No. _____

In the
Supreme Court of the United States

Zachary Kelsey,

Petitioner,

v.

Tim Garrett, et al.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Appendix to Petition for Writ of Certiorari
Volume 1 of 3

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ZACHARY KELSEY, Petitioner-Appellant, v. TIM GARRETT; et al., Respondents-Appellees.	No. 22-15557 D.C. No. 3:18-cv-00174-MMD-CLB District of Nevada, Reno ORDER

Before: GRABER, GOULD, and FRIEDLAND, Circuit Judges.

The panel judges have voted to deny Appellant's petition for panel rehearing. Judges Gould and Friedland have voted to deny Appellant's petition for rehearing en banc, and Judge Graber has so recommended.

The full court has been advised of Appellant's petition for rehearing en banc, and no judge of the court has requested a vote on it.

Appellant's petition for panel rehearing and rehearing en banc, Docket No. 43, is DENIED.

NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ZACHARY KELSEY, Petitioner-Appellant, v. TIM GARRETT; et al., Respondents-Appellees.	No. 22-15557 D.C. No. 3:18-cv-00174-MMD-CLB MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Miranda M. Du, Chief District Judge, Presiding

Argued and Submitted December 9, 2022
Opinion Filed May 24, 2023
Opinion Withdrawn and Resubmitted, September 19, 2023
San Francisco, California

Before: GRABER, GOULD, and FRIEDLAND, Circuit Judges.

A jury convicted Petitioner Zachary Kelsey of second-degree murder. He appeals the denial of his habeas corpus petition, brought pursuant to 28 U.S.C. § 2254, alleging ineffective assistance of trial counsel. Under § 2254(d), our review is "doubly deferential," requiring deference under both the Antiterrorism

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

and Effective Death Penalty Act and Strickland v. Washington, 466 U.S. 668 (1984). Knowles v. Mirzayance, 556 U.S. 111, 123 (2009). The state court's decision to affirm Petitioner's conviction and sentence was not "contrary to, [nor did it involve] an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1). We therefore affirm.

1. The district court correctly denied Petitioner's claim pertaining to his trial counsel's waiver of closing argument. Counsel testified that he waived closing argument because the junior prosecutor presented a lackluster closing. Counsel also testified that, by waiving closing argument, he prevented the senior prosecutor, who was a vigorous advocate, from giving a compelling rebuttal. It was reasonable for the state court to decide that this strategy did not make counsel's performance deficient under Strickland. In addition, the state court could reasonably have decided that Petitioner's counsel did not act deficiently in agreeing to a proposal from the codefendants' lawyers to waive closing argument for all defendants. One of the codefendants' lawyers had called witnesses who attacked Petitioner's credibility and who asserted that Petitioner had committed the most brutal part of the beating that resulted in the victim's death. In the circumstances, there was reason for Petitioner's counsel not to give closing argument time to parties whose positions were hostile to his client's interests. See Bell v. Cone, 535 U.S. 685, 701–02 (2002) (holding that a state court reasonably

concluded that counsel in a death penalty case did not violate Strickland by waiving closing argument); see also Yarborough v. Gentry, 540 U.S. 1, 5–6 (2003) (per curiam) (holding that, although "[t]he right to effective assistance [of counsel] extends to closing arguments," counsel is entitled to "wide latitude in deciding how best to represent a client").

The state court also reasonably concluded that Petitioner failed to demonstrate prejudice. Trial counsel gave an effective opening statement and presented a robust defense through Petitioner's testimony and through examination of other witnesses. See Hovey v. Ayers, 458 F.3d 892, 906–07 (9th Cir. 2006) ("Where counsel's failure to oppose the prosecution occurs only in isolated points during the trial, we will not presume prejudice."). The state court reasonably concluded that Petitioner did not show a "substantial" likelihood of a different result, Harrington v. Richter, 562 U.S. 86, 112 (2011), had his counsel given a closing argument.

2. The district court correctly denied Petitioner's claim pertaining to his counsel's decision not to consult a forensic pathologist. Petitioner delivered two blows to the victim's head, knocking him down, and kneed him in the head twice as he fell. Two prosecution experts concluded that Petitioner's actions could have contributed directly to the victim's death. The third expert who, Petitioner argues, should have been consulted, had a view that was more favorable to Petitioner's

case. But it was not unreasonable for the state court to conclude that "[Petitioner] had failed to demonstrate a reasonable probability of a different outcome" had this expert testified. The third expert acknowledged that Petitioner's actions could have been a substantial factor in the victim's death, testimony that would not have absolved Petitioner of criminal liability. See Etcheverry v. State, 821 P.2d 350, 351 (Nev. 1991) (per curiam) ("[A]n intervening cause must be a superseding cause, or the sole cause of the injury in order to completely excuse the prior act." (emphasis omitted)). For those reasons, the state court reasonably applied Strickland in finding no prejudice.

AFFIRMED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ZACHARY KELSEY, *Petitioner-Appellant,* v. TIM GARRETT; JAMES DZURENDA; AARON D. FORD, *Respondents-Appellees.*	No. 22-15557 D.C. No. 3:18-cv-00174-MMD-CLB OPINION

Appeal from the United States District Court
for the District of Nevada
Miranda M. Du, Chief District Judge, Presiding

Argued and Submitted December 9, 2022
San Francisco, California

Filed May 24, 2023

Before: Susan P. Graber, Ronald M. Gould, and Paul J. Watford, Circuit Judges.

Opinion by Judge Gould;
Dissent by Judge Graber

SUMMARY*

Habeas Corpus

The panel reversed the district court's denial of Nevada prisoner Zachary Kelsey's 28 U.S.C. § 2254 habeas corpus petition challenging his conviction and 10-to-25-year sentence for the second-degree murder of Jared Hyde, and remanded for the district court to issue the writ.

In his habeas corpus petition, Kelsey claimed that he was denied effective assistance of counsel as guaranteed under the Sixth Amendment by his trial counsel, Scott Edwards, waiving closing argument and failing to consult a forensic pathologist expert.

The panel agreed with Kelsey that Edwards' decision to waive closing argument was not based on strategy and that he was prejudiced by counsel's waiver. Addressing deficient performance, the panel wrote that neither reason offered by Edwards during post-conviction proceedings testimony—that he chose to waive closing argument to cut off the possibility that the lead prosecutor would give a more powerful rebuttal closing argument, and to preclude the prosecutor from arguing for first-degree murder—is supported by the record. The panel wrote that the record likewise does not support respondents' asserted justification—never offered by Edwards—that the waiver was a tactic to prevent co-defendants' counsel from presenting closing arguments that would shift blame to Kelsey. The panel wrote that Edwards' decision to waive

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

closing argument was also unreasonable under prevailing professional norms. The panel held that Kelsey successfully showed that he was prejudiced by Edwards' waiver of closing argument. Had Edwards made a closing argument, he could have explained that Kelsey's actions were not the proximate cause of Hyde's death and asked the jury to convict, if at all, on a lesser offense. As this was a joint trial with varying defense theories and degrees of culpability, closing argument was a critical opportunity for Edwards to distinguish and disentangle Kelsey's culpability from that of his co-defendants. Applying the Antiterrorism and Effective Death Penalty Act (AEDPA), the panel held that Nevada Court of Appeals unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984), by accepting Edwards' implausible explanations for waiving closing argument and because there was a reasonable probability of a better outcome for Kelsey if Edwards had given closing argument.

The panel also agreed with Kelsey that Edwards' decision not to consult a forensic pathologist expert was not based on strategy and that Kelsey was prejudiced by this decision. The panel held that Edwards did not conduct a reasonable investigation. The central issue at trial was the cause of Hyde's death, and Edwards' defense theory was that Kelsey was guilty at best of simple battery. But even though he was not an expert in forensic pathology himself, Edwards did not contact, consult with, or present, an expert questioning whether Kelsey's actions caused Hyde's death. The panel wrote that it was enough that Edwards knew the testifying experts called by co-defendants' counsel would contradict his defense theory and nevertheless failed to present countervailing expert testimony on that subject or even consult with an expert to aid in his cross-examination and trial preparation. Addressing prejudice, the panel wrote

that it is reasonable to conclude that, presented with an expert in disagreement with testifying experts, at least one juror would have been swayed to have a reasonable doubt because of the disagreeing expert, and that there is thus a reasonable probability that the jury would have returned with a different sentence. As the Nevada Court of Appeals did not address whether Edwards was deficient for failing to consult a forensic pathologist expert, the panel applied AEDPA deference only to its analysis of the prejudice prong. The panel held that the Nevada Court of Appeals' and the state district court's decisions involved an unreasonable application of *Strickland* because they did not accord appropriate weight to the potential force of countervailing expert testimony in this case where causation was so critical and because they failed to consider the combined prejudicial effect of both deficiencies (waiver of closing argument and failure to consult with an expert).

Dissenting, Judge Graber wrote that Edwards made tactical decisions that neither fell below an objective standard of reasonableness nor prejudiced Kelsey, and that the state court's denial of his habeas petition therefore was not an unreasonable application of *Strickland*. She wrote that in concluding that Edwards was ineffective because he waived closing argument and because that decision prejudiced Kelsey, the majority opinion fails to give proper deference to the decisions of Kelsey's trial counsel *and* to the decision of the state court. She wrote that not only was the decision to waive closing argument objectively reasonable in the circumstances, it also is essentially the same strategy that the Supreme Court approved in *Bell v. Cone*, 535 U.S. 685 (2002). Concerning Edwards' failure to consult a forensic pathologist, Judge Graber wrote that Edwards already possessed reports from two well-respected

experts and both concluded that Kelsey's actions could have contributed *directly* to the victim's death; that a third expert, whom the majority chides Edwards for failing to call, recognized that Kelsey's actions could have been a *substantial factor* in the victim's death; and that Kelsey is guilty of the crime of conviction even if his acts were only a "substantial factor" in the killing. She wrote that this court should not expand *Strickland* to stand for the proposition that a defense attorney always must consult with an expert when the government puts forth its own expert. She wrote that the majority opinion also fails to explain precisely how consultation with any forensic expert would have resulted in a different outcome at trial.

COUNSEL

Kimberly Sandberg (argued), Assistant Federal Public Defender; Rene L. Valladares, Federal Public Defender, District of Nevada; Public Defenders' Office; Las Vegas, Nevada; for Petitioner-Appellant.

Erica Berrett (argued), Deputy Attorney General; Office of the Nevada Attorney General; Las Vegas, Nevada; Charles L. Finlayson, Senior Deputy Attorney General; Aaron D. Ford, Attorney General of Nevada; Office of the Nevada Attorney General; Carson City, Nevada; for Respondents-Appellees.

OPINION

GOULD, Circuit Judge:

Zachary Kelsey appeals the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition challenging his conviction and 10-to-25-year sentence for the second-degree murder of Jared Hyde. We reverse and remand.

At trial, Kelsey was tried with two co-defendants, Robert Schnueringer and Andrue Jefferson, each of whom had their own counsel. Kelsey's trial counsel, Scott Edwards, did not consult with or retain a forensic pathologist regarding Hyde's cause of death. Then, prompted by counsel for Schnueringer, Edwards agreed to waive closing argument. In post-trial proceedings, Edwards testified that he did not consult a forensic pathologist because Schnueringer's attorney told him that he had talked to an expert and that her opinion "wasn't good." Edwards stated that he agreed to waive closing argument to avoid giving the prosecutor a chance to argue for first-degree murder in rebuttal.

In his habeas corpus petition, Kelsey claimed that he was denied effective assistance of counsel as guaranteed under the Sixth Amendment. The state district court granted Kelsey's petition on the claim that his trial counsel was ineffective in failing to give a closing argument, but the Nevada Court of Appeals reversed. The federal district court denied habeas relief. We have jurisdiction under 28 U.S.C. § 1291 and 28 U.S.C. § 2253; we reverse and order the district court to issue the writ of habeas corpus.

I. FACTUAL AND PROCEDURAL BACKGROUND

a. The death of Jared Hyde

On February 4, 2012, Kelsey went to a bonfire party attended by forty to sixty individuals in their teens and early twenties. During the party, fights broke out. One was between Kelsey and Jared Hyde, the victim.

At trial, four individuals testified about the fight between Kelsey and Hyde: three attendees of the bonfire party—Mike Opperman, Brandon Nastaad, and Aubree Hawkinson—along with Kelsey himself. Opperman, Nastaad, and Hawkinson all testified that they saw Kelsey hit Hyde in his face two to three times. Naastad testified that he saw Hyde pulling Kelsey's shirt off of him and then saw Kelsey punch Hyde in the face three times. Opperman testified that Kelsey's hits knocked Hyde down. Kelsey testified that he punched Hyde twice and only tried to kick him after Hyde grabbed Kelsey's shirt. Some witnesses of the fight testified that Kelsey later bragged about wearing brass knuckles during the fight, but no one testified that they actually saw him wearing them. Hyde's friend Tyler DePriest testified that, after the fight between Kelsey and Hyde was over, Hyde walked toward DePriest's vehicle and told him, "I just got rocked. Let's get out of here, let's go."

As Hyde walked around to the passenger side of the car, he was confronted by Schnueringer and Jefferson, who asked if Hyde was "still talking smack," and Hyde responded that he was not. Hyde did not have his hands up to defend himself when Schnueringer punched him in the head, the sound of which witnesses compared to the crack of a baseball bat. Hyde's knees buckled and he fell to the ground. While Hyde was unconscious on the ground, Jefferson punched him in the head again. Schnueringer and Jefferson

proceeded to stomp on Hyde's head, while Jefferson shouted, "I slept him. I slept him." When a friend of Hyde's checked Hyde for a pulse, he did not find one. Hyde's friends drove him to the hospital. Hyde was not breathing when they arrived at the hospital and efforts to resuscitate him failed.

b. Expert Opinions

Dr. Ellen Clark performed Hyde's autopsy and she determined that "[t]he cause of death was bleeding into the brain . . . due to blunt force trauma." Dr. Clark explained that "[t]here were multiple injuries to different parts of the brain" such that she could not "identify one fatal impact site" because "based upon the cumulative effect or the compounding injury, any and all of the blows may have contributed to causing death." Dr. Clark consulted with Dr. Bennet Omalu, a forensic pathologist, neuropathologist, and a "recognized and leading expert in brain trauma," to get his opinion of Hyde's cause of death. Similar to Dr. Clark, Dr. Omalu testified about "repetitive traumatic brain injury," meaning "each and every repeated blow accentuates the totality of all the blows" such that it cannot be determined "which blow was the fatal blow."

In sharp contrast, at Kelsey's post-conviction hearing, a pathologist named Dr. Amy Llewellyn testified that, after reviewing Hyde's autopsy report and photographs, Dr. Clark and Dr. Omalu's trial testimonies, and various witness statements, she did not agree with Dr. Omalu's conclusion that every single hit necessarily contributed to Hyde's death. She testified that she thought, "to a reasonable degree of medical certainty," that it was the second attack by Schnueringer and Jefferson that killed Hyde. That conclusion accords with common sense. It is one thing for a

teenager at a party to throw and land a punch to someone's head. But it is quite another thing, and clearly more extreme, for two teenagers to repeatedly beat someone in the head multiple times. There is a difference between a typical high school fight of teenagers, and a savage, brutal beating delivering repeated blows to a helpless victim's head.

c. Prior State and Federal Proceedings

i. Nevada State Courts

On direct appeal, the Nevada Supreme Court affirmed Kelsey's judgment of conviction and sentence. Kelsey sought post-conviction relief. The state district court granted Kelsey's petition on the claim that his trial counsel was ineffective in failing to give a closing argument, but the Nevada Court of Appeals reversed. Kelsey then pursued relief in federal court.

ii. Federal Habeas Corpus

The United States District Court for the District of Nevada denied Kelsey's habeas petition and initially denied him a certificate of appealability. Kelsey appealed, and we granted a certificate of appealability with respect to whether his trial counsel was ineffective. We also granted Kelsey's motion for remand because certain documents were not submitted to, and thus not reviewed by, the district court. On remand, the district court reaffirmed its prior denial of Kelsey's habeas petition, but it granted a certificate of appealability for whether Kelsey's trial counsel was ineffective for (a) waiving closing argument and/or (b) failing to consult with or retain an expert regarding the victim's cause of death.

II. STANDARD OF REVIEW

We review a district court's denial of a habeas petition *de novo*. *Godoy v. Spearman*, 861 F.3d 956, 961-62 (9th Cir. 2017) (en banc). Because Kelsey filed his petition after April 24, 1996, the Antiterrorism and Effective Death Penalty Act ("AEDPA") applies to review of this petition. *See Summers v. Schriro*, 481 F.3d 710, 712 (9th Cir. 2007). Under AEDPA, when a state court has adjudicated a claim on the merits, a federal court may grant habeas relief only if the state court's decision was: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2). When the state court does not reach a particular issue, § 2254 does not apply, and we review that issue *de novo*. *See Rompilla v. Beard*, 545 U.S. 374, 390 (2005); *see also Weeden v. Johnson*, 854 F.3d 1063, 1071 (9th Cir. 2017) ("Because the [state court] did not reach the issue of prejudice, we address the issue de novo.").

III. DISCUSSION

A defendant claiming ineffective assistance of counsel ("IAC") must demonstrate: (1) that counsel's performance was deficient and (2) that the defendant was prejudiced by reason of counsel's actions. *Strickland v. Washington*, 466 U.S. 668, 687-90 (1984).

Regarding the first prong, counsel's performance was deficient if it "fell below an objective standard of reasonableness . . . . under prevailing professional norms." *Id.* at 688. There is a strong presumption that counsel rendered adequate assistance, and "strategic choices made

after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.* at 690-91. However, the purpose of these inquiries is to ensure that criminal defendants receive a fair trial, so we analyze IAC claims "considering all the circumstances." *Id.* at 688-89.

Regarding the second prong, we consider "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695. "A reasonable probability is one 'sufficient to undermine confidence in the outcome,' but is 'less than the preponderance more-likely-than-not standard.'" *Lambright v. Schriro*, 490 F.3d 1103, 1121 (9th Cir. 2007) (quoting *Summerlin v. Schriro*, 427 F.3d 623, 640, 643 (9th Cir. 2005) (en banc)). It is not necessary to show that counsel's deficient conduct "more likely than not altered the outcome in the case." *See Duncan v. Ornoski*, 528 F.3d 1222, 1239 (9th Cir. 2008) (quoting *Sanders v. Ratelle*, 21 F.3d 1446, 1461 (9th Cir. 1994)).

In addition to defining these standards, the *Strickland* Court set guidance for their application, reminding lower courts that, "[a]lthough [the *Strickland* standards] should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." 466 U.S. at 696.

There is a large amount of deference owed in this case. Review of an IAC claim under § 2254(d) is "doubly deferential," requiring the court to apply AEDPA deference on top of *Strickland* deference. *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). However, a federal habeas court may grant the writ if it concludes that the state court decision was "contrary to" or "involved an unreasonable application of" clearly established federal law. 28 U.S.C. § 2254(d)(1).

"[C]ontrary to" means that "the state court applie[d] a rule different from the governing law set forth in [the Supreme Court's] cases" or that it "decide[d] a case differently than [the Supreme Court] ha[s] done on a set of materially indistinguishable facts." *Bell v. Cone*, 535 U.S. 685, 694 (2002) (citing *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)). "[U]nreasonable application" means that "the state court identifie[d] the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applie[d] that principle to the facts of the prisoner's case." *Williams*, 529 U.S. at 413.

a. Waiving closing argument

Kelsey argues that his trial counsel was ineffective for waiving closing argument. He argues that Edwards' decision to waive closing argument was not based on strategy and that he was prejudiced by Edwards' waiver. *Id.* We agree.

Edwards testified that the reason he waived closing argument was because he did not think the junior prosecutor's closing argument was "the most vigorous closing argument [he] had ever seen," and he didn't want to give the more senior prosecutor an opportunity to argue for first-degree murder in rebuttal. John Ohlson, counsel for Kelsey's co-defendant Schnueringer, was the one who initially suggested waiving closing argument. Edwards, understanding that all three attorneys had to waive closing to keep the prosecution from getting a rebuttal, agreed to Ohlson's suggestion.

The state district court held that Edwards was deficient for waiving closing argument and that the waiver prejudiced Kelsey, but the Nevada Court of Appeals reversed. The Nevada Court of Appeals' reversal was based on its

conclusion that while choosing to forgo closing argument "may not have been the best option, it was a tactical decision," and that Kelsey failed to demonstrate prejudice.

i. Deficient performance

Closing arguments are a crucial part of trial. As the Supreme Court emphasized in *Herring v. New York*, "no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment." 422 U.S. 853, 862 (1975). While "[c]losing arguments should 'sharpen and clarify the issues for resolution by the trier of fact,' . . . which issues to sharpen and how best to clarify them are questions with many reasonable answers." *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (per curiam) (quoting *Herring*, 422 U.S. at 862). As pointed out by Respondents, it is true that sometimes it might make sense to "forgo closing argument altogether." *Id.* But even if waiving closing argument can, in some cases, be a tactical decision, it was not one in this case.

As a threshold matter, Kelsey's co-defendants, Jefferson and Schnueringer, presented defenses that were directly adversarial to Kelsey's, such that it was questionable for Edwards to rely on Ohlson's strategic assessment. At every turn, Ohlson and Molezzo (counsel for Jefferson) sought to inculpate Kelsey in order to exonerate their clients. Indeed, Ohlson presented a theory of the case that was arguably even more extreme than the State's with respect to Kelsey's culpability, repeatedly emphasizing Kelsey's alleged use of brass knuckles.

During the Nevada post-conviction proceedings, Edwards testified that he chose to waive closing argument to cut off the possibility that the lead prosecutor would give a

more powerful rebuttal closing argument and to preclude the prosecutor from arguing for first-degree murder. Neither reason is supported by the record. Edwards himself acknowledged that the State never argued for first-degree murder during its initial closing and could not have credibly argued that Kelsey was guilty of first-degree murder in rebuttal. As for the desire to avoid a more persuasive rebuttal, there is no concrete indication in the record that the lead prosecutor would be the person to argue the State's rebuttal, and, more importantly, there is no indication that anything was left unsaid in the State's initial closing argument. As the Nevada district court emphasized in granting Kelsey post-conviction relief, the prosecution's initial closing argument was not brief. It lasted for approximately two hours, over which time the State reviewed virtually every aspect of the trial in detail. Given the length and comprehensiveness of the State's initial closing argument, it was entirely unreasonable to think that the State had saved its best for last.

Respondents advance an additional reason that Edwards' decision to waive closing argument was tactical, namely to prevent Molezzo and Ohlson from presenting closing arguments that would shift blame to Kelsey by highlighting his alleged use of brass knuckles. But Edwards never offered that as a reason justifying his decision to waive closing argument, and the record does not support that asserted justification in any event.

Although Ohlson attempted at trial to elicit testimony that Kelsey had used brass knuckles and bragged about killing Hyde, Ohlson testified during post-conviction proceedings that the witnesses he put on the stand had been thoroughly discredited by the end of the trial. In fact, Ohlson testified that he had waived closing argument to avoid the

possibility that the damage done to the credibility of those witnesses would "rub off" on his client. During its closing argument, the prosecution picked apart the credibility of Ohlson's witnesses, telling the jury that parts of their story didn't "make sense," and that the brass knuckles testimony was unfounded. Thus, any supposed desire to prevent counsel for Kelsey's co-defendants from presenting closing arguments could not have supported Edwards' decision to waive closing argument on Kelsey's behalf.

Bell v. Cone, on which Respondents rely, does not change our conclusion. In that case, the Supreme Court held that a Tennessee state court's determination that counsel was not ineffective for waiving closing argument during the sentencing stage of proceedings did not involve an unreasonable application of *Strickland*. 535 U.S. at 688-87. The Court's holding was based on an analysis of the evidence defense counsel had presented during the guilt stage of proceedings, how close in time the trial was to the sentencing hearing, and the tactical choice with which counsel was faced.

The petitioner in *Bell* was tried and convicted for the brutal murder of an elderly couple. *Id.* at 689. The killings culminated a "2-day crime rampage," *id.*, that also included robbing a jewelry store, shooting a police officer, shooting a citizen, and trying to hijack a car by attempting to shoot its driver, *id.* There was "overwhelming physical and testimonial evidence showing that [petitioner] had perpetrated the crimes and killed the [victims] in a brutal and callous fashion." *Id.* The State had "near conclusive proof of guilt on the murder charges as well as extensive evidence demonstrating the cruelty of the killings." *Id.* at 699.

At trial, defense counsel conceded that Cone had committed most of the acts in question but sought to prove that he was not guilty by reason of insanity. *Id.* at 690. Counsel presented extensive mitigating evidence during the guilt stage of the proceedings. *Id.* Defense experts testified to the petitioner's post-traumatic stress disorder developed while serving in Vietnam and to the petitioner's chronic amphetamine psychosis, hallucinations, and paranoia, which affected his ability to obey the law. *Id.* Petitioner's mother testified that Vietnam had changed her son and spoke about the deaths of his father and fiancée while he was serving an eight-year prison sentence for robbery.

The day after the trial concluded, a three-hour sentencing hearing took place. *Id.* The trial judge explicitly advised the jury that even though the evidence at trial was insufficient to establish an insanity defense, it could be considered as mitigation evidence at sentencing. *Id.* at 691. According to the Court, the prosecution's evidence at sentencing was not "particularly dramatic or impressive." *Id.* at 701. And, at the close of the hearing, the junior prosecuting attorney gave a brief "low-key" closing, *id.* at 692, that "did not dwell on any of the brutal aspects of the crime," *id.* at 701.

Upon hearing that closing argument, defense counsel waived his own closing argument to prevent the lead prosecutor, who was regarded as "an extremely effective advocate," from arguing in rebuttal. *Id.* at 692. Defense counsel's choice to prevent the prosecution from "depict[ing] his client as a heartless killer, just before the jurors began deliberation," *id.* at 702, the Court explained, was reasonable—under those circumstances, counsel reasonably could have relied "on the jurors' familiarity with the case and his opening plea for life made just a few hours before," *id.*

Respondents argue that the facts of this case are identical to those in *Bell*, and that the outcome in *Bell* precludes relief here. We disagree. Even assuming Edwards' strategy was similar to counsel's strategy in *Bell*, a strategy that is sufficient in one case can be deficient in another case. *See Strickland*, 466 U.S. at 690 (explaining that courts must assess reasonableness "in light of all the circumstances").

In *Bell*, defense counsel's waiver of closing argument was a tactical decision because he knew that the lead prosecutor was going to deliver the rebuttal and all he could do on closing was repeat arguments from his opening statement (which he had delivered only a "few hours before") and "impress upon the jurors the importance of what he believed were less significant facts." *See* 535 U.S. at 701-02. By contrast, Edwards waived closing argument only because Ohlson suggested that they do so—before their conversation during the lunch break, Edwards had prepared to give a closing. Edwards claimed that the "strategy" behind waiving closing was to keep the prosecutor from arguing first-degree murder, but Edwards acknowledged that the junior prosecutor was "[n]ot at all" arguing for a first-degree conviction for Kelsey in her approximately two-hour-long opening remarks.

Further, unlike in *Bell*, Edwards' defense was not thorough without closing argument—Edwards had purposefully left details out of his opening statement (delivered over a week prior) because he planned to use closing argument to "come back" to the jury to explain how "[t]his is not a murder case, at least from Zach Kelsey's perspective." Because he waived closing, Edwards also gave up the ability to address the jury on the proximate cause, misdemeanor battery, and involuntary manslaughter instructions he had prepared, all of which were central to his

theory of the defense. At trial, the only witness Edwards called was Kelsey, and, unlike in *Bell* where defense counsel had presented extensive mitigating evidence just the day before, closing argument was the only opportunity for Edwards to present his defense that Kelsey was not guilty of second-degree murder and to differentiate Kelsey's culpability from that of Jefferson and Schnueringer. *See Herring*, 422 U.S. at 862 ("[I]t is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole.").

Edwards' decision to waive closing argument was also unreasonable under prevailing professional norms. While there is no ABA Guideline addressing the potential waiver of closing argument, Ohlson and Edwards were both seasoned defense attorneys at the time of Kelsey's trial, and thus, their experiences can give us some indication of the profession's "norms." *See Wiggins v. Smith*, 539 U.S. 510, 523, 524-25 (2003) (looking to the ABA Guidelines to define "prevailing professional norms."). Before this trial, Ohlson had defended more than 30 murder cases that went to trial and Edwards had tried at least 20 cases to verdict as a defense attorney. This trial was the first time that either attorney had ever waived closing argument, and for Edwards, "[it] might be the last." Ohlson admitted that he would not have waived closing argument if he were Kelsey's attorney.

In sum, the importance of closing argument to Kelsey's case cannot be overstated. While waiving closing argument may have been a tactical choice for Ohlson, the purportedly tactical reasons Edwards offered after the fact do not withstand even moderate scrutiny and are not reasonable in light of prevailing professional norms.

ii. Prejudice

We hold that Kelsey successfully showed that he was prejudiced by Edwards' waiver of closing argument. Had Edwards made a closing argument, he could have explained that Kelsey's actions were not the proximate cause of Hyde's death and asked the jury to convict, if at all, on a lesser offense.

In *Herring*, the Supreme Court highlighted the importance of closing arguments to the "adversary factfinding process." *See* 422 U.S. at 858 ("The right to the assistance of counsel has thus been given a meaning that ensures to the defense in a criminal trial the opportunity to participate fully and fairly in the adversary factfinding process. There can be no doubt that closing argument for the defense is a basic element of the adversary factfinding process in a criminal trial."). Closing argument is all the more important in a trial as lengthy as the one in this case, which lasted for over seven days and included over twenty witnesses and over fifty exhibits.

Here, taking into consideration the combined effect of failing to consult an expert and waiving closing argument in a joint trial, we conclude that Edwards "entirely failed" to oppose the prosecution. Because he did not present an expert of his own and did not give a closing argument, at no point during trial did Edwards have an opportunity to differentiate his client from the other defendants in the case and argue for, ideally, simple battery or, at worst, involuntary manslaughter. The jury received instructions on the lesser offenses, but Edwards never explained them to the jury, though he clearly intended to do so initially. In his opening statement, Edwards told the jury that "after [they] hear[d] all the evidence," he was going to ask them to

conclude that Kelsey did not murder Hyde. Edwards promised that he would "come back" to the jury and "discuss the evidence again," but by waiving closing argument, Edwards never did "come back" to the jury as he had promised.

As this was a joint trial with varying defense theories and degrees of culpability—unlike in *Bell* and *Yarborough*—closing argument was a critical opportunity for Edwards to distinguish and disentangle Kelsey's culpability from that of his co-defendants. Instead, by the end of the trial, Edwards' defense seemed no different than those presented by counsel for Kelsey's co-defendants, despite their defense theories being completely different. This was a grave deficiency in the defense causing prejudice to Kelsey.

iii. AEDPA

The Nevada Court of Appeals correctly identified *Strickland* as the relevant "clearly established federal law" for an IAC claim, but the Nevada court then unreasonably applied *Strickland* to Kelsey's case.

First, as to the deficient performance prong of *Strickland*, the Nevada court unreasonably applied *Strickland* when it accepted Edwards' implausible explanations for waiving closing argument. *Strickland* requires courts to evaluate counsel's decisions for reasonableness in light of counsel's "perspective at the time of the alleged error . . . and in light of all of the circumstances." 466 U.S. at 689; *see Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986); *see also id.* at 386 (noting that "counsel offered only implausible explanations" for his challenged failure). Here, Edwards' decision to waive closing argument was unreasonable for all of the reasons stated above.

Edwards said that he agreed to waive closing argument because he did not want to give the prosecutor an opportunity to argue for first-degree murder in rebuttal. The Nevada court accepted this explanation as tactical in nature, but it was implausible that the prosecution would argue for first-degree murder in rebuttal. The junior prosecutor had only advocated for second-degree murder during her two-hour-long opening remarks and had "[n]ot at all" argued for or suggested a first-degree murder conviction for Kelsey. Similarly, the Nevada court reasoned that Edwards' decision was tactical because he feared that the State's rebuttal would be "much more persuasive," but that fear is similarly unsubstantiated given the exhaustive nature of the State's initial closing. The Nevada court unreasonably applied *Strickland* by not evaluating Edwards' decision to waive closing argument for reasonableness.

Second, as to the prejudice prong, the Nevada court unreasonably applied *Strickland* because there was a "reasonable probability" of a better outcome for Kelsey if Edwards had given closing argument. 466 U.S. at 694. Edwards had prepared jury instructions regarding proximate causation, simple battery, and involuntary manslaughter, but as explained above, he waived the opportunity to explain those instructions and to ask the jury to find Kelsey guilty of one of these lesser offenses. Closing argument was Edwards' only chance to present his theory of the case to the jury and to explain his jury instructions. If Edwards had not given up this critical opportunity to address the jury, there is a reasonable probability that the outcome of this case would have been different for Kelsey, especially considering the combined effect of failing to consult with an expert in a joint trial with varying degrees of culpability.

b. Not consulting a forensic pathologist expert

Kelsey argues that Edwards was ineffective for failing to consult a forensic pathologist expert. He argues that Edwards' decision not to consult an expert was not based on strategy and that he was prejudiced by this decision. Again, we agree.

i. Deficient performance

"[Counsel] has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. "Strategic" choices made after "less than complete investigation" are reasonable only to the extent that "reasonable professional judgments support the limitations on investigation." *Id.* at 690-91; *see also Harrington v. Richter*, 562 U.S. 86, 106 (2011) ("Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence . . . ."); *Duncan*, 528 F.3d at 1235 ("[W]hen the prosecutor's expert witness testifies about pivotal evidence or directly contradicts the defense theory, defense counsel's failure to present expert testimony on that matter may constitute deficient performance."); *Jennings v. Woodford*, 290 F.3d 1006, 1014 (9th Cir. 2002) ("[A]ttorneys have considerable latitude to make strategic decisions about what investigations to conduct *once they have gathered sufficient evidence upon which to base their tactical choices*.").

