considerable  
9 provocation appears or when all of the circumstance of a  
10 killing show an abandoned or malignant heart. So there's  
11 implied malice as well as expressed. It can be deliberate or  
12 you can imply it. And you can imply it with no provocation  
13 appears and when all of the circumstances showing a killing of  
14 an abandoned or malignant heart.

15 Simply put, malice aforethought means it wasn't an  
16 accident, okay. Malice aforethought simply put, not an  
17 accident. What is first degree murder? The killing was  
18 willful, deliberate, premeditated. All of those have  
19 definitions, too, believe it or not. Of course, they do.  
20 Okay. And each one is different.

21 What is willfulness? The intent to kill. The intent  
22 to kill -- you intended it kill. That's willful. You know, we  
23 kind of all know we what -- we willfully do things everyday.  
24 You know, we willfully get in our car and come to the -- start  
25 it and drive down to the court house to sit for jury duty.

Page 135

ROUGH DRAFT TRANSCRIPT

1 time for premeditation.

2 If you believe the evidence -- from the evidence that  
3 the act constituting the killing has opinion preceded by and  
4 has been the result of premeditation, no matter how rapidly,  
5 the killing's premeditated.

6 What is second degree murder? The killing was not  
7 deliberate, not premeditated. Just intentional. Voluntary  
8 manslaughter. Killing without malice aforethought,  
9 deliberation or premeditation with provocation. An example  
10 would be a serious injury. Self-defense, maybe. Or somebody  
11 is trying to hurt you. With no time to think. An irresistible  
12 impulse in the heat of passion.

13 And the objective standard, though, for that heat of  
14 passion is an ordinary person would have killed without  
15 thinking. I mean, it's just innate, okay. You're in a  
16 circumstance where, you know, let's say that you're at the zoo  
17 and a tiger comes out of the cage and he's loose, I mean, it  
18 would be -- you wouldn't even think to try to save your  
19 daughter or, you know, that's instantaneous. That's an  
20 instantaneous -- that's what an ordinary person would do. You  
21 know, a situation where an ordinary person would kill.

22 Involuntary manslaughter, killing without any intent  
23 during the commission of an unlawful act or a lawful act which  
24 probably might produce such a consequence in an unlawful  
25 manner. [But where the involuntary killing occurs in the ]

Page 137

ROUGH DRAFT TRANSCRIPT

000298

320124

INSTRUCTIONS 413  
2)

1 commission of an unlawful act which in its consequences  
2 naturally tends to destroy the life of a human being the  
3 offense is murder.  
4 What's a deadly weapon? Well, it's complicated,  
5 according to the law. Any instrument if used in the ordinary  
6 manner contemplated by its design and construction will or is  
7 likely to cause substantial bodily harm or death. Or any  
8 weapon, device, any instrument, under the circumstances it was  
9 used or attempt to be used or threaten to be used that's  
10 readily capable of causing substantial bodily harm or death is  
11 a deadly weapon. And of course, our contention is that a knife  
12 was the deadly weapon.  
13 Substantial, what's substantial bodily harm?  
14 Substantial bodily harm means that it's bodily injury which  
15 creates a substantial risk of death or causes serious  
16 impairment, disfigurement or prolonged physical pain. All  
17 right, what's self-defense. We use the reasonable person  
18 standard. Honest but unreasonable does not negate malice and  
19 does not reduce the offense from murder to manslaughter.  
20 It has to be reasonable under the reason person  
21 standard. There has to be the threat of eminent death.  
22 Eminent means quicker than immediate. Or substantial bodily  
23 harm. So there has to be a risk of eminent death or  
24 substantial bodily harm, which, again, was, you know, the  
25 threat of serious bodily injury.

Page 138

ROUGH DRAFT TRANSCRIPT

1 instantaneous? How do we know all this? Well, I'm going to  
2 get to that want it was deliberate. And there was definitely  
3 malice aforethought, either express, definitely implied. Okay.  
4 MR. PIKE: Objection, your Honor. May we approach  
5 the bench, I'm sorry.  
6 THE COURT: All right.  
7 MR. PIKE: I hate to interrupt Counsel's argument.  
8 (Off-record bench conference).  
9 MS. GRAHAM: Okay. So we look at the evidence before  
10 the murder, during the murder and after the murder. What did  
11 he say, the defendant? What did he do before the murder? He  
12 said I want to kill the bitch. He told Cheryl Morris that. I  
13 want to kill the bitch, she's poison. Why? He told her why.  
14 She took three years of his life.  
15 You can judge the credibility of Cheryl Morris  
16 herself. He even told her how he could kill somebody with a  
17 knife. He demonstrated to Cheryl that he can kill somebody  
18 with a knife. He talked about his proficiency in the services  
19 with a knife. His training. Before the murder he said all  
20 that.  
21 What about during the murder? Well, that's a little  
22 tougher because we don't really know what was said or exactly  
23 in what order that transpired. We know that the Tolivers, who  
24 live directly under the defendant and Victoria that night,  
25 directly under, were in their bedroom where the murder occurred

Page 140

ROUGH DRAFT TRANSCRIPT

1 The killing was absolutely necessary to avoid your  
2 death or substantial bodily harm in this case, as it applies in  
3 this case. The reasonable person standard. Fear alone is not  
4 enough. And you cannot use more force than was necessary under  
5 the law. And it doesn't apply to initial aggressors.  
6 Intoxication. We've heard about intoxication. If an  
7 intoxicated person has the capacity to form the intent to take  
8 a life and he concedes and executes that intent, that's no  
9 grounds for reducing the degree of this crime. There are other  
10 instructions that are the packet. Those are pretty much  
11 self-explanatory.  
12 How do we know defendant killed Victoria? Well, for  
13 one thing, there's been absolutely no evidence that anybody was  
14 in the room but the defendant and Victoria. I don't think  
15 identity's an issue in this case. All right, this is how we  
16 know it's first degree murder. It wasn't an accident. It was  
17 willful. I don't think I have to go through all the facts.  
18 You guys, there's been so much testimony here. Use your common  
19 sense. Use all the evidence. You can infer that there was no  
20 accident here. The medical examiner testified that the  
21 location of the wound -- you can view the photos yourself and  
22 determine that this was no accident. It was willful. The act  
23 of stabbing Victoria was willful.  
24 It was premeditated. He had time to think about it  
25 and thought about it. Remember, premeditation can be quick

Page 139

ROUGH DRAFT TRANSCRIPT

1 directly under. And Joyce told you as she was laying in bed,  
2 she heard lots of thumping, lots of noises, a woman crying.  
3 She kept turning up the volume. It got louder. It won't on  
4 for about an hour. She heard thumps, she heard crying. And  
5 then at one point it got so loud, it woke Cookie (phonetic) up.  
6 You remember, he jumps up, what the hell? Stick the broom up  
7 -- you know, the old broom trick on the ceiling, you know, to  
8 try to quiet it down. It didn't quiet it down. It got louder.  
9 And then Cookie was so frickin' irritated because he  
10 was awoken. He went up there to tell them to quiet down, and  
11 what did he see? Well, he saw Victoria laying there in a pool  
12 of blood. And Cookie's reaction is what the hell did you do?  
13 He ran down stairs, started calling for people to call 911.  
14 Defendant never asked him to call 911. He saw Cookie. Told  
15 him to get out. Most importantly, one of the things that we  
16 can infer that during the murder, since we don't know exactly  
17 how everything transpired, we have photos.  
18 The photos, and you know the saying? A picture is  
19 worth a thousand words. These are all going to be back in the  
20 jury room, State's Exhibit 55, State's Exhibit 36, State's  
21 Exhibit 59, State's Exhibit 46, State's Exhibit 39, State's  
22 Exhibit 58, 57. There's more, folks. I'm not going to show  
23 you all of them. How about this one, 8? State's Exhibit 60.  
24 How about this one, Defendant's Exhibit UU? That says it all,  
25 really. Picture's worth a thousand words.

Page 141

ROUGH DRAFT TRANSCRIPT

000299

1 that she's dead, Mr. O'Keefe breaks down and cries. The video  
2 didn't support that. What it showed was a person who sat there  
3 for several seconds and then began to kind of whine. And you  
4 heard the testimony from the detective who was actually there,  
5 that he saw no tears, he saw no welling up of her eyes, he saw  
6 no reaction. That's because he already knew she was dead. He  
7 was just kind of playing a game.

8 Now let's talk about credibility. They've already  
9 said the credibility instruction, and we're talking about  
10 Cheryl Morris. Now, the defense attorney wants you to believe  
11 that Cheryl Morris came in here and basically told you a lion  
12 the stand because she was a jilted ex-girlfriend. But this is  
13 the same ex-girlfriend that the defense attorney called and  
14 said hey, you know, we think that Mr. O'Keefe's -- you still  
15 have Mr. O'Keefe's glasses, can you bring them. She brought  
16 them.

17 Does that sound like the woman who has an ax to  
18 grind? She brought the man's glasses. When asked on the stand  
19 well, why are you here, because I was subpoenaed. She's  
20 subpoenaed, she gets on the stand, she's take an oath where  
21 she's asked questions, she tells the -- she provides the  
22 answers. She certainly didn't seem like a woman scorn. They  
23 want you to believe that this is hell hath no fury like a  
24 woman scorned simply because the defendant cheated on her  
25 sometime ago.

Page 174

ROUGH DRAFT TRANSCRIPT

1 on direct examination, did you ever demonstrate on her how you  
2 could kill somebody with a knife? He said well, no, I didn't  
3 demonstrate. Well, certainly that can infer that he admits  
4 that he at least told her.

5 Why would she make that up? Because she hates him?  
6 I don't think so. And let's talk about the testimony of Joyce  
7 and Todd and the timing here. The evidence certainly supports  
8 that there was noise coming from that apartment for an  
9 extensive period of time. Not five minutes, not ten minutes,  
10 but for an extensive period of time. And at some point it got  
11 to loud that Mr. Toliver went upstairs to find out what was  
12 going on. And we all know what happened after that, the police  
13 were called.

14 This brings me to circumstantial evidence. You heard  
15 Joyce Toliver talk about how she could hear the woman crying  
16 during the time that she heard that noise. Some of you might  
17 be thinking well, this whole scenario could have been avoided  
18 if Ms. Toliver had called the police. That might be true, but  
19 that doesn't change the facts of this case, folks. And it  
20 doesn't get the defendant off the hook.

21 You got a woman crying, you got loud noises, you have  
22 signs of disturbance inside that apartment, inside that  
23 bedroom, and you have a woman looking like the way she looks in  
24 those photographs with all those bruises. You have an injury  
25 to the front of her head. You have an injury to the back of

Page 176

ROUGH DRAFT TRANSCRIPT

1 But you also heard that Ms. Witmarsh stopped dealing  
2 with Mr. O'Keefe in August when she moved out. And now some  
3 six or seven months later he want you to believe that she still  
4 has this pinned up aggression that she would craft this  
5 preposterous story about -- they want you to believe it's  
6 preposterous, but that she would make up this story about what  
7 the defendant told her about his underlying disdain or enmity  
8 towards Victoria Witmarsh because what had happened.

9 Now, some of you may say but yeah, they were together  
10 at the time. Sure, but that doesn't mean that he didn't have  
11 some deep seeded disdain for what happened during that time she  
12 testified against him in front of a jury of people like you.  
13 It doesn't change the fact because there could be an alternate  
14 scenario as to what happened that night, and I'll get to that  
15 in a second.

16 You heard Ms. Witmarsh say that the defendant told  
17 her that he wanted to kill the bitch because she took away  
18 three years of his life by testifying against him. Take into  
19 consideration that her testimony is corroborated by the  
20 evidence. The judgment of conviction that's been admitted into  
21 evidence, folks, read it.

22 The defendant said that he served about two years,  
23 but I'd ask you this, how would Cheryl know this information  
24 unless the defendant told her? Cheryl testified that the  
25 defendant told her he was proficient with knives. When asked

Page 175

ROUGH DRAFT TRANSCRIPT

1 her head. That's certainly circumstantial evidence of a  
2 battery or something that precipitated a stabbing.

3 Now, if he started this, he can't now claim  
4 self-defense because the law says the initial aggressor does  
5 not have the right to self-defense. That's the law. Ms. Pike  
6 -- excuse me, Ms. Palm also said that doubt Cheryl Morris'  
7 credibility because she called the police. Well, it's  
8 reasonable to infer it's because she learned what had happened  
9 in that apartment, and she had some relevant information to  
10 provide. That's not unlike something that anyone would do  
11 under those circumstances. Not just a person who had an ax to  
12 grind.

13 The night in question the defendant never said look,  
14 this is where I got injured. But not some several months  
15 later, he wants to fall back on that as some evidence  
16 corroborating that this little woman trying to kill him that  
17 night. Folks, it's unreasonable under these circumstances.

18 Now, with regards to the testimony about the DNA, you  
19 can't really conclude anything from that but except that two  
20 people came into contact with knife, Victoria Witmarsh and  
21 Brian O'Keefe. And the reason why is because the defendant  
22 doesn't even know what happened to that knife after she got  
23 stabbed, and you can see on the pictures that there's  
24 pillowcases laying on top of it. There's an indication that  
25 the blade may have been wiped off. I mean, you can't just --

Page 177

ROUGH DRAFT TRANSCRIPT



MATCHES  
OPENING  
Statement

1 you can't really just trust the testimony of Dr. Schiro and  
2 that his interpretation means that these wounds are totally  
3 defensive because I've shown how they aren't.  
4 Now, briefly allow me to talk about the defendant's  
5 testimony on the stand. He tells you about his military  
6 service some 25 years ago. We know since then some things have  
7 happened in his life. The law says that you can take, for  
8 instance, his felony convictions as evidence in assessing his  
9 credibility, especially when combined with the fact that he's  
10 -- the story's he's given today is inconsistent with the story  
11 he told Cheryl Witmarsh (sic), and it's inconsistent with the  
12 story he gave on that videotape.