In *Duncan v. Ornoski*, we held that counsel's performance was deficient because he failed to consult an expert on potentially exculpatory evidence. 528 F.3d at 1235. In the murder case, counsel's defense theory was that his client did not kill the victim. *Id.* However, without consulting and presenting an expert, counsel was unable to

either present specific evidence that his client was not the murderer or advance a plausible alternative defense theory. *Id.* We found counsel's failure to consult an expert to be particularly deficient because he did not have any "knowledge or expertise" about the field of serology and there were blood samples that, if tested, could have shown Duncan was not the murderer. *Id.* Counsel had an "increased" duty to seek the assistance of an expert because the potentially exculpatory evidence to be gained from consultation with an expert could have played a "central role" at trial. *Id.* at 1236. Had counsel consulted an expert, he would have been in a position to make strategic choices about whether to share the expert's findings, but without expert consultation, he had "no basis on which to devise his defense strategy." *Id.*

In *Wiggins v. Smith*, the Supreme Court held that the petitioner's counsel's decision not to expand their investigation beyond a presentence report and certain records fell short of prevailing professional standards and prejudiced the petitioner. 539 U.S. at 524. Counsel did not present any additional mitigating evidence from the petitioner's background even though there was plenty of mitigating evidence available. *Id.* at 525. The Court held that counsel's performance was deficient for conducting an "unreasonable investigation." *Id.* at 528. Counsel argued that it was a tactical decision not to focus on the petitioner's background at sentencing, but the Court found that counsel "were not in a position to make a reasonable strategic choice . . . because the investigation supporting their choice was unreasonable." *Id.* at 536. The Court found counsel's investigation to be "incomplete" and the result of "inattention, not reasoned strategic judgment." *Id.* at 534.

Here, Edwards did not conduct a reasonable investigation. The central issue at trial was the cause of Hyde's death, and Edwards' defense theory was that "[Kelsey] was guilty at best of the lesser included offense of simple battery and that he was not guilty of murder." But even though he was not an expert in forensic pathology himself, Edwards did not contact, consult with, or present, an expert questioning whether Kelsey's actions caused Hyde's death. *See Duncan*, 528 F.3d at 1235-36. Like in *Duncan*, where the potentially exculpatory blood evidence could have played a "central role," expert testimony like that of Dr. Llewellyn or Dr. Terri Haddix, with whom Ohlson had consulted, could have been central to Edwards' defense of Kelsey. *Id.* at 1236. This was clear to Ohlson, who explained that he did not share the views of Dr. Haddix with Edwards because he felt the information was "possibly exculpatory to Mr. Edwards' client, [but] was inculpatory to Mr. Molezzo's and more particularly to [his own] client." Respondents argue that Edwards was not ineffective because Dr. Llewellyn's testimony was not exculpatory, but there is no requirement that potential information from the forgone investigation be game-changing. It is enough that Edwards knew the testifying experts—Dr. Clark and Dr. Omalu—would contradict his defense theory and nevertheless failed to present countervailing expert testimony on that subject or even to consult with an expert to aid in his cross-examination and trial preparation. *See Duncan*, 528 F.3d at 1235-36.

Edwards' decision not to consult with a forensic pathologist expert was unreasonable. Like in *Wiggins*, where counsel was not in a position to make a strategic decision, Edwards was not in a position to make a strategic decision about presenting expert testimony because he did not even contact or consult with an expert. *See* 539 U.S. at

536. Had Edwards consulted with an expert and *then* decided to not have that expert testify at trial, our analysis would be different. But instead, Edwards simply relied upon Ohlson's assessment that Dr. Haddix's expert opinion would not be good for the defense. This was not a tactical decision because Edwards had not gathered sufficient evidence to make a sound strategic decision.

ii. Prejudice

In *Duncan*, we held that counsel's failure to investigate potentially exculpatory blood samples prejudiced his client because had counsel conducted a proper investigation, "it is likely that at least one juror would have had a reasonable doubt" about his client's guilt. 528 F.3d at 1244. We reasoned that had counsel consulted an expert, he would have been better prepared for aspects of trial such as the cross-examination of the State's expert. *Id.* at 1241. Without expert consultation regarding the potentially exculpatory evidence, all the physical evidence presented at trial suggested that the defendant was guilty. *Id.* at 1246. Because counsel did not consult with or call an expert, the jury did not get to hear "convincing evidence" that would have supported counsel's defense theory. *Id.* at 1241.

During the state post-conviction proceedings, Dr. Llewellyn testified that, to a reasonable degree of medical certainty, Schnueringer and Jefferson's attack caused Hyde's death. While she said it was *possible* that Kelsey's punches caused or contributed to Hyde's death, Schnueringer and Jefferson's attack was the more probable cause. Significantly, Dr. Llewellyn testified that all of Hyde's injuries could be attributed to Schnueringer and Jefferson's attack, but that she could not conclude that Hyde's injuries were caused solely by Kelsey. She testified

that Schnueringer's punch, which sounded like the crack of a baseball bat, was a very severe blow, and that Hyde's injuries were consistent with stomping. She testified that there were no distinctive marks on Hyde to indicate that he had been hit with brass knuckles. Finally, she testified that she disagreed with Dr. Omalu's finding that every punch necessarily contributed to Hyde's death. This testimony would have been powerful evidence for the jury, especially when confronted with the witness testimony describing how different Kelsey's fight with Hyde was from the attack on Hyde by Schnueringer and Jefferson.

The difference between: (a) presenting testimony by an expert like Dr. Llewellyn or Dr. Haddix alongside the testimonies of Dr. Clark and Dr. Omalu versus (b) only presenting the testimonies of Dr. Clark and Dr. Omalu is sufficient to undermine confidence in Kelsey's conviction of second-degree murder. Like in *Duncan*, where counsel's failure to consult an expert resulted in the jury not being able to hear convincing evidence supporting counsel's defense theory, had Edwards presented a forensic pathologist expert of his own, the jury would have heard about the difference in injuries from face-to-face fights (like that between Kelsey and Hyde) and more brutal attacks involving kicking someone in the head while they are down (like Schnueringer and Jefferson's attack on Hyde). *See* 528 F.3d at 1241.

Even under Respondents' version of the facts—that Kelsey hit Hyde in the face twice and then kneed him in the head twice after Hyde fell down—Dr. Llewellyn opined that Kelsey's actions were less likely than the actions of Schnueringer and Jefferson to have caused the fatal bleeding in Hyde's brain. The jury did not get to hear this testimony. Instead, like in *Duncan*, where the jury did not get to hear about any physical evidence indicating the defendant's

innocence, they heard no disagreement with the opinions of Dr. Clark and Dr. Omalu. It is reasonable to conclude that, presented with an expert in disagreement with Dr. Clark and Dr. Omalu, at least one juror would have been swayed to have a reasonable doubt because of the disagreeing expert. Thus, there is a reasonable probability that the jury would have returned with a different sentence.

iii. AEDPA

The Nevada Court of Appeals did not address whether Edwards was deficient for failing to consult a forensic pathologist expert, so § 2254 deference is only owed to its analysis of the prejudice prong. *See Rompilla*, 545 U.S. at 390. The Nevada Court of Appeals held that substantial evidence supported the district court's decision that "Kelsey failed to demonstrate a reasonable probability of a different outcome at trial had counsel presented an expert" because Dr. Llewellyn "could not establish which arteries caused the hemorrhaging in the victim's brain and her testimony could not be differentiated from that of the experts presented by the State."

The Nevada Court of Appeals' and the state district court's decisions involved an unreasonable application of clearly established federal law because they did not accord appropriate weight to the potential force of countervailing expert testimony in this case where causation was so critical and because they failed to consider the combined prejudicial effect of both deficiencies (waiver of closing argument and failure to consult with an expert).

The Nevada courts' analyses focused primarily on the potential effect of Edwards' failure to call Dr. Llewellyn specifically. But Kelsey was not prejudiced solely by his counsel's failure to call Dr. Llewellyn; he was prejudiced by

his counsel's failure to contact, consult with, or call *any expert at all*. There is, at least, a reasonable probability that the outcome of this case would have been different if Edwards had consulted with a forensic pathologist expert because countervailing expert testimony could have been exculpatory for Kelsey. Causation was the central issue at trial, and a countervailing expert like Dr. Llewellyn could have clearly explained the difference in injuries from teenage fistfights and involuntary attacks.

The Nevada courts considered each instance of deficient performance by counsel independently and did not consider the combined prejudicial effect of the two deficiencies. This was an unreasonable application of *Strickland*. The prejudice prong of *Strickland* asks whether "the decision reached would reasonably likely have been different absent the errors." 466 U.S. at 696. In addition to using "errors," i.e., the plural form of the word, it is clear that courts are to consider the combined prejudicial effect of multiple errors because the prejudice prong concerns the ultimate decision at trial. In making decisions, courts consider the totality of the evidence before the judge or jury, so it is clear that a *Strickland* prejudice determination should be based upon the total effect of all of counsel's errors.

In this case, although Edwards' defense was that Kelsey was not the proximate cause of Hyde's death and that he was guilty at most of misdemeanor battery or involuntary manslaughter, Edwards never presented that defense to the jury. The jury never heard from a defense expert that Kelsey's blows were, to a reasonable degree of medical certainty, not fatal. And at the end of the trial, the jury was asked by the State to find all three defendants guilty of second-degree murder, without any opposition from the defense because Edwards waived closing argument at the

behest of a clear adversary. While waiving closing might have made sense for Jefferson and Schnueringer, it was catastrophic for Kelsey, whose defense was premised on the fact that his actions were entirely distinguishable from Schnueringer and Jefferson's. On these facts, we conclude that, particularly given the combined effect of Edwards' decision to waive closing argument, Kelsey was prejudiced by Edwards' failure to consult a forensic pathologist expert.

IV. CONCLUSION

REVERSED and **REMANDED** with instructions to issue the writ of habeas corpus.

GRABER, Circuit Judge, dissenting:

I respectfully dissent. Scott Edwards, trial counsel for Petitioner Zachary Kelsey, made tactical decisions to waive closing argument and to forgo consulting a forensic pathologist. Those decisions neither fell below an objective standard of reasonableness nor prejudiced Petitioner. Therefore, the state court's denial of Petitioner's habeas petition was not an unreasonable application of Strickland v. Washington, 466 U.S. 668 (1984). I would affirm.

A. Waiver of Closing Argument

The majority opinion concludes that Petitioner's trial counsel was ineffective because he waived closing argument and because that decision prejudiced Petitioner. Maj. Op. at 9. But the majority opinion fails to give proper deference to the decisions of Petitioner's trial counsel and to the decision of the state court. Under 28 U.S.C. § 2254(d), review of an ineffective-assistance-of-counsel claim is "doubly

deferential," requiring deference under both the Antiterrorism and Effective Death Penalty Act ("AEDPA") and Strickland. Knowles v. Mirzayance, 556 U.S. 111, 123 (2009). Overcoming the deference owed under Strickland is no easy task. "[E]ven if there is reason to think that [trial] counsel's conduct 'was far from exemplary,' a court still may not grant relief if '[t]he record does not reveal' that counsel took an approach that no competent lawyer would have chosen." Dunn v. Reeves, 141 S. Ct. 2405, 2410 (2021) (quoting Burt v. Titlow, 571 U.S. 12, 22–23 (2013))(emphasis added).

Edwards testified that he had prepared a closing argument but decided to forgo it because the junior prosecutor presented a lackluster closing argument. By waiving closing argument, Edwards deprived the senior prosecutor of the opportunity to give a compelling rebuttal. Edwards reasonably was concerned about the jurors' hearing a rebuttal from the senior prosecutor, as Edwards had seen him vigorously cross-examine defense witnesses throughout trial.

The majority opinion suggests that Edwards' strategy was imprudent because it seemingly was informed by a mistaken belief that the senior prosecutor would argue in favor of a first-degree murder conviction for Petitioner—even though the junior prosecutor had not done so in her closing argument. Maj. Op. at 10–11, 15. Although Edwards testified that the possibility of such an argument "went into [his] calculation," there is no indication that this was his sole rationale. He reasonably did not want to open the door for the senior prosecutor to make an argument about anything that could harm his client, including, but not limited to, first-degree murder. Although "[t]he right to effective assistance [of counsel] extends to closing

arguments," counsel is entitled to "wide latitude in deciding how best to represent a client." Yarborough v. Gentry, 540 U.S. 1, 5–6 (2003) (per curiam). And, as the Supreme Court has recognized, "it might sometimes make sense to forgo closing argument altogether." Id. at 6. Given the circumstances, I cannot conclude that Edwards' decision to waive closing argument was a decision that "no competent lawyer would have chosen." Dunn, 141 S. Ct. at 2410.

Additionally, Edwards reasonably agreed to the proposal by John Ohlson, defendant Robert Schnueringer's attorney, that all of the codefendants waive closing argument. Not only was Edwards worried about the government's giving a persuasive rebuttal, he also had an interest in preventing the codefendants from presenting a closing argument that could hurt his client. The codefendants had argued that Petitioner started the fight with the victim and used brass knuckles to commit the most brutal part of the attack.[1] Edwards already felt "sandbagged" by Ohlson, who had attacked Petitioner's credibility by noting that Petitioner was associated with a neo-Nazi movement and had bragged about killing the victim. Given the demonstrated hostility of the codefendants, Edwards made a legitimate strategic choice to shield the jury from any reminder of the codefendants' damaging accusations right before the jury began deliberations. Contrary to the majority opinion's characterization of Edwards' actions, he did not waive closing argument "only because Ohlson suggested that they do so." Maj. Op. at 15.

[1] Schnueringer presented three witnesses at trial—Aaron Simpson, Zachary Fallen, and Zachary Smith—and each one testified that Petitioner told them (a) that he had used brass knuckles in the fight and (b) that the last person Petitioner had hit died.

The majority opinion fairly notes that Edwards' defense might have been aided by a closing argument that explicitly addressed issues like proximate cause. Maj. Op. at 15. But that argument rests on the "distorting effects of hindsight." Strickland, 466 U.S. at 689. We "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690. In my view, the decision to waive closing argument was "precisely the sort of calculated risk that lies at the heart of an advocate's discretion." Gentry, 540 U.S. at 9.

Petitioner also failed to demonstrate that Edwards' waiver prejudiced him. The majority opinion asserts that, had Edwards taken the opportunity to present a closing, Petitioner's culpability could have been distinguished from his codefendants'. Maj. Op. at 15–16. But under Strickland, "[t]he likelihood of a different result must be substantial, not just conceivable." Harrington v. Richter, 562 U.S. 86, 112 (2011). Even in the absence of a closing argument, Edwards took advantage of his opening statement, his questioning of witnesses, and his client's own testimony to present a robust defense. See Hovey v. Ayers, 458 F.3d 892, 906–07 (9th Cir. 2006) ("Where counsel's failure to oppose the prosecution occurs only in isolated points during the trial, we will not presume prejudice."). Moreover, the court instructed the jury to base its verdict on the evidence presented at trial, not on the statements of counsel.

Even if Edwards' decision to waive closing argument was questionable, we also must apply the deference mandated by AEDPA. Knowles, 556 U.S. at 121, 123. In particular, federal habeas relief is not available whenever we disagree with a state court's decision. We may grant the writ only if we conclude that the state court's decision was

"contrary to, or involved an unreasonable application of, clearly established [f]ederal law." 28 U.S.C. § 2254(d)(1).

Here, not only was the decision to waive closing argument objectively reasonable in the circumstances, it also is essentially the same strategy that the Supreme Court approved in Bell v. Cone, 535 U.S. 685 (2002). As in Bell, Edwards faced two options: he could give a closing argument and thus give the lead prosecutor, who was very persuasive, the chance to depict his client as a heartless killer just before the jurors began deliberations, or he could prevent the lead prosecutor from doing so by waiving his own closing argument. See Bell, 535 U.S. at 701–02. The Supreme Court held that "[n]either option . . . so clearly outweigh[ed] the other that it was objectively unreasonable for the [state court] to deem counsel's choice to waive argument a tactical decision about which competent lawyers might disagree." Id. at 702. The same is true here. Even if Bell is distinguishable, the factual differences are not significant enough to render unreasonable the Nevada state court's decision under Strickland.[2] Thus, Petitioner has not shown that the state court's interpretation is "so obviously wrong that its error lies 'beyond any possibility for

[2] Although the majority opinion distinguishes Bell by arguing that the decisions of Cone's trial counsel reflected tactical decision-making far superior to that of Kelsey's counsel, Maj. Op. at 15, the facts of Bell reveal the opposite. Bell involved a death penalty case in which the need for a competent closing argument was significantly more important. See Bell, 535 U.S. at 714 (Stevens, J., dissenting) ("Perhaps that burden was insurmountable, but the jury must have viewed the absence of any argument in response to the State's case for death as [trial counsel's] concession that no case for life could be made. A closing argument provided the only chance to avoid the inevitable outcome of the 'primrose path'—a death sentence." (emphasis added)).

fairminded disagreement.'" Shinn v. Kayer, 141 S. Ct. 517, 523 (2020) (per curiam) (quoting Richter, 562 U.S. at 103).

B. Failure to Consult a Forensic Pathology Expert

The majority opinion also argues that Edwards was ineffective for failing to consult a forensic pathologist.[3] Maj. Op. at 20. Under Strickland, "attorneys have considerable latitude to make strategic decisions about what investigations to conduct once they have gathered sufficient evidence upon which to base their tactical choices." Jennings v. Woodford, 290 F.3d 1006, 1014 (9th Cir. 2002) (emphasis omitted). Edwards already possessed reports from two well-respected experts, and both concluded that Petitioner's actions could have contributed directly to the victim's death.[4] The majority opinion chides Edwards for failing to call a third expert, Dr. Amy Llewellyn. Maj. Op. at 23–24. But Dr. Llewellyn never expressly disavowed the prosecution's theory that Petitioner's attack contributed to the victim's death. Though Dr. Llewellyn's testimony was less damning than that of the prosecution's experts, she admitted that, if Petitioner knocked the victim down and kneed him in the head, as the evidence showed he did, those acts could cause "a concussion or an injury to the brain" and "could cause the brain to bleed." In other words, even Dr.

[3] The Nevada Court of Appeals concluded that Petitioner failed to demonstrate prejudice, without addressing the issue of deficient performance. Accordingly, we review de novo whether Petitioner demonstrated deficient performance. Tamplin v. Muniz, 894 F.3d 1076, 1083 (9th Cir. 2018).

[4] At trial, Dr. Clark testified that she observed five separate areas of bleeding on the victim's brain. She concluded that the victim died from the cumulative effect of the blows to his head. Dr. Omalu agreed with Dr. Clark's findings.

Llewellyn recognized that Petitioner's actions could have been a substantial factor in the victim's death. As will be explained below, Petitioner is guilty of the crime of conviction even if his acts were only a "substantial factor" in the killing. And if Dr. Llewellyn's opinion was indicative of the testimony of other independent experts,[5] Edwards would have invested significant time and energy pursuing an issue that ultimately would have proved fruitless.

In its analysis of the deficient-performance prong, the majority opinion relies on Duncan v. Ornoski, 528 F.3d 1222 (9th Cir. 2008), a case in which defense counsel's failure to consult an expert resulted in key exculpatory evidence going unexplored. See id. at 1236 (holding that defense counsel's failure to consult an expert meant that he "had no basis upon which to devise his defense strategy"). Unlike in Duncan, Edwards' failure to consult an expert did not deprive him of a viable defense strategy. Edwards knew that causation would be a major issue in the trial, and he skillfully cross-examined witnesses in a way that suggested that the fatal blows did not come from his client.

Consultation with an expert might have facilitated a more elegant presentation of the defense's theory. But Edwards testified that, despite declining to consult with an expert, he "didn't feel like [he] was undermanned" when

[5] The majority opinion refers to a hearsay statement attributed to Dr. Haddix, who never testified, was never cross-examined, and never authored an expert report. Maj. Op. at 23. But it is improper to rely on that hearsay statement for the truth of the matter asserted. At the deposition, Petitioner explicitly agreed that he was not offering that statement for the truth of the matter asserted. And the record contains no expert testimony suggesting that Petitioner's actions were not a substantial factor in the victim's death.

questioning the government's experts. This court should not expand Strickland to stand for the proposition that a defense attorney always must consult with an expert when the government puts forth its own expert. Cf. Richter, 562 U.S. at 111 ("Strickland does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense.").

The majority opinion also fails to explain precisely how consultation with any forensic expert would have resulted in a different outcome at trial. The government charged Petitioner with open murder, which included second-degree murder. Under Nevada law, Petitioner was guilty of second-degree murder if he killed the victim and acted with "reckless disregard of consequences and social duty," Guy v. State, 839 P.2d 578, 582–83 (Nev. 1992), or if he committed an unlawful act that "naturally tends" to take the life of a human being, Sheriff v. Morris, 659 P.2d 852, 858–59 (Nev. 1983). The state court found that the medical examiner who conducted the forensic autopsy "testified that the first blow to [the victim's] head could have been the fatal blow."[6] Kelsey v. State, 130 Nev. 1204, 2014 WL 819465, at *2 (Feb. 27, 2014). And the evidence is undisputed that Petitioner delivered the first blows to the victim's head. As the state court found, Petitioner "struck [the victim] twice in the head" even though the victim had his hands in the air at the time and that Petitioner then "kneed him in the head twice" as the victim fell to the ground. Id. at *1.

Although the majority opinion downplays the significance of the harm inflicted by Petitioner, likening it to

[6] Petitioner did not challenge the state court's findings of fact, so those facts are conclusive. 28 U.S.C. 2254(e)(1).

a teenage squabble, the undisputed facts suggest that Petitioner's actions could have been just as damaging as the "savage, brutal beating" delivered by Schnueringer and Jefferson. Maj. Op. at. 5. As long as Petitioner's acts were a substantial factor in the victim's death, the mere fact that an expert could opine that he did not deliver the final fatal blow does not absolve him of criminal liability. See Etcheverry v. State, 821 P.2d 350, 351 (Nev. 1991) (per curiam) ("[A]n intervening cause must be a superseding cause, or the sole cause of the injury in order to completely excuse the prior act." (emphasis omitted)).

In sum, the state court reasonably concluded that Petitioner failed to meet the requirements of Strickland as to either the waiver of closing argument or the decision not to consult a forensic pathology expert. I would affirm the district court's denial of habeas relief and, therefore, dissent.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

ZACHARY KELSEY, Petitioner, v. TIM GARRETT,[1] *et al.*, Respondents.	Case No. 3:18-cv-00174-MMD-CLB ORDER

I. SUMMARY

Petitioner Zachary Kelsey filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 on May 16, 2018. (ECF No. 6 ("Petition").) This Court denied the Petition and a certificate of appealability on August 22, 2019. (ECF No. 27.) Kelsey appealed on September 4, 2019, and the United States Court of Appeals for the Ninth Circuit granted a certificate of appealability with respect to the following issues: whether Kelsey's trial counsel provided ineffective assistance, including whether his counsel was ineffective for (a) waiving closing argument, or (b) failing to consult with or retain an expert regarding the victim's cause of death.[2] (ECF Nos. 29, 31.)

Kelsey moved for a remand because documents—namely, John Ohlson's deposition testimony and Amy L. Llewellyn, M.D.'s report—from the state court record were not submitted to—and thus not reviewed by—this Court when it denied the Petition. The United States Court of Appeals for the Ninth Circuit granted the motion on July 12,

[1]The state corrections department's inmate locator page states that Kelsey is incarcerated at Lovelock Correctional Center. Tim Garrett is the current warden for that facility. At the end of this order, this Court directs the clerk to substitute Tim Garrett as a respondent for the prior respondent Renee Baker. *See* Fed. R. Civ. P. 25(d).

[2]These issues were grounds 1 and 2, respectively, of the Petition. (ECF No. 6.)

2021, pursuant to *Nasby v. McDaniel*, and remanded the case for further proceedings. Based on that order, this Court reopened this action.

Based on the foregoing, grounds 1 and 2 of the Petition are before this Court for consideration of Ohlson's deposition and Dr. Llewellyn's report to determine whether this Court's previous judgment should be amended. In that respect, Kelsey filed a supplemental brief, respondents answered, and Kelsey replied. (ECF Nos. 44, 49, 52.) This Court now affirms its previous denial of—but grants a certificate of appealability for—grounds 1 and 2 of the Petition.

II. BACKGROUND[3]

On February 4, 2012, a group of approximately 50 people, ranging from high school students to individuals in their early 20s, were at the motocross track in Lemmon Valley, Nevada having a party and bonfire. (ECF Nos. 18-1 at 73–74, 88; 18-3 at 179.) A few hours into the party, two women, Amber Dutra and Kasey Sinfellow, started to fight. (ECF No. 18-4 at 78.) Taylor Pardick, Dutra's boyfriend, broke up the fight, but Sinfellow hit Pardick. (*Id.*) Pardick "threatened that he wasn't scared to punch a girl in the face," so Jacob Graves, Sinfellow's close friend, joined the altercation, saying, "if you want to try and hit a girl, then you can hit me.'" (*Id.* at 274.) Andrue Jefferson and others tried to instigate a fight between Pardick and Graves, asking if Pardick "was part of the [Twisted Minds] crew, and if [he] was, then [he] needed to fight." (ECF No. 18-2 at 212, 214.) Eric Boatman joined the altercation to assist Pardick, but Graves hit Boatman and Pardick, knocking them both to the ground. (*Id.* at 215.)

Michael Opperman testified that he and Kelsey were walking away from the altercation involving Graves, Boatman, and Pardick when they heard Jared Hyde comment, to no one in particular, "[t]his is bullshit. You just knocked out my best friend." (ECF No. 18-2 at 282.) Kelsey overheard Hyde's comment and pushed him. (*Id.*) Hyde

[3]This Court makes no credibility findings or other factual findings regarding the truth or falsity of this evidence from the state court. The summary is merely a backdrop to its consideration of the issues presented in the case. Any absence of mention of a specific piece of evidence does not signify the Court overlooked it in considering Kelsey's claims.

"had his arms up kind of like . . . don't hit kind of thing," and Kelsey hit him twice in the head. (*Id.* at 283.) "And then as [Hyde] was going down, [Kelsey] grabbed his head and kneed him twice in the head." (*Id.*) Aubree Hawkinson testified that she saw Kelsey "grab[Hyde] by the shirt and knee[ ] him in the face and hit him a couple times." (ECF No. 18-4 at 275.) Opperman testified that he grabbed Kelsey and pushed him away from Hyde. (ECF No. 18-2 at 283.) Hyde got up, "had blood either from his mouth or his nose running down, his shirt was torn," and walked away. (*Id.*) Opperman characterize the incident between Kelsey and Hyde as an attack: "[Hyde] had no way to defend himself. He was just walking, was talking to himself . . . . [Kelsey] overheard it, thought he was talking shit about him or about maybe one of his friends or something like that and kind of just went at him." (ECF No. 18-3 at 18.)

Opperman testified that he tried to calm Kelsey down because Kelsey was screaming at Hyde as he walked away. (ECF No. 18-2 at 283-84.) Cliffton Fuller testified that Kelsey was "taking off his shirt acting like he wanted to go again," and Hyde "seemed kind of out of it." (ECF No. 18-3 at 167-69.) Anthony Fuller testified that Hyde's "mouth was bleeding, [and] his shirt was ripped in half." (ECF No. 18-2 at 106.) And Brandon Naastad testified that Hyde "was scared. He was about to cry. He didn't want to be there at all." (ECF No. 18-4 at 39.)

Tyler DePriest, who drove Hyde and a few other people to the party in his Dodge Durango, testified that he saw Hyde following the incident with Kelsey, "[a]nd the collar of [Hyde's] shirt was really stretched out and ripped" and "[h]e looked kind of distraught." (ECF No. 18-2 at 11, 16.) Hyde told DePriest, "[l]et's go, let's get out of here. I just got rocked." (*Id.* at 16.) DePriest and Hyde walked back to the Durango to leave. (*Id.*) As they walked, Kelsey, who was approximately 30 feet away with his shirt off, asked Hyde, "[o]ne punch, that's it?" (*Id.* at 17.) As DePriest was getting in the driver's side door of the Durango, believing Hyde was getting in the vehicle on the passenger's side, he saw Hyde "drop." (*Id.* at 17-18.)

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L.E.[4] testified that she saw Robert Schnueringer walk up to Hyde at the Durango and ask, "[s]o do you want to fight, too?" (ECF No. 18-3 at 240.) Hyde responded, "[n]o, I'm just trying to leave." (*Id.*) Schnueringer hit Hyde "[r]eally hard," and Hyde fell to the ground. (*Id.* at 240–241.) Jefferson and two other individuals then punched and kicked Hyde. (*Id.* at 241.) Naastad testified that Schnueringer and Jefferson were asking Hyde if he was "still talking smack," and after Hyde responded in the negative while "about to cry," Jefferson "hit [Hyde] and then [Hyde] kind of fell and then [Schnueringer] hit him one time and then [Jefferson] hit him two more times on the ground." (ECF No. 18-4 at 40.) Hawkinson testified that Schnueringer "punched [Hyde] about three times and [Hyde] looked pretty like [sic] he was going to pass out from the fight. And then the next thing you know, [Jefferson] jumped from behind the car and hit [Hyde] as well about three times." (*Id.* at 281.) Opperman testified that Schnueringer hit Hyde in the head with a "full-blown" punch, causing Hyde to fall, and Jefferson then told Hyde, "[y]ou got knocked the fuck out," and punched Hyde in the head. (ECF Nos. 18-2 at 284; 18-3 at 22.) Mark Rankin testified that Schnueringer asked Hyde "if he had a problem with the crew and if he wanted to get down with TM, get down with the mob." (ECF No. 18-3 at 300.) Schnueringer then "proceeded to keep yelling things about TM and he hit [Hyde]," causing him to "kind of noodle[ ] to the ground." (*Id.*) J.B. testified that Schnueringer's hit to Hyde was hard and "sounded like a baseball bat," and Schnueringer and Jefferson kicked Hyde after he fell. (ECF No. 18-4 at 195.) And Justin Ferretto testified that Schnueringer asked Hyde if he had a problem, and after Hyde said no, Schnueringer hit him, causing Hyde to fall. (*Id.* at 136.) Jefferson and Schnueringer then "started stomping on [Hyde's] head." (*Id.* at 139.)

Brett Stuber testified that after Jefferson hit Hyde, "[h]e was jumping around saying, 'I slept him, I slept him.'" (ECF No. 18-5 at 27.) Cliffton Fuller also testified that Jefferson said that he "slept" Hyde. (ECF No. 18-3 at 175.) Anthony Fuller testified that while the incident with Schnueringer and Jefferson was occurring, he "heard TM being yelled," meaning "twisted minds," which is "a tagging group." (ECF No. 18-2 at 109, 172.)

[4]The Court refers to minors by their initials. *See* LR IC 6-1(a)(2).

Hyde was brought to the emergency room "in essentially cardiorespiratory arrest," and efforts to resuscitate him were unsuccessful. (ECF No. 18-1 at 203.)

Schnueringer presented three witnesses at trial—Aaron Simpson, Zachary Fallen, and Zach Smith—who each testified that they saw Kelsey the night after Hyde died, and Kelsey told them that he had used brass knuckles in his fight with Hyde and that "the last person [he] hit died." (ECF No. 18-5 at 214, 243, 259.)

Kelsey testified that he was watching the fight between Graves, who was his good friend, and Pardick when three individuals, including Hyde, rushed into the fight. (ECF No. 18-9 at 36.) Kelsey "jumped between them and [Graves] and swung at the first two" individuals. (*Id.* at 37.) Hyde then said to Kelsey, "[i]f you are going to swing on me[,] I'm going to knock you out." (*Id.*) Hyde then "came forward with his fists balled up." (*Id.* at 38.) Kelsey punched Hyde twice, and Hyde grabbed Kelsey's shirt, causing Kelsey to try to kick Hyde off him. (*Id.*) In an effort to get Hyde to release his hold on Kelsey's shirt, Kelsey "ended up just leaning back and putting [his] weight into putting [Hyde] off of [him] and when [he] did that[, Hyde] pulled [his] shirt over [his] head." (*Id.*) With his shirt over his head, Kelsey "got pushed and tripped and fell into [a] tree." (*Id.*) Kelsey stood up and with his "fists balled up" asked Hyde, "[a]re you done?" (*Id.* at 39.) Hyde said he was, and then their fight was over. (*Id.*) Kelsey gave Schnueringer a ride home after the party and denied using, or bragging about using, brass knuckles. (*Id.* at 21, 50, 56-57.)

Kelsey, Schnueringer, and Jefferson were found guilty of second-degree murder. (ECF No. 18-13 at 83-84.) Kelsey was sentenced to 10 to 25 years, and Schnueringer and Jefferson were sentenced to 10 years to life. (ECF No. 18-15 at 57-58.) The Nevada Supreme Court affirmed Kelsey's judgment of conviction. (ECF No. 19-8.) Kelsey sought post-conviction relief. (ECF No. 19-16.) Although the state district court granted Kelsey's petition on the claim that his trial counsel was ineffective in failing to give a closing argument, the Nevada Court of Appeals reversed. (ECF Nos. 20-15; 21-17.)

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III. LEGAL STANDARDS

A. Antiterrorism and Effective Death Penalty Act ("AEDPA")

28 U.S.C. § 2254(d) sets forth the standard of review generally applicable in habeas corpus cases under AEDPA:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

A state court decision is contrary to clearly established Supreme Court precedent, within the meaning of 28 U.S.C. § 2254, "if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court." *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000), and citing *Bell v. Cone*, 535 U.S. 685, 694 (2002)). A state court decision is an unreasonable application of clearly established Supreme Court precedent within the meaning of 28 U.S.C. § 2254(d) "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 75. "The 'unreasonable application' clause requires the state court decision to be more than incorrect or erroneous. The state court's application of clearly established law must be objectively unreasonable." *Id.* (quoting *Williams*, 529 U.S. at 409-10) (internal citation omitted).

The Supreme Court has instructed that "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The Supreme Court

has stated "that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* at 102 (citing *Lockyer*, 538 U.S. at 75); *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (describing the standard as a "difficult to meet" and "highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt" (internal quotation marks and citations omitted)).

B. Effective Assistance of Counsel

In *Strickland v. Washington*, the Supreme Court propounded a two-prong test for analysis of claims of ineffective assistance of counsel requiring the petitioner to demonstrate (1) that the attorney's "representation fell below an objective standard of reasonableness," and (2) that the attorney's deficient performance prejudiced the defendant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. 668, 688, 694 (1984). A court considering a claim of ineffective assistance of counsel must apply a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. The petitioner's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. Additionally, to establish prejudice under *Strickland*, it is not enough for the habeas petitioner "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. Rather, the errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687.

Where a state district court previously adjudicated the claim of ineffective assistance of counsel under *Strickland*, establishing that the decision was unreasonable is especially difficult. *See Richter*, 562 U.S. at 104-05. In *Richter*, the United States Supreme Court clarified that *Strickland* and § 2254(d) are each highly deferential, and when the two apply in tandem, review is doubly so. *Id.* at 105; *see also Cheney v. Washington*, 614 F.3d 987, 995 (9th Cir. 2010) (internal quotation marks omitted) ("When

a federal court reviews a state court's *Strickland* determination under AEDPA, both AEDPA and *Strickland*'s deferential standards apply; hence, the Supreme Court's description of the standard as doubly deferential."). The Supreme Court further clarified that, "[w]hen § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Richter*, 562 U.S. at 105.

IV. DISCUSSION

A. Ground 1—Closing Argument

In ground 1, Kelsey argues that Edwards' decision to waive closing argument was ineffective assistance of counsel because he gave up any chance to (1) persuade the jury to select a lesser-included offense, (2) explain the jury instructions counsel prepared, and (3) distinguish Kelsey's actions from Schnueringer and Jefferson's. (ECF No. 44 at 18.)

1. Information Reviewed During Initial Merits Review

The State tried Kelsey, Schnueringer, and Jefferson together. (ECF No. 17-4.) Kelsey was represented by Scott Edwards, Schnueringer by John Ohlson, and Jefferson by Richard Molezzo. (ECF No. 18 at 3.) The junior prosecutor gave the State's first closing argument, arguing that "the State [was] asking [the jury] to return a verdict for each of these three defendants" for second-degree murder. (ECF No. 18-13 at 28, 31.) A lunch break was taken following the junior prosecutor's closing argument, and following that break, Ohlson represented that "all three counsel have been discussing and we're all in unanimous agreement and each of the three defense lawyers waives closing arguments." (ECF No. 18-13 at 79.) Edwards then confirmed that he was waiving his closing argument. (*Id.*)

During the post-conviction evidentiary hearing, Edwards testified that his theory of defense was that Kelsey "was guilty at best of the lesser included offense of simple battery" and that Kelsey was not the proximate cause of the victim's death. (ECF No. 20-9 at 177-78.) Edwards testified that by waiving his closing argument, he gave up the opportunity to address his jury instructions on—and argue about—Kelsey's lack of

proximate cause to Hyde's death and Kelsey's actions amounting to only a misdemeanor battery or involuntary manslaughter. (*Id.* at 194-95, 200-01.) However, Edwards testified that the decision was made to waive closing argument because he, Ohlson, and Molezzo "didn't want [the senior prosecutor], the number one prosecutor, to come in with an argument that made a first degree [sic] murder conviction a possibility at all." (*Id.* at 194, 197.) Edwards explained that Ohlson "floated" the idea of waiving closing argument, and he and Molezzo "had the same kind of opinion." (*Id.* at 231.) Edwards testified that the junior prosecutor's closing argument "wasn't the most vigorous closing argument [he] had ever seen in a prosecution." (*Id.*) Conversely, Edwards explained that he would characterize the senior prosecutor's closing arguments as more vigorous; thus, the decision to waive closing argument was "predicated in part on a desire to keep [the senior prosecutor] from addressing the jury." (*Id.* at 232.) Edwards, however, did testify that Kelsey's trial was the first time he had ever waived a closing argument and that "[i]t might be the last." (*Id.* at 244.)

2. New Information

In his August 2015 deposition, which this Court did not possess for consideration during its initial merits review, Ohlson confirmed that it was his idea for the three defendants to waive closing argument and that he discussed this idea with Edwards during the lunch break. (ECF No. 43-1 at 23.) Ohlson opined that the junior prosecutor's closing argument "was intentionally perfunctory in order to set us up for closing arguments to which [the senior prosecutor] could give a blazing rebuttal argument." (*Id.* at 24.) Ohlson "wanted to cut [the senior prosecutor] off from arguing" because the senior prosecutor was "[v]ery tough." (*Id.*) When asked if he would have waived closing argument had he represented Kelsey, Ohlson responded that he would not. (*Id.* at 26.) Ohlson's deposition was admitted as an exhibit at Kelsey's post-conviction evidentiary hearing. (ECF No. 20-9 at 171.)

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3. Legal Standard

"[C]losing argument for the defense is a basic element of the adversary factfinding process in a criminal trial," so "counsel for the defense has a right to make a closing summation to the jury." *Herring v. New York*, 422 U.S. 853, 858 (1975) (explaining that "closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions"). As such, "[t]he right to effective assistance [of counsel] extends to closing arguments," but "counsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage." *Yarborough v. Gentry*, 540 U.S. 1, 5-6 (2003). Accordingly, "[j]udicial review of a defense attorney's summation is therefore highly deferential-and doubly deferential when it is conducted through the lens of federal habeas." *Id.* at 6.

4. State Court Determination

In its order affirming in part, reversing in part, and remanding, the Nevada Court of Appeals held:

> The State argues the district court erred by granting the postconviction petition when it found trial counsel was ineffective for waiving respondent Zachary Kelsey's right to present a closing argument. In its order, the district court concluded counsel's decision to waive closing argument was deficient and not a tactical decision and Kelsey demonstrated prejudice because there was a possibility of a different outcome at trial had counsel presented a closing argument.
>
> We conclude the district court erred by granting Kelsey's claim that counsel was ineffective for waiving closing argument. To prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). Both components of the inquiry must be shown, *Strickland*, 466 U.S. at 697, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence, *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). We give deference to the district

court's factual findings if supported by substantial evidence and not clearly erroneous but review the court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

"A court considering a claim of ineffective assistance must apply a strong presumption that counsel's representation was within the wide range of reasonable professional assistance." *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (internal quotation marks omitted). Tactical decisions of counsel "are virtually unchallengeable absent extraordinary circumstances." *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). The decision to waive closing argument is a tactical decision. *See Bell v. Cone*, 535 U.S. 685, 701-702 (2002). An appellate court is "required not simply to give the attorneys the benefit of the doubt, but to affirmatively entertain the range of possible reasons [an appellant's] counsel may have had for proceeding as they did." *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011) (internal quotation marks, alterations, and citations omitted).

At the evidentiary hearing, counsel testified he decided to waive closing argument because he did not believe the State's closing argument was very vigorous and believed the State's rebuttal closing argument would be much more persuasive. Counsel testified he was prepared to present a closing argument, but decided not to after hearing the State's closing argument and discussing the strategy with Kelsey's codefendants' counsels, and all defense counsel agreed to waive closing argument. He also testified he had observed the prosecutor's rebuttal closing arguments in other cases and found the prosecutor to be very vigorous and persuasive. This was a tactical decision, and cannot be challenged outside of extraordinary circumstances, which are not present here.

> [FN1] The district court relied on *Ex parte Whited*, 180 So.3d 69 (Ala. 2015), to conclude Kelsey demonstrated counsel was ineffective. Trial counsel in *Whited*, however, could not articulate his strategic reason for waiving closing argument. 180 So.3d at 81-82. In the instant case, counsel articulated his reason for waiving, and therefore, the instant case is distinguishable.

While the choice to forgo closing argument may not have been the best option, it was a tactical decision and did not place counsel's representation "outside the wide range of professional competent assistance." *Strickland*, 466 U.S. at 690-91. Accordingly, we conclude the district court erred by determining counsel was deficient for waiving his closing argument.

We also conclude the district court erred by determining Kelsey suffered prejudice by counsel waiving closing argument. While the district court found Kelsey "suggest[ed] a manner in which counsel could have argued in closing that could have affected a reasonable probability of a different outcome for the Petitioner at trial," the district court also stated there were "arguments available to the Petitioner from which the jury could possibly conclude the Petitioner was guilty of the lesser charged offenses as offered in the jury instructions." Based on the evidence presented at trial, Kelsey failed to demonstrate a reasonable probability of a different outcome at trial had counsel not waived closing argument. Kelsey punched the victim in the head twice and may have kneed him the [sic] in the head as well. After being pulled out of the fight, Kelsey continued to yell and try to get at the victim. After the fight, the victim stood up, had blood streaming from his mouth, and told his friend he had been "rocked." An expert who testified at

> trial stated the first blow to the victim's head may have been the death blow and another expert testified the injuries to the victim were likely cumulative. Accordingly, we conclude the district court erred by granting this claim.

(ECF No. 21-17 at 2-5.)

Kelsey argues that this Court should review this ground *de novo* because the Nevada Court of Appeals' decision is based on an unreasonable determination of the facts and an unreasonable application of *Strickland*. (ECF No. 44 at 26-27.) Specifically, Kelsey argues that the Nevada Court of Appeals' finding that Edwards' decision to waive closing argument was strategic is undermined by the record and the Nevada Court of Appeals unreasonably gave deference to Edwards' strategy without evaluating whether that strategy was reasonable. (*Id.* at 27; ECF No. 52 at 8-10.) Regarding the latter argument, this Court disagrees that the Nevada Court of Appeals simply acquiesced to Edwards' testimony about the strategy behind his waiver of closing argument; rather, the Nevada Supreme Court determined that Edwards' decision was tactical *and* was not "outside the wide range of professional competent assistance." (ECF No. 21-17 at 4 (citing *Strickland*, 466 U.S. at 690-91).)

And turning to the former argument, it is true, as Kelsey contends, that Edwards testified that he waived closing argument, in part, to keep the senior prosecutor from advocating that the jury should convict Kelsey of first-degree murder. (ECF No. 20-9 at 194.) However, this Court does not agree with Kelsey's contention that this testimony was undermined by Edwards' alleged later testimony that the senior prosecutor could not have made such an argument based on the facts of the case. Contrarily, Edwards testified he "couldn't say . . . for sure" that the senior prosecutor would not have contradicted the junior prosecutor by advocating that the jury convict Kelsey of first-degree murder because "we hadn't been able to shake the causation issue." (*Id.* at 198, 202.)

Consequently, this Court declines to review ground 1 *de novo*.

5. Analysis

Due to the allegedly distinctive roles Schnueringer and Jefferson played in Hyde's death as compared to the role Kelsey played, it seems sensible that Edwards would have

taken the opportunity to present a closing argument to highlight the fact that Kelsey's actions towards the victim occurred prior in time to the, arguably, more severe beating Hyde received from Schnueringer and Jefferson. Further, like his opening statement, Edwards could have asked the jury to find Kelsey guilty of involuntary manslaughter or misdemeanor battery instead of murder. (*See* ECF No. 18-1 at 66-68.)

However, while Edwards' decision to forgo closing argument may have been unexpected given the facts of the case, the Nevada Court of Appeals reasonably noted that Edwards testified that he waived closing argument for a tactical reason: his belief that the senior prosecutor would give a vigorous rebuttal closing whereby he *may* ask the jury to find Kelsey guilty of first-degree murder. Evaluating this tactical decision from Edwards' perspective at the time it was made and in light of the circumstances, the Nevada Court of Appeals reasonably determined that Edwards' decision fell within "the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 689; s*ee also Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986) ("The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances.").

Indeed, similarly, in *Bell v. Cone*, defense counsel faced two similar options: he could give a closing argument and, thus, "give the lead prosecutor, who all agreed was very persuasive, the chance to depict his client as a heartless killer just before the jurors began deliberation" or he "could prevent the lead prosecutor from arguing by waiving his own summation and relying on the jurors' familiarity with the case and his opening plea." 535 U.S. 685, 701-02 (2002). In *Bell*, the Supreme Court held that "[n]either option . . . so clearly outweigh[ed] the other that it was objectively unreasonable for the Tennessee Court of Appeals to deem counsel's choice to waive argument a tactical decision about which competent lawyers might disagree." *Id.* at 702; *see also Narvaez v. Scribner*, 551 F.App'x 416, 418 (9th Cir. 2014) ("[T]he state court correctly noted that the decision to waive closing argument was a reasonable strategic choice because the waiver denied the prosecution the opportunity to argue in response.").

Therefore, the Nevada Court of Appeals' determination that the state district court erred by determining counsel was deficient for waiving his closing argument constituted an objectively reasonable application of *Strickland*'s performance prong. *Strickland*, 466 U.S. at 688; *Yarborough*, 540 U.S. at 5-6; *Bell*, 535 U.S. at 701-02. This Court's previous denial of ground 1 will not be amended.

B. Ground 2—Consultation and Retention of Expert

In ground 2, Kelsey argues that Edwards was ineffective for failing to consult with a forensic pathologist since the central issue at trial was the cause of Hyde's death. (ECF No. 44 at 28.)

1. Information Reviewed During Initial Merits Review

Ellen Clark, M.D., the chief medical examiner and coroner for Washoe County, testified at Kelsey's trial that she performed Hyde's autopsy and that "[t]he cause of death was bleeding into the brain . . . due to blunt force trauma." (ECF No. 18-1 at 213-14, 216, 218.) Dr. Clark explained that "a cumulative effect of the blows to the head" could have resulted in death, or a single blow to the head could have caused tearing of the veins and arteries that supply blood to the brain and that additional blows to the head exacerbated those tears. (*Id.* at 227-28.) Dr. Clark explained that "[t]here were multiple injuries to different parts of the brain" such that she could not "identify one fatal impact site" because "based upon the cumulative effect or the compounding injury, any and all of the blows may have contributed to causing death." (*Id.* at 238, 259.)

Bennet Omalu, M.D., a forensic pathologist, neuropathologist, and "recognized and leading expert in brain trauma," testified that Dr. Clark consulted with him regarding his opinion of Hyde's cause of death. (ECF No. 18-8 at 5, 10, 16.) Dr. Omalu testified about "repetitive traumatic brain injury," meaning "each and every repeated blow accentuates the totality of all the blows" such that it cannot be determined "which blow was the fatal blow." (*Id.* at 29; *see also id.* at 48 ("Science cannot tell you or isolate the single punch which resulted in his death."), 61 ("Each blow you receiving [sic] increases the severity of injury and the risk of death.").) Dr. Omalu further testified that each hit to

Hyde cannot be isolated, so he must conclude that "each and every blow contributed to his death." (*Id.* at 30; *see also id.* at 67 ("The guideline of the science indicates and dictates that each and every impact to the head contributed to his eventual fatality. The more blows you receive, the greater the risk of death.").) Dr. Omalu explained that "after receiving the first injury, the first rupture, he may still be lucid, he may still be talking, but maybe symptoms will start coming up gradually." (*Id.* at 32-33.) And "[i]f he receives a second impact or force, he may drop nonresponsive almost instantaneously." (*Id.* at 33.)

Edwards did not call an expert witness to rebut Dr. Clark and Dr. Omalu's testimonies, and Edwards testified at the post-conviction hearing that he "did not contact a forensic pathologist as an expert witness." (ECF No. 20-9 at 179.) Instead, Edwards explained that he spoke to Ohlson about an expert who Ohlson had contacted and that Ohlson indicated to Edwards that his expert's opinion "wasn't good," meaning that his expert could not contradict Dr. Clark or Dr. Omalu's findings. (*Id.* at 182.) Edwards testified that he "didn't have any reason to distrust what [Ohlson] was saying to [him]." (*Id.* at 187.) Edwards also testified that he "[p]erhaps" would have been able to better cross-examine Dr. Omalu by consulting with an expert, but he "didn't feel like [he] was undermanned." (*Id.* at 249.)

Dr. Llewellyn, a pathologist, testified at Kelsey's post-conviction hearing that she reviewed Hyde's autopsy report and photographs, Dr. Clark and Dr. Omalu's trial testimonies, and various witness statements. (ECF No. 20-9 at 24, 29-30.) Dr. Llewellyn testified that it is possible that Kelsey's blows to Hyde's face caused Hyde's death, but, based on a reasonable degree of medical certainty, the second attack by Schnueringer and Jefferson were the blows that killed Hyde. (*Id.* at 31-32). Dr. Llewellyn further testified that it is "more probable" that the disruption of Hyde's blood vessels on the base of his brain was due to the actions of Schnueringer and Jefferson if the facts were that, following Kelsey's two or three punches, Schnueringer and Jefferson blindsided Hyde and then repeatedly kicked him in the head. (*Id.* at 34; *see also id.* at 43 (testifying it is "more likely than not that the injuries identified in Dr. Clark's autopsy protocol c[a]me from attacks

from the second group of assailants") and 44 (testifying that "it's much more probable that most, if not all, injuries were from the second assault").) On cross-examination, Dr. Llewellyn testified that if the facts were that Hyde were knocked to the ground or fell to his knees and was kneed in the head by Kelsey, then those would be further injuries that could possibly cause his brain to bleed. (*Id.* at 56.) Dr. Llewellyn also testified that she agreed with much of Dr. Clark and Dr. Omalu's reports; however, she did not agree with Dr. Omalu's opinion "that every single hit would have necessarily contributed to [Hyde's] death" because "not every hit is equal." (*Id.* at 60-61.)

Dr. Clark testified at Kelsey's post-conviction hearing that she "cannot exclude the initial fight or the initial exchange of blows involving [Kelsey] . . . from causing severe and potentially lethal injury to [Hyde's] brain." (ECF No. 20-9 at 69, 72.) Dr. Clark also testified that Kelsey's blows to Hyde's head could have caused tearing that was exacerbated by the subsequent attack and that Kelsey's blows to Hyde's head, even if they were less severe than the blows delivered by Schnueringer and Jefferson, could have caused Hyde's brain to bleed. (*Id.* at 73-74, 86.)

2. New Information

In his August 2015 deposition, which, as stated above, the Court did not possess for consideration during its initial merits review, Ohlson testified that "it was clear that the pathology and the testimony of expert pathologists would be critical," so he consulted with Dr. Terri Haddix, a forensic pathologist. (ECF No. 43-1 at 11-12.) Dr. Haddix "identified the primary injury that was the factual cause of death of the deceased," which "was a rupture or severing of the cranial artery" from "the torquing motion of the head that resulted from a blow that the deceased received." (*Id.* at 12-13.) Ohlson "thought Dr. Haddix' information . . . would have been devastating to the prosecution [sic] . . . [b]ecause she went further than either of the State's pathologists went" in "describ[ing] the effects of a blow that was sufficient to cause the torque to the head to rupture the cranial artery." (*Id.* at 17-18.) Ohlson did not share Dr. Haddix' findings with Edwards or Molezzo because he "felt the information, while possibly exculpatory to Mr. Edwards' client, was inculpatory

to Mr. Molezzo's and more particularly to [his] client." (*Id.* at 14.) Ohlson only "volunteered to [Edwards and Molezzo] that [he] had consulted Terri Haddix, and that she did not have information that [he] deemed to be helpful, and [he] wasn't going to be using her." (*Id.*) As noted in ground 1, Ohlson's deposition was admitted as an exhibit at Kelsey's post-conviction evidentiary hearing. (ECF No. 20-9 at 171.)

In her January 2016 report prepared for Kelsey's postconviction proceedings, which the Court also did not possess for consideration during its initial merits review, Dr. Llewellyn reported that "[w]hile it is possible that" Kelsey's blows to Hyde "could have been fatal or contributed to the death of [Hyde], it is [her] opinion to a reasonable degree of medical probability that the blows administered by . . . Schnueringer and Jefferson[ ] were in fact fatal in nature and resulted in the death of the victim." (ECF No. 43-2 at 4-5.) Dr. Llewellyn's finding was based, in part, on her opinion that "in [the] face-to-face encounter between Kelsey and Master [sic] Hyde, it is possible but unlikely that two jabs to Hyde's cheek, which Hyde would have seen coming, would have created the motion necessary to the torquing/rotational injury (i.e., the fatal injury)." (*Id.* at 5.) Contrarily, "[t]he most significant areas injury [sic] to Jared Hyde's head and face are consistent with acts of kicking on the side of his head, possibly falling to the ground, and punching from an angle where Master [sic] Hyde would not see the assailant." (*Id.*) Dr. Llewellyn concluded that she could not "agree with the opinion that each and every blow contributed to Master [sic] Hyde's death" because "the more reasonable cause of the rotational forces causing disruption of Master [sic] Hyde's blood vessels, which caused his death, came from the second fight as opposed to the first one (involving Kelsey)." (*Id.* at 6.) Notably, Dr. Llewellyn's report was not admitted as an exhibit at Kelsey's post-conviction evidentiary hearing. (ECF 20-9 at 29.)

3. State Court Determination

In its order affirming in part, reversing in part, and remanding, the Nevada Court of Appeals held:

> First, Kelsey claims the district court erred by denying his claim counsel was ineffective for failing to consult with and present an expert at trial to provide

> a contrary and exculpatory opinion regarding the probable cause of the victim's death. After holding an evidentiary hearing, the district court concluded Kelsey failed to demonstrate a reasonable probability of a different outcome at trial had counsel presented an expert because the expert presented at the evidentiary hearing could not establish which arteries caused the hemorrhaging in the victim's brain and her testimony could not be differentiated from that of the experts presented by the State at trial. Substantial evidence supports the decision of the district court, and we conclude the district court did not err in denying this claim.

(ECF No. 21-17 at 5.)

Kelsey argues that the Nevada Court of Appeals' decision is based on an unreasonable determination of the facts, making this Court's review *de novo*, because Dr. Llewellyn's testimony at the post-conviction evidentiary hearing could be differentiated from the experts presented by the State at trial. (ECF No. 44 at 32-33.) Dr. Llewelyn testified that she did not agree with Dr. Omalu's opinion that every hit Hyde suffered necessarily contributed to his death. (*See* ECF No. 20-9 at 60-61.) However, Dr. Llewelyn also testified that it was possible that Kelsey caused Hyde's death, which is consistent with Dr. Clark and Dr. Omalu's testimonies. (*Id.* at 31-32.) Accordingly, this Court disagrees that the Nevada Court of Appeals' decision was based on an unreasonable determination of the facts and declines to review ground 1 *de novo*.[5]

4. Analysis

Dr. Llewellyn's testimony that it was more probable that the disruption of Hyde's blood vessels was due to the actions of Schnueringer and Jefferson was based on Kelsey's self-serving version of the facts: that he only punched Hyde whereas Schnueringer and Jefferson blindsided Hyde and then repeatedly kicked him in the head. Importantly, during cross-examination, Dr. Llewellyn's opinion as to the role Kelsey played in Hyde's death changed based on the State's version of the facts: that Kelsey punched and kneed Hyde in the head, causing him to be knocked to the ground.

At the trial, there were three individuals who testified about Kelsey's attack on Hyde: Opperman, Hawkinson, and Kelsey. Opperman testified that Kelsey hit Hyde twice

[5]And even if this Court were to review ground 2 *de novo*, Kelsey would still not be entitled to relief because he fails to demonstrate prejudice as discussed below.

in the head, and as Hyde "was going down," Kelsey "grabbed his head and kneed him twice in the head." (ECF No. 18-2 at 283.) And Hawkinson testified that she saw Kelsey "grab[Hyde] by the shirt and knee[ ] him in the face and hit him a couple times." (ECF No. 18-4 at 275.) Contrarily, Kelsey testified that he only punched Hyde twice after Hyde "came forward with his fists balled up" and only *tried* to kick Hyde because Hyde had grabbed his shirt. (ECF No. 18-9 at 38.)

Based on (1) the evidence presented at the trial, which demonstrates that Dr. Llewelyn's testimony would have only been helpful if the jury believed Kelsey's testimony over Opperman and Hawkinson's testimonies; and (2) Dr. Llewelyn's testimony that—notwithstanding Schnueringer and Jefferson's actions—it was possible that Kelsey caused Hyde's death, which did not directly challenge the conclusions made by Dr. Clark and Dr. Omalu, Kelsey establishes nothing more than a theoretical possibility—not a reasonable probability—that the result of his trial would have been different had Edwards' retained an expert like Dr. Llewellyn. *See Strickland*, 466 U.S. at 694; *see also Richter*, 562 U.S. at 112 ("It was also reasonable to find Richter had not established prejudice given that he offered no evidence directly challenging other conclusions reached by the prosecution's experts."); *Djerf v. Ryan*, 931 F.3d 870, 881 (9th Cir. 2019) ("*Strickland* prejudice is not established by mere speculation."). As such, the Nevada Court of Appeals' determination that substantial evidence supports the state district court's decision that Kelsey failed to demonstrate a reasonable probability of a different outcome at trial had counsel presented an expert constituted an objectively reasonable application of *Strickland*'s prejudice prong. *See Strickland*, 466 U.S. at 694. The Court's previous denial of ground 2 will not be amended.

V. CERTIFICATE OF APPEALABILITY

This is a final order adverse to Kelsey. Rule 11 of the Rules Governing Section 2254 Cases requires this Court to issue or deny a certificate of appealability (COA). This Court has *sua sponte* evaluated the claims within the petition for suitability for the issuance of a COA. *See* 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d 851, 864-65

(9th Cir. 2002). Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner "has made a substantial showing of the denial of a constitutional right." With respect to claims rejected on the merits, a petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable jurists could debate (1) whether the petition states a valid claim of the denial of a constitutional right and (2) whether this Court's procedural ruling was correct. *See id*.

Applying these standards, the Court finds that a certificate of appealability is warranted for grounds 1 and 2. First, reasonable jurists could debate whether Edwards' decision to waive closing argument amounted to ineffective assistance of counsel because (1) he gave up the opportunity to argue for a lesser-included offense by highlighting the distinctive role that Kelsey played in Hyde's death as compared to Schnueringer and Jefferson, and (2) his tactical decision, at least in part, to keep the senior prosecutor from advocating for first-degree murder is somewhat illogical given that the junior prosecutor only advocated for second-degree murder. And second, reasonable jurists could debate whether prejudice ensued from Edwards' failure[6] to consult with a forensic pathologist.

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[6]It is fairly irrefutable that Edwards' "representation fell below an objective standard of reasonableness" due to (1) his failure to attempt to contact an expert pathologist since the central issue at trial was the cause of Hyde's death, and (2) his misguided reliance on Ohlson's representation that a defense expert was unobtainable. *See Strickland*, 466 U.S. at 691 (explaining that defense counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary"); *Richter*, 562 U.S. at 106 ("Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence."); *Duncan v. Ornoski*, 528 F.3d 1222, 1235 (9th Cir. 2008) ("[W]hen the prosecutor's expert witness testifies about pivotal evidence or directly contradicts the defense theory, defense counsel's failure to present expert testimony on that matter may constitute deficient performance.").

VI. CONCLUSION[7]

It is therefore ordered that the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (ECF No. 6) remains denied.

It is further ordered that a certificate of appealability is granted for grounds 1 and 2.

The Clerk of Court is directed to substitute Tim Garrett for respondent Renee Baker. The Clerk of Court shall not amend the judgment previously entered on August 22, 2019. The Clerk of Court is directed to close this case.

DATED THIS 29th Day of March 2022.

MIRANDA M. DU
CHIEF UNITED STATES DISTRICT JUDGE

[7]This Court previously denied grounds 3, 4, and 5 of the Petition in its original merits order on August 22, 2019. (*See* ECF No. 27.) Because (1) the Ninth Circuit did not grant a certificate of appealability as to grounds 3, 4, and 5; and (2) the basis of the Ninth Circuit's remand—the consideration of Ohlson's deposition testimony and Dr. Llewellyn's report—do not particularly concern grounds 3, 4, and 5, this Court does not reconsider them. (*See* ECF No. 43-1 at 26-27 (Ohlson's deposition discussing, briefly, his cross-examination of Kelsey, which tangentially corresponds with ground 4, Edwards' failure to object to Ohlson's racist philosophies).) As such, they remain denied as provided in this Court's original merits order. (ECF No. 27.)

Zachary Kelsey, #1097882
Lovelock Correctional Center
1200 Prison Rd.
Lovelock, NV 89419
In Propria Persona

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

ZACHARY N. KELSEY,

Petitioner,

RENEE BAKER, in her official capacity only as the Warden of the Lovelock Correctional Center; and JAMES DZURENDA in his official capacity only as the Director of the Nevada Department of Corrections.

Respondents.

/

ADAM LAXALT, Attorney General of the State of Nevada,

Additional Respondent.

/

Case No.: 3:18-cv-00174

PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO NRS 28 U.S.C. § 2254 BY A PERSON IN STATE CUSTODY (NOT SENTENCED TO DEATH)

1. Name and Location of Court, and name of judge, that entered the Judgment of Conviction you are challenging:

Second Judicial District Court of the State of Nevada, in and for the County of Washoe, the Honorable Steven P. Elliot, presiding.

2. Full date Judgment of Conviction was entered:

January 28, 2013

3. Did you appeal the conviction? If yes, date appeal decided:

Order of Affirmance filed February 27, 2014. Remittitur filed August 25, 2014.

4. Did you file a Petition for Post-Conviction Relief or Petition for *Habeas Corpus* in the state court?

Yes. On September 23, 2014, Petitioner filed a Petition for Writ of Habeas

Corpus. The Petition raised grounds predicated on ineffective assistance of counsel. The trial court granted the Petition on April 8, 2016, and the State of Nevada appealed. The Nevada Court of Appeals reversed on February 27, 2017. The Nevada Supreme Court denied Petitioner's Petition for Review on July 25, 2017. The Remittitur issued on August 21, 2017.

5. Date you are mailing or handing a correction officer this Petition to the Court:

Not applicable.

6. Is this the first federal Petition for Writ of Habeas Corpus challenging this conviction?

Yes.

7. Do you have any petition, application, motion or appeal (or by an other means) now pending in any court regarding the conviction that you are challenging in this action?

No.

8. Case Number of the Judgment of Conviction being challenged:

Second Judicial District Court: Case No. CR12-0326; Supreme Court of the State of Nevada: Case No. 62570 (direct appeal); Case No. 70155 (Order of Reversal re. Grant of Post-Conviction Petition for Writ of Habeas Corpus).

9. Length and term of sentence:

10 years to 25 years.

10. Start date and projected release date:

First parole eligibility hearing February 21, 2022. Projected release date: August 3, 2024.

11. What was (were) the offense(s) for which you were convicted:

Second degree murder.

12. What was your plea?

Not guilty.

13. Who was the attorney who represented you in the proceedings in state court?

Trial and sentencing: Scott Edwards, Esq., Reno Nevada, appointed; appeal, Thomas Qualls, Reno, Nevada, appointed; Post-conviction Petition for Writ of Habeas Corpus and appeal therefrom: Richard F. Cornell, Esq., Reno, Nevada, appointed.

INTRODUCTION

II. STATEMENT OF FACTS

A. STATEMENT OF TRIAL TESTIMONIES

Tyler DePriest testified that on February 5, 2012 he went to a bonfire party in Lemmon Valley with a good number of young people from North Valley High School. Mr. DePriest was good friends with Jared Hyde, the ultimate homicide victim. (See: AAv3: 510-514) He drove to the party with Mr. Hyde and three other individuals. (Id. at 511) He and the others arrived at about 9 p.m., started drinking some beers and smoking some marijuana. (Id. at 513) Then, near the racetrack a fight between two girls broke out. (Id. at 513-14) That fight involved an individual named Taylor Pardick standing up for his girlfriend, one of the fight's participants, and saying "I'll hit a bitch if I have to." (AAv3: 518)

An individual named Jake Graves then walked up to Pardick, got physically aggressive with Pardick, and ultimately pushed him down and started hitting him. (Id. at 514-15) Another individual named "Ricky Bobby", aka Eric Boatman, jumped in and leaped on Graves' back. Graves knocked Boatman to the ground. (AAv3: 519)

As he started to walk away from the fight, Hyde met up with DePriest. Hyde's collar was stretched out and ripped. Hyde said to DePriest, "let's go, let's get out of here. I just got rocked. These guys were picking on a friend of mine from seventh grade and I wasn't just going to stand there." (AAv3: 520) As they walked away, Respondent appeared where Hyde was and said, "one punch, that's it?" Hyde

responded, "yeah. I just want to go home." (Id. at 521) Kelsey was approximately 25 to 30 feet away from Hyde when he said that. (Id.)

Shortly after that, as DePriest was about to get into his vehicle he heard some individuals chanting "TM!" When DePriest got around the vehicle, he saw Hyde drop to the ground. (Id. at 521-22) DePriest then looked at Hyde, who was on the ground, and learned that Hyde was unconscious and did not have a pulse. (Id. at 522) So, DePriest and another individual lifted Hyde into DePriest's vehicle and they left for the hospital. (Id. at 523)

In other words, after Respondent hit Hyde (which DePriest didn't see, as the skirmish was that brief), Hyde was perfectly *cumpus mentis*. After Schnueringer and Jefferson hit Hyde, Hyde was dead.

Michael Opperman testified.