13 Folks, I'm almost done. Ms. Palm wants you to  
14 consider the defendant's actions after this happened as  
15 evidence that he didn't mean anything to happen on the night in  
16 question, but that's not what the law says. The law says you  
17 determine a person's intent at the moment they commit the act.  
18 And that makes sense because sure, a lot of times people are  
19 sorry that they kill somebody after it's happened and/or before  
20 they get caught. But it doesn't mean -- it doesn't make the  
21 underlying act any less criminal.

22 Now, in talking about reasonable doubt, the  
23 instruction tells you exactly what reasonable doubt is. It  
24 says doubt to be reasonable must be actual, not mere  
25 possibility or speculation. I submit to you the story that the

Page 178

ROUGH DRAFT TRANSCRIPT

1 defendant gave does not comport with the evidence, and I'm  
2 talking about the story he gave today and yesterday on the  
3 stand. He said that she fell backwards, he fell on top of her,  
4 and somehow she ends up stabbed.

5 Now, folks, if you land on -- I submit to you that if  
6 you land on somebody with all your body weight and you weigh  
7 180 something pounds and you land on them and a knife goes into  
8 them because your entire body weight is on them and they only  
9 weigh a hundred pounds, the blade is going to go in a lot  
10 further than four inches. It's going to go all the way in  
11 because all your weight is on there.

12 But here, the length of the wound was four inches,  
13 which is consistent with an intentional stabbing, but  
14 consistent with an accidental stabbing where you fall on top of  
15 the person holding the knife. That's another part of common  
16 sense. So what we're asking you to do here is to use some  
17 common sense, realize that the credibility of the State's  
18 witnesses shouldn't be questioned under the circumstances of  
19 this case, take into the fact -- take in fact that the State's  
20 evidence has corroboration. Go ask me to convict him. We've  
21 met our burden. The burden is beyond a reasonable doubt. It  
22 says that if you feel an abiding conviction and the truth of  
23 the charge, there is no reasonable doubt. Thank you.

24 THE COURT: Thank you, Mr. Smith. The clerk will now  
25 swear in the marshal to take charge of the jury panel.

Page 179

ROUGH DRAFT TRANSCRIPT

1 (Swearing in the marshal)  
2 (Outside the presence of the jury)  
3 THE COURT: Let the record reflect we're outside the  
4 presence of the jury panel. I just want to put on the record  
5 when I read the jury instructions, instruction number 3, as was  
6 provided to counsel, actually I read it as is, but it was  
7 retyped because if you look at line 11, the word instructions  
8 was broken up on the line, and that was just retyped. And so  
9 the corrected -- or the typed version is provided to the jury.

10 Instruction 42 that was original provided to the  
11 attorneys at line 7 and line 8 it says read backs, and I had  
12 that -- I read it as play back, but it's originally typed for  
13 both counsel and read backs, and so that was fixed.

14 And instruction 43, which you had copies of, was just  
15 the instruction that I signed, and the signature line was moved  
16 up. So three changes were made and those changes were included  
17 in the packet of jury instructions provided to the jury panel.  
18 And everyone has provided their cell phone numbers to the  
19 clerk, and please within 15, 20 minutes of the court house to  
20 be called. It's my understanding is that they wish to  
21 deliberate tonight and --

22 MR. PIKE: I plan on staying here --

23 THE COURT: Okay.

24 MR. PIKE: -- until (indiscernible).

25 MS. PALM: Yes, I'll be here, too.

Page 180

ROUGH DRAFT TRANSCRIPT

1 THE COURT: All right.  
2 MS. GRAHAM: Judge, (indiscernible).  
3 MR. SMITH: I'll be here but no guarantee I'll be  
4 sober.

5 THE COURT: Okay.

6 MS. PALM: Yeah, me either.

7 THE COURT: That's off the record, Michelle.

8 (Court recessed at 4:02:58 p.m. until 7:12:55 p.m.)

9 (In the presence of the jury)

10 THE COURT: You may be seated. I understand that we  
11 have a verdict, and Mr. Livemash, are you the foreperson?

12 JUROR NO. 6: Yes, sir.

13 THE COURT: Please hand the verdict form to the  
14 marshal. The clerk will now read the verdict.

15 THE CLERK: District Court, Clark County, Nevada.

16 State of Nevada, plaintiff versus Brian Kerry O'Keefe,  
17 defendant. Case No. C2566 -- 250630, Department No. 17.

18 Verdict. We the jury in the above-entitled case find the  
19 defendant, Brian Kerry O'Keefe, as follows: Count one, murder  
20 with use of a deadly weapon, open murder, guilty of second  
21 degree murder with use of a deadly weapon. Dated this March  
22 20th, 2009. Signed by the foreperson, Kirk Livernash. Ladies  
23 and gentlemen of the jury, is this your verdict as read? So  
24 sea you one, so say you all.

25 THE JURY: Yes.

Page 181

ROUGH DRAFT TRANSCRIPT

331  
135  
000309

**EXHIBIT**

11

CAS VEGAS SUN ARTICLE

CONVICTION OVERTURNED

CZ50630

**EXHIBIT**

11

#001

LCC

# Court overturns man's murder conviction in girlfriend's death

By Cy Ryan (contact)

Tuesday, April 13, 2010 | 4:21 p.m.

CARSON CITY – The Nevada Supreme Court has overturned the second-degree murder conviction of Brian K. O'Keefe, found guilty of killing his live-in girlfriend in Las Vegas in November 2008.

The court said District Judge Michael Villani gave an erroneous jury instruction that was not harmless. It said "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."

O'Keefe and Victoria Whitmarsh had a tumultuous relationship. He was convicted in 2006 of domestic battery upon the testimony of Whitmarsh.

When he was released from prison, they got back together. They had both been drinking the night of the death when Whitmarsh was stabbed in the side.

O'Keefe said Whitmarsh came at him with a knife and they struggled. She fell down and hit the top of her head. He called for help from neighbors.

The Supreme Court said the district judge abused his discretion when it instructed the jury that second-degree murder includes involuntary killing and there was not enough evidence to support second-degree murder.

O'Keefe was sentenced to 10-25 years for second-degree murder and a consecutive term of 96 months to 240 months for a weapons enhancement.

The court on Tuesday ordered a new trial for O'Keefe.

Admissible under Hearsay Rule.  
F.R.E. 803(8)

Please

see

KOSILEK v. SPENCER

see fn 6

889 F. Supp. 2d 190 (U.S. Dist. Ct. Ma.)

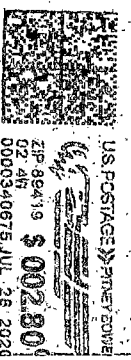
Sept. 4, 2012

The Court may take "judicial notice" of the existence and content of published articles, even if they are not in the record before it

(Cit. in 9th Cir. 2007) (46 U.S. v. W.R. GRACE 504 F.3d 745, 766)

Brian C. Kelle 90244  
LCC  
1200 Prison Road  
Lewes, DE 19649

Lewes Correctional Center



RECEIVED  
JUL 30 2020  
CLERK OF THE COURT

INMATE LEGAL  
MAIL CONFIDENTIAL

Ernesta Stancial District Clerk  
Clerk of the Court (Steven Greenman)  
200 Lewis Ave., 3rd Fl.  
Lewes, DE 19649



CONFIDENTIAL

(out mail to Lewes-Monrovia)  
By Direct Ship No. ~~23277~~

LEGAL MAIL

RECEIVED  
JUL 27 2020  
LCC LAW LIBRARY

*Heather S. Hume*  
CLERK OF THE COURT

1 MOT

2 Brian Kerry O'Keefe # 90244  
3 Lovelock Correctional Center  
4 1200 Prison Road  
5 Lovelock, Nevada 89419

6 Petitioner In Pro Se

7 DISTRICT COURT  
8 CLARK COUNTY, NEVADA

9 \* \* \* \* \*

10 Brian Kerry O'Keefe, )  
11 Petitioner, )  
12 -vs- )  
13 THE STATE OF NEVADA, et al., )  
14 Respondent. )

A-20-820374-W

Case No. \_\_\_\_\_

Dept. No. \_\_\_\_\_

15 EX PARTE - MOTION FOR APPOINTMENT OF COUNSEL - (COVID-19)

16 COMES NOW Petitioner, Brian Kerry O'Keefe, in pro se,  
17 and moves the Court for an order appointing counsel in the  
18 instant petition, see NRS 34.900 TO 34.990 PROMULGATED JULY 1, 2019.

19 This motion is based upon NRS 34.980 all papers and  
20 documents on file herein; and the points and authorities below.

21 POINTS AND AUTHORITIES

22 Petitioner is unable to afford counsel. See Application to  
23 Proceed In Forma Pauperis on file herein.

24 The substantive issues and procedural requirements of this  
25 case are difficult and incomprehensible to Petitioner.

26 Petitioner, due to his incarceration, cannot investigate,  
27 take depositions or otherwise proceed with discovery herein.

28 Petitioner's sentence is: 10-25 years w/consecutive 8-20 years.

LCC LL FORM 24.042

RECEIVED

JUL 30 2020

CLERK OF THE COURT

1        There ☒ are ☐ are not additional facts in support of  
2 this motion. ~~attached hereto on separate page(s).~~ COMA-19 /

3        Counsel would assist Petitioner with a clearer presentation  
4 of his issues before this Court and would likewise facilitate  
5 and ease this Court's task of discerning the issues and  
6 adjudicating same upon their merits.

7        Discretion lies with the Court to appoint counsel under NRS  
8 34.980 Crump v. Warden, 113 Nev. 293, 934 P.2d 247, 254  
9 (1997). The Court is to consider: (1) the complexity of the  
10 issues; (2) whether Petitioner comprehends the issues; (3)  
11 whether counsel is necessary to conduct discovery; and (4) the  
12 severity of Petitioner's sentence. NRS 34.980(1)-(1)(c).

13        Under similar discretionary standards, Federal courts are  
14 encouraged to appoint counsel when the interests of justice so  
15 require - a showing which increases proportionately with the  
16 increased complexities of the case and the penalties involved in  
17 the conviction. Chaney v. Lewis, 801 F.2d 1191, 1196 (9th Cir.  
18 1986). Attorneys should be appointed for indigent petitioners  
19 who cannot "adequately present their own cases." Jeffers v.  
20 Lewis, 68 F.3d 295, 297-98 (9th Cir. 1995).

21        Although Petitioner need meet but one (1) of the enumerated  
22 criteria of NRS 34.980 in order to merit appointment of counsel,  
23 he meets all of them. He also presents a classic example of one  
24 meriting counsel under the interest of justice test bespoken by  
25 the Ninth Circuit. Indeed, Petitioner's sentence, coupled with  
26 the other factors set forth above, demonstrate that appointment  
27 of counsel to him would not only satisfy justice, but *promote*  
28 fundamental fairness, as well.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

CONCLUSION

For the reasons set forth above, the Court should appoint  
counsel to represent Petitioner in and for all further  
proceedings in this petition to establish factual innocence, NRS 34.080

Dated this 18<sup>th</sup> day of July, 2020.

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

Petitioner In Pro Se

CERTIFICATE OF SERVICE

I do certify that I mailed a true and correct copy of the  
foregoing MOTION FOR APPOINTMENT OF COUNSEL to the below address  
on this 18<sup>th</sup> day of July, 2020, by placing same  
in the U.S. Mail via prison law library staff:

Attorney For Respondent

\_\_\_\_\_  
\_\_\_\_\_  
Petitioner In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding  
MOTION FOR APPOINTMENT OF COUNSEL DOES not contain the social  
security number of any person.

Dated this 18<sup>th</sup> day of July, 2020.

Brian K. O'Keefe  
Brian K. O'Keefe

Petitioner In Pro Se



**THIS SEALED  
DOCUMENT,  
NUMBERED PAGE(S)  
52 - 53  
WILL FOLLOW VIA  
U.S. MAIL**

**THIS SEALED  
DOCUMENT,  
NUMBERED PAGE(S)  
54 - 54  
WILL FOLLOW VIA  
U.S. MAIL**

**THIS SEALED  
DOCUMENT,  
NUMBERED PAGE(S)  
55 - 55  
WILL FOLLOW VIA  
U.S. MAIL**

OAC

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

Petitioner In Pro Se

DISTRICT COURT

CLARK COUNTY, NEVADA

\* \* \* \* \*

Brian Kerry O'Keefe, )  
 )  
Petitioner, )  
 )  
-vs- )  
 )  
THE STATE OF NEVADA, )  
 )  
Respondent. )  
 )

A-20-820374-W

Case No. \_\_\_\_\_

Dept., No. \_\_\_\_\_

ORDER APPOINTING COUNSEL

THE COURT, having considered Petitioner's Motion for  
Appointment of Counsel, and with Good Cause appearing,

IT IS HEREBY ORDERED that the motion is GRANTED.

Attorney \_\_\_\_\_ is hereby  
appointed to represent Petitioner for and in relation to all  
further proceedings in the above-entitled habeas corpus action.

IT IS SO ORDERED.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
District Court Judge

27

FILED

SEP 23 2020

*Shelley*  
CLERK OF COURT

1 MOTN  
2 Brian Kerry O'Keefe # 90244  
3 Lovelock Correctional Center  
4 1200 Prison Road  
5 Lovelock, Nevada 89419

6 Plaintiff In Pro Se

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

9 \* \* \* \* \*

10 BRIAN KERRY O'KEEFE, )  
11 Plaintiff, )  
12 -vs- )  
13 THE STATE OF NEVADA, et al., )  
14 Defendants. )

Case No. A-20-820374-W  
Dept. No. XVII  
HEARING REQUESTED

15 MOTION TO COMPEL AND FOR CLARIFICATION  
16 REQUESTING COURT TO ISSUE ORDER FOR  
17 CLERK OF COURT TO FILE AS COMPLAINT  
18 AND SERVE TO ALL APPROPRIATE PARTIES

19 COMES NOW, Brian O'Keefe Plaintiff proper, who files  
20 this action to clarify and compel the Clerk of the Court  
21 to properly file said NRS 34-960 petition.

22 This action is made on the following Points and Authorities  
23 to include petition filed 8/28/2020, as a petition for a  
24 writ of habeas corpus mailed 7/27/2020. see AFFIDAVIT ATTACHED

25 Dated this 14th day of September 2020 pursuant to NRS 208-165 by :

26 B. K. O'Keefe  
Brian K. O'Keefe  
#90244

7110-17 24-014  
CLERK OF THE COURT

SEP 21 2020

RECEIVED

I. STATEMENT OF CASE  
POINTS AND AUTHORITIES

Plaintiff mailed a Petition to Establish Factual Innocence on 8/28/2020. Court Clerk filed with docket stating inmate filed a petition for habeas corpus on 8/28/20.

LEGAL ARGUMENT

Fundamental fairness doctrine applies where Pursuant new law, NRS 34-960, allows a petition to be filed establishing factual innocence which is independent of any habeas action pursuant to NRS 34-724.

- involve NRS 34-950

Procedural due process of law prohibits the state government from depriving an inmate of due process of law and protected liberty interests with equal protection of law also to apply.

The Clerk of Court cannot recharacterize my NRS 34-960 petition as one under the limitations of NRS 34-724.

See Castro v. United States, 540 U.S. 375-377 (2003) citing Haines v. Kerner, 404 U.S. 59, 520 (1972)

II. CONCLUSION

ISSUE ORDER to have Clerk of Court to properly refile said petition and serve to all parties. This simply is being equitable

AFFIDAVIT OF Brian O'Leary #90244

STATE OF NEVADA )  
 ) SS:  
COUNTY OF CLARK )  
 )

I, Brian O'Leary, the undersigned, do hereby swear that all the following statements are true and correct, to the best of my own knowledge and of my own volition.

1. My name is Brian O'Leary,

2. I am over 18 years of age, I reside at Lovelock Correctional Center, 1200 Prison Road, Lovelock, Nevada 89419. I am fully competent to make this affidavit and I have personal knowledge of the facts stated herein.

3. Mailed Petition to Establish Factual Innocence pursuant  
new law, NRS 34.900 to 34.990, inclusive. (NRS 34.960)

4. Said petition is treated as a complaint and is  
independent of my habeas petition pursuant  
to NRS 34.724 - see NRS 34.950

5. This is the second time the Clerk of Court has  
improperly filed petition.

6. Other NRS 34.960 petitions demonstrate controlling law -  
see A-20-820217-C filed 8-26-20 (Det. 22 - Johnson);  
A-20-819883-C filed 8-19-20 (Det. 6 - Bluth);

I declare under penalty of perjury that the foregoing is true and correct, and that this document is executed without benefit of a notary pursuant to NRS 208.165 and/or 28 U.S.C.A § 1746 as I am a prisoner to state custody.

Dated this Monday 14<sup>th</sup> day of September, 2020

Brian O'Leary

CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the  
 foregoing Motion to Compel  
 to the below address(es) on this 14th day of September,  
 2020, by placing same in the U.S. Mail via prison law library  
 staff, pursuant to NRCP 5(b):

Clerk of Court  
200 Lewis Ave., 3rd Flr  
C.V. Nev. 89158

Brian K. O'Neil  
Brian K. O'Neil # 90244  
 Lovelock Correctional Center  
 1200 Prison Road,  
 Lovelock, Nevada 89419  
Plaintiff In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding  
Motion to Compel - - - filed in  
 District Court Case No. A-20-820-34-W does not contain the  
 social security number of any person.

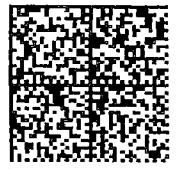
Dated this 14th day of September, 2020.

Brian K. O'Neil  
Brian K. O'Neil  
Plaintiff In Pro Se



Brian O'Keefe #80244  
Lovelock Corr. CTR.  
1200 Prison Rd.  
Lovelock, NV 89409

Lovelock Correctional Center



U.S. POSTAGE PITNEY BOWES  
ZIP 89419 \$000.50  
02 4W  
0000340675 SEP. 15. 2020

INMATE LEGAL  
MAIL CONFIDENTIAL

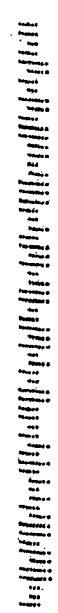
Oct - 9-14-20

~~Box~~ Strip No. 232 6917

LEGAL MAIL

Chell of Court (Steven Brister)  
200 Lewis Ave., 3rd Flr  
Las Vegas, NV 89158

9510186300 COT5



RECEIVED  
SEP 14 2020  
LCO LAW LIBRARY

DISTRICT COURT  
CLARK COUNTY, NEVADA

\*\*\*\*

Electronically Filed  
9/23/2020 3:11 PM  
Steven D. Grierson  
CLERK OF THE COURT



Brian O'Keefe, Plaintiff(s)

vs.

Nevada State of, Defendant(s)

Case No.: A-20-820374-W

Department 17

**NOTICE OF HEARING**

Please be advised that the Plaintiff's Motion to Compel and for Clarification Requesting Court to Issue Order for Clerk of Court to File as Complaint and Serve to All Appropriate Parties in the above-entitled matter is set for hearing as follows:

**Date:** October 27, 2020

**Time:** 8:30 AM

**Location:** RJC Courtroom 11A  
Regional Justice Center  
200 Lewis Ave.  
Las Vegas, NV 89101

**NOTE: Under NEFCR 9(d), if a party is not receiving electronic service through the Eighth Judicial District Court Electronic Filing System, the movant requesting a hearing must serve this notice on the party by traditional means.**

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/ Michelle McCarthy  
Deputy Clerk of the Court

**CERTIFICATE OF SERVICE**

I hereby certify that pursuant to Rule 9(b) of the Nevada Electronic Filing and Conversion Rules a copy of this Notice of Hearing was electronically served to all registered users on this case in the Eighth Judicial District Court Electronic Filing System.

By: /s/ Michelle McCarthy  
Deputy Clerk of the Court

*Heather L. Lamin*  
CLERK OF THE COURT

1 Name Brian O'Keefe  
2 Address 1200 Pison Rd  
3 City Carlin State Nevada 89419  
4 Email \_\_\_\_\_  
5 Telephone \_\_\_\_\_

6 District Court  
7 Clark County, Nevada  
8

9 Brian Kerry O'KEEFE  
10

11 Plaintiff,

12 vs.

13 THE STATE OF NEVADA  
14

15 Defendant  
16

Case No.: A-20-820374-W

Department: XVII

17 Notice of Motion

18 Please take notice that the hearing on NOTICE OF MOTION AND PLAINTIFF'S MOTION  
19 REQUESTING PLAINTIFF TO BE ADVISED OF THIS COURT'S DECISION OF  
20 HEARING RECD 10/21/20 AT 8:53 AM  
21 will be heard on \_\_\_\_\_, 20\_\_\_\_ in Department \_\_\_\_\_ Floor \_\_\_\_\_ Courtroom \_\_\_\_\_  
22 at the hour of \_\_\_\_\_ AM/PM.

23 Dated this 18<sup>th</sup> day of November, 2020

24 Brian O'Keefe  
25

RECEIVED  
NOV 23 2020

CLERK OF THE COURT



*Heather L. O'Keefe*  
CLERK OF THE COURT

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

Petitioner In Pro Se

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

\* \* \* \* \*

BRIAN KERRY O'KEEFE, )  
 )  
Plaintiff, )  
 )  
-vs- )  
 )  
THE STATE OF NEVADA, )  
 )  
Defendants. )

• SEE AFFIDAVIT ATTACHED AND EXH. "A"

Case No. A-20-820374-W

Dept. No. XVII

HEARING REQUESTED

NOTICE OF MOTION AND PLAINTIFF'S MOTION  
REQUESTING PLAINTIFF TO BE ADVISED  
OF THIS COURT'S DECISION OF HEARING  
HELD OCTOBER 27, 2020 AT 8:30 AM

Comes Now, Plaintiff O'Keefe, to file said Motion, in  
accordance to equity and due process - procedural - and N.R. Civ P.,  
• (see NRS 34.960 (10)), requesting a decision by minute order.  
This motion is based on the following facts and points and  
Authorities to resolve Plaintiff's NRS 34.960 petition, improperly  
filed as a Petition for a Writ of Habeas Corpus on 8/28/2020.  
• (see NRS 34.950)

Dated this November 18, 2020, pursuant to NRS 208.165 by: Brian L. O'Keefe  
Brian L. O'Keefe  
pro per #90244

FN 1: Plaintiff's Motion to Compel and for Clarification Requesting Court  
to Issue Order for Clerk of Court to File, [Properly as NRS 34.960]  
... Parties,

STATEMENT OF THE CASE  
POINTS AND AUTHORITIES

I.

The Nevada legislature passed new law,<sup>2</sup> Chapter 34 as NRS 34.900 to 34.990, inclusive, completely separate and independent of NRS 34.720 to 34.830. (see NRS 34.950)

O'Keefe became Plaintiff mailing petition 7/25/2020 where Clerk of Court again improperly filed - intentionally. O'Keefe can only pray that this action and improper conduct is not the genesis of this very Court - Surely, this was another simple - clerical error!

II. LEGAL ARGUMENT (PROCEDURAL DUE PROCESS)

U.S. FIRST AMENDMENT - (REQUEST OF GRIEVANCES)

Due process and protected liberty interests are enforceable by the Nevada and U.S. Constitution.

• see Nev. Const., Article 1 § 8 (5); XIV Constitutional Amendment.

• see 1/86 now NRS 34.900 to 34.990; see 7/80 NRCIVP 7 § 8

Therefore, O'Keefe only requests this Court to issue, by command, notice of its decision where a duty to speak and duty to act is required by law, where the Court Clerk sent a docket-sheet manifesting no text whatsoever, hopefully not by design.

• see EXHIBIT "A" (DOCKET SHEET)

III. CONCLUSIONS GRANT MOTION AND ISSUE WRITTEN DECISION<sup>2</sup> via a minute order in the minimum.

FN2: Promulgated July 1 2019 - see NRS 34.900 to 34.990 -

AFFIDAVIT OF Brian O'Keefe

STATE OF NEVADA )  
 ) SS:  
COUNTY OF PERSHING )

improper case no. A-20-820374-W

I, Brian O'Keefe, the undersigned, do hereby swear that all the following statements are true and correct, to the best of my own knowledge and of my own volition.

1. My name is Brian O'Keefe.

2. I am over 18 years of age, I reside at Lovelock Correctional Center, 1200 Prison Road, Lovelock, Nevada 89419. I am fully competent to make this affidavit and I have personal knowledge of the facts stated herein.

3. I invoked my FIRST AND FOURTEENTH CONSTITUTIONAL Right, bestowed by the Nevada Legislature as NRS 34.960, mailing a Petition to Establish Factual Innocence on July 25, 2020, to end this manifest injustice.

4. Despite Nevada Legislature's intent of NRS 34.950, the Eighth Judicial District Court Clerk intentionally filed Plaintiff O'Keefe's action as a "cause" under NRS 34.724.

5. Plaintiff wrote court clerk multiple times requesting the clerk to correct. Also, Motion to Compel... asking this Court for a remedy naturally, with no response and a blank docket sheet manifesting no minute entry, see

EXH "A"

I declare under penalty of perjury that the foregoing is true and correct, and that this document is executed without benefit of a notary pursuant to NRS 208.165 and/or 28 U.S.C.A § 1746 as I am a prisoner to state custody.

Dated this 18th day of November, 2020

EXHIBIT "A" - CASE SUMMARY (2) Brian O'Keefe  
CASE NO. A-20-820374-W

LCC LL FORM 34.018

**EXHIBIT**

A

CASE SUMMARY

8TH CASE NO. A-20-820374-W

**EXHIBIT**

A

#001

LCC



**CASE SUMMARY****CASE NO. A-20-820374-W**

**Brian O'Keefe, Plaintiff(s)**  
**vs.**  
**Nevada State of, Defendant(s)**

§  
 §  
 §  
 §  
 §  
 §

Location: **Department 17**  
 Judicial Officer: **Villani, Michael**  
 Filed on: **08/28/2020**  
 Cross-Reference Case **A820374**  
 Number:  
 Defendant's Scope ID #: **1447732**

**CASE INFORMATION**

**Related Cases**  
 08C250630 (Writ Related Case)

Case Type: **Writ of Habeas Corpus**

Case  
 Status: **08/28/2020 Open**

**DATE****CASE ASSIGNMENT****Current Case Assignment**

Case Number A-20-820374-W  
 Court Department 17  
 Date Assigned 08/28/2020  
 Judicial Officer Villani, Michael


**PARTY INFORMATION**


**Plaintiff** **O'Keefe, Brian Kerry**


**Pro Se**


**Defendant** **Nevada State of**


**DATE****EVENTS & ORDERS OF THE COURT****INDEX****EVENTS**


08/28/2020  Inmate Filed - Petition for Writ of Habeas Corpus

08/28/2020  Motion for Appointment of Attorney  
*Ex Parte Motion for Appointment of Counsel*

08/28/2020  Application to Proceed in Forma Pauperis

08/28/2020  Filed Under Seal  
*Certificate of Inmate's Institutional Account*

09/23/2020  Motion to Compel  
 Filed By: Plaintiff O'Keefe, Brian Kerry  
*Motion to Compel and for Clarification Requesting Court to Issue Order for Clerk of Court to File as Complaint and Serve to All Appropriate Parties*

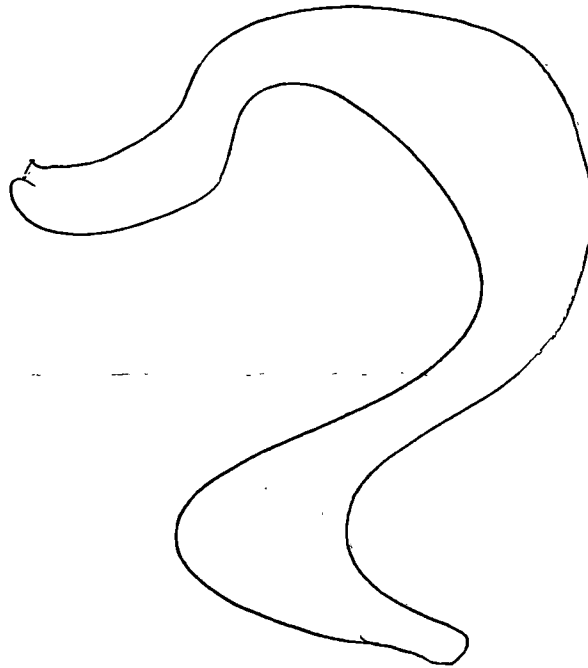
09/23/2020  Clerk's Notice of Hearing  
*Notice of Hearing*

**HEARINGS**

10/27/2020 **Motion (8:30 AM)** (Judicial Officer: Villani, Michael)  
*Plaintiff's Motion to Compel and for Clarification Requesting Court to Issue Order for Clerk of Court to File as Complaint and Serve to All Appropriate Parties*

**CASE SUMMARY**

CASE NO. A-20-820374-W



Very mature  
and equitable -

NICE!  
=

CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing NOTICE OF MOTION AND PLAINTIFF'S MOTION ... AT 8:30AM to the below address(es) on this 18th day of November, 2020, by placing same in the U.S. Mail via prison law library staff, pursuant to NRCP 5(b):

INVOICE EDCR B.05

Clark County D.A.  
200 Lewis Ave.  
Las Vegas, NV 89158

Brian O'Keefe  
Brian O'Keefe # 902469  
Lovelock Correctional Center  
1200 Prison Road  
Lovelock, Nevada 89419  
Petitioner In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding NOTICE OF MOTION AND PLAINTIFF'S MOTION --filed in District Court Case No. A-20-820374-W does not contain the social security number of any person.