Before the fight began, Opperman and Kelsey were talking at Kelsey's vehicle. Kelsey mentioned that he had a new pair of brass knuckles, but Kelsey never showed them to Opperman. (AAv3: 780-81)

He testified that Jefferson and three other males (not Kelsey) egged on the fight (between the two girls and participants). (Id. at 783)

After Graves punched Pardick and knocked out Boatman, Hyde was walking towards DePriest's vehicle. Kelsey was with Opperman. Hyde said loudly, "This is bullshit. You just knocked out my best friend." (Id. at 784-86) When that happened Kelsey started pushing Hyde. (Id. at 786-87) Kelsey hit Hyde twice in the head. As Hyde was going down, Kelsey grabbed his head and kneed him twice in the head. Opperman grabbed Kelsey by the neck and said, "No, this is bullshit. You need to get the fuck away. You can't be doing this." (Id. at 787) Hyde got up, his shirt was torn, and he had blood running from his nose or mouth. Opperman told Hyde to walk to DePriest's vehicle and that's when he walked around the corner towards the vehicle. (Id. at 787) Kelsey screamed at Hyde, "You're a pussy! You're a bitch! You know you can't fight, you can't do this!" (Id. at 787) Opperman told Kelsey

to calm down. Kelsey did so and said, "I shouldn't have done that." (Id. at 788)

It was after that that Schnueringer hit Hyde in the head and Hyde fell to the ground, and Jefferson continued to punch Hyde in the head. (Id. at 788)

Opperman clarified that Kelsey punched Hyde three times, not more than that; and that Hyde immediately came back up after Kelsey knocked him down. (AAv4: 892-93)

In other words, Respondent and Hyde were face-to-face when Respondent jabbed him twice or three times. But Hyde was not expecting Schnueringer and Jefferson to hit and kick him when they did so, and Hyde never recovered from what they did.

Cliffton Fuller testified that after the fight between Respondent and Hyde, Hyde seemed out of it, although that could have been from Hyde's drinking. (AAv4: 976) He didn't see any injuries to Hyde's face, however. (Id. at 976-77) He heard Hyde say, "I got to get out of here", and saw him walk towards DePriest's vehicle. (Id. at 977) But after Schnueringer and Jefferson attacked Hyde and Hyde was on the ground, the witness felt Hyde for a pulse and told Schnueringer "he has no pulse." Schnueringer bent down, felt for the pulse, stood up and told his friends they all had to go. (Id. at 982-84) At that point Hyde had blood coming out of his mouth. (Id. at 1022)

Brandon Naastad testified that he saw Respondent hit Hyde a few times, and then someone broke up the fight and it was over. (AAv5: 1192) Then, Schnueringer and Jefferson went to "talk to" Hyde. Hyde at that point was scared and about to cry, and said that he did not want to be there. (Id. at 1192-93) Jefferson and Schnueringer then hit Hyde repeatedly, - more than twice - while Hyde was on the ground. (Id. at 1194-95)

Justin Ferretto testified that after Hyde hit the ground following Schnueringer's punch, both Schnueringer and Jefferson stomped on Hyde's head approximately three times. (AAv5: 1293, 1320) But just before that, when Hyde was

heading to the truck, Hyde appeared normal. In fact, he was standing there, leaning up against the truck, before Schnueringer and Jefferson approached him. The witness did not see any blood on Hyde's face at that point. (Id. at 1323-24)

Jordon B. testified that when Schnueringer hit Hyde, it sounded "like a baseball bat." He saw Schnueringer and Jefferson kicking Hyde while Hyde was on the ground. (AAv5: 1349)

Brandon Moulder testified that before Schnueringer hit Hyde, it looked to him like someone was "wrestling" with Hyde. (AAv5: 1413) He saw Hyde right after that fight fixing his white shirt, when Schnueringer came over and hit him. The witness did not see any blood or cuts or Hyde's face when Schnueringer did so. (Id. at 1414)

Aubree Hawkinson testified that she saw Respondent hit Hyde in the face a couple of times, and saw his knee hit Hyde during the skirmish. (AAv5: 1429) However, after Respondent hit Hyde, Hyde walked to DePriest's car like a normal person. Hyde was not staggering, and Hyde did not fall to the ground. (Id. at 1458, 1468) After that, she saw Schnueringer hit Hyde three times, and saw Jefferson hit Hyde three more times. (Id. at 1435)

Respondent testified when several kids, including Hyde, rushed into the Graves'- Boatman fight, Respondent warned them to get back. While the others complied, Hyde said, "if you're going to swing at me, I'm going to knock you out. (AAv7: 1800-01) Respondent then punched Hyde twice in the cheek with a jab-like punch. (Id. at 1802, 1806, 1850) Hyde grabbed Respondent's shirt and tried to kick him off. That did not work. Hyde pulled Respondent's shirt over his head. (Id. at 1802) Respondent fell into a tree and walked towards Hyde with fists balled up and said, "Are we done?" Hyde said, "yeah," and both headed toward their cars. A friend then grabbed Respondent and said, "calm down, Zach. It's over with." (Id. at 1804) Subsequently, Schnueringer hit Hyde, and Hyde bounced off the side of DePriest's vehicle. While Hyde fell, Jefferson and Schnueringer punched Hyde, and continued

to kick him when he hit the ground. (Id. at 1808-10)

Mark Rankin testified while Graves and Pardick had words before their fight, Schnueringer and Jefferson, among others - but not Respondent - egged them on, making statements about "getting down for TM" and "catching a fade" (meaning "knock him out!") (AAv4: 1100) However, Respondent was not part of "TM", or "the Twisted Minds." (Id. at 1148) That is, the kids who were "Straight Edge" and the kids who belonged to the "Twisted Minds" were different subsets of kids. (See: Id.)

Dr. Ellen Clark testified, as the forensic pathologist conducting the autopsy (AAv2: 454, 457) that the manner of death was homicide, while the cause of death was bleeding into the brain (subarachnoid hemorrhage) and the spinal cord due to blunt force trauma. (Id. at 459)

Dr. Clark also testified that one blow to the head could cause a tearing of veins or arteries that supply blood to the brain, while additional blows can exacerbate the tears and increase the amount of bleeding to the brain. (Id. at 468) The injuries in this case were consistent with numerous punches and kicks to Mr. Hyde's head. (Id. at 471-72)

However, Dr. Clark also testified that if three different individuals struck Mr. Hyde, it would be impossible to identify the fatal blow. **She could not tell which blood vessels ruptured or perforated to cause the bleeding; it could have been a combination of multiple vessels.** (Id. at 479) It could have been multiple blows by one person that cause Hyde's death, or multiple blows by more than one person. She could not tell from the autopsy how many people struck the victim. It was possible that the attacker(s) had an implement, possibly a ring. (Id. at 481-84)

Notably, Dr. Clark was able to document five separate areas of trauma that could have cause bleeding into the victim's brain. (Id. at 497-500) Even more notably, Dr. Clark also testified that she saw no facial fractures, no skull fractures, and the trauma to the victim's face was not severe. (Id. at 473-74)

Dr. Bennett Omalu, one with whom Dr. Clark consulted (AAv6: 1544), testified if an individual were to receive repeated impacts to the head in a short period of time, each and every impact would contribute to the eventual outcome. Each and every blow would accentuate the totality of all the blows. Likewise, he could not tell which blow was the fatal blow. If the victim received five blows, each one would have contributed to his death because of the phenomenon of repetitive traumatic brain injury. (Id. at 1557) If a punch were to cause a tear in the vein, the cells would go to close the injury, but a second jolt would increase the tear and jolt the cells, causing greater bleeding and greater risk of sudden death. (Id. at 1558)

But certainly, in this case the veins of Mr. Hyde were ripped and torn **in the middle of the base of skull extending to the neck**. (Id. at 1577) Sudden acceleration and deceleration of the individual not expecting such blows would result in the sudden infarct. (Id. at 1578-79)

And critically, Dr. Omalu admitted that **not every blow to the head would cause this kind of injury**. Every impact to the head causes a concussion; but if the concussion does not manifest itself **immediately**, it becomes a **subconcussion**. (Id. at 1586)

B. TESTIMONY OF ADDITIONAL "TRIAL WITNESSES" AT THE POST-CONVICTION HEARING

Amy Llewellyn, a forensic pathologist called by the Respondent at the evidentiary hearing (AAv9: 2266-67), testified that she could not say to a reasonable degree of medical probability that the blows delivered by Respondent to Jared Hyde's face prior to Schnueringer and Jefferson's attack of the victim were the cause of Hyde's ultimate death. (Id. at 2273-74) She testified that it was a possibility. (Id. at 2274) She testified that to a reasonable degree of medical certainty the blows that killed Mr. Hyde were the ones delivered by Schnueringer and Jefferson. (Id. at 2274)

Dr. Llewellyn agreed that she could not tell from the autopsy protocol which particular vessels were severed; but that determination **is not critical**. She testified

that what is important is there was subarachnoid hemorrhaging on the brain as well as on the spinal cord. (Id. at 2275) She testified that it was more probable that which Schnueringer and Jefferson did disrupted the blood vessels in question than what Kelsey did. (Id. at 2276)

Dr. Llewellyn further testified that the bruising on Hyde's scalp did not appear likely to be caused by punches to the head, but really were more in the nature of a "stomping injury." (Id. at 2279) She testified that all of the injuries she detected at autopsy could have been explained by the second attack by Schnueringer and Jefferson, but she could not conclude that all of the injuries could have been produced by the first assailant, Kelsey. (Id. at 2282) She testified that in the face-to-face confrontation between Kelsey and Hyde, most of Hyde's injuries should have been more towards the front of the body rather than the back or the side of the head; but in this case the injuries were in the back and side of the head. (Id. at 2283-84)

Dr. Llewellyn further testified that if as a result of the encounter with Respondent Mr. Hyde sustained a subconcussion, it is not reasonably probable that a person who suffers from a subconcussion will die minutes later just from the subconcussion alone. (Id. at 2287)

Dr. Llewellyn indicated from the autopsy protocol in photos, there are no distinctive marks indicating that Mr. Hyde was struck with brass knuckles. (Id. at 2288)

Respondent objected to the State's calling Dr. Clark as a post-conviction witness on the grounds that she had already testified at trial, and therefore her testimony was irrelevant but potentially prejudicial, because it could cause the trial court to usurp a jury's role by deciding that Dr. Clark is "more credible" than Dr. Llewellyn, when it is the jury who should make that call. (AAv9: 2253-55) The court overruled the objection and allowed Dr. Clark to testify. (Id. at 2259)

Notwithstanding that ruling, when Dr. Clark was asked what she disagreed about with Dr. Llewellyn's testimony, Respondent continued his objection on the

grounds of irrelevant and prejudicial. Again, the *habeas* court overruled that objection. (Id. at 2312-13)

Dr. Clark's testimony was that she could not exclude the initial exchange of blows (between Respondent and Mr. Hyde) causing severe and potential lethal injury to the brain. (Id. at 2314) She further indicated that bleeding could have proceeded into Mr. Hyde's brain from somewhere other than the vertebral artery. (Id. at 2314-15)

On cross-examination Dr. Clark admitted that she had not studied "second impact syndrome", or an exacerbating or cumulative injury where the initial impact renders the brain more vulnerable to injury under a lesser-magnitude or lesser-force trauma and therefore could not render an opinion in that regard. (Id. at 2317-19) She further indicated that she does not testify in criminal cases to "a reasonable degree of medical probability". (Id. at 2319) She is not aware of the standard of admissible testimony in Nevada in medical malpractice cases. (Id. at 2320)

On cross-examination, Dr. Clark rendered this testimony:

> "Q: . . . contrast that to a situation where the victim - or person #1 hits the victim two times in the cheek, the victim walks away, goes and eat dinner, comes out of the restaurant, 25 minutes later a guy comes up from behind him and hits him on the head with a shovel and he dies of subarachnoid hemorrhaging. In that hypothetical situation we could say the #2 - the cause of death was the subarachnoid from the shovel hit and the two punches 25 minutes prior really didn't contribute to the cause of death, can't we?
>
> A: **I don't know if we can definitively say that."**

Dr. Clark further admitted that it would entirely possible that as a result of a blow to Mr. Hyde's head, knocking him down, he would have a small tear in that plexis of arteries at the base of the brain or at the neck, and then as a result of being kicked repeatedly in the head, the tear would be exacerbated; and that person would not only would not get up on under his own power but would be dead within 20 or 25 minutes. (Id. at 2324-25)

Dr. Clark also claimed that she does not use the terminology "subconcussion" and therefore did not have an opinion as to whether two jabs to the face and the knee

to the chest (by Mr. Kelsey to Mr. Hyde) could have caused a subconcussion. (Id. at 2325-26)

She believed that Mr. Hyde suffered rotational force or shearing injury; and the rotation or shearing force in this case could have happened when one guy (Schnueringer) came up from [Hyde's] side and hit him without Hyde seeing it and hitting him hard enough that it sounded like the crack of a baseball bat or two rocks coming together. (Id. at 2327)

Z[redacted] C[redacted] was at the bonfire party on February 5, 2012 at age 17. (AAv9: 2330)

He testified that he knew that Graves and Kelsey were friends. (Id. at 2334) He heard Taylor Pardick and Jake Graves get into their argument. (Id. at 2333) He heard Jefferson "egging on" the fight on behalf of the Twisted Minds. However, Respondent is not a member of the Twisted Minds. (Id. at 2334) He testified that it appeared to him that the reason "Ricky Bobby" got into the fight was he was coming to defend Pardick. (Id. at 2336-37)

After Graves knocked out Boatman, he saw Hyde and Kelsey get into a fight. (Id. 2337) They pulled their shirts over each other's heads and were "kind of flailing around at each other." They were more wrestling than anything else. (Id. at 2338) Mr. C[redacted] saw Hyde strike Kelsey. (Id. at 2339) He also saw Kelsey strike Hyde twice. (Id. at 2340) The fight between Kelsey and Hyde lasted approximately 20 seconds. (Id.) Hyde did not hit the ground. (Id. at 2340) Likewise, Kelsey did not hit the ground. (Id. at 2341) Mr. C[redacted] is certain that Mr. Kelsey was not wearing a pair of brass knuckles when he hit Hyde. (Id. at 2341)

Based on what C[redacted] saw, neither Hyde nor Kelsey "got the better" of the other. (Id. at 2341) C[redacted] saw Hyde walk away from the fight, walking normally. (Id. at 2342) When C[redacted] walked away, Hyde appeared perfectly fine to him. (Id. at 2342)

On the prosecutor's examination, C[redacted] testified that he did not believe that

Kelsey should be in prison for what he did. However, he was there to tell the truth. (Id. at 2346)

T C was also at the party on February 5, 2012 when she was 16 years old. (AAv9: 2351) She was never interviewed by a defense investigator prior to trial. She was interviewed by the District Attorney's Office prior to trial, however, and they released her from her subpoena after she spoke with them. (Id. at 2352)

She knew that neither Mr. Graves nor Mr. Kelsey were members of the "Twisted Minds." (Id. at 2353)

She indicated that the only source of light was that from the bonfire and back lights from cell phones. (Id. at 2353-54)

Before the fight started between Respondent and Hyde, she saw Hyde run up behind Jake Graves. (Id. at 2356) She saw Kelsey pull Hyde off of Graves. (Id. at 2357) Kelsey was not wearing a pair of brass knuckles that evening. (Id. at 2357) She saw Kelsey throw a punch at Hyde and missed, and then tried to knee him. (Id. at 2357) It appeared to her that Kelsey's knee contacted Hyde's shoulder, but not his head. (Id. at 2358) She saw Kelsey hit Hyde one time on his face. (Id. at 2358) She estimated that the fight between Kelsey and Hyde lasted no longer than 30 seconds. (Id. at 2359) At the end of the fight both walked away, and Hyde went toward DePriest's vehicle. (Id. at 2360) During the fight Hyde did not hit the ground, and she did not see either Hyde or Kelsey slip to a knee and come right back up. (Id. at 2360) She did not see anyone break up the fight between Kelsey and Hyde. (Id. at 2361) When Hyde walked towards DePriest's vehicle, he was walking normally. (Id. at 2361) The next time she saw Hyde he was on the ground unconscious. (Id. at 2361) She does not know how that happened. (Id.)

She has not known Kelsey either to hang out with Schnueringer or with Jefferson. (Id. at 2362) She has known Kelsey for a little over four years. (Id. at 2364)

S L testified that he was at the bonfire at February 5, 2012

when he was 16 years old. (AAv9: 2374-75) He was never interviewed by the defense prior to trial. (Id. at 2375) He did not know Hyde, Kelsey, Jefferson or Schnueringer. (Id. at 2377) He did not see the fight between Kelsey and Hyde. (Id. at 2378) However, he heard someone say "fuck TM" [sic]. Schnueringer ran up behind Hyde and said "this guy said, 'Fuck TM.'" Hyde turned around and the last thing he said was, "What? Wait! No!" (Id. at 2380-81) The next thing the witness heard was a very loud sound like two rocks hitting each other solidly, and Hyde dropping to the ground. (Id. at 2381) Before that happened, Hyde was walking away and was perfectly fine. He walked 15 feet up the hill before Schnueringer accosted him. (Id. at 139) After Hyde said, "What? Wait! No!", it was within a blink of an eye that Schnueringer hit him. (Id. at 2382) And it was after that that a number of Black people - including Jefferson - stomped on Hyde. (Id. at 2383) Kelsey was not there when that happened. (Id. at 2383).

C. TESTIMONY OF ATTORNEYS

Thomas Qualls, Respondent's appellate attorney, testified that he saw an issue regarding John Ohlson, Schnueringer's attorney, examining Kelsey and claiming that Kelsey associated with the "Straight Edge" which is associated with "Neo-Nazis." (Id. at 2400). He testified that he considered raising that as an issue, but did not do so because it was plain error issue (meaning trial counsel, Scott Edwards did not object to it) (Id. at 2400-01) and that the strongest issue in the case was that the evidence was insufficient to support a second degree murder conviction, both on the issue of malice and on the issue of proximate causation. (Id at 2402) He testified that had Mr. Edwards objected to Mr. Ohlson's examination regarding "Straight Edge being associated with Neo-Nazi" and moved for a mistrial, and the same had been denied, he would have raised that issue on direct appeal. (Id. at 2403)

Mr. Qualls testified that as he analyzed the case, Kelsey committed a misdemeanor battery, and there was an intervening criminal act (by Schnueringer and Jefferson) which broke proximate cause. That fact inherently made Edwards' case

very different from Ohlson's and Molezzo's case. He felt that Kelsey was faced with more than one prosecutor in Mr. Ohlson. (Id. at 2404)[1]

The parties stipulated the deposition of **John Ohlson** into evidence. (AAv9: 412-13)

Mr. Ohlson was appointed to represent Bobbby Schnueringer. (AAv10: 2633) In developing a theory of defense he sent all information to a Dr. Terri Haddix, a forensic pathologist who practices in Hayward, California. (Id. at 2634-35) She identified the primary injury as the factual cause of death of the deceased as a rupture or a severing of the cranial artery bundle that serves the brain with blood. (Id. at 2635-36) She could not describe which defendant delivered the fatal blow, but her opinion was that the likely cause of death was the torquing motion that disrupted the arteries in the back of the skull. (Id. at 2636) Dr. Haddix did not issue a written report in that regard, and prior to trial Mr. Ohlson did not share that information with co-counsel. (Id. at 2636-37) He felt the information was not helpful to Mr. Schnueringer. (Id. at 2635) He felt the information, while possibly exculpatory to Mr. Kelsey, was inculpatory to Mr. Jefferson and more particularly to Mr. Schnueringer. (Id. at 2637)

Mr. Ohlson did not recall Mr. Edwards (or Mr. Molezzo) specifically requesting Dr. Haddix's information, but he volunteered that he had consulted with her, did not deemed that she did not have information that was helpful, and that he was not going to use her. (Id. at 2637)

Mr. Ohlson then obtained the investigatory services of Bill Savage, a thorough, well-trained and well-experienced investigator. (Id. at 2638) Mr. Savage interviewed

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[1] Mr. Qualls noted that when Mr. Ohlson stated to Dr. Clark at the end of his examination, "thank you doctor. You remain as brilliant as usual", it struck him as a form of vouching; however he did not raise the issue primarily because Mr. Edwards did not object to it. (Id. at 2405)

a number of scene witnesses. (Id. at 2639) Mr. Ohlson did not share Mr. Savage's reports with either Mr. Molezzo or Mr. Edwards. (Id. at 2639-40)

He believed that Dr. Haddix's information would be devastating to the State, since Dr. Haddix went further than either of the State's pathologists went in determining the cause of death. (Id. at 2640-41)

Mr. Ohlson also testified that the idea to waive closing argument after Ms. Halstead gave her opening and closing argument was his. (Id. at 2646) After Ms. Halstead spoke, Mr. Ohlson had lunch with Mr. Edwards. (Id.) The reason he did that was he thought Ms. Halstead had given a perfunctory summation. (Id. at 2647) His opinion was that it was intentionally perfunctory in order to set up for closing arguments to which the co-prosecutor, Mr. Hall, would give a blazing rebuttal argument. (Id. at 2647)

Before that, Mr. Hall had cross-examined Mr. Ohlson's three witnesses, and his cross-examination of them was very tough. (Id.) He believed that Mr. Hall had hurt his witnesses; an additional argument for him would give him an opportunity to emphasize the damage to their credibility that he had done in cross-examining those witnesses. (Id. at 2648)

Mr. Ohlson testified he would not have waived closing argument but for Mr. Edwards and Mr. Molezzo agreeing to do so. (Id. at 2648)

Mr. Ohlson testified that had he been appointed to represent Mr. Kelsey he would not have waived closing argument. (Id. at 2649)

Mr. Ohlson testified that when he cross-examined Mr. Kelsey and brought up the information that "Straight Edge" is a "Neo-Nazi" philosophy, he did not recall where he got that information, but thought it was a combination of running into some "Straight Edge defendants in the past" and "street knowledge." (Id. at 2649) He did not have any information from any source that the kids at North Valley High who were "Straight Edge" were also "Neo-Nazis". (Id. at 2649-50) He had no information in the case that the homicide of Jared Hyde was racially motivated. (Id. at 2650) Had

he represented Kelsey, he would have filed a pretrial motion to keep the subject of "Straight Edges are Neo-Nazis" out of evidence. (Id. at 2650)

Scott Edwards, the attorney appointed to represent Mr. Kelsey (AAv9: 2415-16) testified that his theory of defense was that Mr. Kelsey was guilty at best of the lesser-included offense of simple battery and was not guilty of murder; and along with that that he was not the proximate cause of the death of Mr. Hyde. (Id. at 2419-20) He also admitted that an available option was to find Mr. Kelsey guilty of involuntary manslaughter. (Id. at 2420)

Mr. Edwards alighted on that theory of defense as early as June 12, 2012 (AAv9: 2421), but as August 7, 2012, while he knew that Mr. Ohlson had retained a forensic pathologist, he did not know what that pathologist was going to testify to. (AAv9: 2423)

Mr. Edwards admitted that Dr. Haddix's opinion would have been helpful to the theory that Mr. Kelsey's blow was not the cause of death, but Mr. Ohlson never told him of that theory. (Id. at 2424-225) He admitted that based upon the torquing motion causing the death of Hyde, he could have factually argued that tied exclusively to the act of activities of Schnueringer and Jefferson, and therefore Schnueringer and Jefferson's activities were the cause of death, not Kelsey's. (Id. at 2425-26) He admitted that he could not make that argument based upon Dr. Clark or Dr. Omalu's testimonies. (Id. at 2426)

He also admitted that if another forensic expert had testified to a reasonable degree of medical probability the blows administered by the second group of assailants, Schnueringer and Jefferson, were in fact fatal in nature and resulted in the death of the victim, he would have wanted to present such information in developing his defense. (Id. at 2427) However, he did not know whether there was an expert out there who held that opinion. (Id. at 2428)

Mr. Edwards recalled having a meeting with Mr .Ohlson and Mr. Molezzo, where they agreed to a trial where they would not "point fingers at each other".

(AAv9: 2429-31) However, his theory of defense had Mr. Kelsey really pointing the finger at the co-defendants, since his defense had the co-defendants being the intervening superseding cause of the death of Hyde. (Id. at 2431)

Prior to trial he did not believe that Mr. Ohlson was going to present a defense that would place the blame solely on Mr. Kelsey. (Id. at 2431) Mr. Ohlson disclosed the witnesses that he was going to call prior to trial, but he did not know prior to trial what they were going to testify to, and he did not send an investigator out to talk with those witnesses. (Id. at 2431-32) The first he learned of what those witnesses would say was when Mr. Ohlson gave his opening statement. (Id. at 2432) It occurred to him that Mr .Ohlson was running a defense pointing the finger at Mr. Kelsey "to some degree." (Id. at 2432) There was nothing in the State's pre-trial discovery that indicated to him that that could have been Mr. Ohlson's defense. (Id. at 2433) He felt that Mr. Ohlson "sandbagged him" in a way. (Id. at 2434) However, he did not consider moving to sever the trials at the point when Mr. Ohlson gave his opening statement. (Id. at 2434)

Mr. Edwards was completely unaware that Mr. Ohlson would cross-examine Mr. Kelsey on the subject of "Straight Edge" being a "Neo-Nazi movement". He had no information from any source that that would be the case. (Id. at 2434-35) He did not object, although the information shocked him. He felt that Mr. Kelsey was able to disabuse the notion that "Straight Edge" was a "Neo-Nazi philosophy" in his testimony. (Id. at 2435) He was surprised when Mr Ohlson said "well, it is, son," meaning the "Straight Edge" is "Neo-Nazi philosophy." That was not Mr. Edwards' understanding of what "Straight Edge" was about. (Id. at 2435)

On the subject of waiving closing argument, Mr. Edwards was the one who prepared the proximate cause/intervening superseding cause instructions. (Id. at 2436-37) He did not think it likely that Mr. Ohlson or Mr. Molezzo could have argued those instructions. (Id. at 2437) He also did not believe that Mr. Ohlson or Mr. Molezzo could have credibly argued for a mere misdemeanor battery. (Id. at 2437)

However, Mr. Edwards was the one who prepared the misdemeanor battery lesser-included instruction and verdict for the trial court to give. (Id. at 2437)

Mr. Edwards did not believe that the facts were present in the record for Mr Hall to credibly argue that Mr. Kelsey not only premeditated, but also deliberated, before taking Mr. Hyde's life.[2]

Mr. Edwards admitted that by waiving closing argument, he waived the ability to address the jury and argue that based upon the jury instructions, Mr. Kelsey was not the proximate cause of the death of Hyde; and even if he were, the case was either an involuntary manslaughter or a misdemeanor battery as to Mr. Kelsey. (Id. at 2443)

Mr. Edwards recalled moving to have Ken Peele appointed as investigator, but he did not recall directing Ken Peele to do anything. (Id. at 2449-50)

He admitted that he spoke with Mr. Peele after the fact, and Mr. Peele had no recollection of doing anything on the case. (Id. at 2453-54) The court record does not reflect that Mr. Peele ever submitted a voucher requesting payment. (Id. at 2454)

When given the description of Z[redacted] C[redacted]'s testimony, Mr. Edwards admitted that that testimony, although given by other sources, would have played into his theory that Mr. Kelsey was not the proximate cause of the death of Jared Hyde. (Id. at 2455-56) Accordingly, per Mr. C[redacted]'s testimony, that would have been consistent with the notion that at worst Mr. Kelsey committed a misdemeanor battery. (Id. at 2457) And when given the description of T[redacted] C[redacted]'s testimony, he also admitted that her testimony was consistent with his theory of proximate cause and misdemeanor battery, but also was consistent with most of what the lay witnesses testified to. (Id. at 2457-58) He also admitted that the testimony of S[redacted] L[redacted] was consistent with his theory of the case. (Id. at 2461-62)

Mr. Edwards also admitted that he knew what Mr. Ohlson's witnesses were

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[2] In fact, after the sentencing Mr. Hall came up to Mr. Kelsey and shook his hand. (Id. at 2439)

going to testify to from what the State told him at the beginning of the trial. (Id. at 2462-63) He believed that it might have been Ms. Halstead who had imparted that information. (Id. at 2464)

Nevertheless, at no time did Mr. Edwards consider the idea of moving for a severance based on inconsistent defenses. (Id. at 2465)

Mr. Edwards admitted that he had never before waived a closing argument. (Id. at 2485-86) He was prepared to go forward with closing argument, and would have done so had Mr. Ohlson not bought up the subject. (Id.) He saw why Mr. Ohlson would have a good strategy reason to waive closing argument, as well as Mr. Molezzo. (Id. at 2486-87) However, Mr. Kelsey was in a different position than Mr .Schnueringer and Mr. Jefferson. (Id. at 2487)

Mr. Edwards candidly admitted that this case may be the last time he ever waives closing argument. (Id. at 2486)

GROUND I.

I allege that my federal constitutional rights to due process of law, to a fair trial, and to effective assistance of counsel under the Fifth, Sixth, and Fourteenth Amendments to the Federal Constitution were infringed. Counsel was prejudicially ineffective in waiving closing argument along with co-counsel for the co-defendants. The co-defendants' best case was the result they received, or guilt of second degree murder. But Petitioner had very strong positions to take that he was not guilty of murder, but at best of misdemeanor battery or at worst of involuntary manslaughter, and that his blows to the victim were not the proximate cause of the victim's death. Accordingly, the "strategy" of waiving closing argument can be deemed the type of "unreasonable strategy" that Strickland v. Washington, 446 U.S. 668 (1984) does not countenance.

The trial court's findings of fact in this regard are not only correct, but are also supported by specific cites to the post-conviction record. The trial court correctly found as follows:

1. Ms. Halstead, the State's co-prosecutor, gave the State's initial closing argument. Her argument was not brief. She asked the jury to return a guilty verdict to each defendant of second degree murder. By this argument, the State specifically eliminated one potential verdict (on an open murder charge). But Ms. Halstead asked the jury to return the same verdict as to each defendant.

2. Trial counsel, Scott Edwards, had the ability to present argument addressing the lesser-included offense as numerated within the jury instruction. By his own admission, Edwards' theory of the case was that Petitioner was "guilty" at best of the lesser-included offense of simple battery. But Edwards failed to present his theory of defense to the jury by waiving closing argument.

3. The trial record is devoid of any explanation of why Edwards, Richard Molezzo (counsel for co-defendant Jefferson) and John Ohlson (counsel for co-defendant Schweringer) waived closing argument. Judge Elliott (the trial judge) did not conduct a "canvass" of Edwards regarding the decision to waive closing argument. The Petitioner was not addressed in any way regarding the decision. Such canvass, although not required, would have clarified the motivation for waiving closing argument.

4. Edwards' reason for waiving closing argument was to prevent co-prosecutor, Karl Hall, from conducting rebuttal. But there is no indication why Edwards was sure Hall would argue the rebuttal closing. While Hall is a very experienced and successful litigator, he could not have made an argument with much more vigor than Halstead's analysis in her opening closing argument.

5. Edwards testified at the evidentiary hearing. He was not convinced waiving closing argument was a sound decision, or one he would do again.

6. Edwards admitted during the evidentiary hearing that he could have argued to the jury that this was an involuntary manslaughter case or a misdemeanor battery. Edwards could have emphasized to the jury that after Petitioner's altercation with Hyde, Hyde was able to walk away without assistance. Edwards could have

pointed out the conflicts or discrepancies of witness in testimony order to persuade the jury to find the Petitioner guilty of a lesser offense than the second degree murder verdict it reached. There were an abundance of issues for Edwards to discuss, had he elected to give a closing argument.

7. Petitioner's last clear chance to persuade the jury against guilt for murder was at closing argument. Edwards had the opportunity to point out the existence of reasonable doubt as to the proximate cause required for second degree murder. Edwards could have pointed out the inconsistencies of witness testimony developed on direct and cross-examination. Edwards could have addressed the complexity of the jury instructions. The speed in which the jury determined the guilt of the Petitioner was brief in light of the complexity of the case and the evidence presented. But the decision to waive closing arguments by all three defendants took away the explanation of the jury instructions in that regard. The waiver of closing argument had a sufficient impact on the trial to undermine confidence in its outcome.

The only other findings the trial judge could have made from the undisputed record, although they might have been superfluous, are these:

8. It was Mr. Ohlson, Schnueringer's counsel, who came up with the idea of waiving closing argument. Mr. Ohlson and Mr. Molezzo would have a good strategy reason to do so, once Ms. Halstead took first degree murder off the table in her first closing argument.

9. Mr. Edwards was prepared to go forward with closing argument, and would have done so had Mr. Ohlson not brought up the subject.

10. Petitioner was in a different legal position than his co-defendants. Mr. Edwards was the one who prepared the proximate cause/intervening superseding cause instruction. He did not think it likely that Mr. Ohlson and Mr. Molezzo could have argued that instruction. Mr. Edwards was also the one who prepared the misdemeanor battery lesser included instruction and verdict for the trial court to give. He did not believe that Mr. Ohlson or Mr. Molezzo could have credibly argued for

a mere misdemeanor battery. Yet, Mr. Edwards admitted that by waiving closing argument, he waived the ability to address the jury and argue that based upon the jury instructions, Petitioner was not the proximate cause of the death of Hyde; and even if he were, the case either was a case of involuntary manslaughter or a misdemeanor battery as to Petitioner

EXHAUSTION OF GROUND I.

This was the first issue raised in the appeal after grant of post-conviction relief in Case No. 70155. See: RAB at 34-44.

28 U.S.C. §2254(d) CONSIDERATIONS

This is taken directly from the Petition for Review filed on April 6, 2017 in Case No. 70155:

Respectfully, the position of the State and the Nevada Court of Appeals is not only an incorrect application of Wiggins v. Smith, 539 U.S. 510, 522-523, 123 S.Ct. 25-27, 25-36 156 L.Ed 2d. 471(2003) and Strickland v. Washington, 446 U.S. 668, at 687-89 (1984), but an *unreasonable* application of that authority. The position of the State, adopted by the Court of Appeals, is because that counsel had the strategy of waiving closing argument because he did not believe the State's closing argument was very "vigorous" and believed the State's rebuttal closing argument would be "much more persuasive," that the tactical decision cannot be challenged.

As made clear in Wiggins, the concern in deciding whether counsel exercised "reasonable professional judgment" is not whether [that he should or should not have waived closing argument], but whether counsel's decision to do so *was itself reasonable*. [Emphasis in the original.] That language in Wiggins clarifies what the Supreme Court meant in Strickland: while the normal performance standard envisions a wide range of permissible actions for the attorney in question, and the reviewing court therefore defers to the attorney's choice of strategy, counsel's performance is deficient when that strategy results in counsel "not functioning as the counsel guaranteed by the Sixth Amendment." Strickland, *supra.*

In other words, the reviewing court simply cannot defer to the trial counsel's explanation, no matter how unreasonable or ill-considered, and therefore consider it a "strategy" that Strickland will not allow the Court to touch. The Court has to consider whether the strategy is "reasonable" in the context of the case.