Dated this 18th day of November, 2020.

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

Brian O'Keefe #20244  
L.C.C.  
1200 Prison Rd.  
Lovelock, NV 89419

Lovelock Correctional Center



U.S. POSTAGE >> PITNEY BOWES  
ZIP 89419 \$ 000.65<sup>0</sup>  
02 4W  
0000340675 NOV. 19. 2020

INMATE LEGAL  
MAIL CONFIDENTIAL

Clerk of Court (Steven Cravens)  
200 Lower Ave., 3rd Flr  
Las Vegas, NV. 89155

CONFIDENTIAL

OUT-MAIL 11-18-20

Branch Slip No. 2333801

LEGAL MAIL

LCC LAW LIBRARY

NOV 18 2020

RECEIVED

DISTRICT COURT  
CLARK COUNTY, NEVADA

\*\*\*\*

Electronically Filed  
12/8/2020 1:26 PM  
Steven D. Grierson  
CLERK OF THE COURT



Brian O'Keefe, Plaintiff(s)

vs.

Nevada State of, Defendant(s)

Case No.: A-20-820374-W

Department 17

**NOTICE OF HEARING**

Please be advised that the Notice of Motion and Plaintiff's Motion Requesting Plaintiff to be Advised of This Court's Decision of Hearing Held October 27, 2020 at 8:30 am in the above-entitled matter is set for hearing as follows:

**Date:** January 08, 2021

**Time:** 10:15 AM

**Location:** RJC Courtroom 11A  
Regional Justice Center  
200 Lewis Ave.  
Las Vegas, NV 89101

**NOTE: Under NEFCR 9(d), if a party is not receiving electronic service through the Eighth Judicial District Court Electronic Filing System, the movant requesting a hearing must serve this notice on the party by traditional means.**

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/ Michelle McCarthy  
Deputy Clerk of the Court

**CERTIFICATE OF SERVICE**

I hereby certify that pursuant to Rule 9(b) of the Nevada Electronic Filing and Conversion Rules a copy of this Notice of Hearing was electronically served to all registered users on this case in the Eighth Judicial District Court Electronic Filing System.

By: /s/ Michelle McCarthy  
Deputy Clerk of the Court

*Heather S. Hemin*  
CLERK OF THE COURT

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

Plaintiff In Pro Se

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

\* \* \* \* \*

BRIAN KERRY O'KEEFE, ) • CASE-OF-FIRST-IMPRESSION  
Plaintiff, ) \* Case No. A-20-820374  
-vs- ) Dept. No. XVII  
THE STATE OF NEVADA, )  
Defendant. ) HEARING REQUESTED

PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT  
PERTAINING TO RIGHTS AFFECTED BY  
NRS 174.085 SUBSEQUENT ORDER OF  
REVERSAL AND REMAND AS LAW OF CASE  
AND ANOTHER INFORMATION CHARGING INCLUDED OFFENSE

(see A. NRS 30.040, TWO QUESTIONS at 4-5.)

COMES NOW, Plaintiff Brian O'Keefe, pro per, to invoke  
Nev. Rule Civil Procedure 57 pursuant the Uniform Declaratory Judgments Act.

This motion is made pursuant to NRS 34.960 (10) which governs  
petitions filed pursuant to NRS 34.960 (1), and all the following  
points and authorities concerning the rights of plaintiff  
generated by NRS 174.085 caused by law of the case, as  
exhibits 1, 2, 3 and 4 attached, and subsequent information filed.  
Dated this 20<sup>th</sup> day, November 2020 pursuant NRS 208.165 by Brian K. O'Keefe  
Brian K. O'Keefe  
pro per #90244

\* This Motion is to follow NRS 34.960 Petition if said  
petition is assigned a new case no.

## I. JURISDICTION

Pursuant NRS 34.960(10), Nev. R. Civ. P. govern petitions filed under NRS 34.960(1) where NRCiv.P §7 and NRS 30.010 to NRS 30.160, inclusive, provide authority in law.

## II. STATEMENT OF CASE (FACTS)

Plaintiff O'Keefe was noticed and charged with Battery/Domestic<sup>1</sup> Violence: ADMONISHMENT OF RIGHTS separately, (see EXHIBIT 1), as the underlying unlawful act supporting the OPEN MURDER INFORMATION. (see EXHIBIT 2).

The first trial resulted in an implied acquittal, with the jury trial verdict reversed on first direct appeal, (see EXHIBIT 3), where the decision was adjudged and decreed that "the judgment of conviction REVERSED AND REMAND this matter to the district court for proceedings consistent with this order;" — [ONLY]!

New prosecutors, despite NRS 174.085(2) and (3), file SECOND - AMENDED INFORMATION as another INFORMATION for the same offense charged in the former information as an offense that was necessarily included therein. (see EXHIBIT 4)

• A second jeopardy attached by second jury empaneled August 25, 2020, day 3. Nevada Legislature passed new law as NRS 34.900 to 34.990, inclusive, where O'Keefe as Plaintiff mails timely petition on July 25, 2020 assigned case no. A-20-820374-W, improperly.

FN1 "Domestic Violence" means the "Commission of" the Battery, see NRS 48.061(3)

### III. POINTS AND AUTHORITIES

Procedural Due Process Rights under New Const. Art. I § 8(s), the FIFTH and FOURTEENTH U.S. Const. Amendments prohibit the government from depriving protected liberty interests created by NRS 174.085 provisions (2) and (3).

Moreover, the ORDER OF REVERSAL AND REMAND provides a liberty interest.

Therefore, pursuant the Uniform Declaratory Judgments Act where petitions pursuant NRS 34.960(1) are governed by NRCIVP 57, the requested declaratory judgment is not precluded despite the existence of another adequate remedy and this Court may order a speedy hearing and advance it on the calendar.

Requirements for declaratory relief are :

- (1) There must exist a justiciable controversy;
- (2) the controversy must be between persons whose interests are adverse;
- (3) the party seeking declaratory relief must have a legal interest and;
- (4) the issue involved in the controversy must be ripe for judicial determination.

NRS 34.960 petitions, pursuant provision ten (10), provide equitable means to petition the government for a redress of grievances, that may aid this Court in providing declaratory relief that ultimately can assist the factual innocence petition's overall resolution as a matter of law ending Plaintiff O'Keefe's "manifest injustice" and unconstitutional custody despite Plaintiff O'Keefe's absolute actual innocence, factually.



Here Specifically, NRS 30.030 - "Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree."

Application of criminal statutes are proper subject where NRS 174.085(2)(3) here requires a declaratory judgment by this court. (see 10 A.L.R. 3d 727)

A. NRS 30.040; <sup>TWO</sup> QUESTIONS - RIGHTS - STATUTE - REVERSAL ORDER  
Question - 1

1.) Pursuant provision two (2) of negative statute NRS 174.085;

(1) If enforced, does not the ORDER OF REVERSAL AND REMAND, attached as exhibit 3, acquit Plaintiff O'Keefe of the single offense of Second Degree Murder W.D.W. despite any alleged defect in the information based on Sohed v. Arizona, 501 U.S. 641, 644 (1991) where alternative theories of mens rea as means are allowable by due process. (??)  
• invoke also THE STATE OF NEVADA vs. MANGANA, 33 Nev. 511 (1910) (The indictment charged that defendant had killed the deceased by stabbing him and with malice aforethought.)  
(HOLDING that the indictment was not improper in presenting two theories of a killing to the jury.) (Felony murder and malice murder constitute the single crime of murder) (Equal culpability)

1 NRS 174.085 (2) READS: "If a defendant is acquitted on the merits,  
2 the defendant is acquitted of the same offense, notwithstanding a  
3 defect in the form or substance in the ... information... on  
4 which the trial was had." • SEE EXHIBIT 3 (REVERSAL ORDER)

5  
6 Question 2.) Pursuant NRS 174.085 (3): (Negative Statute) (EFFECT);

7  
8 (2) Does not provisions three (3) of NRS 174.085 prohibit  
9 ANOTHER INFORMATION for an offense that was included  
10 within the first OPEN murder information when  
11 Plaintiff O'Keefe had been once placed in jeopardy  
12 which encompassed the lesser included offense.

13 • FIRST JEOPARDY ATTACHED WHEN JURY EMpaneled MARCH 16, 2009, DAY 1.

14 NRS 174.085 (3) READS: When a defendant ... has been  
15 once placed in jeopardy upon an ... information... the jeopardy  
16 is a bar to another ... information... for the offense charged  
17 in the former, ..., or for an offense necessarily included  
18 therein, of which the defendant might have been convicted  
19 under that ... information...

20  
21 Factual innocence can be clearly established by a true  
22 jurisdictional failure. With emphasis the Attorney General  
23 made judicial admission in his ANSWER that if another/  
24 jeopardy attached Judge Bonaventure was without SMJ.

25  
26 IV. CONCLUSION Grant Motion providing a declaratory judgment,  
27 which establishes the legal rights of NRS 174.085 (2) and (3)  
28 caused by the ORDER OF REVERSAL AND REMAND and another Information.

CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing Plaintiff's Motion For Declaratory Judgment to the below address(es) on this 19<sup>th</sup> day of November, 2020, by placing same in the U.S. Mail via prison law library staff, pursuant to NRCP 5(b):

INVOICE EDCR 8.05

Orill County Dist. Attorney  
200 Lewis Ave.  
Las Vegas, NV 89105

Brian K. O'Keefe  
Brian K. O'Keefe # 90244  
Lovelock Correctional Center  
1200 Prison Road  
Lovelock, Nevada 89419  
Plaintiff In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding Plaintiff's Motion For Declaratory Judgment filed in District Court Case No. A-20-820374 does not contain the social security number of any person.

Dated this 19<sup>th</sup> day of November, 2020.

Brian K. O'Keefe  
Brian K. O'Keefe  
Plaintiff In Pro Se

**EXHIBIT**

1

**EXHIBIT**

1

LCC #001

# Justice Court, Las Vegas Township

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,  
Plaintiff,

- vs. -

BRIAN O'KEEFE, aka,  
Brian Kerry Okcefe #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

241

45

**EXHIBIT**

2

**EXHIBIT**

2

#001

LCC

**ORIGINAL**

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

FILED IN OPEN COURT

FEB 10 2009

EDWARD A. FRIEDLAND  
CLERK OF THE COURT

BY Kristen Brown  
KRISTEN BROWN DEPUTY

DISTRICT COURT  
CLARK COUNTY, NEVADA

12 THE STATE OF NEVADA,  
13 Plaintiff,

14 -VS-

15 BRIAN KERRY O'KEEFE,  
16 #1447732

17 Defendant.

Case No. C250630  
Dept No. V

AMENDED  
INFORMATION

18 STATE OF NEVADA }  
19 COUNTY OF CLARK } ss:

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

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

///

FAWPDOCSINP02100274002.DOC

000012

247

EOR 078

DAVID ROGER  
DISTRICT ATTORNEY  
Nevada Bar #002781

BY

*Phillip N. Smith, Jr.*  
PHILLIP N. SMITH, JR.  
Deputy District Attorney  
Nevada Bar #010233

2: 11-cv-02109 - GMN-VCF

Names of witnesses known to the District Attorney's Office at the time of filing this

Information are as follows:

NAMEADDRESS

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



**EXHIBIT** 3

**EXHIBIT** 3

#001

LCC

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

(0) 197A

037 10-08450

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

**EXHIBIT**

4

**EXHIBIT**

4

#001

LCC

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 ///

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  
Nevada Bar #002781

5  
6 BY Christopher J. Lalli  
7 CHRISTOPHER J. LALLI  
Chief Deputy District Attorney  
8 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:

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

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)

2:11-cv-02109-GMN-VCF

55

MR. Brian O'Keefe  
LOVELOCK CORR. CTR.  
1200 PRISON ROAD  
LOVELOCK, NV. 89409

Lovelock Correctional Center



U.S. POSTAGE >> FITNEY BOWES



ZIP 89419 \$001.40<sup>0</sup>  
02 4W  
0000340675 NOV. 20, 2020

**INMATE LEGAL  
MAIL CONFIDENTIAL**

8TH Judicial District Court  
Clerk of Court, (STEVEN BRIERSON)  
200 Lewis Ave., 3RD FL.  
Las Vegas, NV. 89155  
CONFIDENTIAL

OUT MAIL 11/19/20

Postage Slip No. 2333803

LEGAL MAIL

LCO-LAW LIBRARY  
NOV 19 2020  
**RECEIVED**



DISTRICT COURT  
CLARK COUNTY, NEVADA

\*\*\*\*

Electronically Filed  
12/8/2020 2:34 PM  
Steven D. Grierson  
CLERK OF THE COURT



Brian O'Keefe, Plaintiff(s)

vs.

Nevada State of, Defendant(s)

Case No.: A-20-820374-W

Department 17

**NOTICE OF HEARING**

Please be advised that the Plaintiff's Motion for Declaratory Judgment Pertaining to Rights Affected by NRS 174.085 Subsequent Order of Reversal and Remand as Law as Case and Another Information Charging Included Offense in the above-entitled matter is set for hearing as follows:

**Date:** January 12, 2021

**Time:** 10:15 AM

**Location:** RJC Courtroom 11A  
Regional Justice Center  
200 Lewis Ave.  
Las Vegas, NV 89101

**NOTE: Under NEFCR 9(d), if a party is not receiving electronic service through the Eighth Judicial District Court Electronic Filing System, the movant requesting a hearing must serve this notice on the party by traditional means.**

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/ Michelle McCarthy  
Deputy Clerk of the Court

**CERTIFICATE OF SERVICE**

I hereby certify that pursuant to Rule 9(b) of the Nevada Electronic Filing and Conversion Rules a copy of this Notice of Hearing was electronically served to all registered users on this case in the Eighth Judicial District Court Electronic Filing System.

By: /s/ Michelle McCarthy  
Deputy Clerk of the Court

*Heather L. Hume*

CLERK OF THE COURT

**ORDR**

STEVEN B. WOLFSON  
Clark County District Attorney  
Nevada Bar #001565  
PAMELA WECKERLY  
Chief Deputy District Attorney  
Nevada Bar #6163  
200 Lewis Avenue  
Las Vegas, NV 89155-2212  
(702) 671-2500  
Attorney for Plaintiff

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,

Plaintiff,

-vs-

BRIAN O'KEEFE,  
#1447732

Defendant.

CASE NO: A-20-820374-1  
08C250630

DEPT NO: XVII

**ORDER**

DATE OF HEARING: 10/27/20  
TIME OF HEARING: 8:30 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the 27th day of October, 2020, the Defendant not being present, IN PROPER PERSON, the Plaintiff being represented by STEVEN B. WOLFSON, District Attorney, through PAMELA WECKERLY, Chief Deputy District Attorney, without argument, based on the pleadings and good cause appearing therefor,

///

///

///

///

1 IT IS HEREBY ORDERED that the Defendant's Motion to Compel and for  
2 Clarification Requesting Court to Issue Order for Clerk of Court to File as Complaint and  
3 Serve to All Appropriate Parties, shall be, and it is DENIED.

4 DATED this 11<sup>th</sup> day of December, 2020.  
5 h

Dated this 12th day of December, 2020



6 DISTRICT JUDGE

7 STEVEN B. WOLFSON  
8 Clark County District Attorney  
9 Nevada Bar #001565

AFB 880 DBEF 4DD8  
Michael Villani  
District Court Judge

10 BY /s/PAMELA WECKERLY  
11 PAMELA WECKERLY  
12 Chief Deputy District Attorney  
13 Nevada Bar #6163

14 CERTIFICATE OF MAILING

15 I hereby certify that service of the above and foregoing was made this 10th day  
16 of December, 2020, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

17 BRIAN OKEEFE #90244  
18 LOVELOCK CORRECTIONAL CENTER  
19 1200 PRISON ROAD  
20 LOVELOCK, NV 89419

21 BY: /s/Deana Daniels  
22 Secretary for the District Attorney's Office  
23  
24  
25  
26

27 dd/mvu  
28

1 **CSERV**

2  
3 DISTRICT COURT  
4 CLARK COUNTY, NEVADA

5  
6 Brian O'Keefe, Plaintiff(s)

CASE NO: A-20-820374-W

7 vs.

DEPT. NO. Department 17

8 Nevada State of, Defendant(s)  
9

10 **AUTOMATED CERTIFICATE OF SERVICE**

11 Electronic service was attempted through the Eighth Judicial District Court's  
12 electronic filing system, but there were no registered users on the case. The filer has been  
13 notified to serve all parties by traditional means.  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

*Heather J. Linn*  
CLERK OF THE COURT

27

MEMO

Brian O'Keefe # 90244

Lovelock Correctional Center  
1200 Prison Road  
Lovelock, Nevada 89419

Brian Kerry O'Keefe In Pro Se

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

\* \* \* \* \*

BRIAN KERRY O'KEEFE, )

Plaintiff, )

-vs-

THE STATE OF NEVADA, )

Defendant. )

Case No. A-20-820374

Dept. No. XVII

MEMORANDUM OF POINTS AND AUTHORITIES IN  
SUPPORT OF PETITION WHERE THIS COURT MUST  
RECOGNIZE LAW OF FIRST APPEAL WHERE STATE  
MADE JUDICIAL ADMISSION OF SELF DEFENSE CLAIM  
AND FAILED THE BURDEN OF PROOF BY RES JUDICATA

Comes Now, Plaintiff Brian O'Keefe, in proper, to humbly  
file said MEMORANDUM in support of petition.

This action is made on "matters of fact" and "matters of law"  
which generated the ORDER OF REVERSAL AND REMAND, with  
the following Points and Authorities and affidavit.

Dated this 22<sup>nd</sup> day of December 2020 pursuant to NRS 208.165 by: Brian O'Keefe  
Brian O'Keefe

FN1 SON CASE NO. 53859 FILED APRIL 7, 2010 (B/C Case No. C250630) # 90244

RECEIVED  
LCCLL FORM 24.014  
DEC 28 2020

CLERK OF THE COURT

## I. JURISDICTION Chapter 34

Jurisdiction is provided by NRS 34.960 (10), where the Nev. Rules Civ. P govern with N.R.Civ.P 8(c) affirmative defenses of self defense and issue preclusion with res judicata.

## II. STATEMENT OF FACTS TO CASE

Plaintiff was charged with an "OPEN MURDER" INFORMATION based on a single act amounting to a single count of murder with the use of a deadly weapon, allowable by the Nevada Constitution and common law of STATE OF NEVADA v. MANGANA, 33 Nev. 211, 518 (1910).

Moreover, notice of the Battery<sup>2</sup> unlawful act was filed separately, attached as EXHIBIT(3) to petition filed 8/28/2020 as A820374.

Pursuant NRS 175.201, in a criminal trial a defendant can be found guilty of any offense which is necessarily included in that which he is charged.

• see Schmuck v. United States, 489 U.S. 705 (1989) (SAARE)

Defense theory of "self-defense" as "affirmative defense" claim timely made. State, based on no evidence, pursued a single theory of an intentional unlawful act of stabbing where as a principal O'Keefe could be found liable as a natural consequence where the intent (mens rea) to satisfy the charge of second-degree murder then could be implied as a matter of law. The standard of proof was devoid. On first direct appeal the appellate court stated burden of proof not met, where the standard of review was invoked within Fast Track Response.

FN 2 Battery / Domestic Violence: ADMONISHMENT OF RIGHTS (Justice Court Case No. 20F25346X) (Dept. 9) (11/01/2020)

1 III. MATTERS OF LAW

2 This "Court" is well advised to the purpose  
3 of closing argument where here the State conceded this was truly  
4 a circumstantial case where proof by circumstantial evidence of a  
5 battery or something caused the stabbing as an unlawful act.  
6

7 Jury Instruction (16) was the result of the State's case-in-chief  
8 with the defense's case-in-chief with an "affirmative defense" of  
9 true self defense undisputed by all parties and specifically  
10 raised in the Fast Trial Statement and Response which by  
11 law requires "MALICE" period.

12 Jury instruction provision two (2)  
13 was the factors that constitute malice delineated specifically  
14 in *Rose v. State*, 255 P.3d 391 (Nev. 2011).

15 Also, the Nevada  
16 legislature intended that, "every involuntary killing which occurs  
17 in the commission of an unlawful act which, in its consequences naturally  
18 tends to destroy a human life is murder". • see NRS 200.070;

19 • INVOKE Sheriff Clark County, Nev. v. Morris, 99 Nev 109 (1983)

20 In Sheriff Clark County, Nevada v. Morris, 99 Nev. 109, 118-121 (1983)  
21 also dictates that a defendant can be prosecuted for second-degree  
22 murder under present law where a conviction may result from an  
23 unintentional killing when it occurs in the commission of an unlawful  
24 act which by its nature tends to destroy human life, citing

25 *State v. Hall*, 34 Nev. 213, 239 which determined that this  
26 is a Constitutionally sufficient alternative theory of implied malice.  
27 • see State of Nevada v. Mangano, *supra* (adopting the "Sullivan Rule")  
28

1 The felony murder rule (NRS 200.070) is simply another means.  
2 Noting the abandoned and malignant heart language - NRS 200.070(2)-  
3 contains within it the common law second-degree felony  
4 murder rule. The willingness to commit a felony inherently  
5 dangerous to life is a circumstance showing an abandoned  
6 and malignant heart. Therefore, the second-degree felony  
7 murder rule is based on statute and, accordingly, stands  
8 on firm constitutional ground.

9 Clearly express malice and  
10 implied malice cannot co-exist. Moreover, the State truly  
11 abandoned first degree - express malice where the jury  
12 returned an implied malice Second-Degree conviction becoming  
13 an implied acquittal to boot.

14 Final closing argument by the  
15 State manifests on EXHIBIT (10)<sup>3</sup> of petition filed 8/28/2020,  
16 - "... That's certainly circumstantial evidence of a battery or something  
17 that precipitated a stabbing." and

18 "... The law  
19 says you determine a person's intent the moment they commit the act.  
20 ... - it doesn't mean - it doesn't make the underlying act any less  
21 criminal."

22 Common law of Bullis v. State, 33 Nev. 175, 176 (Nev. 1961)  
23 delineates that the Information need not reflect Battery, where  
24 the battery is implied. The charge was open murder not  
25 open battery. The battery is the ultimate element of the  
26 murder charge. This is the physical component as actus reus.  
27 FN 3 Rough Draft Transcript pg. 177, lines 1-2; RDT 178, lines 13-21



#### IV. LEGAL ARGUMENT

On first direct appeal the law of the case was established as "res judicata." Where the defense raised the claim of "self defense," made as a judicial admission in the Fast Track Response, the State countered with the standard of review by burden of proof which embodies both the burden of persuasion and the burden of production -- "By raising the Jackson Standard." The Fast Track Response specified that the issue to the jury was ultimately whether it was murder or self defense. The state even admitted that the alleged victim in the case attacked O'Keefe with a knife as provocation.

The State's flow is that the standard of review on direct appeal holds that the state had to disprove the "affirmative defense" of self defense by providing enough proof where any rational trier of fact, here as the Nevada Supreme Appellate Court, could have found all the essential elements of second-degree murder W.D.W. beyond a reasonable doubt.

This was in response to the Fast Track Statement issue A, which bolstered the preserved claim of self defense by bringing true-fact proof beyond a reasonable doubt that the alleged victim was mentally capable and likely to cause O'Keefe great bodily harm when she came at him with a knife, and with O'Keefe claiming self defense this credible evidence should it been also heard by the jury.

PN 4 State argued Jackson v. Virginia, 443 U.S. 307 at 319 (1979) to sustain second-degree W.D.W. conviction.

1 This "Court" recognizes that J.I. 18 (2) was a constitutionally  
2 sound instruction<sup>5</sup> based on statute as a protected liberty  
3 interest, by Procedural Due Process of law and the  
4 Nevada Const., Art. I § 8(5) and U.S. Constitution's 14th Amend.  
5 • In re: NRS 200.070

6 The state argued that second-degree  
7 murder was J.I. 18(2) by all the factors which therefore  
8 constituted malice in law.

9 However, all parties forget that  
10 when the "Jackson Standard" was invoked this was an  
11 acquittal on the merits.

12 This involved an appellate determination  
13 that required 1) an evidentiary insufficiency issue be raised on  
14 appeal, 2) the appellate court's application of the Jackson  
15 v. Virginia standard of review, and 3) a finding that  
16 the evidence presented was insufficient to sustain the  
17 second-degree murder w.d.w. conviction.

18 Here, NRS 174.085 (2)  
19 kills any alleged trial error or misinstruction of law is overruled  
20 by the corner of the sufficiency of the evidence. [When a  
21 defendant challenging his conviction on appeal contends both  
22 that the trial was infected by error and that the evidence  
23 was constitutionally insufficient, the court may not, consistent  
24 with Brink's v. United States, 437 U.S. 1 (1978) ignore the sufficiency  
25 claim, reverse on grounds of trial error, and remand for retrial.  
26 FNS Phillips v. State, 121 Nev. 501, 502, 109 P.3d 711, 716 (2003) "... if the theories  
27 are all legally sufficient, a general verdict can stand even if sufficient evidence  
28 supports only one of the theories.) 6

Because the first trial has concluded plainly, jeopardy has therefore terminated and a retrial on the same offense is foreclosed by the Double Jeopardy Clause. This also would be protected by the negative statute of ALA 17-1-038 (3) as a protected liberty interest enforceable by the New Constitution and the U.S. 14<sup>th</sup> Amend.

An acquittal on one theory of a SINGLE-COUNT charged crime serves as an acquittal on all alternative theories of that crime. • INVOKE Santana v. United States, 437 U.S. 57, 72 (1978); see also Jackson v. State, 128 Nev. 55 (2012)

O'Kane was simply charged with one theory of criminal liability which was alleged as an intentional unlawful act of stabbing with a knife. The state instructed that malice aforethought was either express or implied where the unlawful killing may be effected by any of the various means by which death may be occasioned. see Nev. 200.010

Ultimately, the law of the first appeal is the law of the case where all the facts substantially remained the same and no new evidence was introduced. In fact, the state used less evidence.

"Schad" holds that premeditation and commission of a felony are not independent elements of a crime, but rather are mere means of satisfying a single mental element. The state must be held to its choice. (id 561 U.S. 637)

Schad v. Arizona, supra also determined that the "Sullivan rule" applies to alternative mens rea theories that still equal a single crime.

Noting with emphasis that the ORDER OF REVERSAL AND REMAND (804 NO. 53859) explained it was 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.