In determining whether counsel's decision is "reasonable," the Court must ask whether it is the sort of conscious, reasonably informed decision made with an eye toward benefitting his client that reasonable counsel would make. The decision has to be one expected to yield some benefit or avoid some harm to the defense. Pavel v. Hollins, 261 F.3d 210, 218 2d Cir. (2001), citing Moore v Johnson, 194 F.3d 586, 615 (5th Cir. 1999). But a "reasonable strategic approach" cannot be one that involves an attorney's abdicating his client's cause. Pavel, Id.

Petitioner recognizes that counsel is called upon to make a great number decisions during a jury trial that requires on-the-spot decision making. But waiving a closing argument where a counsel has two defenses that co-counsel does not enjoy is not a "strategic decision," rather, it is an abdication of advocacy.

That much is made clear from Ex Parte Whited, 180 So. 3d 69, 78-79 (Ala. 2015), which explains why that is so. Both the trial court and Petitioner advocated the Whited decision, but the Court of Appeals distinguished it in footnote 1 of page 3 of the Order of Reversal by drawing the distinction between counsel who cannot articulate a reason for waiving closing argument, and a counsel who can - regardless of the reasonableness of the decision.

In fact, a decision to waive closing argument in a non-capital case, where counsel has defenses, is analogous to waiving cross-examination of the key prosecuting eye witness in an alibi case. If counsel's decision for doing that is the prosecution's case is so impenetrable that an acquittal is impossible, that simply is an explanation too implausible to accept under the Sixth Amendment. See: Higgins v. Renico, 470 F.3d 624, 633 (6th Cir. 2006). That is not a "strategy"; that is an abdication of Sixth Amendment counsel.

Another aspect of the Court of Appeals' decision that is extremely disturbing is on the standard of review. The district court's purely factual findings regarding claims of ineffective assistance of counsel are entitled to deference. Nika v. State, 124 Nev. 1272, 1278-79, 189 P.3d 839 (2008). This is a principle that prisoner's counsel get reminded of constantly on appeals from denial of habeas. Here, an appeal from a grant of habeas, the standard of review was honored in the breach. Nowhere did the Court of Appeals even discuss the trial judge's extensive findings. Instead, the Court of Appeals cherry-picked Edwards' testimony out of context as the reason for making this misdemeanant spend~~ing~~ years more in prison.

The irony of the situation: The only "reason" - which would not be a reasonable strategy afforded Strickland or Wiggins deference, but at least a "reason" - for waiving closing argument is because Mr. Hall or Ms. Halstead could be expected to present in rebuttal that Mr. Edwards had not presented any medical evidence to contradict Dr. Clark or Dr. Olamu. That is why justice is not done in this case unless the Court also reviews the next two issues based on the proper standard of review under Strickland. The Nevada Court of Appeals and the Nevada Supreme Court's unwillingness to do so was unreasonable.

GROUND II

I allege that my Fifth, Sixth and Fourteenth amendment rights to a fair trial to due process of law and to effective assistance of counsel were violated. Counsel was prejudicially ineffective in failing to consult with and retain an expert to give a contrary, exculpatory (to Petitioner) medical opinion regarding the probable cause of death of the victim.

Petitioner's specific theory alleged in his Supplemental Petition for Writ of Habeas Corpus in state court was that trial counsel was ineffective in not consulting with an independent forensic pathologist, relying upon Mr. Ohlson to present forensic pathological testimony (which obviously Mr Ohlson would not present as it was damaging to his client), failing to ask the line of questioning to the two doctors

(consistent with Mr. Ohlson's expert's conclusions), and failing to present a competing opinion testimony of a forensic pathologist in the event Dr. Clark or Dr. Omalu were able "create" a theory of proximate cause of several hard jabs to the cheek in this case as contributory to the cause of death of Mr. Hyde.

Mr. Edwards' theory of defense was that Petitioner was guilty at best of the lesser included offense of simple battery, but was not guilty of murder; and along with that, Petitioner was not the proximate cause of the death of Mr. Hyde. Therefore, Petitioner's defense rested on medical testimony.

Further, Mr. Edwards alighted on that defense as early as June 12, 2012, six months prior to trial, yet Mr. Edwards never retained a forensic pathologist at all. While he knew that Mr. Ohlson had retained a forensic pathologist, he did not know what that pathologist was going to testify to. He ultimately admitted that Mr. Ohlson's expert, Dr. Haddix, could have given helpful opinion testimony relevant to his theory of the case (per his understanding of Dr. Haddix' proposed testimony). He further admitted that he could not make the factual argument to the jury, tying the activities of Schnueringer and Jefferson exclusively (to a reasonable degree of medical probability) to the death of Hyde through Dr. Clark or Dr. Omalu. He also admitted that if another forensic expert to a reasonable degree of medical probability held the opinion that the blows administered by Schnueringer and Jefferson (but not Petitioner) were in fact fatal in nature and resulted in the death of the victim, he would have wanted to present such information in developing his defense. He did not know whether that there was an expert out there who held that opinion, however, for the simple reason that he did not investigate.

As reflected in the above introduction (Statement of Facts), Dr. Amy Llewellyn in fact held that opinion.

Although Dr. Llewellyn and Dr. Clark agree on more than they disagree upon, where they differ is in attributing areas of trauma found at autopsy. Dr. Llewellyn could explain all the injuries Dr. Clark detected at autopsy as consistent with the

second attack by Schnueringer and Jefferson, but could not conclude that all of the trauma could have been produced by Petitioner. But it seems most likely in a face-to-face confrontation between Petitioner and Hyde, with Petitioner landing two or three punches and maybe a knee to the chest, most of Hyde's injuries should have been toward the front of his body rather than the back or side of his head. Yet all of the traumatic injuries in this case were to the back and side of Mr. Hyde's head - that is, where Schnueringer and Jefferson attacked Hyde.

In this case, had he not waived closing argument, Mr. Edwards could have argued even with the existing trial record and his tendered jury instructions that the court gave to lead a reasonable jury to a not guilty verdict viz murder. In other words this was very far from the strong case wherein prejudice cannot exist. But with the expanded record, a reasonable trier of fact easily could credit Dr. Llewellyn's testimony; and in so crediting it would return a not guilty verdict to any form of criminal homicide. A reasonable jury could decide, based upon Dr. Omalu's testimony and Dr. Llewellyn's, that at worst Petitioner's blows resulted in a subconcusion to Hyde; and a subconcusion under these circumstances could not have been the cause of Hyde's death.

EXHAUSTION OF STATE REMEDIES

This ground was raised as the second ground for relief in Case No. 70155. See RAB at 44-49.

28 U.S.C. §2254(d) CONSIDERATIONS

The following is taken directly from the Petition for Review filed April 6, 2017:

When determining "prejudice" under Strickland the Court must consider it in light of all the evidence presented at the State habeas hearing where one was granted, as here. Harrington v. Richter, 562 U.S. 86, 103-104, 131 S.Ct 770, 787, 178 L.Ed 2d 624 (2010); and see: Cullen v. Pinholster, 563 U.S. 170 (2011). When the "new evidence" is truly new and exculpatory - that is, exculpatory evidence that the jury

who returned the verdict did not hear - and the trial evidence is not overwhelming, there is a reasonable probability of a different result. See: Hart v. Gomez, 174 F.3d 1083, 1093-97 (9th Cir.) cert denied, 120 S.Ct. 326 (1999). As the Ninth Circuit duly noted in Lord v. Wood, 184 F.3d 1083, 1093-97 (9th Cir. 1999), cert denied 120 S.Ct. 1262 (2000), counsel who fails to investigate and thereby fails to discover exculpatory testimony cannot justify his abdication of his responsibilities by the fact that in retrospect the witnesses' newly presented testimony contained some explainable minor discrepancies.

The trial court and the Nevada Court of Appeals at page 4 of its Order concluded that because Dr. Llewellyn could not establish which precise artery or arteries caused the hemorrhaging in the victim's brain, she could not differentiate her testimony from the expert presented by the State at trial and thus counsel was not ineffective for failing to call Dr. Llewellyn (or like expert). But that conclusion is unreasonable.

While Dr. Llewellyn agreed that she could not tell from the autopsy protocol which particular vessels were severed, **that determination is not critical**. What is important is there was subarachnoid hemorrhaging on the brain as well as on Hyde's spinal cord. **It more was more probable that what Schueringer and Jefferson did disrupted Hyde's blood vessels in question than what Kelsey did**.

Dr. Clark did not testify to that. Dr. Llewellyn did, and that testimony clearly is exculpatory.

Further, the bruising on Hyde's scalp could not appear likely to be caused by punches to the head, but really were more in the nature of a "stomping injury." All of the injuries detected at autopsy could be explained by the second attack by Schnueringer and Jefferson, but she could not conclude that Kelsey could have caused all of the injuries. In fact, a face-to-face confrontation between Kelsey and Hyde, most of Hyde's injuries should have more toward the front of the body more towards the front of the body rather than the back or side of the head; but in this case

the injuries were in the back of Hyde's head. Dr. Clark did not testify to that point at trial; but Dr. Llewellyn did at post-conviction..

Further, if as a result of the encounter with Petitioner Mr. Hyde sustained a subconcusion, it is not reasonably probable that a person who suffers from a subconcusion will die minutes later just from the subconcusion alone.

Dr. Clark did not testify to that point at trial. However, Dr. Llewllyn did at post-conviction - and really, so did Dr. Omalu at trial.

That Mr. Edwards was ineffective in not consulting a forensic with an expert such as Dr. Llewellyn simply cannot be seriously questioned. As held by the Seventh Circuit in Thomas v Clements 789 F.3d 760 (7th Cir, 2015) cert denied, 136 S.Ct. 1454 (2016), counsel is ineffective in failing to consult with or even consider forensic expert to support a defense deflecting defendant as the cause of death of the victim, especially when the testimony squares up in certain respects with the prosecution's expert testimony. Thomas, 789 F.3d at 768-69, 772-73. As noted in Richey v. Bradshaw, 498 F.3d 344, 362 (6th Cir. 2007), in any case that heavily rests on scientific evidence, failing altogether to consult with an expert **is the most egregious type of ineffectiveness**.

As Thomas explains, when a case rests on proof of proximate causation, and the client's version of the events in inconsistent, competent counsel is compelled to reach out to a pathologist to see if the State's medical examiner's findings can be reconciled with his client's version of the events. To not even contact an expert is to accept the State's medical examiner's findings without challenge, and thus basically subvert the defense's theory of the case. See: Thomas, 784 F.3d at 768-769,

Essentially, the analysis of the trial court and the Court of Appeals goes to Strickland prejudice rather than performance. A failure to investigate the case's key factual issue at all is the very type of decision-making that Wiggins simply does not countenance.

But as to prejudice, the analysis of the trial court and the Court of Appeals

under Strickland is simply wrong - not merely incorrect, but unreasonably wrong.

To so conclude, we need go no further than Mr. Edwards actual testimony - a point that the trial court and the Court of Appeals overlooked. Mr. Edwards admitted that Haddix's opinion would have been helpful to the theory that Mr. Kelsey's blow was not the cause of death. And when given a synopsis of Dr. Llewellyn's opinion, Mr. Edwards admitted that he would have wanted to present that information in developing his defense. However, he did not know that there was an expert that held that opinion.

A notion that a reviewing court can ignore Edwards' testimony on point and conclude a lack of prejudice, notwithstanding Edward's testimony, simply cannot be squared with Raygoza v. Hulick, 474 F.3d 958, 965 (7th Cir. 2007). To do so puts the habeas judge in the position of being a "13th juror," and that is unreasonable under Strickland. The issue is not whether the newly presented testimony would have swayed the habeas judge's judgment had he been a 13th juror, but whether it could have swayed the judgement of a reasonable juror, who never had a chance to evaluate the testimony.

This deficiency should cumulate with the prior deficiency in adjudicating prejudice per Harris by and through Ramseyer v. Wood, 64 F.3d 1432, 1438-39 (9th Cir. 1995).

GROUND III

I ALLEGE THAT MY FEDERAL CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO A FAIR TRIAL, TO DUE PROCESS OF LAW, AND TO EFFECTIVE ASSISTANCE OF COUNSEL WERE VIOLATED. COUNSEL WAS PREJUDICIALLY INEFFECTIVE IN FAILING TO INTERVIEW AND PRESENT THE TESTIMONIES OF ZACH CLOUGH, TAYLOR CORNELISON AND STEPHEN LAUDENSLADER, IN ORDER TO CORROBORATE HIS TESTIMONY AND IMPEACH THE TESTIMONY OF MICHAEL OPPERMAN.

The trial judge's ruling was that these witnesses would not have corroborated Petitioner's defense theory and therefore would not have established him to be

factually innocent.

But at page 37 of the Supplemental Petition, Petitioner pleaded that the jury never had the opportunity to consider the possibility that Petitioner's story was corroborated and in fact he enjoyed self defense or defense-of-others as against the victim. The fact that the trial judge concluded that the Petitioner did not enjoy self-defense based on his own testimony does not end the inquiry. The clear thrust of that ground was not investigating and presenting evidence that is consistent with the Petitioner's testimony. That testimony clearly leads to the proposition that the Petitioner did not act with implied malice per NRS 200.020, and therefore is innocent of murder; and Petitioner was not the proximate cause of the death of Master Hyde, meaning he is innocent of any form of criminal homicide.

The issue really is: did the testimonies of these three witnesses establish those conclusions? The answer certainly is yes.

In this case, unquestionably Mr. Edwards did not utilize the investigator that was given to him. He effectively did **no** factual investigation before trial of this open murder case. As noted above, he admitted that C[redacted]'s testimony was helpful to the proposition that Petitioner was not the proximate cause of death of Mr. Hyde. He gave like testimony when given the description of Ms. C[redacted]'s testimony. His excuse was that their testimonies were consistent with most of what the State's witnesses testified.

Here, the State argued and the Nevada Supreme Court somewhat agreed on direct appeal that the testimony of Michael Opperman established implied malice within the meaning of NRS 200.020.[3] But what the State and the trial judge failed to confront is that the testimonies of Mr. C[redacted] and Mr. C[redacted] the two most percipient witnesses to the Kelsey-Hyde skirmish, have nothing in their testimonies that is in any way probative of the presence of implied malice. That being the case,

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[3] Petitioner takes severe exception as developed in Ground V below.

those two witnesses - who were in the best position to see the skirmish - clearly both rendered exculpatory testimony and impeached Mr. Opperman.

There is not one credible reason from the post-conviction hearing why a reasonable juror would not believe Mr. C[redacted], Ms. C[redacted] and/or Mr. L[redacted], and a reasonable jury who believed them would not return a guilty verdict to murder or to manslaughter in this case. That jury might well return a guilty to misdemeanor battery; but that is a result that, by virtue of the lesser-included offense instruction that Mr. Edwards tendered, the Petitioner agreed with.

EXHAUSTION OF STATE REMEDIES

This is Ground III presented in Case No. 70155. See RAB at 49-54.

28 U.S.C. §2254(d) CONSIDERATIONS

This is taken directly from the Petition for Review filed April 6, 2017: The Court of Appeals concluded that Edwards acted reasonably in not investigating or interviewing these three witnesses, because they never told the police they had actually witnessed the Kelsey-Hyde fight.

This is a violation of 28 U.S.C. §2254(d)(2), as opposed (d)(1). Very unfortunately, that was not their testimonies. The Court of Appeals got it wrong.

C[redacted] actually told the police he saw the fight between Kelsey and Hyde. He didn't tell them that he saw Hyde hit Kelsey. Likewise, Ms. C[redacted] testified that she didn't tell the police that she saw Hyde run up behind Graves. She didn't say that she never saw the fight.

Moreover, there is no evidence that the police asked these young witnesses all of the right questions in a thorough, comprehensive manner.

Finally, and like the last issue, the final word on this should belong to Mr. Edwards. Edwards testified that C[redacted]'s testimony would have supported his theory that Kelsey was not the proximate cause of Hyde's death. Accordingly, per C[redacted]'s testimony, at worst Kelsey committed a misdemeanor battery.

And when given the description of C[redacted]'s testimony, he also admitted

that her testimony was consistent with his theory of proximate cause and misdemeanor battery.

He also admitted that L[redacted]'s testimony was consistent with his theory of the case.

This is an injustice, and a correctable one. As Respondent pointed out in the Answering Brief the Ninth Circuit cases of Reynoso v. Giurbino, 462 F.3d 1099, 1112-13 (9th Cir. 2006) and Horton v. Maile, 408 F.3d 570, 580-81 (9th Cir. 2005) compel the granting of habeas, as does Raygoza.[4] What we have here are three witnesses who would have impeached Opperman, but counsel limited the investigation in its entirety and thus could not had a strategy for not calling them.

Indeed, on this issue the Ninth Circuit decision in Reynoso v. Giurbino, *supra* compels the grant of habeas corpus.

To call C[redacted]'s, C[redacted]'s, and L[redacted]'s testimonies cumulative is both irrelevant and wrong, Where a witness's credibility is a major trial issue, a percipient witness who contradicts the State's main witness cannot be excluded on the grounds of cumulative testimony; such violates the defendant's Sixth Amendment right to present a defense. United States v. Turning Bear, 357 F.3d 730, 734-35 (8th Cir. 2004). And it is wrong because of the Ninth Circuit case of Horton v. Mayle, *supra:* where a witness is central to the prosecution's case, the defendant's conviction demonstrates that the impeachment evidence presented at trial likely did not suffice to convince the jury that said witness lacked credibility. Therefore, any impeachment not introduced at trial takes that much greater significance for post-conviction habeas purposes.

While the prejudice from this ground alone could warrant a grant of habeas corpus, counsel's deficiencies in failing to investigate at all in this fact-intensive case

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[4] For that matter so does State v. Love, 109 Nev. 1136, 1138-39, 865 P.2d 322 (1993), a case that all courts in Nevada overlooked.

is a clear deficiency that accumulates with the other clear deficiencies shown in establishing Strickland prejudice per Harris by and through Ramseyer v. Wood, *supra.*

GROUND IV

I allege that my federal constitutional rights under the Fifth, Sixth and Fourteenth Amendments to a fair trial, to due process of law, and to effective assistance of counsel were impinged. Trial counsel was prejudicially ineffective in failing to object and move for a mistrial when co-counsel Ohlson injected racist philosophies to Petitioner while cross-examining him, and when Mr. Ohlson vouched for the credibility of Dr. Clark.

During Mr. Ohlson's cross-examination of Petitioner, the following examination ensued:

> Q: Yeah, well, you once told me that you weren't afraid of Jake Graves.
> A: Jacob Graves is my friend. I have no reason to be afraid of him.
> Q: Well aren't you a tough guy?
> A: No.
> Q: Straight Edge has been around for a long time haven't they?
> A: Yes. Around a year.
> Q: And you know about a little bit about Straight Edge? Nothing? You just joined?
> A. It's not really a joining. It's a way to lead a life.
> Q: **Straight Edge used to be in association with the Neo-Nazis, didn't they?**
> A: No.
> Q: They did, son. Did you know that?
> A: No, I didn't know that.
> Q. Part of the culture used to be fighting; did you know that?
> A: No, I didn't know that.
> Q: They used to shave their heads. Did you know that?
> A: I don't have a shaved head. Does that mean I'm not Straight Edge?
> Q. **No**, I think you are Straight Edge. ...

And as mentioned throughout, Dr. Clark and Omalu were critical witnesses against Petitioner. The State needed their testimonies in order to establish Petitioner as the proximate cause of death; and indeed, the Nevada Supreme Court in its Order of Affirmance rejected Petitioner's sufficiency attack on the basis of the testimonies of those two doctors. At the beginning of cross-examination, Mr. Ohlson established

with Dr. Clark that he had cross-examined in "a lot of cases". Mr. Ohlson got out of Dr. Clark the testimony that the wounds found at autopsy could be consistent with the use of brass knuckles, and the first blow Mr. Hyde received could have been the fatal blow. At the end of his cross-examination, Mr. Ohlson stated:

> "Thank you Doctor. **You remain as brilliant as usual.**"
> **The Witness**: "Thank you."

As stated above, Mr. Qualls testified that had Mr. Edwards objected to Mr. Ohlson's examination regarding "straight edge being associated with neo-Nazis", and moved for a mistrial, and the same had been denied, he would have raised that issue on direct appeal. And as noted above, not only was Mr. Edwards unaware that Mr. Ohlson would cross-examine Mr. Kelsey in that regard, but also found the examination to be shocking. But Mr. Ohlson's knowledge was based on past cases and "street knowledge": he did not have any information from any source that the kids at North Valleys High who were "straight edge" were also "neo-Nazis".

Unquestionably, the State did not charge a "hate crime enhancement in this case"; and the subject matter came from Mr. Ohlson, not from Mr. Hall or Ms. Halstead.

The court below denied this ground because the jury was instructed that statements and questions of attorneys are not evidence, and because Mr. Ohlson's comment, although unnecessary, did not provide personal assurances of Dr. Clark's veracity.

Counsel should have objected, moved to strike, and moved for a mistrial on both instances of misconduct. He was ineffective in failing to do so. By itself these two areas of ineffectiveness arguably would not be enough to establish prejudice; but in cumulation with all of the other proven deficiencies in this case, Petitioner established prejudice certainly by a preponderance of evidence.

EXHAUSTION OF STATE REMEDIES

This ground was raised as the fifth ground for relief in case no. 70155. See

RAB at 57-61.

28 U.S.C. §2254(d) CONSIDERATIONS

The following is taken directly from the Supplemental Petition for Review filed May 24, 2017:

This case was not charged or proven as a "hate crime", nor did the evidence reveal anything regarding the religious beliefs either of Petitioner or of Master Hyde. As far as we know, Mr. Kelsey and Master Hyde are white, and that's all there is to say. Yet co-counsel injected irrelevant racism into this trial, and so far the response of **eleven** judges has been a "judicial shrug".

As the Ninth Circuit put it succinctly in United States v. Cabrera, 222 F.3d. 590, 594 (9th Cir. 2000), appeals to racial, ethnic or religious prejudice during the course of a trial violates a defendant's Sixth Amendment right to a fair trial.

And as the D.C. Circuit pointed out in United States v. Doe, 903 F.2d. 15, 25 (D.C. Cir. 1990), racial fairness of a trial is an indispensable hallmark of due process and racial equality a hallmark of justice. An unembellished reference to evidence of race simply of fact or bolstering an eye witness identification of a culprit, for example, poses no threat to the purity of the trial. The line of demarcation is crossed, however, when the argument shifts its emphasis from evidence to emotion. When that is done, it matters not whether the reference is to race, ancestry, or ethnic background.

This is what we are talking about here. It is inconceivable that this Court could possibly countenance an anti-Semitic slur like this having no relevance to any issue in the case.

As pointed out at RAB at 60, a generalized stock instruction regarding "statements are not evidence" does not cure misconduct as a matter of law. United States v. Weatherspoon, 410 F.3d. 1142, 1151 (9th Cir. 2005), and cases cited therein.

The trial court found that the error was cured by the stock jury instruction of statements and questions of attorneys are not evidence. And in affirming, the Nevada

Court of Appeals repeated that point plus noted that counsel made a "tactical decision" not to object.

These rulings are unreasonable- not merely incorrect, but unreasonable- in light of Dawson v. Delaware, 503 U.S. 159, 165, 112 S.Ct. 1093, 1097, 117 L.Ed.2d. 309 (1992) and United States v. Olano, 507 U.S. 725, 736-37, 113 S.Ct. 1770, 1779, 123 L.Ed.2d. 508 (1993).

Dawson holds that it was constitutional error to admit by stipulation the fact of the defendant's membership in a white racist prison gang during the penalty phase of his trial, where the evidence was not relevant to any issue being decided at that phase.

In other words, inherently prejudicial evidence such as this is flatly inadmissible; the fact that it was stipulated in does not make it any more admissible.

Similarly, a strategic reason for not objecting does not make it any more admissible. Olano must be considered in light of Doe. There as here, the defendant's lawyer failed to object to the racially charged comments of the prosecutor. Even so, the D.C. Circuit reversed the conviction because "plain error review is entirely appropriate when the matter complained of seriously affects the fairness, integrity or public reputation of judicial proceedings." 903 F.2d. at 26.

In Olano, the United States Supreme Court stated that a court of appeals should correct a plain forfeited [as opposed to waived] error affecting substantial rights if the error seriously affects the fairness, integrity, or public reputation of the judicial proceeding. An error may seriously affect the fairness, integrity or public reputation of judicial proceeding independent of the defendant's innocence. Olano, 507 U.S. at 736-37, 113 S.Ct. at 1779.

That is what we are talking about here. Racism is flatly unacceptable in a court of law, when it is irrelevant to any issue in the case. Allowing it to occur seriously affects the fairness, integrity and public reputation of the judicial proceedings. As argued extensively in the Petition for Review, a "tactical decision" is not enough; the

decision must be "reasonable." Allowing racism to go on like this could hardly be labeled a "reasonable tactical decision". And given the weakness of this case as a second degree murder case relative to Mr. Kelsey, the prejudice of this error alone is manifest. But in cumulation with these other deficiencies it is intolerable.

GROUND V

I ALLEGE THAT MY FEDERAL CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO A FAIR TRIAL, TO DUE PROCESS OF LAW, AND TO EFFECTIVE ASSISTANCE OF COUNSEL WERE VIOLATED. COUNSEL WAS PREJUDICIALLY INEFFECTIVE IN FAILING TO BRING A MOTION TO SEVER THE TRIALS OF HIM FROM HIS CO-DEFENDANTS IN THE MIDDLE OF TRIAL ONCE SCHNUERINGER'S COUNSEL GAVE HIS OPENING STATEMENT, AND ANNOUNCED HIS THEORY OF THE CASE. AT THAT POINT, IT WAS MANIFESTLY CLEAR THAT THE PARTIES HAD ANTAGONISTIC, MUTUALLY EXCLUSIVE DEFENSES AND EACH SERVED ONLY AS A SECOND PROSECUTOR TO THE OTHER.

As discussed extensively above, Petitioner's theory of the case was that he was not the proximate cause of Hyde's death; rather, the ones delivering the fatal blows were Schnueringer and Jefferson. His theory of defense was that, at worst, Petitioner was guilty of misdemeanor battery.

Mr. Schnueringer's counsel, John Ohlson, reserved his opening statement until the beginning of his case-in-chief. At that time, Mr. Ohlson made it clear that his defense was that Mr. Kelsey delivered the lethal blow to Hyde with brass knuckles, meaning that if Schnueringer hit Hyde, he hit a "dead person". That is, Schnueringer's theory of the defense was that the "killer" was Kelsey.

Mr. Ohlson then called three (3) witnesses, Aaron Simpson, Zachary Fallen, and Zach Smith, all to testify to Petitioner's out-of-court statements, after the fact, at Karl Schnueringer's grandfather's home. They all claimed that Petitioner claimed he killed Hyde when he hit him with brass knuckles. In each case, each witness was not present at the scene of Hyde's death on February 5, 2012. And none of these three (3) witnesses was called by the State or even on the State's witness list.

Respondent's testimony was in fact that all three witnesses were lying, and

Simpson in particular had a beef with him over an old girlfriend.

As noted above, Thomas Qualls, Petitioner's appellate attorney, was of the opinion that Mr. Kelsey was faced with more than one prosecutor in Mr. Ohlson.

By his order, however, the trial court did not agree. He acknowledged that the defenses were antagonistic; but counsel could have addressed that fact in closing argument. Since the trial judge found that counsel was prejudicially ineffective in waiving closing argument, he denied relief on this ground.

EXHAUSTION OF STATE REMEDIES

This is Ground IV presented in case no. 70155. See: RAB at 54-57.

28 U.S.C. § 2254 (d)

The following is taken directly from the Supplemental Petition for Review, filed May 24, 2017, for the most part:

Everyone acknowledges that Mr. Schnueringer (and Mr. Jefferson) and Respondent had antagonistic defenses. The ruling of the court below, however, and the Nevada Court of Appeals was that "merely demonstrating defenses are antagonistic is not enough to require the granting of a motion to sever". And to that the trial judge added that counsel could have addressed the antagonistic defenses in closing arguments; and the Court of Appeals added that the evidence that Mr. Ohlson presented would have been admissible had the state presented, in terms of the three witnesses who claimed that the Petitioner "confessed" after the fact to them.

But neither the court below nor the Court of Appeals discussed Chartier v State, 124 Nev. 760, 191 P.3d. 1182 (2008).

As made clear at 124 Nev. at 765-66 and 191 P.3d. at 486-87, antagonistic defenses alone indeed do not warrant granting a severance. But where the defenses are so conflicting and irreconcilable that the jury will unjustifiably infer that the conflict demonstrates that both defendants are guilty, a severance is warranted. The question is whether they are mutually antagonistic. And to determine that, the Court

looks to the entire accumulation of the circumstances, with some questions: Did the co-defendant present evidence that the State did not present? Did the co-defense present evidence that might not have otherwise been admissible? Was the evidence against the co-defendant strong, while the evidence against the defendant otherwise relatively weak?

Here, the defenses were not merely "antagonistic" but "mutually antagonistic". Kelsey's defense had him committing a misdemeanor battery against Hyde, while Schnueringer and Jefferson, acting by themselves, subsequently killed Hyde. Schnueringer (and Jefferson)'s defense, on the other hand, had Kelsey killing Hyde and had them merely battering a dead person. Both served as second prosecutors to each other- just as Mr. Qualls testified.

The trial court's suggested "panacea" to the prejudice involved was addressing the antagonism of the defenses in closing argument. But obviously that did not happen when Schnueringer's counsel talked Kelsey's counsel out of giving closing argument. So, that is one of cumulative circumstances that, as in Chartier, mandate a reversal.

And in order to make the defense fly for Mr. Schnueringer, his counsel had to make Mr. Kelsey look "at least as bad" as Schnueringer- which he did through his racially-motivated cross-examination. For reasons stated above, that absolutely was inadmissible- and to the State's credit, the State did not even think to go there.

And two points overlooked by the court below and the Court of Appeals was this:

First, the co-prosecutor, Karl Hall, absolutely eviscerated Mr. Ohlson's witnesses on cross-examination, getting them to backtrack considerably. A strong inference arises that the State did not see fit to call these witnesses (if the State even knew about them before trial) because their testimonies were unreliable. Even if their testimonies would have been admissible against Mr. Kelsey, that fact by itself did not make their testimonies reliable. It is constitutional error per Zafiro v. United States,

506 U.S. 534, 539 (1993) to base a conviction on unreliable evidence. And of course, the manner in which Mr. Hall eviscerated the three (3) witnesses was central in Mr. Ohlson's thinking to waive closing argument, so as to prevent Mr. Hall from forcefully pointing out in rebuttal just how unreliable the testimonies of Mr. Simpson, Mr. Fallen, and Mr. Smith were.

Secondly, and a point not pointed out in the Supplemental Petition for Review, is this: the only evidence of implied malice came from Mr. Ohlson's witnesses. And, the best evidence of proximate cause came from these witnesses. If one looks carefully just at the State's case-in-chief, there is no evidence of any statement on the scene uttered by Petitioner consistent with implied malice; and the notion that Mr. Kelsey acted with implied malice was indeed conjectural. Had this case been tried in federal court under Title 18 of the United States Code, it would not have survived a Fed. R. Cr. Proc. Rule 29(a) motion.

However, when considering a sufficiency of the evidence attack, the court takes into account all evidence presented, including that by the defendant(s). In this case, sufficient evidence per Jackson v. Virginia, 443 U.S. 307 (1979) occurs only because of the testimony of Mr. Ohlson's three witnesses.

But a point that everybody- the trial court, trial counsel, appellate counsel, post-conviction counsel, the Nevada Court of Appeals, and the Nevada Supreme Court- overlooked was this: the testimonies of Mr. Smith, Mr. Fallen, and Mr. Smith were inadmissible because the testimony violated the rule of Opper v. United States, 348 U.S. 84 (1954), and Smith v United States, 337 U.S. 132 (1949). That is, Petitioner is in prison for 10-25 years based solely on his statements, which are not corroborated but in fact are contradicted by all physical evidence. The Court of Appeals' conclusion to the contrary constitutes unreasonable application of Opper and Smith.

In particular, there was no trial evidence that Mr. Kelsey was specifically wearing a pair of brass knuckles when he hit Mr. Hyde during their brief skirmish. At

best, per Mr. Opperman, Petitioner said he owned a pair of brass knuckles and said he had worn them on other occasions. But the testimonies of Mr. C[redacted] and Ms. C[redacted], above, definitively bring home the point that Mr. Kelsey was not wearing a pair of brass knuckles on the evening of February 5, 2012, and did not hit Master Hyde on the back or side of his head. And the testimony of Dr. Llewellyn brings home the forensic proof that there are no injuries on the front of Mr. Hyde's face consistent with being hit with a pair of brass knuckles in his face, to a reasonable degree of medical probability.

And the fact of a brief skirmish, wherein Mr. Hyde was not knocked down or knocked out, and walked away, could not rationally lead to a conclusion either that Petitioner acted with implied malice or was the proximate cause of Mr. Hyde's death.

Yet, Dr. Clark admitted in the post-conviction hearing that she is not concerned in a criminal case with "reasonable probabilities". Otherwise, she is comfortable with giving testimony which, if believed, puts people in prison for considerable lengths of time based on speculation or possibility. And when one looks at her trial testimony, as developed in Ground II, she cannot say even to a reasonable degree of probability that Petitioner's blows during the brief skirmish alone constituted the proximate cause of Master Hyde's death.

Accordingly, with nothing whatsoever to corroborate Petitioner's supposed admissions to the three (3) young witnesses, that testimony should not have even been admitted or considered to be admissible after the fact.

But this obscures the greater point: had there been separate trials, the three (3) young witnesses would not have testified against Petitioner, and the record would have been left with no sufficient evidence either of implied malice or of proximate cause.