The appellate court determined the evidence didn't support the theory which constituted second-degree murder period.

This court must recognize that Jury Instruction 18 provision (2) clearly stated the physical component (actus reus) and the mental component (mens rea) where also conscious knowledge was also drafted by the language that - "KNOWS HIS CONDUCT ENDANGERS THE LIFE OF ANOTHER", which was the mens rea for conduct.

However now, where "lex judicialis" applies to this instruction not only does claim preclusion exist, collateral estoppel would apply to the elements of intentionally, unlawful act, conduct and knowledge.

Second degree murder comprises unintentional homicides resulting from intentional unlawful acts committed recklessly, where general intent exists. There is no specific intent as express malice.

By pure duplicity caused by prosecutorial misconduct to boot, O'Keefe is also improperly sentenced

1 pursuant NRS 193.165 despite having not committed an  
2 unlawful act by "not judicial." • see Burichauer v. State,  
3 106 Nev. 890, 896 (1990) (First the plain language of NRS 193.165 -  
4 "use" of a weapon "in the commission of a crime" --  
5 indicator that the instrumentality must be used in conscious  
6 furtherance of a criminal objective), citing, e.g., People v.  
7 Chambers, 498 P.2d 1024 (Cal. 1972) (discussing definition of  
8 term "use" in statute creating deadly weapon sentence enhancement).

9  
10 Here in the case at bar, the Nevada Attorney General makes  
11 the ultimate judicial admission in his 2018 ANSWER that  
12 the Nevada Supreme Court acquitted O'Keefe of Second-  
13 Degree Murder that was based on the second-degree  
14 felony murder RULE detailed by jury instruction 18(2).

15  
16 IN SUMMARY, there was no new evidence but only briefed  
17 upped argument relishing same evidence. Moreover, the  
18 "castle doctrine" is applicable for it was O'Keefe's home.  
19 The affirmative defense of self defense was determined  
20 applicable where the State failed there burden of proof  
21 on first direct appeal issue number one. All parties  
22 admit, as stated in EXHIBIT (11) to petition filed 8/28/20  
23 (LAS VEGAS SUN ARTICLE), Victoria attacked O'Keefe with  
24 a knife and a struggle occurred, where no provocation by  
25 O'Keefe existed. There was sadly a death, but it was  
26 determined - it was not by ANY UNLAWFUL ACT, INTENTIONALLY!

27 V. CONCLUSION ORDER STATE TO RETURN TO PETITION AND HOLD  
28 AN EVIDENTIARY HEARING.

AFFIDAVIT OF Brian Kerry O'Keefe

STATE OF NEVADA )

8th Case No. A-20-820374

COUNTY OF Perkins )

SS:

I, Brian O'Keefe, the undersigned, do hereby swear that all the following statements are true and correct, to the best of my own knowledge and of my own volition.

1. My name is Brian O'Keefe.

2. I am over 18 years of age, I reside at Lovelock Correctional Center, 1200 Prison Road, Lovelock, Nevada 89419. I am fully competent to make this

affidavit and I have personal knowledge of the facts stated herein. *Self-Defense as*

3. *Affirmative defense was truly supported by credible evidence and timely raised and even briefed by both parties on direct appeal 53859 issue one.*  
*• invoke "Castle Doctrine"*

4. *The State invoked the "Jackson Standard" trying to convince the appellate court they presented enough proof to support a showing of implied malice where this was determined unfounded thereby supporting O'Keefe's claim of self defense which negates malice by law.*

5. *Chief D.D.A. Christopher Lalli admitted by judicial admission on 8/31/10 8:57 Day 7, Rough Draft Transcript FOR 009 that the Nevada Supreme Court well knows how involuntary manslaughter becomes a second degree murder. It has to do with WHEN does and involuntary become a second degree murder. The NSE said that there is no evidence to support that. Not only was there a trial error but the sufficiency review didn't support it.*

I declare under penalty of perjury that the foregoing is true and correct, and that this document is executed without benefit of a notary pursuant to NRS 208.165 and/or 28 U.S.C.A § 1746 as I am a prisoner to state custody.

Dated this 22nd Tuesday day of December, 2020

6. *Reversal was based on two errors: Trial error and sufficiency of review determination. First Jeopardy also terminated where second jeopardy violated NRS 174.005(2)*

*Brian O'Keefe*

CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing MEMORANDUM OF POINTS AND AUTHORITIES to the below address(es) on this 22<sup>nd</sup> day of December, 2020, by placing same in the U.S. Mail via prison law library staff, pursuant to NRCP 5(b): Brass Slip No. 2329641

Also INVOKE EDCR 8.05

Service List

Clark County District Attorney's Office  
and Clark County Attorney General's Office

Mailed copy to Clark County Dist.  
Law Library

125 West, NV. 89125-2212

Don K. O'Keefe  
Don K. O'Keefe # 90244  
Lovelock Correctional Center  
1200 Prison Road  
Lovelock, Nevada 89419

Don K. O'Keefe In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding MEMORANDUM OF POINTS AND AUTHORITIES filed in District Court Case No. AB20374 does not contain the social security number of any person.

Dated this 22<sup>nd</sup> day of December, 2020.

Don K. O'Keefe  
Don K. O'Keefe In Pro Se

Brian O'Keefe #90244  
LCC  
1200 Prison Rd  
Lovelock, NV. 89409

Lovelock Correctional Center

RENO NV

23 DEC 2020 P



INMATE LEGAL  
MAIL CONFIDENTIAL

Clerk of Court  
Steven Goversal  
200 Lewis Ave., 3rd Fl.  
Las Vegas NV. 89101

OUT 12/22/20

LEGAL MAIL

Brass slip No. 232964

8510136300 C075



RECEIVED  
DEC 29 2020  
LCC LAW LIBRARY



*Steven S. Smith*  
CLERK OF THE COURT

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

Plaintiff - Petitioner In Pro Se

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

\* \* \* \* \*

<u>BRIAN KERRY O'KEEFE</u>	)	Case - of - First - Impression
<u>Plaintiff</u>	)	Case No. <u>A-20-820374</u> (Pertains to C250630)
-vs-	)	Dept. No. <u>XVII</u>
<u>THE STATE OF NEVADA</u>	)	* (see Attached Exhibit 1 and Affidavit.)
<u>Defendant</u>	)	

MOTION FOR LEAVE OF COURT FOR SUPPLEMENTAL POINT  
WITH AUTHORITIES SUPPORTING PETITION WHERE TRUE  
PURPOSE OF REMAND WAS REEXAMINATION WHERE  
FAILURE OF PROOF ON A THEORY THAT HOLDS EQUAL  
CULPABILITY TO ANY REMAINING THEORY BY DUE PROCESS

COMES NOW, Brian O'Keefe, Plaintiff pro per, who hereby requests  
leave of court to file action in support pursuant to NRS 34.960 (10),  
N.R.Civ.P. 15 (d), and the EDCR's - 2.20 - 3.20 - 5.508.

— Plaintiff presents this "a fortiori".  
By due process, the "sullivan rule," Nev. Constitution, Article 1 § 2 enforcing the  
rights bestowed by SCHAD v. ARIZONA, *infra* as greater force of logic, even  
more so < if the [same] evidence presented at trial did not support this  
theory of second degree murder, then, a fortiori, the same rehearsed  
evidence cannot support a malice theory >. [Subsequent trials used less proof.]

This action is made on the following points and authorities and the petition  
on file. Dated December 25, 2020 pursuant to NRS 208.165 by: Brian O'Keefe  
Brian O'Keefe

I. SUPPLEMENTAL POINT AND AUTHORITIES (FIRST TRIAL - FIRST APPEAL)

The remand was for "new trial reexamining issue two" and jurisdiction. As "res judicata", the law of the first appeal is the law of the case.

Undisputed fact that the same evidence was reheated by beefed up argument of the same issue, already determined unfounded.

● Collateral estoppel applies to intent, unlawful act, stabbing with knife use!

The State's theory of criminal culpability, as law of the trial, failed on direct appeal where subsequent the State invoking the "Jackson Standard", the appellate court concluded not only was a trial error committed,<sup>1</sup> but the State "also" failed to meet the burden of proof<sup>2</sup> to "sustain" the conviction, thereby "ailing" to prove "beyond a reasonable doubt" that Plaintiff O'Keefe committed an intentional unlawful act resulting in criminal homicide of second-degree murder with "use" of a deadly weapon.<sup>3</sup>

This court apparently is "unaware" that the State invoked the "Jackson Standard" to defend their jury conviction when manifesting the State's theory of criminal liability by "judicial admissions" in the Fast Track Response, issues II. and VI., that Jury Instruction 18 was a Nevada Constitutionally correct statement of the law defining in provision two the factors that constituted second-degree murder by a "showing" of malice - IMPLIED. Issue VI. specifically called J.I. 18 (2) a malice instruction in law. Abuse of discretion is an appellate court's standard for reviewing issue unsupported by the evidence.

FN1 "... the district court abused its discretion when it instructed the jury..."

FN2 "... and the evidence presented at trial did not support... second degree..."

FN3 NRS 193.165 sentence enhancement must be also vacated. No death occurred in the commission of a crime with "use" of a weapon in conscious furtherance of a criminal objective. id. 106 Nev 890 (Buschauer)

This is demonstrated by prima facie evidence in the record of the trial itself where J.I. 18's provision two read: (Partially) (mens rea) "... 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 intent to kill."

- The state defined by argument and instructions the act as stabbing!

Here, "KNOWS" is the mens rea for "CONDUCT" which amounts to conduct being contrary to law, as an unlawful act, not proven!

Elements of a crime consist of actus reus, mens rea, causation, any grading factors and the negative of any defense claims where Plaintiff O'Keefe had both self defense and voluntary intoxication on first appeal; as preserved valid affirmative defenses. - (state concedes in F.R. #53882)

Where O'Keefe's implied acquittal "negated" deliberation and premeditation, also at O'Keefe's Motion to SETTLE THE RECORD, all parties stipulated there was no deliberate intent to kill. The only theory was based on malice implied which here J.I. 18 described the factors.

Second Degree murder comprises unintentional homicides with general intent to perform an act even though the [alleged] actor does not desire the consequences that result.

IN O'KEEFE'S case, J.I. 18 provided alleged theory 1 as - "An unlawful killing of a human being with malice aforethought, but without deliberation or premeditation or ..." provision two above.

The point is actually J.I. 18 (2) equals provision one and simply "interpret" what malice aforethought is by the factors defining malice as elements of a crime. The commission of an unlawful act is not an element, but rather a means.

1 • see SCHAD v. ARIZONA, 501 U.S. 624 at 637 (1991) (premeditation and commission  
2 of a felony are not independent elements of a crime, both rather are mere  
3 means of satisfying a single mens rea element, [for a single crime],  
4 in accordance with due process of law - as the process due.  
5 Noting the "Sullivan rule" applies also to alternative theories that  
6 constitute a single crime. • see Utah v. Russell, 733 P.2d 162, 167-68 (1997)  
7 • see also Marquez v. Gunn, 1994 U.S. App. LEXIS 16088 (9th Cir. 1994) (same).

8  
9 Therefore, first direct review (SEN #53859), the existence of trial error  
10 and the existence of alternative grounds for reversal did not affect  
11 the sufficiency of evidence review. (• see United States v. Recio<sup>4</sup>)  
12 The existence of alternative grounds for reversal did not avoid the  
13 review of the sufficiency of evidence<sup>5</sup> invoked by the State raising the  
14 "Jackson Standard", to sustain the jury conviction of second-degree murder on appeal.  
15 • INVOKED Evans v. Michigan, 568 U.S. 313, 319 (2013) (Acquittal on one, same for all).

16 Pursuant Burks v. United States,<sup>6</sup> the lower district court, based on the  
17 Double Jeopardy Clause and NRS 194.085(3), could not ignore the conclusion  
18 made on first direct appeal that the evidence did not support the  
19 State's ONLY theory available for the instant case based on the facts,  
20 evidence, admissions and the result of the implied acquittal with both  
21 affirmative defenses where by law self defense negates malice.  
22 Moreover, under the "BURKS TEST", an error justifying a reversal,  
23 which could only be cured by the introduction of new evidence at the  
24 subsequent trial results in an acquittal by implication.

25  
26 FN4 371 F.3d 1093, 1106 (9th Cir. 2004) (... alternative grounds for reversal besides trial...)  
27 FN5 United States v. Gergen, 192 F.3d 719, 724-25 (9th Cir. 1999)  
28 FN6 437 U.S. 1, 11 (1978)

1 Plaintiff brings to this Court's attention that contrary to N25 174.085 (3),  
2 a new second jeopardy attached subsequent the implied acquittal when the  
3 second jury was empaneled on 8/25/2010, day (3) of second trial on  
4 the lesser included offense of the first open murder information in  
5 which the first jeopardy attached when empaneled day (1) - 3/16/2009.  
6 Emphasis is that the third trial was based on the continuing jeopardy  
7 doctrine where the second trial jurors hung with a mistrial declared by court.  
8 • The state was given a second and third bite of the apple caused by failure of prot.  
9 Most important, is this Court conducted no reexamination of any "alleged"  
10 "new evidence" before the second trial. However, making a mockery of  
11 this Court as a fool, for otherwise this Court consciously participated,  
12 is the undisputed fact Deputy District Attorney Liz Mercer - #10681 - filed  
13 a second Motion in Limine To ADMIT EVIDENCE OF OTHER BAD ACTS on the  
14 exact same evidence, where this Court conducted two Petrocelli Hearings?  
15 The "discovery" provided no new acts except a fabricated Department  
16 of Public Safety report as a letter concerning a bogus conviction under  
17 case NO. C205105. • (INCORPORATE EXHIBIT "1" attached (Letter Oct. 11, 2005))  
18 **FN 1** MOTION TO ADMIT OTHER BAD ACTS filed 2/2/2009; MOTION IN LIMINE... filed 1/6/2011  
19 When the alternative theories are determined to hold equivalent blameworthiness  
20 as criminal culpability, then an acquittal on one theory of a single-count charged  
21 crime serves as an acquittal on any remaining possible alternative theories of that  
22 crime. • INVOKED *Sanabria v. United States*, 437 U.S. 54, 72 (1978); *Jackson v. State*, 128 Nev. 55 (2012)

### 23 • IN SUMMARY

24 The courts have determined implied malice theories require even a higher burden  
25 of proof where a higher culpable state of mind exceeds the state of mind for the  
26 simple felony murder rule theory. • INVOKED *Marquez v. Gunn*, supra at ¶ 7 citing *Schack*, supra.  
27 Where all the same evidence didn't support this theory, a fortiori, the less same cannot.  
28 • CONCLUSION Grant leave and allow for resolution of petition filed 8/28/2020 with  
initial prayer for relief. Order response.