In sum, when the court looks at the entire cumulation of circumstances, just as in Chartier, the Court is forced to conclude that a severance should have been granted- not at the very beginning of the trial, but somewhere between Mr. Ohlson's

opening statement and presentation of his case-in-chief.

In cumulation with the other deficiencies, or by itself, this deficiency absolutely warrants the grant of habeas and mandates a new trial or release of the Respondent.

WHEREFORE, Petitioner prays for the granting of relief on any or all grounds sought, and his conditional or unconditional release from the Nevada Department of Corrections.

DATED this 19th day of April 2018.

Zachary Kelsey

Zachary Kelsey, #1097882
Lovelock Correctional Center
1200 Prison Rd.
Lovelock, NV 89419

Prepared By,

LAW OFFICES OF RICHARD F. CORNELL
150 Ridge Street, Second Street
Reno, NV 89501

By: _____
Richard F. Cornell

VERIFICATION

Zachary Kelsey, under penalty of perjury, swears and declares as follows:

1. That he is the above-named Petitioner in the above-named Petition for Habeas Corpus by a Prisoner in State Custody (Non-Capital);

2. That he has read and reviewed the Petition before signing it;

3. That the petition is true and correct to the best of his knowledge, information and belief.

DATED this 19 day of April 2018.

Executed under penalty of perjury in The Lovelock Correctional Center, Pershing County, Nevada.

Zachary Kelsey
Zachary Kelsey

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CR12-0326B
2016-04-08 05:01:59 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 5458559

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

* * *

ZACHARY KELSEY,

Petitioner,

vs.

STATE OF NEVADA,

Respondent.

Case No: CR12-0326B

Dept. No: 10

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ORDER

Presently before the Court is a PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) ("the Petition") filed by the Petitioner ZACHARY KELSEY ("the Petitioner") on September 15, 2014. The Petitioner filed a SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS POST CONVICTION ("the Supplement") on April 9, 2015. The STATE OF NEVADA ("the State") filed an ANSWER TO PETITION AND SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) ("the Answer") on June 2, 2015. The State filed the STATE'S BENCH MEMORANDUM REGARDING EVIDENTIARY HEARING ("the State's Memo") on January 6, 2016. The Court heard testimony and argument on January 13 and 14, 2016. This written ORDER follows.

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The Petitioner was found guilty by a jury of Murder in the Second Degree, a violation of NRS 200.010, NRS 200.030, and NRS 195.020, a felony, on December 12, 2012. The Petitioner was sentenced to imprisonment in the Nevada Department of Corrections for a minimum term of ten (10) years to a maximum term of twenty-five (25) years with credit for three hundred thirty-seven (337) days time served on January 24, 2013.

The underlying facts of this case, taken from the Supreme Court of Nevada's ("the Supreme Court") ORDER OF AFFIRMANCE ("the February Order") entered February 27, 2014, are as follows: the Petitioner and his two co-defendants, Andrue Jefferson ("Jefferson") and Bobby Schnueringer ("Schnueringer") attended a bonfire party in Lemmon Valley on February 4, 2012. Schnueringer and Jefferson identified themselves as part of a group called "Twisted Minds." A fight broke out between two females at the party. Jefferson and Schnueringer encouraged the fight. Jefferson struck Taylor Pardick ("Pardick"), who tried to break up the fight between the two females. The decedent, Jared Hyde ("Hyde"), was walking away from the fight toward a car to leave the party after Jacob Graves ("Graves") had struck Pardick knocking him to the ground. The Petitioner confronted Hyde and struck him twice in the head. Z[redacted]C[redacted] ("Clough") and Michael Opperman ("Opperman") restrained the Petitioner. Hyde picked himself up, looking distraught and had blood running from his mouth. Hyde then continued toward the car where he was confronted by Schnueringer and Jefferson. Schnueringer punched Hyde causing Hyde to buckle and fall to the ground. Jefferson proceeded to punch Hyde's head as he was on the ground. Both Schnueringer and Jefferson kicked Hyde as he was knocked out on the ground. Clifton Fuller ("Fuller") took Hyde to the hospital after he could not find a pulse. Hyde was not breathing when he arrived at the hospital and could not be resuscitated.

The trial began on December 3, 2012.[1] The trial lasted for eight days. The Petitioner was represented by Scott Edwards ("Edwards"). Schnueringer was represented by John Ohlson ("Ohlson") and Jefferson was represented by Richard Molezzo ("Molezzo"). The State was represented by Deputy District Attorney Patricia Halstead ("Halstead") and Chief Deputy District

[1] The Honorable Steven P. Elliott ("Judge Elliott") presided over the trial. Judge Elliott retired in March of 2013.

Attorney Karl Hall ("Hall"). Fifty-one exhibits were admitted in the course of the trial. A total of twenty two witnesses were called including the Petitioner who testified on his own behalf. Edwards, Ohlson, and Molezzo each cross examined all of the State's witnesses. Halstead gave closing argument on behalf of the State. All three defendants waived closing argument and the case was given to the jury. The jury reached a verdict in three hours and twenty minutes.

The Petition alleges the following grounds for relief:

1. Trial counsel was ineffective in violation of Petitioner's Due Process and Equal Protection rights.
2. The Petitioner was denied due process.

The Supplement alleges the following grounds for relief:

1. Trial counsel was ineffective for failing to object to the testimony of Dr. Ellen Clark ("Dr. Clark") and Dr. Bennet Omalu ("Dr. Omalu"), or prevent Dr. Clark and Dr. Omalu from testifying via motion in limine, or failing to force Dr. Clark and Dr. Omalu to testify to a reasonable degree of medical probability in violation of Petitioner's Due Process and Equal Protection rights.
2. Trial counsel was ineffective for failing to seek severance of the Petitioner from his co-defendants in violation of Petitioner's Due Process and Equal Protection rights.
3. Trial counsel was ineffective for waiving closing argument in violation of Petitioner's Due Process and Equal Protection rights.
4. Trial counsel was ineffective for failing to offer a self-defense instruction in violation of Petitioner's Due Process and Equal Protection Rights.
5. Trial counsel was ineffective for failing to object to John Ohlson ("Ohlson") (counsel for Schnueringer) and Deputy District Attorney Patricia Halstead's ("Halstead") (co-counsel for the State) arguments or evidence introduced during trial in violation of Petitioner's Due Process and Equal Protection Rights.
6. Trial counsel was ineffective for failing to seek a limiting instruction after gang evidence was introduced against the Petitioner's co-defendants in violation of Petitioner's Due Process and Equal Protection Rights.
7. Trial Counsel was ineffective for failing to conduct an investigation of the case and call certain witnesses in violation of Petitioner's Due Process and Equal Protection Rights.

A post-conviction petition for writ of habeas corpus challenging a conviction based on a jury verdict is limited to claims that could not have been raised in a prior proceeding, such as at trial, or on direct appeal. NRS 34.810(1)(b). Claims that could have been considered in a prior proceeding are waived, and the district court must dismiss any such claim unless it finds: (1) cause for the procedural default and actual prejudice to the Petitioner, NRS 34.810(1)(b); or (2) that

failure to consider the claims would result in a fundamental miscarriage of justice. *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). The Petitioner has the burden of pleading and proving specific facts to demonstrate good cause and prejudice.[2] NRS 34.810(3).

Claims of ineffective assistance of counsel require the Petitioner to demonstrate two components: (1) that counsel's performance was deficient, and (2) that the deficient performance resulted in prejudice to the petitioner. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984). *See also, Kirksey v. State*, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996). "'[D]eficient' assistance requires a showing that counsel's representation fell below an objective standard of reasonableness." *Dawson v. State*, 108 Nev. 112, 115, 825 P.2d 593, 595 (1992). "In order to eliminate the distorting effects of hindsight, courts indulge in a strong presumption that counsel's representation falls within the broad range of reasonable assistance." *Id.* If the petitioner overcomes this strong presumption, he must additionally "show that, but for counsel's errors, the result of the trial would probably have been different." *Id.* "A court may consider the two test elements in any order and need not consider both prongs if the defendant makes an insufficient showing on either one." *Kirksey*, 112 Nev. at 987, 923 P.2d at 1107 (*citing Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069).

The Supplement contends Edwards was ineffective in failing to object to the testimony of the State's experts Dr. Clark and Dr. Omalu. The Supplement argues Dr. Clark and Dr. Omalu did not testify the Petitioner's punches could have contributed to Hyde's death. Dr. Clark testified the cause of Hyde's death was bleeding into the brain consistent with numerous punches and kicks to Hyde's head. Dr. Clark further testified she could not identify which blow was the fatal blow, stating it could have been a combination of multiple ruptured or perforated blood vessels. Dr. Clark testified

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[2] "Good cause" is established when the petitioner demonstrates that an impediment external to the defense prevented him from complying with the procedural requirements, e.g. failing to raise a claim in a prior proceeding. *State v. Dist. Court (Riker)*, 121 Nev. 225, 232, 112 P.3d 1070, 1074-75 (2005), *Pellegrini*, 117 Nev. at 886, 34 P.3d at 537. Ineffective assistance of counsel at trial and on direct appeal may constitute good cause. *See id.* at 887-88, 34 P.3d at 537-38. To demonstrate prejudice, the petitioner must show not just that the claimed errors "created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Riker*, 121 Nev. at 232, 112 P.3d at 1075 (quoting *United States v. Frady*, 456 U.S. 152, 170 (1982)); *see also Hogan v. Warden*, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993).

trauma to Hyde's face was not severe. Dr. Omalu testified he could not identify a single fatal blow. Dr. Omalu concluded each blow would have contributed to tearing in the veins causing greater bleeding. Dr. Omalu did note not every blow to the head would cause such injury.

The Petitioner argues Dr. Clark's testimony, coupled with witness testimony stating Hyde did not act like someone with severed arteries/veins after the altercation with Petitioner, demonstrates the Petitioner was not responsible for the fatal blow to Hyde. The Supplement argues the testimony of Dr. Clark and Dr. Omalu should not have been permitted as to the Petitioner because the Petitioner's blows were not linked to Hyde's death. The Supplement asserts Edwards should have filed a motion in limine to prevent such testimony or have hired an independent forensic pathologist as a rebuttal expert.

The State's Memo contends there is no legal basis to preclude the testimony of Dr. Clark and Dr. Omalu through a motion in limine. The State's Memo notes both Dr. Clark and Dr. Omalu testified they could not isolate which blow caused the fatal hemorrhage. Dr. Omalu further explained on cross-examination the injuries Hyde received would result in diminishing sensorium, whether immediate or gradual. Accordingly, the State's Memo argues the Petitioner's factual argument regarding whether Hyde was alert after the Petitioner hit Hyde is unpersuasive. The State's Memo further argues the Petitioner's apparent sufficiency of the evidence argument had been specifically considered on direct appeal. The State's Memo argues counsel is not per se ineffective for failing to retain his own forensic pathologist. The State's Memo contends no cases can support this argument and the Petitioner failed to articulate how an expert would have testified differently in support of the Petitioner. At the evidentiary hearing, Dr. Amy Llewellyn ("Dr. Llewellyn") stated she could not state with 100% certainty which arteries caused the hemorrhaging. January 13, 2016, Evidentiary Hearing Trans. 64:23-65:3; 67:17-21.

The Court finds the Petitioner's arguments to be unpersuasive. The Supplement has not established what authority would have permitted Edwards to file a motion in limine to prevent the experts' testimony. The Supreme Court found substantial evidence supported the verdict. Further, the testimony taken at the evidentiary hearing does not establish an opposing expert could have made a different result reasonably probable. The Court found Dr. Llewellyn's testimony to be

unpersuasive due to her inability to establish which arteries caused the hemorrhaging, thereby failing to differentiate her testimony from that of Dr. Omalu or Dr. Clark. Even if Dr. Llewellyn had been called to testify at trial the Petitioner did not establish the outcome would have been different. Accordingly, Ground One is denied.

Ground Two of the Supplement asserts Edwards was ineffective for failing to seek severance of the Petitioner's trial from Jefferson and Schnueringer's. The Supplement argues Jefferson and Schnueringer presented antagonistic defenses to the Petitioner, such that they claimed the Petitioner killed Hyde when he hit Hyde with brass knuckles. The Supplement argues the defenses were mutually exclusive, such that if the jury accepted the defenses of Jefferson and Schnueringer, the Petitioner's defense could not be believed. The State's Memo argues prejudice cannot be presumed simply due to different defenses.

The Supreme Court has held "[d]ifferent defenses are simply a part of the adversarial process when defendants are tried together," and "mutually antagonistic defenses are not prejudicial per se." *Amen v. State,* 106 Nev. 749, 756, 801 P.2d 1354, 1359 (1990), *overruled on other grounds by Grey v. State,* 124 Nev. 110, 178 P.3d 154 (2008). "Thus, antagonistic defenses are a relevant consideration but not, in themselves, sufficient grounds for concluding that joinder of defendants is prejudicial." *Marshall v. State,* 118 Nev. 642, 647-48, 56 P.3d 376, 379 (2002). The Court finds the Supplement does not establish Petitioner's counsel was objectively unreasonable by not bringing a motion to sever the defendants. The defenses were antagonistic in that Jefferson and Schnueringer tried to inculpate the Petitioner and exonerate themselves. However, such arguments did not compel rejection of the Petitioner's theory. This would be an issue counsel could addresses in closing argument. *See* discussion of Ground Three, *infra.* The Supreme Court noted "it is for the jury to determine the weight and credibility to give conflicting testimony" and ultimately concluded substantial evidence supported the verdict in this case. The February Order 4. Accordingly, Ground Two is denied.

Ground Three of the Supplement contends Edwards was ineffective when he waived closing argument. Halstead gave the State's initial closing argument. Halstead's argument was not brief. Halstead's argument lasted approximately two hours, beginning at 9:37 a.m. and concluding at 11:36

a.m..[3] The Court did not break at any time during Halstead's closing. Halstead reviewed the different theories of the case and the requirements of the numerous jury instructions. Halstead also reviewed the testimony of many of the witnesses presented during the trial. She reviewed the testimony and evidence presented and articulated their relationship to the jury instructions. She singled out each defendant and highlighted the evidence against each defendant asking the jury to find the defendants guilty of second degree murder. By this argument the State specifically eliminated one potential verdict. The Defendants were charged with open murder. The Defendants were not left with an all-or-nothing argument for second degree murder. An open murder "complaint charges murder in the first degree and all necessarily included offenses, such as manslaughter where less than all the elements of first degree murder are present." *Wrenn v. Sheriff, Clark County,* 87 Nev. 85, 87, 482 P.2s 289, 291 (1971). Edwards had the ability to present argument addressing the lesser included offenses as enumerated within the jury instructions. *See* Jury Instructions 25-28. By his own admission, Edwards' theory of the case was that the Petitioner was "guilty at best of the lesser included offense of simple battery." January 13, 2016, Evidentiary Hearing Trans. 176:16-18. Edwards failed to present this theory of defense to the jury by waiving closing argument.

All three defendants waived their closing argument. The Supplement acknowledges waiver of closing argument arguably was a reasonable strategic decision for Schnueringer and Jefferson. The Supplement argues the Petitioner had the ability to be found guilty of a lesser crime of involuntary manslaughter or battery. Accordingly, the Supplement argues Edwards had strong arguments to make regarding the conduct of the Petitioner. The Supplement contends all three trial counsel chose to waive closing argument out of anticipation of Hall's rebuttal closing argument. The Court notes there is no concrete indication in the record Hall was the person to argue the State's rebuttal or why defense counsel assumed as much. *But see* Trial Trans. Vol. 8 2045:21-23.

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[3] The Court read the jury instruction to the jury prior to Halstead's closing.

The Supplement asserts there was no legitimate strategic purpose for counsel to waive closing argument. The Supplement avers there was "plenty this Petitioner's trial counsel could have said in closing argument that would have had a reasonable probability of changing the result viz. Second Degree Murder." The Supplement 19: 6-8. The State's Memo responds by arguing the Supplement misrepresents the facts of the case and the argument for involuntary manslaughter is not as clear cut as the Supplement contends. The State's Memo argues the Petitioner does not establish the strategy was both unreasonable and prejudicial.

A strategic decision ... is a tactical decision that is "virtually unchallengeable absent extraordinary circumstances." *Howard v. State*, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) (*citing Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066–67)); *Doleman v. State*, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996). Courts have recognized the waiver of closing argument to prevent the prosecutor from returning on rebuttal as a valid strategic decision. *See People v. Mendoza*, 2009 WL 118938, *Lawhorn v. State*, 756 So.2d 971 (Ala. Crim. App. 1999); *Floyd v. State*, 571 So.2d 1221 (Ala. Crim. App. 1989). "However, in a criminal case, defense counsel's waiver of, or failure to make a closing argument to the jury may support a finding of incompetent representation." 75 Am. Jur. 2d Trial § 411. In both *Floyd* and *Lawhorn* the decision to waive closing argument was seen as a valid strategic decision because the prosecutor's initial closing was brief and the parties awaited strong persuasive argument from the state on rebuttal. Further, the defendants in these cases "ha[d] no strong arguments available to dissuade the jury from conviction ...or to persuade the jury to find petitioner guilty of a lesser offense." *Floyd*, 756 So.2d at 1227.

The Court must first address whether the Edwards' decision to waive closing argument was a strategic decision. The Court must "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. Closing argument for the defendant "is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt." *Herring v. New York*, 422 U.S. 853, 862, 95 S. Ct. 2550, 2555 (1975). "[P]resentation of closing argument by defense counsel based upon the evidence introduced at an adjudicatory hearing is an integral party of [the] right to effective assistance of counsel." *Shawn M.*

v. State, 105 Nev. 345, 348, 775 P.2d 700, 701 (1989). "Summation serves to sharpen and clarify the issues, a particularly useful process in light of the complex procedures." *Id.,* 775 P.2d at 701. The Court notes the decision to waive closing argument "does not *per se* constitute ineffective assistance." *State v. Lee,* 142 Ariz. 210, 217, 689 P.2d 153, 160 (1984); *see also Yarborough v. Gentry,* 540 U.S. 1, 5, 124 S. Ct. 1, 4 (2003); *Bell v. Cone,* 535 U.S. 685, 686, 122 S.Ct. 1843, 1846 (2002); *Narvaez v. Scribner,* 551 Fed. Appx. 416 (9th Cir. 2014); *Hovey v. Ayers,* 458 F.3d 892 (9th Cir. 2006); *U.S. ex rel. Taylor v. Barnett,* 109 F. Supp. 2d 911 (N.D. Ill. 2000); *Powell v. Campbell,* 2008 WL 4907204 (C.D. Cal. 2008); *but see People v. Wilson,* 911 N.E.2d 413 (2009); *Lawhorn v. Allen,* 519 F.3d 1272 (11th Cir. 2008); *Whited v. State,* 180 So.3d 69 (Ala. 2015); *People v. Pringle,* 2003 WL 22017766 (Cal. Ct. App. 2003); *Lee, supra,* 142 Ariz. at 210, 689 P.2d at 153. The decision to waive closing argument is generally a matter of trial strategy. However, where trial counsel's decision to waive closing argument is unreasonable, counsel's conduct will not escape juridical scrutiny. *Id.* at 218, 689 P.2d at 161.

The Court finds the trial record is devoid of any explanation of why Edwards, Molezzo, and Ohlson waived closing argument. *See* Trial Trans. Vol. 8 2043:20-22; 2045:3-17. Judge Elliott and counsel engaged in a bench conference prior to breaking for lunch after Halstead's closing. There was no memorialization of what was discussed. "Meaningful [] review is inextricably linked to the availability of an accurate record of the lower court proceedings regarding the issues" subject to the Court's review. *Preciado v. State,* 130 Nev. Adv. Op. 6, 318 P.3d 176, 178 (2014).[4] A defendant is "entitled to have the most accurate record of his or her district court proceedings possible." *Id.,* 318 P.3d at 178. "[I]t is crucial for a district court to memorialize all bench conferences, either contemporaneously or by allowing the attorneys to make a record afterward." *Id.,* 318 P.3d at 178.

The Court notes Judge Elliott did not conduct a canvas of Edwards regarding the decision to waive closing argument. The Petitioner was not addressed in anyway regarding the decision. Such canvas, although not required, would have clarified the motivation for waiving closing argument.

[4] The Court notes *Preciado* was not decided until 2014, while the trial occurred in 2012. The Court merely notes the reasoning in *Preciado* demonstrates how a record of the bench conference would have been of assistance to the Court in deciding this matter.

See Moore v. Reynolds, 153 F.3d 1086, 1104-05 (10th Cir. 1998) ("The above-quoted portions of the trial transcript clearly demonstrate the waiver of closing argument was the product of a strategic decision on the part of defense counsel designed to prevent the district attorney from giving a second summation.").[5]

The California Court of Appeals has found the waiver of closing argument does not constitute ineffective assistance of counsel even when "the record [was] silent on the reasons for counsel's decision to waive closing argument." *People v. Ortiz*, B246524, 2014 WL 3565719, at *3 (Cal. Ct. App. 2014.) The California Court of Appeals looked to the overall record and determined "it is highly plausible that defense counsel concluded Ortiz would be better served if neither she nor the prosecutor made a closing argument and that, if she had proceeded to make an argument, the prosecutor would then have asserted the right to a final rebuttal." *Id.* The prosecutor in *Ortiz* waived

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[5] The trial court reviewed in *Moore* conducted the following canvas regarding the waiver of closing argument:

> THE COURT: You must understand the purpose of closing argument. The purpose of closing argument is persuasion. It is not evidence. It contemplates a liberal freedom of speech and the range of discussion, illustration, and argumentation is wide. Counsel for the State and your attorneys in this case have a right to discuss fully from their standpoints the evidence and the inferences and deductions that arise therefrom. Do you understand me so far?
> THE DEFENDANT: Yes, sir.
> THE COURT: You have an absolute right for your attorneys to argue this case; however, you may waive that right, providing it is done knowingly and intelligently. Do you understand the purpose of closing argument as I have explained it to you?
> THE DEFENDANT: Yes, sir, I do.
> THE COURT: Do you concur with the decision of your attorneys that you wish to waive closing argument?
> THE DEFENDANT: Yes, sir, I do.
> THE COURT: You have consulted with your attorneys prior to them announcing in open court that they wish to waive on your behalf closing argument; is that true?
> THE DEFENDANT: Yes, sir.
> THE COURT: You have had their advice in the matter?
> THE DEFENDANT: Yes, sir, I have been advised on it.
> ...
> MR. RAVITZ: ....Further we recommend at this particular time, based on the fact that there has been absolutely no preparation made on the closing argument on my advice to Mr. Whittaker. I specifically told Mr. Whittaker that he should not prepare a closing argument and that he should waive it and Mr. Whittaker could not get up and give a proper closing argument at this particular stage. So, I make a recommendation to you at this particular time to waive that closing argument.
> THE COURT: Do you understand what he said?
> THE DEFENDANT: Yes, sir.
> THE COURT: What is your desire?
> THE DEFENDANT: I'll go along with his advice. I'll waive closing arguments.

Moore, 153 F.3d at 1101.

closing argument. The Court of Appeals reasoned there was no indication the defendant had been prejudiced by his counsel's decision because the factual issues were simple, it was a one-day bench trial, and the testimony was uncontroverted. "There is simply no reason to believe closing argument would have led it to a different conclusion as to Ortiz's guilt." *Id.*

The California Court of Appeals came to the same conclusion in a similar case, *People v. Mendoza*, B206639, 2009 WL 118938, at *3 (Cal. Ct. App. 2009). The Court found the decision to waive closing argument was reasonable "although the record is essentially silent on the reasons for the decision to waive closing argument." *Id.* The Court determined,

> Any closing argument by Mendoza would have given the prosecutor the opportunity to highlight in rebuttal the conflicting defense theories he had not mentioned in his initial closing argument, namely, that Mendoza had asserted in his opening statement he was not the shooter, but then testified during trial he was. Defense counsel could have reasonably concluded that emphasizing the change in the defense's theory of the case would have entirely undermined Mendoza's credibility and destroyed any possibility the jury would accept his newly-raised theories of actual or imperfect self-defense. On this record, Mendoza cannot demonstrate his counsel's decision to waive closing argument was an objectively unreasonable one. (See *Bell v. Cone*, *supra*, 535 U.S. at pp. 701-702; *see also People v. Espinoza* (1979) 99 Cal.App.3d 44, 48 [counsel's decision to forego closing argument to deprive the prosecutor of an opportunity for a "fiery rebuttal" was not ineffective assistance; counsel's belief that the prosecutor had "undertried the case and the best response was to waive closing argument" was "a judgment call well within his prerogative to make"].)

Id. The Court notes the facts of this case are not as simple as either *Ortiz* or *Mendoza*. Neither *Ortiz* nor *Mendoza* concerned codefendant trials. The trial in this matter was a jury trial, lasting eight days. Dozens of exhibits and numerous witnesses were presented. Expert testimony on complex medical issues was produced. Additionally, Halstead's lengthy closing left little to be addressed in rebuttal that could be considered a "new" argument.

There is no case law directly on point in Nevada. The Court finds *Whited, supra*, to be instructive. The Supreme Court of the State of Alabama ("the Alabama Supreme Court") reversed the decision of the Criminal Court of Appeals affirming the conviction of Whited. Whited argued his trial counsel was ineffective for waiving closing argument. The Criminal Court of Appeals found the decision to waive argument to be a strategic decision which could not be disturbed. The

Alabama Supreme Court articulated a three factor analysis to determine whether the waiver of closing argument constituted ineffective assistance of counsel. The Alabama Supreme Court noted "trial counsel's decision to waive a closing argument on behalf of his or her client does not alone constitute ineffective assistance of counsel." *Id.* at 78. The Alabama Supreme Court looked to "whether trial counsel could articulate a strategic reason for waiving the argument, the strength or persuasiveness of the defendant's arguments against guilt, and the nature of the State's closing argument." *Id.* at 80.

The Alabama Supreme Court determined Whited's counsel could not adequately articulate a strategic reason for waiving closing argument. Although the lower court found counsel was trying to prevent the State from arguing, the Alabama Supreme Court found counsel did not have a legitimate strategic reason because "trial counsel was unable to recall specifics about the decision to waive closing argument." *Id.* at 81. Additionally, trial counsel had decided to waive closing argument before closing arguments began and it was not possible for counsel to fully inform a strategic decision regarding waiver of closing argument. The Alabama Supreme Court also noted there were strong arguments available to the defendant to dissuade the jury from convicting Whited. The State's initial closing argument was not brief and did not make it appear that the prosecution was saving its persuasive argument for last. The Alabama Supreme Court ultimately concluded the petitioner was deprived the effective assistance of counsel.

Here, Edwards was able to affirmatively answer he made the decision to waive argument after the State's initial argument by Halstead. January 13, 2016, Evidentiary Hearing Trans. 230:14-19, 231:7-10. The Court finds Edwards did articulate a reason for waiving closing argument: to prevent Hall from conducting rebuttal. As noted, *supra,* there is no indication why Edwards was sure Hall would argue the rebuttal closing. The Court acknowledges Hall is a very experienced and successful litigator. Hall could not, however, have made an argument with much more vigor than Halstead's thorough analysis. "[I]f no reason is or can be given for a tactic, the label 'tactic' will not prevent it from being used as evidence of ineffective assistance of counsel." *People v. Wilson,* 911 N.E.2d 413, 424 (Ill. 2009) (*citing Miller v. Anderson,* 255 F.3d 455, 458 (7th Cir.2001). "It would

be a rare case in which choosing not to make a closing argument in a jury trial would be sound trial strategy." *Wilson*, 911 N.E.2d at 424. Edwards testified at the evidentiary hearing he was not convinced it was a sound decision, or one he would do again.

The next consideration is the arguments available to the Petitioner to dissuade the jury from convicting the Petitioner. "In order to demonstrate prejudice in these circumstances, a habeas petitioner must make some type of showing of what defense counsel might have said at closing that would have had a reasonable probability of changing the result." *Moore*, 153 F.3d at 1105 (*citing Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068). The court in *Moore* found the petitioner "offer[ed] no hypothetical arguments that [could] satisfy" the second prong of *Strickland*. In order to fulfill the second prong of the ineffective assistance of counsel test, the defendant must establish that "the probability that counsel's errors changed the outcome of the case sufficient to undermine confidence in the outcome." *Wilson*, 911 N.E.2d at 422-23. *Moore* determined the evidence presented "overwhelmingly point[ed] to Moore's guilt" and concluded in light of such evidence "there [was] no reasonable probability that, had Moore's defense counsel given a closing argument, the jury would have chosen life over death." *Moore*, 153 F.3d at 1105. Edwards admitted during the evidentiary hearing he had a closing argument prepared. January 13, 2016, Evidentiary Hearing Trans. 243:15.

Contrary to *Moore*, the Supplement has raised various arguments which Edwards could have raised in closing argument which may have changed the outcome. The Supplement contends Edwards should have presented an argument regarding involuntary manslaughter or misdemeanor battery. Edwards admitted during the evidentiary hearing he could have made these arguments. January 13, 2016, Evidentiary Hearing Trans. 200:13-21. The Supplement emphasizes Edwards could have argued the Petitioner's blows to Hyde would not "normally or naturally tend to take the life of another" and the Petitioner was not associated with the acts of Schnueringer and Jefferson. The Supplement 18:4-7. The Supplement points out the proximate causation issue presented by the State's experts: they could not identify the fatal blow or who delivered it. Edwards could have emphasized for the jury that after the Petitioner's altercation with Hyde, Hyde was able to walk away without assistance. Edwards could have discussed all of the available charges under the

charged theory of open murder. Edwards could have pointed out the conflicts or discrepancies of witness testimony in order to persuade the jury to find the Petitioner guilty of a lesser offense than second degree murder as urged by the State. There was an abundance of issues for Edwards to discuss had he elected to do a closing argument.

The final consideration by the *Whited* court was the nature of the state's closing argument. The prosecutor in *Whited* made an initial closing argument that could "neither be characterized as 'very brief', nor does 'it appear[] that the prosecution was saving its persuasive argument for last." *Whited*, 180 So.2d at 85. *Floyd* and *Lawhorn* are distinguishable on this matter as initial arguments in those cases were very brief such that by waiving argument the defense prevented the state from making any persuasive argument. Halstead's closing argument was far from brief. She argued at length and reviewed the majority of witness testimony presented in the State's case.

The Court finds Edwards' decision to waive closing argument, although possibly a strategic decision, was unreasonable. There were arguments available to the Petitioner from which the jury could possibly conclude the Petitioner was guilty of the lesser charged offenses as offered in the jury instructions. The Petitioner's last clear chance to persuade the jury against guilt for murder was at closing argument. Edwards had the opportunity to point out the existence of reasonable doubt as to the proximate cause required for second-degree murder. Edwards could have pointed out the inconsistences in witness testimony developed on direct and cross-examination. Edwards could have addressed the complexity of jury instructions, such as Judge Elliott indicating counsel would do.[6] Trial Trans. Vol 8 1970:17-22. Further, the Petitioner did suggest a manner in which counsel could have argued in closing that could have affected a reasonable probability of a different outcome for the Petitioner at trial. The choice to prevent Hall from speaking did not prevent the State from

[6] The Court notes the speed at which the jury determined the guilt of the defendants was brief in light of the complexity of the case and the evidence presented. Judge Elliott indicated the jury could anticipate argument from the defendants and further explanation of jury instructions from the defendants. Such anticipated argument and review was never delivered as a result of the decision to waive closing argument by all three defendants. A review of the totality of the case presented requires this court to consider whether the lack of closing by counsel had a sufficient impact in the trial to "undermine confidence in the outcome." Such an error is grounds for overturning a conviction. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068.

inflaming the minds of the jury as the initial closing argument by the State was not brief and argued the facts of the crime in detail. There would be no surprise as to what persuasive argument the State would make on rebuttal. Accordingly, Ground Three is granted.

Ground Four of the Supplement argues Edwards was ineffective for failing to proffer a self-defense instruction. The Supplement contends the Petitioner testified to a set of facts consistent with self-defense. The Petitioner testified when Schnueringer went after Pardick, other people went to throw a punch near Graves. Three to four people rushed into the fight including Hyde. The Petitioner testified he told Hyde and the others to stay back. The Petitioner stated Hyde then came toward Petitioner two times with his fists balled up. The Petitioner then punched Hyde with two jabs to Hyde's left cheek. The Supplement argues the Petitioner's testimony warranted a self-defense instruction because it indicated the Petitioner was not the initial aggressor and used reasonably necessary force. The State's Memo asserts the Petitioner cannot demonstrate a reasonable probability of a different outcome had Edwards requested a self-defense instruction. The State notes the Petitioner's testimony was contradicted by various witnesses and his own admissions. The Petitioner admitted he never told the police Hyde had threatened him in any way during cross examination.

The Court finds the Supplement does not establish a reasonable probability of a different outcome should Edwards have proffered a self-defense instruction. The Court finds the facts of *Allen v. State*, 97 Nev. 394, 632 P.2d 1153 (1981), distinguishable from this case. In *Allen*, the Supreme Court noted *several* witnesses testified a fight occurred in one manner, and *several* other witnesses testified differently. The Supreme Court stated pertinent portions of the testimony indicated the evidence "was in conflict as to who the actual aggressor was and what the victim actually did to the defendant." *Id.* at 397, 632 P.2d at 1155. However, the Supreme Court specifically stated "[t]he testimony of the defendant is not the determining factor as to what legal defenses may be shown by the evidence; such a rule would improperly remove from the jury the question of the defendant's credibility." *Id.*, at 398, 632 P.2d at 1155. The Supplement only relies on the Petitioner's testimony. The Supplement 22:22-23. Accordingly, Petitioner's counsel did not fall below the objective standard of reasonableness and Ground Four is denied.

Ground Five of the supplement contends Halstead and Ohlson introduced evidence or made testimonial statements to which Edwards should have objected. Ohlson suggested Straight Edge had connections to Neo-Nazis on cross-examination of the Petitioner. The Supplement argues the statement was improper as it suggested the Petitioner was affiliated with a racist organization. The Court finds this contention to be without merit. The jury was instructed the statements and questions of attorneys are not evidence. "A jury is presumed to follow its instructions." *Leaonard v. State,* 117 Nev. 53, 66, 17 P.3d 397, 405 (2001) (*citing Weeks v. Angelone,* 528 U.S. 225, 120 S.Ct. 727, 733, 145 L.Ed.2d 727 (2000)).

The Supplement additionally argues Ohlson's comment to Dr. Clark after her testimony, "You remain brilliant as usual," was improper vouching to which Edwards should have objected. The State's Memo argues Ohlson was not vouching for Dr. Clark as the comment followed after Ohslon impeached her with the grand jury transcript. Trial Trans. Vol. 2, 475-89. The Court agrees. Ohlson's comment, although unnecessary, does not rise to the level of improper vouching for the witness' credibility. Ohlson's comments did not "provide personal assurances of [Dr. Clark's] veracity." *Browning v. State*, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004). Ohlson's comments would be more accurately characterized as rhetorical flourish. It clearly does not militate in favor of error.

The Supplement contends the questions posited by Halstead are further cause to find ineffective assistance of counsel. The Supplement contends Edwards should have objected to Halstead's examination of Fuller, whereby Halstead elicited testimony the three defendants did not attend Hyde's funeral. The Supplement argues such evidence was irrelevant and prejudicial as it led to an inference the Petitioner did not attend out of guilt. The Supplement notes this "error by itself or deficiency of counsel by itself would not be enough for the Court to find prejudice." The Supplement 30:5-7. The Court agrees. The Supplement does not establish the result of trial would have been different in any way had Edwards objected to the above testimony. Accordingly, Ground Five is denied.

Ground Six of the supplement asserts Edwards was ineffective in failing to seek a limiting instruction regarding references to Twisted Minds. The Supplement argues the Petitioner needed the limiting instruction as he was the only defendant who was not a member of Twisted Minds. The

Supplement relies on *Meeks v. State,* 112 Nev. 1288, 930 P.2d 1104 (1996), to argue the failure to give a limiting instruction was prejudicial. *Meeks* dealt with the failure to provide jurors with a limiting instruction regarding prior act evidence. The error was compounded when there was no *Petrocelli v. State,* 101 Nev. 46, 692 P.2d 503 (1985), hearing regarding the prior act evidence. Unlike *Meeks,* the Court conducted a hearing on the Petitioner's motion to exclude the Twisted Minds evidence. Further, the Supreme Court considered the argument the Court erred in admitting gang-affiliation evidence on direct appeal. The State did not seek to use the evidence as a prior bad act, but as res gestae. The State did not offer evidence to prove the Petitioner was a member of Twisted Minds. The Supplement does not establish the result of trial would have been different in any way had a limiting instruction been given. Because the Supreme Court concluded the evidence was admissible under res gestae the Petitioner cannot establish he was prejudiced by such evidence and counsel's failure to seek a limiting instruction. Ground Six is denied.

The Supplement alleges in Ground Seven that Edwards was ineffective for failing to investigate or call certain witnesses. The Supplement contends the testimony of Joel Cohen, Z[redacted] C[redacted] Koralynn Birmingham, S[redacted] L[redacted] Emma Johnson, and T[redacted] C[redacted] would have corroborated Petitioner's self-defense theory of defense. The State's Memo contends the Petitioner's own testimony did not support a self-defense theory. The State's Memo argues such testimony would have been cumulative. *See* NRS 48.035(2). Further, Edwards admitted during the evidentiary hearing he was aware of testimony of the above-listed witnesses and did not request their testimony as it would have been duplicative to the evidence presented. January 13, 2016, Evidentiary Hearing Trans. 213:13-20.

"Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland,* 466 U.S. at 690-91, 104 S.Ct. at 2066. "A lawyer who fails adequately to investigate, and to introduce into evidence, records that demonstrate his client's factual innocence, or that raise sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance." *Hart v. Gomez,* 174 F.3d 1067, 1070 (9th Cir. 1999). The Court finds the Supplement does not articulate how Edwards was objectively unreasonable in failing to call these additional

witnesses, or that these witnesses would have a reasonable probability of a different outcome had they been called. The Petitioner has not established new information would have been established through reasonably diligent investigation such that a self-defense theory would have been supported. Accordingly, Ground Seven is denied.

IT IS HEREBY ORDERED the Petition and Grounds 1,2,4,5,6,7, of the Supplement are DENIED.[7] IT IS HEREBY FURTHER ORDERED Ground 3 of the Supplement is GRANTED.

DATED this 8 day of April, 2016.

ELLIOTT A. SATTLER
District Judge

[7] The Court notes Ground 1 and Ground 2 of the Petition are subsumed by the Supplement and addressed in further detail.

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this ____ day of April, 2016, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

NONE

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe; that on the 8 day of April, 2016, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

JENNIFER NOBLE, ESQ.

RICHARD CORNELL, ESQ,

Sheila Mansfield
Administrative Assistant

Received 2/28/17

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
ZACHARY KELSEY,
Respondent.

No. 70155

FILED

FEB 27 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

The State of Nevada appeals from an order of the district court granting in part and denying in part, a postconviction petition for a writ of habeas corpus filed on September 15, 2014. Second Judicial District Court, Washoe County; Elliott A. Sattler, Judge.

The State argues the district court erred by granting the postconviction petition when it found trial counsel was ineffective for waiving respondent Zachary Kelsey's right to present a closing argument. In its order, the district court concluded counsel's decision to waive closing argument was deficient and not a tactical decision and Kelsey demonstrated prejudice because there was a possibility of a different outcome at trial had counsel presented a closing argument.

We conclude the district court erred by granting Kelsey's claim that counsel was ineffective for waiving closing argument. To prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *Strickland v. Washington*, 466

17-900372

U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). Both components of the inquiry must be shown, *Strickland*, 466 U.S. at 697, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence, *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). We give deference to the district court's factual findings if supported by substantial evidence and not clearly erroneous but review the court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

"A court considering a claim of ineffective assistance must apply a strong presumption that counsel's representation was within the wide range of reasonable professional assistance." *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (internal quotation marks omitted). Tactical decisions of counsel "are virtually unchallengeable absent extraordinary circumstances." *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). The decision to waive closing argument is a tactical decision. *See Bell v. Cone*, 535 U.S. 685, 701-702 (2002). An appellate court is "required not simply to give the attorneys the benefit of the doubt, but to affirmatively entertain the range of possible reasons [an appellant's] counsel may have had for proceeding as they did." *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011) (internal quotation marks, alterations, and citations omitted).

At the evidentiary hearing, counsel testified he decided to waive closing argument because he did not believe the State's closing argument was very vigorous and believed the State's rebuttal closing argument would be much more persuasive. Counsel testified he was prepared to present a closing argument, but decided not to after hearing the State's closing argument and discussing the strategy with Kelsey's codefendants' counsels, and all defense counsel agreed to waive closing

argument. He also testified he had observed the prosecutor's rebuttal closing arguments in other cases and found the prosecutor to be very vigorous and persuasive. This was a tactical decision, and cannot be challenged outside of extraordinary circumstances, which are not present here.[1] While the choice to forgo closing argument may not have been the best option, it was a tactical decision and did not place counsel's representation "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690-91. Accordingly, we conclude the district court erred by determining counsel was deficient for waiving his closing argument.

We also conclude the district court erred by determining Kelsey suffered prejudice by counsel waiving closing argument. While the district court found Kelsey "suggest[ed] a manner in which counsel could have argued in closing that could have affected a reasonable probability of a different outcome for the Petitioner at trial," the district court also stated there were "arguments available to the Petitioner from which the jury could possibly conclude the Petitioner was guilty of the lesser charged offenses as offered in the jury instructions." Based on the evidence presented at trial, Kelsey failed to demonstrate a reasonable probability of a different outcome at trial had counsel not waived closing argument. Kelsey punched the victim in the head twice and may have kneed him the in the head as well. After being pulled out of the fight, Kelsey continued to yell and try to get at the victim. After the fight, the victim stood up,

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[1]The district court relied on *Ex parte Whited*, 180 So.3d 69 (Ala. 2015), to conclude Kelsey demonstrated counsel was ineffective. Trial counsel in *Whited*, however, could not articulate his strategic reason for waiving closing argument. 180 So.3d at 81-82. In the instant case, counsel articulated his reason for waiving, and therefore, the instant case is distinguishable.

had blood streaming from his mouth, and told his friend he had been "rocked." An expert who testified at trial stated the first blow to the victim's head may have been the death blow and another expert testified the injuries to the victim were likely cumulative. Accordingly, we conclude the district court erred by granting this claim.

Kelsey argues, even if this court concludes the district court erred by granting his claim that counsel was ineffective for waiving closing argument, the district court reached the right result by granting the petition, albeit for the wrong reasons. *Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (this court will affirm the judgment of district court if it reached the correct result for the wrong reason). Kelsey argues the other claims raised in his petition had merit and the district court should have granted his petition on those grounds.

First, Kelsey claims the district court erred by denying his claim counsel was ineffective for failing to consult with and present an expert at trial to provide a contrary and exculpatory opinion regarding the probable cause of the victim's death. After holding an evidentiary hearing, the district court concluded Kelsey failed to demonstrate prejudice. The district court found Kelsey failed to demonstrate a reasonable probability of a different outcome at trial had counsel presented an expert because the expert presented at the evidentiary hearing could not establish which arteries caused the hemorrhaging in the victim's brain and her testimony could not be differentiated from that of the experts presented by the State at trial. Substantial evidence supports the decision of the district court, and we conclude the district court did not err in denying this claim.

Second, Kelsey claims the district court erred by denying his claim counsel was ineffective for failing to interview and present the testimony of three witnesses. Kelsey failed to demonstrate counsel was deficient or resulting prejudice. The district court concluded Kelsey failed

to demonstrate counsel's decision not to interview these witnesses was unreasonable or the witnesses would have provided testimony such that there was a reasonable probability of a different outcome at trial had they testified. Substantial evidence supports the decision of the district court. At the evidentiary hearing, evidence was adduced that these three witnesses, while they gave statements to the police, never told the police they had witnessed this particular fight at the party. Therefore, it was reasonable for counsel not to have sought to interview these witnesses. *See Ford*, 105 Nev. at 853, 784 P.2d at 953. Further, the testimony presented by these witnesses was duplicative of testimony provided by other witnesses who testified at trial. Accordingly, we conclude the district court did not err in denying this claim.

Third, Kelsey claims the district court erred by denying his claim counsel was ineffective for failing to object and move for a mistrial when Kelsey's codefendant's counsel asked Kelsey whether he knew he was a member of a racist group. At the evidentiary hearing, counsel testified he did not object because he believed Kelsey handled the question well on the stand and he did not want to call the jury's attention to the questions. Kelsey failed to demonstrate counsel was deficient because this was a tactical decision by counsel. *See id.* Kelsey also failed to demonstrate resulting prejudice because the jury was instructed the statements and questions of attorneys are not evidence and "[a] jury is presumed to follow its instructions." *Leonard v. State*, 117 Nev. 53, 66, 17 P.3d 397, 405 (2001). Therefore, he failed to demonstrate a reasonable probability of a different outcome at trial had counsel objected or moved for a mistrial. Accordingly, we conclude the district court did not err by denying this claim.

Fourth, Kelsey claims the district court erred by denying his claim counsel was ineffective for failing to object and move for a mistrial

when Kelsey's codefendant's counsel thanked the medical examiner and told her "You remain as brilliant as usual." Kelsey claims this was improper vouching of a witness. Kelsey failed to demonstrate counsel was deficient or resulting prejudice. Kelsey failed to demonstrate this statement was vouching, *see Browning v. State*, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004) ("vouching occurs when the prosecution places the prestige of the government behind a witness by providing personal assurances of the witness's veracity" (internal quotation marks and alterations omitted)), or that it was a comment on the veracity of the witness. Therefore, we conclude the district court did not err by denying this claim.

Finally, Kelsey claims the district court erred by denying his claim counsel was ineffective for failing to move for severance when it became clear the codefendants had antagonistic and mutually exclusive defenses. Kelsey claims the defenses were antagonistic because each of the codefendants accused the others of causing the death of the victim. Merely demonstrating defenses are antagonistic is not enough to require the granting of a motion to sever. *Marshall v. State*, 118 Nev. 642, 648, 56 P.3d 376, 380 (2002). Instead, Kelsey "must show that the joint trial compromised a specific trial right or prevented the jury from making a reliable judgment regarding guilt or innocence." *Id.* Further, "it is not prejudicial for a codefendant to introduce relevant, competent evidence that would be admissible against the defendant at a severed trial." *Id.* at 647, 56 P.3d at 379. Severance is not warranted simply because it would have made acquittal more likely. *Id.*

We conclude Kelsey fails to demonstrate counsel was deficient or resulting prejudice because counsel was not deficient for failing to file futile motions. *Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). While we agree the defenses in this case were antagonistic, Kelsey failed to demonstrate the joint trial compromised a specific trial right or

prevented the jury from making a reliable judgment regarding guilt or innocence. Further, unobjected to evidence elicited from other percipient witnesses regarding Kelsey's use of brass knuckles and his bragging about killing the victim was evidence that would have been admissible against Kelsey at a severed trial. Accordingly, we conclude the district court did not err in denying this claim.

For the reasons discussed above, we

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

Silver, C.J.

Tao, J.

Gibbons, J.

cc: Hon. Elliott A. Sattler, District Judge
Attorney General/Carson City
Washoe County District Attorney
Richard F. Cornell
Washoe District Court Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

AARON L. KATZ,
Appellant,
vs.
INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT,
Respondent.

No. 70440

FILED

APR 24 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

Cherry, J.
Cherry

Parraguirre, J.
Parraguirre

Stiglich, J.
Stiglich

cc: Hon. Patrick Flanagan, District Judge
Richard F. Cornell
Erickson Thorpe & Swainston, Ltd.
Washoe District Court Clerk

18-15560

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
ZACHARY KELSEY,
Respondent.

Supreme Court No. 70155
District Court Case No. CR120326 B

FILED
AUG 25 2017
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

REMITTITUR

TO: Jacqueline Bryant, Washoe District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: August 21, 2017

Elizabeth A. Brown, Clerk of Court

By: Jessica Rodriguez
Deputy Clerk

cc (without enclosures):
Hon. Elliott A. Sattler, District Judge
Washoe County District Attorney
Attorney General/Carson City
Richard F. Cornell

RECEIPT FOR REMITTITUR

Received of Elizabeth A. Brown, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on August 22 2017

District Court Clerk

RECEIVED
AUG 24 2017
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
DEPUTY CLERK

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
ZACHARY KELSEY,
Respondent.

Supreme Court No. 70155
District Court Case No. CR120326

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

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

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order."

Judgment, as quoted above, entered this 27th day of February, 2017.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"Review denied."

Judgment, as quoted above, entered this 25th day of July, 2017.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada this August 21, 2017.

Elizabeth A. Brown, Supreme Court Clerk

By: Jessica Rodriguez
Deputy Clerk

Updated 01/07/16

AMY LIBBY LLEWELLYN, M.D.

[redacted]
Reno, Nevada 89509
[redacted]-8803

PROFESSIONAL PREPARATION

1992- 1993:	Fellowship in Forensic Pathology, Indiana University, Indianapolis, IN
1991-1992:	Fellowship in Cytology, Medical College of Pennsylvania, Philadelphia, PA
1987- 1991:	Residency in Pathology, University of New Mexico, Albuquerque, NM
1987:	M.D., Vanderbilt University School of Medicine, Nashville, TN
1982:	B.A., Combined Chemistry-Biology, Middlebury College, Middlebury, VT.

PROFESSIONAL EXPERIENCE

April 22, 2013- Present	Pathologist, Sierra Pathology Associates, Reno, NV
1999-March 2013	Medical Director Laboratory Corporation of America, Reno Branch
1998-April 2013	Assistant Professor, University of Nevada School of Medicine, Pathology Department
2008-March 2013	Laboratory Director Nevada Urology Histology, Reno, NV
2010- March 2013	Laboratory Director Carson Urology Histology, Minden, NV
2010- March 2013	Laboratory Director Digestive Health Histology, Reno, NV
2009-2012	Medical Director Laboratory Corporation of America, Las Vegas Branch
2008-2010	Medical Director Viral Immune Pathology Diagnostics (VIPDX), Stead, NV
1993-1997:	Staff Pathologist, McKee Medical Center, Loveland, CO Deputy Coroner, Larimer County, CO

MEDICAL LICENSES

1998-Present	Nevada
1999-Present	California

SPECIALTY BOARD STATUS

American Board of Pathology:	Anatomic Pathology, 1992 Clinical Pathology, 1992 Forensic Pathology, 1993

TEACHING AND RESEARCH

1998- March 2013	Assistant Professor, University of Nevada School of Medicine, Pathology Dept
1992-1993:	Lab Teaching Assistant in Pathology, Indiana University
1991-1992:	Lab Teaching Assistant in Pathology, Medical College of Pennsylvania
1990:	HLA Research using molecular techniques, University of New Mexico

Updated 01/07/16

HONORS AND AWARDS

1982: Phi Beta Kappa Honor Society, Middlebury College
1982: B.A., Magna Cum Laude, Middlebury College

PROFESSIONAL SOCIETIES

College of American Pathologists/in process as of 1/04/2015

PUBLICATIONS

1. Foucar K, Friedman K, Llewellyn A, McConnell T, Aisenbrey G, Argubright K, Ballinger L, **"Prenatal Diagnosis of Transient Myeloproliferative Disorder via Percutaneous Umbilical Cord Sampling. Report of two cases in fetuses affected by Down's Syndrome,"** *American Journal of Clinical Pathology,* 97(4): 584-90, April 1992.
2. Davis LE, Hjelle BL, Miller VE, Palmer DL, Llewellyn AL, Merlin TL, Young SA, Mills RG, Wachsman W, Wiley CA, **"Early Viral Brain Invasion in Iatrogenic Human Immunodeficiency Virus Infection",** *Neurology,* 42 (9): 1736-9, September 1992.
3. Harruff RC, Llewellyn AL, Clark MA, Hawley DA, Pless, **"Firearm Suicides During Confrontations with Police",** *Journal of Forensic Sciences,* 39(2): 402-411, March 1994.

AMY LIBBY LLEWELLYN, M.D.
[redacted]
Reno, Nevada 89509

January 7, 2016

Richard F. Cornell, Esq.
150 Ridge Street, Second Floor
Reno, NV 89501

Re: *Zachary Kelsey*

Dear Mr. Cornell:

You've asked me to give you a written opinion letter on certain subjects of inquiry relative to this case.

I have reviewed the following documents before signing off on this letter:

1. The trial testimony of Dr. Ellen Clark;

2. The trial testimony of Dr. Bennet Omalu;

3. The autopsy report of Dr. Ellen Clark;

4. A series of photos identified to me as the autopsy photos taken as part and parcel of her autopsy;

5. The Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), which contains the description of the testimonies of material witnesses;

6. Witness statements of Tyler DePriest, Michael Opperman, Brandon Naastad, Cliffton Fuller, Brandon Smolder, and Aubree Hawkinson;

7. Dr. Omalu's neuropathology report.

You wanted my opinion on the following areas of inquiry:

1. Can I say to a reasonable degree of probability that the blows delivered by Kelsey to Master Hyde's face, prior to Schnueringer's and Jefferson's attack of Hyde, were the cause of Hyde's ultimate death?

While it is possible that the blows administered by the first assailant (Kelsey), could have been fatal or contributed to the death of the victim, it is my opinion to a reasonable degree of

medical probability that the blows administered by the second group of assailants (Schnueringer and Jefferson) were in fact fatal in nature and resulted in the death of the victim.

2. Is it possible for me to link the injuries as shown at autopsy to blows delivered by any of the assailants as the likely cause of the victim's death?

The most significant areas injury to Jared Hyde's head and face are consistent with acts of kicking on the side of his head, possibly falling to the ground, and punching from an angle where Master Hyde would not see the assailant. In contrast, in a face-to-face encounter between Kelsey and Master Hyde, it is possible but unlikely that two jabs to Hyde's cheek, which Hyde would have seen coming, would have created the motion necessary to the torquing/rotational injury (i.e., the fatal injury) seen at autopsy.

3. To what degree of medical probability can Master Hyde's cause of death be linked to a severing of blood vessels leading to or from the brain?

There are a whole plexis of blood vessels at the base of the brain that can tear from blunt force impact. From the autopsy, one cannot pinpoint exactly which vessels tore. However, again, a more likely mechanism of tearing of those vessels would be the unexpected punching and kicking in the head, than a face-to-face series of jabs. Given that Master Hyde pulled Kelsey's shirt over his head, was not knocked down by Kelsey, and Hyde walked away from Kelsey's fight while speaking coherently; but after Schnueringer hit Hyde and Schnueringer and Jefferson kicked Hyde in the head Hyde hit the ground and never got up under his power, and was pronounced dead on arrival when his friends drove him from the scene of the fight to the hospital, it would appear likely to a reasonable degree of medical certainty that the tearing of some blood vessels leading to or from the brain caused his immediate death, and that tearing occurred from the second fight involving Schnueringer and Jefferson.

4. Did I see any injuries Master Hyde's face, particularly in the check area, that would suggest a cause or contributing cause to Master Hyde's death?

Not to a reasonable degree of medical certainty. There are indication of marks on his face from the autopsy photos, lateral to his left eye; but one cannot link those marks to a series of jabs to the face with any reasonable degree of certainty. Given the abrasion on Master Hyde's shoulder, it would seem most likely that the abrasions on the side of his face were simultaneous or virtually simultaneous with his fall on the right side of his body. The deep scalp and subperiostial areas of hemorrhage are most consistent with kicks to the side of Master Hyde's head while he was on the ground. Importantly, that would appear to be most consistent with the witnesses' testimonies.

5. Is it reasonably medically possible or likely that all of the injuries Dr. Clark identified

at autopsy came from the second assailants, Schnueringer and Jefferson, and none from Kelsey?

It is possible that all of the injuries identified at autopsy happened during the second fight (that is, the fight involving Schnueringer and Jefferson). However, it is not possible that all of the injuries identified at autopsy came from the first fight (involving Kelsey).

It must be remembered from Dr. Omalu's testimony that a punch to the face (especially in conditions such as boxing match where the fighters are face-to-face and expect on some level to be hit in the face) can create a sub-concussion or concussion. If it were a sub-concussion, the likelihood of death from that condition alone would be minimal. If it were a concussion, the risk of death from that condition alone is not substantial when compared to the second fight in this case. Again, the more reasonable cause of the rotational forces causing disruption of Master Hyde's blood vessels, which caused his death, came from the second fight as opposed to the first one (involving Kelsey). This is why I cannot agree with the opinion that each and every blow contributed to Master Hyde's death in this case. In some other cases I may be able to agree with that opinion; but in this case, I cannot agree.

Respectfully submitted,

By: _____
Amy L. Llewellyn, M.D.

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CR12-0326B
DO

THE STATE OF NEVADA,
Appellant,
vs.
ZACHARY KELSEY,
Respondent.

No. 70155

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

The State of Nevada appeals from an order of the district court granting in part and denying in part, a postconviction petition for a writ of habeas corpus filed on September 15, 2014. Second Judicial District Court, Washoe County; Elliott A. Sattler, Judge.

The State argues the district court erred by granting the postconviction petition when it found trial counsel was ineffective for waiving respondent Zachary Kelsey's right to present a closing argument. In its order, the district court concluded counsel's decision to waive closing argument was deficient and not a tactical decision and Kelsey demonstrated prejudice because there was a possibility of a different outcome at trial had counsel presented a closing argument.

We conclude the district court erred by granting Kelsey's claim that counsel was ineffective for waiving closing argument. To prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *Strickland v. Washington*, 466

M-911372

U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). Both components of the inquiry must be shown, *Strickland*, 466 U.S. at 697, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence, *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). We give deference to the district court's factual findings if supported by substantial evidence and not clearly erroneous but review the court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

"A court considering a claim of ineffective assistance must apply a strong presumption that counsel's representation was within the wide range of reasonable professional assistance." *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (internal quotation marks omitted). Tactical decisions of counsel "are virtually unchallengeable absent extraordinary circumstances." *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). The decision to waive closing argument is a tactical decision. *See Bell v. Cone*, 535 U.S. 685, 701-702 (2002). An appellate court is "required not simply to give the attorneys the benefit of the doubt, but to affirmatively entertain the range of possible reasons [an appellant's] counsel may have had for proceeding as they did." *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011) (internal quotation marks, alterations, and citations omitted).

At the evidentiary hearing, counsel testified he decided to waive closing argument because he did not believe the State's closing argument was very vigorous and believed the State's rebuttal closing argument would be much more persuasive. Counsel testified he was prepared to present a closing argument, but decided not to after hearing the State's closing argument and discussing the strategy with Kelsey's codefendants' counsels, and all defense counsel agreed to waive closing

argument. He also testified he had observed the prosecutor's rebuttal closing arguments in other cases and found the prosecutor to be very vigorous and persuasive. This was a tactical decision, and cannot be challenged outside of extraordinary circumstances, which are not present here.[1] While the choice to forgo closing argument may not have been the best option, it was a tactical decision and did not place counsel's representation "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690-91. Accordingly, we conclude the district court erred by determining counsel was deficient for waiving his closing argument.

We also conclude the district court erred by determining Kelsey suffered prejudice by counsel waiving closing argument. While the district court found Kelsey "suggest[ed] a manner in which counsel could have argued in closing that could have affected a reasonable probability of a different outcome for the Petitioner at trial," the district court also stated there were "arguments available to the Petitioner from which the jury could possibly conclude the Petitioner was guilty of the lesser charged offenses as offered in the jury instructions." Based on the evidence presented at trial, Kelsey failed to demonstrate a reasonable probability of a different outcome at trial had counsel not waived closing argument. Kelsey punched the victim in the head twice and may have kneed him the in the head as well. After being pulled out of the fight, Kelsey continued to yell and try to get at the victim. After the fight, the victim stood up,

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[1]The district court relied on *Ex parte Whited*, 180 So.3d 69 (Ala. 2015), to conclude Kelsey demonstrated counsel was ineffective. Trial counsel in *Whited*, however, could not articulate his strategic reason for waiving closing argument. 180 So.3d at 81-82. In the instant case, counsel articulated his reason for waiving, and therefore, the instant case is distinguishable.

had blood streaming from his mouth, and told his friend he had been "rocked." An expert who testified at trial stated the first blow to the victim's head may have been the death blow and another expert testified the injuries to the victim were likely cumulative. Accordingly, we conclude the district court erred by granting this claim.

Kelsey argues, even if this court concludes the district court erred by granting his claim that counsel was ineffective for waiving closing argument, the district court reached the right result by granting the petition, albeit for the wrong reasons. *Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (this court will affirm the judgment of district court if it reached the correct result for the wrong reason). Kelsey argues the other claims raised in his petition had merit and the district court should have granted his petition on those grounds.

First, Kelsey claims the district court erred by denying his claim counsel was ineffective for failing to consult with and present an expert at trial to provide a contrary and exculpatory opinion regarding the probable cause of the victim's death. After holding an evidentiary hearing, the district court concluded Kelsey failed to demonstrate prejudice. The district court found Kelsey failed to demonstrate a reasonable probability of a different outcome at trial had counsel presented an expert because the expert presented at the evidentiary hearing could not establish which arteries caused the hemorrhaging in the victim's brain and her testimony could not be differentiated from that of the experts presented by the State at trial. Substantial evidence supports the decision of the district court, and we conclude the district court did not err in denying this claim.

Second, Kelsey claims the district court erred by denying his claim counsel was ineffective for failing to interview and present the testimony of three witnesses. Kelsey failed to demonstrate counsel was deficient or resulting prejudice. The district court concluded Kelsey failed

to demonstrate counsel's decision not to interview these witnesses was unreasonable or the witnesses would have provided testimony such that there was a reasonable probability of a different outcome at trial had they testified. Substantial evidence supports the decision of the district court. At the evidentiary hearing, evidence was adduced that these three witnesses, while they gave statements to the police, never told the police they had witnessed this particular fight at the party. Therefore, it was reasonable for counsel not to have sought to interview these witnesses. *See Ford*, 105 Nev. at 853, 784 P.2d at 953. Further, the testimony presented by these witnesses was duplicative of testimony provided by other witnesses who testified at trial. Accordingly, we conclude the district court did not err in denying this claim.

Third, Kelsey claims the district court erred by denying his claim counsel was ineffective for failing to object and move for a mistrial when Kelsey's codefendant's counsel asked Kelsey whether he knew he was a member of a racist group. At the evidentiary hearing, counsel testified he did not object because he believed Kelsey handled the question well on the stand and he did not want to call the jury's attention to the questions. Kelsey failed to demonstrate counsel was deficient because this was a tactical decision by counsel. *See id.* Kelsey also failed to demonstrate resulting prejudice because the jury was instructed the statements and questions of attorneys are not evidence and "[a] jury is presumed to follow its instructions." *Leonard v. State*, 117 Nev. 53, 66, 17 P.3d 397, 405 (2001). Therefore, he failed to demonstrate a reasonable probability of a different outcome at trial had counsel objected or moved for a mistrial. Accordingly, we conclude the district court did not err by denying this claim.

Fourth, Kelsey claims the district court erred by denying his claim counsel was ineffective for failing to object and move for a mistrial

when Kelsey's codefendant's counsel thanked the medical examiner and told her "You remain as brilliant as usual." Kelsey claims this was improper vouching of a witness. Kelsey failed to demonstrate counsel was deficient or resulting prejudice. Kelsey failed to demonstrate this statement was vouching, *see Browning v. State*, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004) ("vouching occurs when the prosecution places the prestige of the government behind a witness by providing personal assurances of the witness's veracity" (internal quotation marks and alterations omitted)), or that it was a comment on the veracity of the witness. Therefore, we conclude the district court did not err by denying this claim.

Finally, Kelsey claims the district court erred by denying his claim counsel was ineffective for failing to move for severance when it became clear the codefendants had antagonistic and mutually exclusive defenses. Kelsey claims the defenses were antagonistic because each of the codefendants accused the others of causing the death of the victim. Merely demonstrating defenses are antagonistic is not enough to require the granting of a motion to sever. *Marshall v. State*, 118 Nev. 642, 648, 56 P.3d 376, 380 (2002). Instead, Kelsey "must show that the joint trial compromised a specific trial right or prevented the jury from making a reliable judgment regarding guilt or innocence." *Id.* Further, "it is not prejudicial for a codefendant to introduce relevant, competent evidence that would be admissible against the defendant at a severed trial." *Id.* at 647, 56 P.3d at 379. Severance is not warranted simply because it would have made acquittal more likely. *Id.*

We conclude Kelsey fails to demonstrate counsel was deficient or resulting prejudice because counsel was not deficient for failing to file futile motions. *Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). While we agree the defenses in this case were antagonistic, Kelsey failed to demonstrate the joint trial compromised a specific trial right or

prevented the jury from making a reliable judgment regarding guilt or innocence. Further, unobjected to evidence elicited from other percipient witnesses regarding Kelsey's use of brass knuckles and his bragging about killing the victim was evidence that would have been admissible against Kelsey at a severed trial. Accordingly, we conclude the district court did not err in denying this claim.

For the reasons discussed above, we

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

Silver, C.J.

Tao, J.

Gibbons, J.

cc: Hon. Elliott A. Sattler, District Judge
Attorney General/Carson City
Washoe County District Attorney
Richard F. Cornell
Washoe District Court Clerk

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

* * *

ZACHARY KELSEY,

Petitioner,

vs.

STATE OF NEVADA,

Respondent.

_____/

Case No: CR12-0326B

Dept. No: 10

ORDER

Presently before the Court is a PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) ("the Petition") filed by the Petitioner ZACHARY KELSEY ("the Petitioner") on September 15, 2014. The Petitioner filed a SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS POST CONVICTION ("the Supplement") on April 9, 2015. The STATE OF NEVADA ("the State") filed an ANSWER TO PETITION AND SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) ("the Answer") on June 2, 2015. The State filed the STATE'S BENCH MEMORANDUM REGARDING EVIDENTIARY HEARING ("the State's Memo") on January 6, 2016. The Court heard testimony and argument on January 13 and 14, 2016. This written ORDER follows.

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The Petitioner was found guilty by a jury of Murder in the Second Degree, a violation of NRS 200.010, NRS 200.030, and NRS 195.020, a felony, on December 12, 2012. The Petitioner was sentenced to imprisonment in the Nevada Department of Corrections for a minimum term of ten (10) years to a maximum term of twenty-five (25) years with credit for three hundred thirty-seven (337) days time served on January 24, 2013.

The underlying facts of this case, taken from the Supreme Court of Nevada's ("the Supreme Court") ORDER OF AFFIRMANCE ("the February Order") entered February 27, 2014, are as follows: the Petitioner and his two co-defendants, Andrue Jefferson ("Jefferson") and Bobby Schnueringer ("Schnueringer") attended a bonfire party in Lemmon Valley on February 4, 2012. Schnueringer and Jefferson identified themselves as part of a group called "Twisted Minds." A fight broke out between two females at the party. Jefferson and Schnueringer encouraged the fight. Jefferson struck Taylor Pardick ("Pardick"), who tried to break up the fight between the two females. The decedent, Jared Hyde ("Hyde"), was walking away from the fight toward a car to leave the party after Jacob Graves ("Graves") had struck Pardick knocking him to the ground. The Petitioner confronted Hyde and struck him twice in the head. Zach Clough ("Clough") and Michael Opperman ("Opperman") restrained the Petitioner. Hyde picked himself up, looking distraught and had blood running from his mouth. Hyde then continued toward the car where he was confronted by Schnueringer and Jefferson. Schnueringer punched Hyde causing Hyde to buckle and fall to the ground. Jefferson proceeded to punch Hyde's head as he was on the ground. Both Schnueringer and Jefferson kicked Hyde as he was knocked out on the ground. Clifton Fuller ("Fuller") took Hyde to the hospital after he could not find a pulse. Hyde was not breathing when he arrived at the hospital and could not be resuscitated.