AFFIDAVIT OF Brian Kerry O'Keefe #90244  
A-20-820374

STATE OF NEVADA )  
SS:

COUNTY OF Pershing )

I, Brian O'Keefe, the undersigned, do hereby swear that all the following statements are true and correct, to the best of my own knowledge and of my own volition.

1. My name is Brian O'Keefe, pro per invoking Nev. Const., Art. I § 10.
2. I am over 18 years of age, I reside at Lovelock Correctional Center, 1200 Prison Road, Lovelock, Nevada 89419. I am fully competent to make this affidavit and I have personal knowledge of the facts stated herein.

3. Judicial admission by State attesting in Fast Track Response, issue (6) that Jury Instruction 18 (2) was a true Malice Instruction listing and defining the factors which would constitute a showing of malice detailed in issue 2.

4. This Court conducted ultimately two Petrocelli Hearings on the same proof reheard! First Motion to Admit BAC ACES filed 2/2/09. Second Motion in Limine filed 11/6/11. • Juxtapose motions where content is the same proof and only proof existing.

5. State violated due process by extrinsic fraud creating bogus discovery, see EXHIBIT "1" attached. • case no. C205165, fabricated, No valid conviction exists under C205165.

6. B.I. 18 (2) is and was an "interpretation" of NRS 200.020(2) abandoned and malignant heart language where also the second degree felony-murder rule is nonstatutory in the sense that no language spells it out. Moreover, Nevada has NRS 200.070, for a noticed unlawful act. • see Sheriff, Clark County v. Morris. 1

I declare under penalty of perjury that the foregoing is true and correct, and that this document is executed without benefit of a notary pursuant to NRS 208.165 and/or 28 U.S.C.A § 1746 as I am a prisoner to state custody.

Dated this Friday - 25<sup>th</sup> day of December, 2020

FN 1 99 Nev. 109, 118, 659 P.2d 852 (1983)

Brian O'Keefe

# **EXHIBIT**

1

FAKE DISCOVERY

Bogus Case No. C205165

NO SUCH CONVICTION EXISTS!

# **EXHIBIT**

1

A-20-820374

DISTRICT OFFICES

STATE OF NEVADA

KENNY C. GUINN

GOVERNOR

1301 CORDONE AVE  
RENO, NEVADA 89502

(775) 688-1000



Dave Kieckbusch

ACTING DIRECTOR

A. A. CAMPOS BUILDING  
215 E. BONANZA ROAD

LAS VEGAS, NEVADA 89101

(702) 486-3001

3920 E. IDAHO STREET  
ELKO, NEVADA 89801

(775) 738-4088

119 E. LONG STREET  
CARSON CITY, NEVADA 89706  
(775) 687-5045

DEPARTMENT OF PUBLIC SAFETY  
DIVISION OF PAROLE AND PROBATION

Amy H. Wright, CHIEF  
1445 HOT SPRINGS ROAD, NO. 104  
CARSON CITY, NEVADA 89706  
(775) 687-5040

October 11, 2005

Victoria Whitemarsh  
PO BOX 97011  
Las Vegas, NV 89193

Re: ☒ Brian Kerry O'Keefe  
Case Number/Offense: C205165 - Attempt Battery Domestic Violence, 3rd (F/GM)

Dear Ms. Whitemarsh,

The Division of Parole and Probation is conducting a pre-sentence investigation on the above-named individual. It is our understanding that you were the victim of this crime. As part of our investigation, we attempt to determine: (1) What loss or expenses you suffered as a result of this crime; and (2) How you were affected by the crime itself.

Per Nevada Revised Statute, the sentencing court shall sentence the offender to pay restitution to you if you suffered a monetary loss as a result of their crime. The Division would request that you return the attached questionnaire within ten days of receipt. We would also request that you provide documentation verifying your loss, if available, for consideration of restitution.

If we do not receive the completed questionnaire back from you, we will assume that no loss has been incurred or you are not interested in receiving restitution. If no financial loss was suffered, we would still like you to express your feelings regarding the defendant and how this crime has affected you.

NRS 176.015 (3)(a)(b) allows for the victims or their attorney to briefly address the court, at the time of sentencing, regarding the impact of the crime and the need for restitution. If you wish to address the court, you must contact the District Attorney's Office, (702) 455-4204, to arrange for your appearance.

The State of Nevada has funds available to qualifying victims for compensation for injury, loss or counseling. For additional information, please contact the District Attorney's Office.

It is important that you provide us with the completed questionnaire and any future change of address as soon as possible so we can maintain open lines of communication with you. Please send your completed questionnaire forms to: Nevada Division of Parole and Probation (ATTN: Yong-Min Hong), 215 E. Bonanza Road, Las Vegas, NV 89101, or, you may fax your reply to: (702) 486-3076. (Retain this cover letter for your records.)

Delayed restitution payments can be avoided by submitting address changes to: Division of Parole and Probations  
(Capitol Complex)

1445 Hot Springs Road, #104

8-28-20

1180-820374

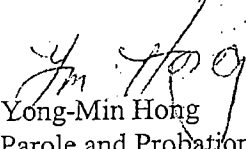
\* THIS IS A  
FABRICATED CASE NO.  
NO CONVICTION  
EXISTS UNDER  
THAT CASE #

on a fabricated case no.?



Carson City, NV 89710

Should you have any questions regarding these matters, please contact me and I will be happy to assist you. I can be contacted at (702) 486-3603 (Private line) or (702) 486-3001 (Message number). Thank you for your cooperation in this matter.

  
Yong-Min Hong  
Parole and Probation Specialist III  
Court Services

0-20-20

117-20-820374

CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing MOTION FOR LEAVE AND SUPPLEMENTAL POINT... RES JUANITA to the below address(es) on this 28<sup>th</sup> day of December, 2020, by placing same in the U.S. Mail via prison law library staff, pursuant to NRCP 5(b): By Brass Slip no. 2333813

INVOKER EDCR 8.05

NOTICE TO CLERK : SERVICE LIST - CLARK COUNTY DISTRICT ATTORNEY  
Registered User of CM/ECF

NOT REGISTERED PARTICIPANT - Brian O'Keeffe  
PAPER COPY TO 1200 PRISON ROAD  
LOVELOCK, NV. 89419

Brian K. O'Keeffe  
Brian K. O'Keeffe #  
Lovelock Correctional Center  
1200 Prison Road  
Lovelock, Nevada 89419  
Plaintiff - Petitioner In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding MOTION FOR LEAVE AND SUPPLEMENTAL POINT... RES JUANITA filed in District Court Case No. A-20-820374 does not contain the social security number of any person.

Dated this 28<sup>th</sup> day of December, 2020.

Brian K. O'Keeffe  
Brian K. O'Keeffe  
Plaintiff - Petitioner In Pro Se

Brian O'Keefe #90244  
LOVELOCK CORR. CTR.  
1200 Prison Rd.  
LOVELOCK, NV. 89409

Lovelock Correctional Center



U.S. POSTAGE PITNEY BOWES

ZIP 89419 \$ 000.65<sup>0</sup>  
02 4W  
0000340675 DEC. 29, 2020

INMATE LEGAL  
MAIL CONFIDENTIAL

Clerk of Court (8th Judicial)  
Steven Greenman  
200 Lewis Ave., 3rd Fl.  
Las Vegas, NV. 89101  
CONFIDENTIAL

OUT LEGAL MAIL

Br208 Slip A/L 2333813

8910136300 C075



RECEIVED  
DEC 28 2020  
LCC LAW LIBRARY



**EIGHTH JUDICIAL DISTRICT COURT  
CLERK OF THE COURT**

REGIONAL JUSTICE CENTER  
200 LEWIS AVENUE, 3<sup>RD</sup> FL.  
LAS VEGAS, NEVADA 89155-1160  
(702) 671-4554

Steven D. Grierson  
Clerk of the Court

Anntoinette Naumec-Miller  
Court Division Administrator

---

1/11/2021  
Honorable Michael Villani  
Department 17  
**Case: A-20-820374-W**

RE: Vexatious Litigant

Attached is a filed Motion for Leave of Court for Supplemental Point and Authorities Supporting Petition Where True Purpose of Remand was Re- Examination Where Failure of Proof on a Theory That Holds Equal Culpability to Any Remaining Theory by Due Process.

**Please advise if we are to schedule this motion for hearing.**

Respectfully,

/s/ Salevao L. Asifoa  
Deputy Clerk, Legal Department

\_\_\_\_\_  
District Court Judge

\_\_\_\_\_  
Date

*Heather S. Smith*  
CLERK OF THE COURT

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

Plaintiff - Petitioner In Pro Se

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

\* \* \* \* \*

<u>BRIAN KERRY O'KEEFE</u>	)	Case - of - First - Impression
<u>Plaintiff</u>	)	Case No. <u>A-20-820374</u> (Pertains to C250630)
-vs-	)	Dept. No. <u>XVII</u>
<u>THE STATE OF NEVADA</u>	)	* (see Attached Exhibit 1 and Affidavit.)
<u>Defendant</u>	)	

MOTION FOR LEAVE OF COURT FOR SUPPLEMENTAL POINT  
WITH AUTHORITIES SUPPORTING PETITION WHERE TRUE  
PURPOSE OF REMAND WAS REEXAMINATION WHERE  
FAILURE OF PROOF ON A THEORY THAT HOLDS EQUAL  
CULPABILITY TO ANY REMAINING THEORY BY DUE PROCESS

COMES NOW, Brian O'Keefe, Plaintiff pro per, who hereby requests  
leave of court to file motion in support pursuant to NRS 34.960 (10),  
N.R.Civ.P. 15 (d), and the EDCR's - 2.20 - 3.20 - 5.508.

— Plaintiff presents this "a fortiori".  
By due process, the "sullivan rule," Nev. Constitution, Article 1 § 2 enforcing the  
rights bestowed by SCHAD v. ARIZONA, *infra* as greater force of logic, even  
more so < if the [same] evidence presented at trial did not support this  
theory of second degree murder, then, a fortiori, the same rehearsed  
evidence cannot support a malice theory >. [Subsequent trials used less proof.]

This action is made on the following points and authorities and the petition  
on file. Dated December 25, 2020 pursuant to NRS 208.165 by: Brian O'Keefe  
Brian O'Keefe

I. SUPPLEMENTAL POINT AND AUTHORITIES (FIRST TRIAL - FIRST APPEAL)

The remand was for "new trial reexamining issue two" and jurisdiction. As "res judicata", the law of the first appeal is the law of the case.

Undisputed fact that the same evidence was reheated by beefed up argument of the same issue, already determined unfounded.

• Collateral estoppel applies to intent, unlawful act, stabbing with knife use!

The State's theory of criminal culpability, as law of the trial, failed on direct appeal where subsequent the State invoking the "Jackson Standard", the appellate court concluded not only was a trial error committed, but the State also failed to meet the burden of proof<sup>2</sup> to "sustain" the conviction, thereby failing to prove "beyond a reasonable doubt" that Plaintiff O'Keefe committed an intentional unlawful act resulting in criminal homicide of second-degree murder with "use" of a deadly weapon.<sup>3</sup>

This court apparently is "unaware" that the State invoked the "Jackson Standard" to defend their jury conviction when manifesting the State's theory of criminal liability by "judicial admissions" in the Fast Track Response, issues II. and VI., that Jury Instruction 18 was a Nevada Constitutionally correct statement of the law defining in provision two the factors that constituted second-degree murder by a "showing" of malice - IMPLIED. Issue VI. specifically called J.I. 18 (2) a malice instruction in law. Abuse of discretion is an appellate court's standard for reviewing issues unsupported by the evidence.

FN1 "... the district court abused its discretion when it instructed the jury..."

FN2 "... and the evidence presented at trial did not support... second degree..."

FN3 NR3 193.165 sentence enhancement must be also vacated. No death occurred in the commission of a crime with "use" of a weapon in conscious furtherance of a criminal objective. id. 106 Nev 896 ("Buschauer")

This is demonstrated by prima facie evidence in the record of the trial itself where J.I. 18's provision two read: (Partially) (mens rea) "... 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 intent to kill."

- The state defined by argument and instructions the act as stabbing!

Here, "KNOWS" is the mens rea for "CONDUCT" which amounts to conduct being contrary to law, as an unlawful act, not proven!

Elements of a crime consist of actus reus, mens rea, causation, any grading factors and the negative of any defense claims where Plaintiff O'Keefe had both self defense and voluntary intoxication on first appeal; as preserved valid affirmative defenses. - (state concedes in F.R. #53888)

Where O'Keefe's implied acquittal "negated" deliberation and premeditation, also at O'Keefe's Motion to SETTLE THE RECORD, all parties stipulated there was no deliberate intent to kill. The only theory was based on malice implied which here J.I. 18 described the factors.

Second Degree murder comprises unintentional homicides with general intent to perform an act even though the [alleged] actor does not desire the consequences that result.

IN O'KEEFE'S case, J.I. 18 provided alleged theory 1 as - "An unlawful killing of a human being with malice aforethought, but without deliberation or premeditation or ..." provision two above.

The point is actually J.I. 18 (2) equals provision one and simply "interpret" what malice aforethought is by the factors defining malice as elements of a crime. The commission of an unlawful act is not an element, but rather a means.

1 • see SOLAD v. ARIZONA, 501 U.S. 624 at 637 (1991) (premeditation and commission  
2 of a felony are not independent elements of a crime, both rather are mere  
3 means of satisfying a single mens rea element, [for a single crime],  
4 in accordance with due process of law - as the process due.  
5 Noting the "Sullivan rule" applies also to alternative theories that  
6 constitute a single crime. • see Utah v. Russell, 733 P.2d 162, 167-68 (1997)  
7 • see also Marquez v. Gunn, 1994 U.S. App. LEXIS 16088 (9th Cir. 1994) (same).

8  
9 Therefore, first direct review (SEN #53559), the existence of trial error  
10 and the existence of alternative grounds for reversal did not affect  
11 the sufficiency of evidence review. (• see United States v. Recio<sup>4</sup>)  
12 The existence of alternative grounds for reversal did not avoid the  
13 review of the sufficiency of evidence<sup>5</sup> invoked by the State raising the  
14 "Jackson Standard", to sustain the jury conviction of second-degree murder on appeal.  
15 • INVOKED Evans v. Michigan, 568 U.S. 313, 319 (2013) (Acquittal on one, same for all).

16 Pursuant Burks v. United States<sup>6</sup>, the lower district court, based on the  
17 Double Jeopardy Clause and NRS 194.085(3), could not ignore the conclusion  
18 made on first direct appeal that the evidence did not support the  
19 State's ONLY theory available for the instant case based on the facts,  
20 evidence, admissions and the result of the implied acquittal with both  
21 affirmative defenses where by law self defense negates malice.  
22 Moreover, under the "BURKS TEST", an error justifying a reversal,  
23 which could only be cured by the introduction of new evidence at the  
24 subsequent trial results in an acquittal by implication.

25  
26 FN4 371 F.3d 1093, 1106 (9th Cir. 2004) (... alternatives grounds for reversal besides trial...)  
27 FN5 United States v. Gergen, 172 F.3d 719, 724-25 (9th Cir. 1999)  
28 FN6 437 U.S. 1, 11 (1978)



1 Plaintiff brings to this Court's attention that contrary to NRS 174.085 (3),  
2 a new second jeopardy attached subsequent the implied acquittal when the  
3 second jury was empaneled on 8/25/2010, day (3) of second trial on  
4 the lesser included offense of the first open murder information in  
5 which the first jeopardy attached when empaneled day (1) - 3/16/2009.  
6 Emphasis is that the third trial was based on the continuing jeopardy  
7 doctrine where the second trial jurors hung with a mistrial declared by court.  
8 • The state was given a second and third bite of the apple caused by failure of prob.  
9 Most important, is this Court conducted no reexamination of any "alleged"  
10 "new evidence" before the second trial. However, making a mockery of  
11 this Court as a fool, for otherwise this Court consciously participated,  
12 is the undisputed fact Deputy District Attorney Liz Mercer - #10681 - filed  
13 a second Motion in Limine To ADMIT EVIDENCE OF OTHER BAD ACTS on the  
14 exact same evidence, where this Court conducted two Petrocelli Hearings.  
15 The "discovery" provided no new acts except a fabricated Department  
16 of Public Safety report as a letter concerning a bogus conviction under  
17 case NO. C205165. • (INCORPORATE EXHIBIT "1" attached (Letter Oct. 11, 2005))  
18 **FN 7** MOTION TO ADMIT OTHER BAD ACTS filed 2/2/2009; MOTION IN LIMINE... filed 1/6/2011

19 When the alternative theories are determined to hold equivalent blameworthiness  
20 as criminal culpability, then an acquittal on one theory of a single-count charged  
21 crime serves as an acquittal on any remaining possible alternative theories of that  
22 crime. • *INVOKED* *Sanabria v. United States*, 437 U.S. 54, 72 (1978); *Jackson v. State*, 128 Nev. 55 (2012)

### 23 • IN SUMMARY

24 The courts have determined implied malice theories require even a higher burden  
25 of proof where a higher culpable state of mind exceeds the state of mind for the  
26 simple felony murder rule theory. • *INVOKED* *Marquez v. Gunn*, supra at 7 citing *Schack*, supra.  
27 Where all the same evidence didn't support this theory, a fortiori, the lesser same cannot.

28 • CONCLUSION Grant leave and allow for resolution of petition filed 8/28/2020 with  
initial prayer for relief. Order response.

AFFIDAVIT OF Brian Kerry O'Keefe #90244  
A-20-820374

STATE OF NEVADA )  
 ) SS:  
COUNTY OF Pershing )

I, Brian O'Keefe, the undersigned, do hereby swear that all the following statements are true and correct, to the best of my own knowledge and of my own volition.

1. My name is Brian O'Keefe, pro per invoking Nev. Const., Art. I § 10.
2. I am over 18 years of age, I reside at Lovelock Correctional Center, 1200 Prison Road, Lovelock, Nevada 89419. I am fully competent to make this affidavit and I have personal knowledge of the facts stated herein.

3. Judicial admission by State attesting in Fast Track Response, issue (6) that Jury Instruction 18 (2) was a true Malice Instruction listing and defining the factors which would constitute a showing of malice detailed in issue 2.

4. This Court conducted ultimately two Petrocelli Hearings on the same proof rehearsed! First Motion to Amend BAC ACES filed 2/2/09. Second Motion in Limine filed 11/6/11.  
• Juxtapose motions where content is the same proof and only proof existing.

5. State violated due process by extrinsic fraud creating bogus discovery, see EXHIBIT "1" attached.  
• case no. C205165, fabricated, No valid conviction exists under C205165.

6. O.I. 18 (2) is and was an "interpretation" of NRS 200.020(2) abandoned and malignant heart language where also the second degree felony-murder rule is nonstatutory in the sense that no language spells it out. Moreover, Nevada has NRS 200.070, for a noticed unlawful act. • see Sheriff, Clark County, Morris.

I declare under penalty of perjury that the foregoing is true and correct, and that this document is executed without benefit of a notary pursuant to NRS 208.165 and/or 28 U.S.C.A § 1746 as I am a prisoner to state custody.

Dated this Friday - 25<sup>th</sup> day of December, 2020

FN 1 99 Nev. 109, 110, 659 P.2d 852 (1983)

Brian O'Keefe

# EXHIBIT 1

FAKE DISCOVERY

Bogus Case No. C205165

NO SUCH CONVICTION EXISTS!

# EXHIBIT 1

A-20-820374

## DISTRICT OFFICES

1301 CORDONE AVE  
RENO, NEVADA 89502

(775) 688-1000

A. A. CAMPOS BUILDING  
215 E. BONANZA ROAD

LAS VEGAS, NEVADA 89101

(702) 486-3001

3920 E. IDAHO STREET  
ELKO, NEVADA 89801

(775) 738-4088

119 E. LONG STREET  
CARSON CITY, NEVADA 89706  
(775) 687-5045

## STATE OF NEVADA



KENNY C. GUINN

GOVERNOR

Dave Kieckbusch

ACTING DIRECTOR

DEPARTMENT OF PUBLIC SAFETY  
DIVISION OF PAROLE AND PROBATION

Amy H. Wright, CHIEF  
1445 HOT SPRINGS ROAD, NO. 104  
CARSON CITY, NEVADA 89706  
(775) 687-5040

October 11, 2005

Victoria Whitemarsh  
PO BOX 97011  
Las Vegas, NV 89193

Re: *\* Brian Kerry O'Keefe*  
Case Number/Offense: *C205165 - Attempt Battery Domestic Violence, 3rd (F/GM)*

Dear Ms. Whitemarsh,

*\* THIS IS A FABRICATED CASE NO. NO CONVICTION EXISTS UNDER THAT CASE #!*  
*on a fabricated case no. ?*  
The Division of Parole and Probation is conducting a pre-sentence investigation on the above-named individual. It is our understanding that you were the victim of this crime. As part of our investigation, we attempt to determine: (1) What loss or expenses you suffered as a result of this crime; and (2) How you were affected by the crime itself.

Per Nevada Revised Statute, the sentencing court shall sentence the offender to pay restitution to you if you suffered a monetary loss as a result of their crime. The Division would request that you return the attached questionnaire within ten days of receipt. We would also request that you provide documentation verifying your loss, if available, for consideration of restitution.

If we do not receive the completed questionnaire back from you, we will assume that no loss has been incurred or you are not interested in receiving restitution. If no financial loss was suffered, we would still like you to express your feelings regarding the defendant and how this crime has affected you.

NRS 176.015 (3)(a)(b) allows for the victims or their attorney to briefly address the court, at the time of sentencing, regarding the impact of the crime and the need for restitution. If you wish to address the court, you must contact the District Attorney's Office, (702) 455-4204, to arrange for your appearance.

The State of Nevada has funds available to qualifying victims for compensation for injury, loss or counseling. For additional information, please contact the District Attorney's Office.

It is important that you provide us with the completed questionnaire and any future change of address as soon as possible so we can maintain open lines of communication with you. Please send your completed questionnaire forms to: Nevada Division of Parole and Probation (ATTN: Yong-Min Hong), 215 E. Bonanza Road, Las Vegas, NV 89101, or, you may fax your reply to: (702) 486-3076. (Retain this cover letter for your records.)

Delayed restitution payments can be avoided by submitting address changes to: Division of Parole and Probations  
(Capitol Complex)

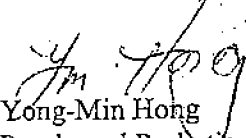
1445 Hot Springs Road, #104

8-28-20

A280-820374

Carson City, NV 89710

Should you have any questions regarding these matters, please contact me and I will be happy to assist you. I can be contacted at (702) 486-3603 (Private line) or (702) 486-3001 (Message number). Thank you for your cooperation in this matter.

  
Yong-Min Hong  
Parole and Probation Specialist III  
Court Services

8-20-20

A-20-820374

CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing MOTION FOR LEAVE AND SUPPLEMENTAL POINT... RES JUDICATA to the below address(es) on this 28<sup>th</sup> day of December, 2020, by placing same in the U.S. Mail via prison law library staff, pursuant to NRCP 5(b): By Brass Slip No. 2333813

INVOKED EDCR 8.05

NOTICE TO CLERK : SERVICE LIST - CLARK COUNTY DISTRICT ATTORNEY  
Registered User of CM/ECF

NOT REGISTERED PARTICIPANT - Brian O'Keeffe  
PAPER COPY TO 1200 Prison Road  
LOVELOCK, NV. 89419

Brian K. O'Keeffe  
Brian K. O'Keeffe #  
Lovelock Correctional Center  
1200 Prison Road  
Lovelock, Nevada 89419  
Plaintiff - Petitioner In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding MOTION FOR LEAVE AND SUPPLEMENTAL POINT... RES JUDICATA filed in District Court Case No. A-20-820374 does not contain the social security number of any person.

Dated this 28<sup>th</sup> day of December, 2020.

Brian K. O'Keeffe  
Brian K. O'Keeffe  
Plaintiff - Petitioner In Pro Se

Brian O'Keefe #90244  
LOVELOCK CORR. CTR.  
1200 Prison Rd.  
LOVELOCK, NV. 89419

Lovelock Correctional Center



U.S. POSTAGE PITNEY BOWES



ZIP 89419 \$ 000.65<sup>0</sup>  
02 4W  
0000340675 DEC. 29, 2020

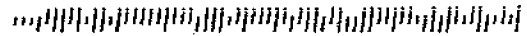
INMATE LEGAL  
MAIL CONFIDENTIAL

Clerk of Court (8th Judicial)  
Steven Greenman  
200 Lewis Ave., 3rd Fl.  
Las Vegas, NV. 89101  
CONFIDENTIAL

OUT LEGAL MAIL

Brass Slip A/L 2333812

8910136300 0075



RECEIVED  
DEC 28 2020  
LCC LAW LIBRARY

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Writ of Habeas Corpus**

**COURT MINUTES**

**October 27, 2020**

---

A-20-820374-W      Brian O'Keefe, Plaintiff(s)  
vs.  
Nevada State of, Defendant(s)

---

**October 27, 2020      8:30 AM      Motion**

**HEARD BY:** Villani, Michael      **COURTROOM:** RJC Courtroom 11A

**COURT CLERK:** Shannon Reid

**RECORDER:** Cynthia Georgilas

**REPORTER:**

**PARTIES  
PRESENT:**

**JOURNAL ENTRIES**

- Court noted the Pltf. has been deemed a vexatious litigant. Court stated it has review the pleadings and FINDS that it does not have any merit and is not going to consider this matter; further, there is no factual legal basis to grant the motion, therefore, ORDERED, Motion DENIED.



**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Writ of Habeas Corpus**

**COURT MINUTES**

**January 08, 2021**

---

A-20-820374-W      Brian O'Keefe, Plaintiff(s)  
vs.  
Nevada State of, Defendant(s)

---

**January 08, 2021      8:30 AM      Motion**

**HEARD BY:** Villani, Michael      **COURTROOM:** RJC Courtroom 11A

**COURT CLERK:** Louisa Garcia

**RECORDER:** Cynthia Georgilas

**REPORTER:**

**PARTIES**

**PRESENT:**

**JOURNAL ENTRIES**

- Court noted the Plaintiff has been deemed a vexatious litigant. Defendant is requesting a copy of the court minutes dated October 27, 2021; clerk will mail to Defendant.

CLERK'S NOTE: Clerk mailed copy of requested minutes to Defendant on 1/15/21. lg

# Certification of Copy and Transmittal of Record

State of Nevada }  
County of Clark } SS:

Pursuant to the Supreme Court order dated November 29, 2022, I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, do hereby certify that the foregoing is a true, full and correct copy of the complete trial court record for the case referenced below. The record comprises one volume with pages numbered 1 through 133.

BRIAN KERRY O'KEEFE,

Plaintiff(s),

vs.

STATE OF NEVADA,

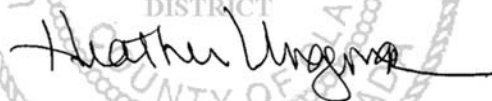
Defendant(s),

Case No: A-20-820374-W  
Related Case 08C250630  
Dept. No: VI

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto  
Set my hand and Affixed the seal of the  
Court at my office, Las Vegas, Nevada  
This 5 day of December 2022.

Steven D. Grierson, Clerk of the Court



Heather Ungermann, Deputy Clerk