The trial began on December 3, 2012.[1] The trial lasted for eight days. The Petitioner was represented by Scott Edwards ("Edwards"). Schnueringer was represented by John Ohlson ("Ohlson") and Jefferson was represented by Richard Molezzo ("Molezzo"). The State was represented by Deputy District Attorney Patricia Halstead ("Halstead") and Chief Deputy District

[1] The Honorable Steven P. Elliott ("Judge Elliott") presided over the trial. Judge Elliott retired in March of 2013.

Attorney Karl Hall ("Hall"). Fifty-one exhibits were admitted in the course of the trial. A total of twenty two witnesses were called including the Petitioner who testified on his own behalf. Edwards, Ohlson, and Molezzo each cross examined all of the State's witnesses. Halstead gave closing argument on behalf of the State. All three defendants waived closing argument and the case was given to the jury. The jury reached a verdict in three hours and twenty minutes.

The Petition alleges the following grounds for relief:

1. Trial counsel was ineffective in violation of Petitioner's Due Process and Equal Protection rights.
2. The Petitioner was denied due process.

The Supplement alleges the following grounds for relief:

1. Trial counsel was ineffective for failing to object to the testimony of Dr. Ellen Clark ("Dr. Clark") and Dr. Bennet Omalu ("Dr. Omalu"), or prevent Dr. Clark and Dr. Omalu from testifying via motion in limine, or failing to force Dr. Clark and Dr. Omalu to testify to a reasonable degree of medical probability in violation of Petitioner's Due Process and Equal Protection rights.
2. Trial counsel was ineffective for failing to seek severance of the Petitioner from his co-defendants in violation of Petitioner's Due Process and Equal Protection rights.
3. Trial counsel was ineffective for waiving closing argument in violation of Petitioner's Due Process and Equal Protection rights.
4. Trial counsel was ineffective for failing to offer a self-defense instruction in violation of Petitioner's Due Process and Equal Protection Rights.
5. Trial counsel was ineffective for failing to object to John Ohlson ("Ohlson") (counsel for Schnueringer) and Deputy District Attorney Patricia Halstead's ("Halstead") (co-counsel for the State) arguments or evidence introduced during trial in violation of Petitioner's Due Process and Equal Protection Rights.
6. Trial counsel was ineffective for failing to seek a limiting instruction after gang evidence was introduced against the Petitioner's co-defendants in violation of Petitioner's Due Process and Equal Protection Rights.
7. Trial Counsel was ineffective for failing to conduct an investigation of the case and call certain witnesses in violation of Petitioner's Due Process and Equal Protection Rights.

A post-conviction petition for writ of habeas corpus challenging a conviction based on a jury verdict is limited to claims that could not have been raised in a prior proceeding, such as at trial, or on direct appeal. NRS 34.810(1)(b). Claims that could have been considered in a prior proceeding are waived, and the district court must dismiss any such claim unless it finds: (1) cause for the procedural default and actual prejudice to the Petitioner, NRS 34.810(1)(b); or (2) that

failure to consider the claims would result in a fundamental miscarriage of justice. *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). The Petitioner has the burden of pleading and proving specific facts to demonstrate good cause and prejudice.[2] NRS 34.810(3).

Claims of ineffective assistance of counsel require the Petitioner to demonstrate two components: (1) that counsel's performance was deficient, and (2) that the deficient performance resulted in prejudice to the petitioner. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984). *See also, Kirksey v. State*, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996). "'[D]eficient' assistance requires a showing that counsel's representation fell below an objective standard of reasonableness." *Dawson v. State*, 108 Nev. 112, 115, 825 P.2d 593, 595 (1992). "In order to eliminate the distorting effects of hindsight, courts indulge in a strong presumption that counsel's representation falls within the broad range of reasonable assistance." *Id.* If the petitioner overcomes this strong presumption, he must additionally "show that, but for counsel's errors, the result of the trial would probably have been different." *Id.* "A court may consider the two test elements in any order and need not consider both prongs if the defendant makes an insufficient showing on either one." *Kirksey,* 112 Nev. at 987, 923 P.2d at 1107 (*citing Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069).

The Supplement contends Edwards was ineffective in failing to object to the testimony of the State's experts Dr. Clark and Dr. Omalu. The Supplement argues Dr. Clark and Dr. Omalu did not testify the Petitioner's punches could have contributed to Hyde's death. Dr. Clark testified the cause of Hyde's death was bleeding into the brain consistent with numerous punches and kicks to Hyde's head. Dr. Clark further testified she could not identify which blow was the fatal blow, stating it could have been a combination of multiple ruptured or perforated blood vessels. Dr. Clark testified

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[2] "Good cause" is established when the petitioner demonstrates that an impediment external to the defense prevented him from complying with the procedural requirements, e.g. failing to raise a claim in a prior proceeding. *State v. Dist. Court (Riker)*, 121 Nev. 225, 232, 112 P.3d 1070, 1074-75 (2005), *Pellegrini*, 117 Nev. at 886, 34 P.3d at 537. Ineffective assistance of counsel at trial and on direct appeal may constitute good cause. *See id.* at 887-88, 34 P.3d at 537-38. To demonstrate prejudice, the petitioner must show not just that the claimed errors "created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Riker*, 121 Nev. at 232, 112 P.3d at 1075 (quoting *United States v. Frady*, 456 U.S. 152, 170 (1982)); *see also Hogan v. Warden*, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993).

trauma to Hyde's face was not severe. Dr. Omalu testified he could not identify a single fatal blow. Dr. Omalu concluded each blow would have contributed to tearing in the veins causing greater bleeding. Dr. Omalu did note not every blow to the head would cause such injury.

The Petitioner argues Dr. Clark's testimony, coupled with witness testimony stating Hyde did not act like someone with severed arteries/veins after the altercation with Petitioner, demonstrates the Petitioner was not responsible for the fatal blow to Hyde. The Supplement argues the testimony of Dr. Clark and Dr. Omalu should not have been permitted as to the Petitioner because the Petitioner's blows were not linked to Hyde's death. The Supplement asserts Edwards should have filed a motion in limine to prevent such testimony or have hired an independent forensic pathologist as a rebuttal expert.

The State's Memo contends there is no legal basis to preclude the testimony of Dr. Clark and Dr. Omalu through a motion in limine. The State's Memo notes both Dr. Clark and Dr. Omalu testified they could not isolate which blow caused the fatal hemorrhage. Dr. Omalu further explained on cross-examination the injuries Hyde received would result in diminishing sensorium, whether immediate or gradual. Accordingly, the State's Memo argues the Petitioner's factual argument regarding whether Hyde was alert after the Petitioner hit Hyde is unpersuasive. The State's Memo further argues the Petitioner's apparent sufficiency of the evidence argument had been specifically considered on direct appeal. The State's Memo argues counsel is not per se ineffective for failing to retain his own forensic pathologist. The State's Memo contends no cases can support this argument and the Petitioner failed to articulate how an expert would have testified differently in support of the Petitioner. At the evidentiary hearing, Dr. Amy Llewellyn ("Dr. Llewellyn") stated she could not state with 100% certainty which arteries caused the hemorrhaging. January 13, 2016, Evidentiary Hearing Trans. 64:23-65:3; 67:17-21.

The Court finds the Petitioner's arguments to be unpersuasive. The Supplement has not established what authority would have permitted Edwards to file a motion in limine to prevent the experts' testimony. The Supreme Court found substantial evidence supported the verdict. Further, the testimony taken at the evidentiary hearing does not establish an opposing expert could have made a different result reasonably probable. The Court found Dr. Llewellyn's testimony to be

unpersuasive due to her inability to establish which arteries caused the hemorrhaging, thereby failing to differentiate her testimony from that of Dr. Omalu or Dr. Clark. Even if Dr. Llewellyn had been called to testify at trial the Petitioner did not establish the outcome would have been different. Accordingly, Ground One is denied.

Ground Two of the Supplement asserts Edwards was ineffective for failing to seek severance of the Petitioner's trial from Jefferson and Schnueringer's. The Supplement argues Jefferson and Schnueringer presented antagonistic defenses to the Petitioner, such that they claimed the Petitioner killed Hyde when he hit Hyde with brass knuckles. The Supplement argues the defenses were mutually exclusive, such that if the jury accepted the defenses of Jefferson and Schnueringer, the Petitioner's defense could not be believed. The State's Memo argues prejudice cannot be presumed simply due to different defenses.

The Supreme Court has held "[d]ifferent defenses are simply a part of the adversarial process when defendants are tried together," and "mutually antagonistic defenses are not prejudicial per se." *Amen v. State,* 106 Nev. 749, 756, 801 P.2d 1354, 1359 (1990), *overruled on other grounds by Grey v. State,* 124 Nev. 110, 178 P.3d 154 (2008). "Thus, antagonistic defenses are a relevant consideration but not, in themselves, sufficient grounds for concluding that joinder of defendants is prejudicial." *Marshall v. State,* 118 Nev. 642, 647-48, 56 P.3d 376, 379 (2002). The Court finds the Supplement does not establish Petitioner's counsel was objectively unreasonable by not bringing a motion to sever the defendants. The defenses were antagonistic in that Jefferson and Schnueringer tried to inculpate the Petitioner and exonerate themselves. However, such arguments did not compel rejection of the Petitioner's theory. This would be an issue counsel could addresses in closing argument. *See* discussion of Ground Three, *infra.* The Supreme Court noted "it is for the jury to determine the weight and credibility to give conflicting testimony" and ultimately concluded substantial evidence supported the verdict in this case. The February Order 4. Accordingly, Ground Two is denied.

Ground Three of the Supplement contends Edwards was ineffective when he waived closing argument. Halstead gave the State's initial closing argument. Halstead's argument was not brief. Halstead's argument lasted approximately two hours, beginning at 9:37 a.m. and concluding at 11:36

a.m..[3] The Court did not break at any time during Halstead's closing. Halstead reviewed the different theories of the case and the requirements of the numerous jury instructions. Halstead also reviewed the testimony of many of the witnesses presented during the trial. She reviewed the testimony and evidence presented and articulated their relationship to the jury instructions. She singled out each defendant and highlighted the evidence against each defendant asking the jury to find the defendants guilty of second degree murder. By this argument the State specifically eliminated one potential verdict. The Defendants were charged with open murder. The Defendants were not left with an all-or-nothing argument for second degree murder. An open murder "complaint charges murder in the first degree and all necessarily included offenses, such as manslaughter where less than all the elements of first degree murder are present." *Wrenn v. Sheriff, Clark County,* 87 Nev. 85, 87, 482 P.2s 289, 291 (1971). Edwards had the ability to present argument addressing the lesser included offenses as enumerated within the jury instructions. *See* Jury Instructions 25-28. By his own admission, Edwards' theory of the case was that the Petitioner was "guilty at best of the lesser included offense of simple battery." January 13, 2016, Evidentiary Hearing Trans. 176:16-18. Edwards failed to present this theory of defense to the jury by waiving closing argument.

All three defendants waived their closing argument. The Supplement acknowledges waiver of closing argument arguably was a reasonable strategic decision for Schnueringer and Jefferson. The Supplement argues the Petitioner had the ability to be found guilty of a lesser crime of involuntary manslaughter or battery. Accordingly, the Supplement argues Edwards had strong arguments to make regarding the conduct of the Petitioner. The Supplement contends all three trial counsel chose to waive closing argument out of anticipation of Hall's rebuttal closing argument. The Court notes there is no concrete indication in the record Hall was the person to argue the State's rebuttal or why defense counsel assumed as much. *But see* Trial Trans. Vol. 8 2045:21-23.

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[3] The Court read the jury instruction to the jury prior to Halstead's closing.

The Supplement asserts there was no legitimate strategic purpose for counsel to waive closing argument. The Supplement avers there was "plenty this Petitioner's trial counsel could have said in closing argument that would have had a reasonable probability of changing the result viz. Second Degree Murder." The Supplement 19: 6-8. The State's Memo responds by arguing the Supplement misrepresents the facts of the case and the argument for involuntary manslaughter is not as clear cut as the Supplement contends. The State's Memo argues the Petitioner does not establish the strategy was both unreasonable and prejudicial.

A strategic decision ... is a tactical decision that is "virtually unchallengeable absent extraordinary circumstances." *Howard v. State,* 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) (*citing Strickland,* 466 U.S. at 691, 104 S.Ct. at 2066–67)); *Doleman v. State*, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996). Courts have recognized the waiver of closing argument to prevent the prosecutor from returning on rebuttal as a valid strategic decision. *See People v. Mendoza,* 2009 WL 118938, *Lawhorn v. State,* 756 So.2d 971 (Ala. Crim. App. 1999); *Floyd v. State,* 571 So.2d 1221 (Ala. Crim. App. 1989). "However, in a criminal case, defense counsel's waiver of, or failure to make a closing argument to the jury may support a finding of incompetent representation." 75 Am. Jur. 2d Trial § 411. In both *Floyd* and *Lawhorn* the decision to waive closing argument was seen as a valid strategic decision because the prosecutor's initial closing was brief and the parties awaited strong persuasive argument from the state on rebuttal. Further, the defendants in these cases "ha[d] no strong arguments available to dissuade the jury from conviction ...or to persuade the jury to find petitioner guilty of a lesser offense." *Floyd,* 756 So.2d at 1227.

The Court must first address whether the Edwards' decision to waive closing argument was a strategic decision. The Court must "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct and to evaluate the conduct from counsel's perspective at the time." *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065. Closing argument for the defendant "is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt." *Herring v. New York,* 422 U.S. 853, 862, 95 S. Ct. 2550, 2555 (1975). "[P]resentation of closing argument by defense counsel based upon the evidence introduced at an adjudicatory hearing is an integral party of [the] right to effective assistance of counsel." *Shawn M.*

v. State, 105 Nev. 345, 348, 775 P.2d 700, 701 (1989). "Summation serves to sharpen and clarify the issues, a particularly useful process in light of the complex procedures." *Id.*, 775 P.2d at 701. The Court notes the decision to waive closing argument "does not *per se* constitute ineffective assistance." *State v. Lee,* 142 Ariz. 210, 217, 689 P.2d 153, 160 (1984); *see also Yarborough v. Gentry,* 540 U.S. 1, 5, 124 S. Ct. 1, 4 (2003); *Bell v. Cone,* 535 U.S. 685, 686, 122 S.Ct. 1843, 1846 (2002); *Narvaez v. Scribner,* 551 Fed. Appx. 416 (9th Cir. 2014); *Hovey v. Ayers,* 458 F.3d 892 (9th Cir. 2006); *U.S. ex rel. Taylor v. Barnett,* 109 F. Supp. 2d 911 (N.D. Ill. 2000); *Powell v. Campbell,* 2008 WL 4907204 (C.D. Cal. 2008); *but see People v. Wilson,* 911 N.E.2d 413 (2009); *Lawhorn v. Allen,* 519 F.3d 1272 (11th Cir. 2008); *Whited v. State,* 180 So.3d 69 (Ala. 2015); *People v. Pringle,* 2003 WL 22017766 (Cal. Ct. App. 2003); *Lee, supra,* 142 Ariz. at 210, 689 P.2d at 153. The decision to waive closing argument is generally a matter of trial strategy. However, where trial counsel's decision to waive closing argument is unreasonable, counsel's conduct will not escape juridical scrutiny. *Id.* at 218, 689 P.2d at 161.

The Court finds the trial record is devoid of any explanation of why Edwards, Molezzo, and Ohlson waived closing argument. *See* Trial Trans. Vol. 8 2043:20-22; 2045:3-17. Judge Elliott and counsel engaged in a bench conference prior to breaking for lunch after Halstead's closing. There was no memorialization of what was discussed. "Meaningful [] review is inextricably linked to the availability of an accurate record of the lower court proceedings regarding the issues" subject to the Court's review. *Preciado v. State,* 130 Nev. Adv. Op. 6, 318 P.3d 176, 178 (2014).[4] A defendant is "entitled to have the most accurate record of his or her district court proceedings possible." *Id.*, 318 P.3d at 178. "[I]t is crucial for a district court to memorialize all bench conferences, either contemporaneously or by allowing the attorneys to make a record afterward." *Id.*, 318 P.3d at 178.

The Court notes Judge Elliott did not conduct a canvas of Edwards regarding the decision to waive closing argument. The Petitioner was not addressed in anyway regarding the decision. Such canvas, although not required, would have clarified the motivation for waiving closing argument.

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[4] The Court notes *Preciado* was not decided until 2014, while the trial occurred in 2012. The Court merely notes the reasoning in *Preciado* demonstrates how a record of the bench conference would have been of assistance to the Court in deciding this matter.

See Moore v. Reynolds, 153 F.3d 1086, 1104-05 (10th Cir. 1998) ("The above-quoted portions of the trial transcript clearly demonstrate the waiver of closing argument was the product of a strategic decision on the part of defense counsel designed to prevent the district attorney from giving a second summation.").[5]

The California Court of Appeals has found the waiver of closing argument does not constitute ineffective assistance of counsel even when "the record [was] silent on the reasons for counsel's decision to waive closing argument." *People v. Ortiz*, B246524, 2014 WL 3565719, at *3 (Cal. Ct. App. 2014.) The California Court of Appeals looked to the overall record and determined "it is highly plausible that defense counsel concluded Ortiz would be better served if neither she nor the prosecutor made a closing argument and that, if she had proceeded to make an argument, the prosecutor would then have asserted the right to a final rebuttal." *Id.* The prosecutor in *Ortiz* waived

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[5] The trial court reviewed in *Moore* conducted the following canvas regarding the waiver of closing argument:

> THE COURT: You must understand the purpose of closing argument. The purpose of closing argument is persuasion. It is not evidence. It contemplates a liberal freedom of speech and the range of discussion, illustration, and argumentation is wide. Counsel for the State and your attorneys in this case have a right to discuss fully from their standpoints the evidence and the inferences and deductions that arise therefrom. Do you understand me so far?
> THE DEFENDANT: Yes, sir.
> THE COURT: You have an absolute right for your attorneys to argue this case; however, you may waive that right, providing it is done knowingly and intelligently. Do you understand the purpose of closing argument as I have explained it to you?
> THE DEFENDANT: Yes, sir, I do.
> THE COURT: Do you concur with the decision of your attorneys that you wish to waive closing argument?
> THE DEFENDANT: Yes, sir, I do.
> THE COURT: You have consulted with your attorneys prior to them announcing in open court that they wish to waive on your behalf closing argument; is that true?
> THE DEFENDANT: Yes, sir.
> THE COURT: You have had their advice in the matter?
> THE DEFENDANT: Yes, sir, I have been advised on it.
> ...
> MR. RAVITZ: ....Further we recommend at this particular time, based on the fact that there has been absolutely no preparation made on the closing argument on my advice to Mr. Whittaker. I specifically told Mr. Whittaker that he should not prepare a closing argument and that he should waive it and Mr. Whittaker could not get up and give a proper closing argument at this particular stage. So, I make a recommendation to you at this particular time to waive that closing argument.
> THE COURT: Do you understand what he said?
> THE DEFENDANT: Yes, sir.
> THE COURT: What is your desire?
> THE DEFENDANT: I'll go along with his advice. I'll waive closing arguments.

Moore, 153 F.3d at 1101.

closing argument. The Court of Appeals reasoned there was no indication the defendant had been prejudiced by his counsel's decision because the factual issues were simple, it was a one-day bench trial, and the testimony was uncontroverted. "There is simply no reason to believe closing argument would have led it to a different conclusion as to Ortiz's guilt." *Id.*

The California Court of Appeals came to the same conclusion in a similar case, *People v. Mendoza*, B206639, 2009 WL 118938, at *3 (Cal. Ct. App. 2009). The Court found the decision to waive closing argument was reasonable "although the record is essentially silent on the reasons for the decision to waive closing argument." *Id.* The Court determined,

> Any closing argument by Mendoza would have given the prosecutor the opportunity to highlight in rebuttal the conflicting defense theories he had not mentioned in his initial closing argument, namely, that Mendoza had asserted in his opening statement he was not the shooter, but then testified during trial he was. Defense counsel could have reasonably concluded that emphasizing the change in the defense's theory of the case would have entirely undermined Mendoza's credibility and destroyed any possibility the jury would accept his newly-raised theories of actual or imperfect self-defense. On this record, Mendoza cannot demonstrate his counsel's decision to waive closing argument was an objectively unreasonable one. (See *Bell v. Cone*, *supra*, 535 U.S. at pp. 701-702; *see also People v. Espinoza* (1979) 99 Cal.App.3d 44, 48 [counsel's decision to forego closing argument to deprive the prosecutor of an opportunity for a "fiery rebuttal" was not ineffective assistance; counsel's belief that the prosecutor had "undertried the case and the best response was to waive closing argument" was "a judgment call well within his prerogative to make"].)

Id. The Court notes the facts of this case are not as simple as either *Ortiz* or *Mendoza*. Neither *Ortiz* nor *Mendoza* concerned codefendant trials. The trial in this matter was a jury trial, lasting eight days. Dozens of exhibits and numerous witnesses were presented. Expert testimony on complex medical issues was produced. Additionally, Halstead's lengthy closing left little to be addressed in rebuttal that could be considered a "new" argument.

There is no case law directly on point in Nevada. The Court finds *Whited, supra,* to be instructive. The Supreme Court of the State of Alabama ("the Alabama Supreme Court") reversed the decision of the Criminal Court of Appeals affirming the conviction of Whited. Whited argued his trial counsel was ineffective for waiving closing argument. The Criminal Court of Appeals found the decision to waive argument to be a strategic decision which could not be disturbed. The

Alabama Supreme Court articulated a three factor analysis to determine whether the waiver of closing argument constituted ineffective assistance of counsel. The Alabama Supreme Court noted "trial counsel's decision to waive a closing argument on behalf of his or her client does not alone constitute ineffective assistance of counsel." *Id.* at 78. The Alabama Supreme Court looked to "whether trial counsel could articulate a strategic reason for waiving the argument, the strength or persuasiveness of the defendant's arguments against guilt, and the nature of the State's closing argument." *Id.* at 80.

The Alabama Supreme Court determined Whited's counsel could not adequately articulate a strategic reason for waiving closing argument. Although the lower court found counsel was trying to prevent the State from arguing, the Alabama Supreme Court found counsel did not have a legitimate strategic reason because "trial counsel was unable to recall specifics about the decision to waive closing argument." *Id.* at 81. Additionally, trial counsel had decided to waive closing argument before closing arguments began and it was not possible for counsel to fully inform a strategic decision regarding waiver of closing argument. The Alabama Supreme Court also noted there were strong arguments available to the defendant to dissuade the jury from convicting Whited. The State's initial closing argument was not brief and did not make it appear that the prosecution was saving its persuasive argument for last. The Alabama Supreme Court ultimately concluded the petitioner was deprived the effective assistance of counsel.

Here, Edwards was able to affirmatively answer he made the decision to waive argument after the State's initial argument by Halstead. January 13, 2016, Evidentiary Hearing Trans. 230:14-19, 231:7-10. The Court finds Edwards did articulate a reason for waiving closing argument: to prevent Hall from conducting rebuttal. As noted, *supra,* there is no indication why Edwards was sure Hall would argue the rebuttal closing. The Court acknowledges Hall is a very experienced and successful litigator. Hall could not, however, have made an argument with much more vigor than Halstead's thorough analysis. "[I]f no reason is or can be given for a tactic, the label 'tactic' will not prevent it from being used as evidence of ineffective assistance of counsel." *People v. Wilson,* 911 N.E.2d 413, 424 (Ill. 2009) (*citing Miller v. Anderson,* 255 F.3d 455, 458 (7th Cir.2001). "It would

be a rare case in which choosing not to make a closing argument in a jury trial would be sound trial strategy." *Wilson*, 911 N.E.2d at 424. Edwards testified at the evidentiary hearing he was not convinced it was a sound decision, or one he would do again.

The next consideration is the arguments available to the Petitioner to dissuade the jury from convicting the Petitioner. "In order to demonstrate prejudice in these circumstances, a habeas petitioner must make some type of showing of what defense counsel might have said at closing that would have had a reasonable probability of changing the result." *Moore*, 153 F.3d at 1105 (*citing Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068). The court in *Moore* found the petitioner "offer[ed] no hypothetical arguments that [could] satisfy" the second prong of *Strickland*. In order to fulfill the second prong of the ineffective assistance of counsel test, the defendant must establish that "the probability that counsel's errors changed the outcome of the case sufficient to undermine confidence in the outcome." *Wilson*, 911 N.E.2d at 422-23. *Moore* determined the evidence presented "overwhelmingly point[ed] to Moore's guilt" and concluded in light of such evidence "there [was] no reasonable probability that, had Moore's defense counsel given a closing argument, the jury would have chosen life over death." *Moore*, 153 F.3d at 1105. Edwards admitted during the evidentiary hearing he had a closing argument prepared. January 13, 2016, Evidentiary Hearing Trans. 243:15.

Contrary to *Moore*, the Supplement has raised various arguments which Edwards could have raised in closing argument which may have changed the outcome. The Supplement contends Edwards should have presented an argument regarding involuntary manslaughter or misdemeanor battery. Edwards admitted during the evidentiary hearing he could have made these arguments. January 13, 2016, Evidentiary Hearing Trans. 200:13-21. The Supplement emphasizes Edwards could have argued the Petitioner's blows to Hyde would not "normally or naturally tend to take the life of another" and the Petitioner was not associated with the acts of Schnueringer and Jefferson. The Supplement 18:4-7. The Supplement points out the proximate causation issue presented by the State's experts: they could not identify the fatal blow or who delivered it. Edwards could have emphasized for the jury that after the Petitioner's altercation with Hyde, Hyde was able to walk away without assistance. Edwards could have discussed all of the available charges under the

charged theory of open murder. Edwards could have pointed out the conflicts or discrepancies of witness testimony in order to persuade the jury to find the Petitioner guilty of a lesser offense than second degree murder as urged by the State. There was an abundance of issues for Edwards to discuss had he elected to do a closing argument.

The final consideration by the *Whited* court was the nature of the state's closing argument. The prosecutor in *Whited* made an initial closing argument that could "neither be characterized as 'very brief', nor does 'it appear[] that the prosecution was saving its persuasive argument for last." *Whited,* 180 So.2d at 85. *Floyd* and *Lawhorn* are distinguishable on this matter as initial arguments in those cases were very brief such that by waiving argument the defense prevented the state from making any persuasive argument. Halstead's closing argument was far from brief. She argued at length and reviewed the majority of witness testimony presented in the State's case.

The Court finds Edwards' decision to waive closing argument, although possibly a strategic decision, was unreasonable. There were arguments available to the Petitioner from which the jury could possibly conclude the Petitioner was guilty of the lesser charged offenses as offered in the jury instructions. The Petitioner's last clear chance to persuade the jury against guilt for murder was at closing argument. Edwards had the opportunity to point out the existence of reasonable doubt as to the proximate cause required for second-degree murder. Edwards could have pointed out the inconsistences in witness testimony developed on direct and cross-examination. Edwards could have addressed the complexity of jury instructions, such as Judge Elliott indicating counsel would do.[6] Trial Trans. Vol 8 1970:17-22. Further, the Petitioner did suggest a manner in which counsel could have argued in closing that could have affected a reasonable probability of a different outcome for the Petitioner at trial. The choice to prevent Hall from speaking did not prevent the State from

[6] The Court notes the speed at which the jury determined the guilt of the defendants was brief in light of the complexity of the case and the evidence presented. Judge Elliott indicated the jury could anticipate argument from the defendants and further explanation of jury instructions from the defendants. Such anticipated argument and review was never delivered as a result of the decision to waive closing argument by all three defendants. A review of the totality of the case presented requires this court to consider whether the lack of closing by counsel had a sufficient impact in the trial to "undermine confidence in the outcome." Such an error is grounds for overturning a conviction. *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068.

inflaming the minds of the jury as the initial closing argument by the State was not brief and argued the facts of the crime in detail. There would be no surprise as to what persuasive argument the State would make on rebuttal. Accordingly, Ground Three is granted.

Ground Four of the Supplement argues Edwards was ineffective for failing to proffer a self-defense instruction. The Supplement contends the Petitioner testified to a set of facts consistent with self-defense. The Petitioner testified when Schnueringer went after Pardick, other people went to throw a punch near Graves. Three to four people rushed into the fight including Hyde. The Petitioner testified he told Hyde and the others to stay back. The Petitioner stated Hyde then came toward Petitioner two times with his fists balled up. The Petitioner then punched Hyde with two jabs to Hyde's left cheek. The Supplement argues the Petitioner's testimony warranted a self-defense instruction because it indicated the Petitioner was not the initial aggressor and used reasonably necessary force. The State's Memo asserts the Petitioner cannot demonstrate a reasonable probability of a different outcome had Edwards requested a self-defense instruction. The State notes the Petitioner's testimony was contradicted by various witnesses and his own admissions. The Petitioner admitted he never told the police Hyde had threatened him in any way during cross examination.

The Court finds the Supplement does not establish a reasonable probability of a different outcome should Edwards have proffered a self-defense instruction. The Court finds the facts of *Allen v. State,* 97 Nev. 394, 632 P.2d 1153 (1981), distinguishable from this case. In *Allen,* the Supreme Court noted *several* witnesses testified a fight occurred in one manner, and *several* other witnesses testified differently. The Supreme Court stated pertinent portions of the testimony indicated the evidence "was in conflict as to who the actual aggressor was and what the victim actually did to the defendant." *Id.* at 397, 632 P.2d at 1155. However, the Supreme Court specifically stated "[t]he testimony of the defendant is not the determining factor as to what legal defenses may be shown by the evidence; such a rule would improperly remove from the jury the question of the defendant's credibility." *Id.,* at 398, 632 P.2d at 1155. The Supplement only relies on the Petitioner's testimony. The Supplement 22:22-23. Accordingly, Petitioner's counsel did not fall below the objective standard of reasonableness and Ground Four is denied.

Ground Five of the supplement contends Halstead and Ohlson introduced evidence or made testimonial statements to which Edwards should have objected. Ohlson suggested Straight Edge had connections to Neo-Nazis on cross-examination of the Petitioner. The Supplement argues the statement was improper as it suggested the Petitioner was affiliated with a racist organization. The Court finds this contention to be without merit. The jury was instructed the statements and questions of attorneys are not evidence. "A jury is presumed to follow its instructions." *Leaonard v. State,* 117 Nev. 53, 66, 17 P.3d 397, 405 (2001) (*citing Weeks v. Angelone,* 528 U.S. 225, 120 S.Ct. 727, 733, 145 L.Ed.2d 727 (2000)).

The Supplement additionally argues Ohlson's comment to Dr. Clark after her testimony, "You remain brilliant as usual," was improper vouching to which Edwards should have objected. The State's Memo argues Ohlson was not vouching for Dr. Clark as the comment followed after Ohslon impeached her with the grand jury transcript. Trial Trans. Vol. 2, 475-89. The Court agrees. Ohlson's comment, although unnecessary, does not rise to the level of improper vouching for the witness' credibility. Ohlson's comments did not "provide personal assurances of [Dr. Clark's] veracity." *Browning v. State*, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004). Ohlson's comments would be more accurately characterized as rhetorical flourish. It clearly does not militate in favor of error.

The Supplement contends the questions posited by Halstead are further cause to find ineffective assistance of counsel. The Supplement contends Edwards should have objected to Halstead's examination of Fuller, whereby Halstead elicited testimony the three defendants did not attend Hyde's funeral. The Supplement argues such evidence was irrelevant and prejudicial as it led to an inference the Petitioner did not attend out of guilt. The Supplement notes this "error by itself or deficiency of counsel by itself would not be enough for the Court to find prejudice." The Supplement 30:5-7. The Court agrees. The Supplement does not establish the result of trial would have been different in any way had Edwards objected to the above testimony. Accordingly, Ground Five is denied.

Ground Six of the supplement asserts Edwards was ineffective in failing to seek a limiting instruction regarding references to Twisted Minds. The Supplement argues the Petitioner needed the limiting instruction as he was the only defendant who was not a member of Twisted Minds. The

Supplement relies on *Meeks v. State*, 112 Nev. 1288, 930 P.2d 1104 (1996), to argue the failure to give a limiting instruction was prejudicial. *Meeks* dealt with the failure to provide jurors with a limiting instruction regarding prior act evidence. The error was compounded when there was no *Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985), hearing regarding the prior act evidence. Unlike *Meeks*, the Court conducted a hearing on the Petitioner's motion to exclude the Twisted Minds evidence. Further, the Supreme Court considered the argument the Court erred in admitting gang-affiliation evidence on direct appeal. The State did not seek to use the evidence as a prior bad act, but as res gestae. The State did not offer evidence to prove the Petitioner was a member of Twisted Minds. The Supplement does not establish the result of trial would have been different in any way had a limiting instruction been given. Because the Supreme Court concluded the evidence was admissible under res gestae the Petitioner cannot establish he was prejudiced by such evidence and counsel's failure to seek a limiting instruction. Ground Six is denied.

The Supplement alleges in Ground Seven that Edwards was ineffective for failing to investigate or call certain witnesses. The Supplement contends the testimony of Joel Cohen, Zach Clough, Koralynn Birmingham, Steffen Laudenslager, Emma Johnson, and Taylor Cornelison would have corroborated Petitioner's self-defense theory of defense. The State's Memo contends the Petitioner's own testimony did not support a self-defense theory. The State's Memo argues such testimony would have been cumulative. *See* NRS 48.035(2). Further, Edwards admitted during the evidentiary hearing he was aware of testimony of the above-listed witnesses and did not request their testimony as it would have been duplicative to the evidence presented. January 13, 2016, Evidentiary Hearing Trans. 213:13-20.

"Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91, 104 S.Ct. at 2066. "A lawyer who fails adequately to investigate, and to introduce into evidence, records that demonstrate his client's factual innocence, or that raise sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance." *Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999). The Court finds the Supplement does not articulate how Edwards was objectively unreasonable in failing to call these additional

witnesses, or that these witnesses would have a reasonable probability of a different outcome had they been called. The Petitioner has not established new information would have been established through reasonably diligent investigation such that a self-defense theory would have been supported. Accordingly, Ground Seven is denied.

IT IS HEREBY ORDERED the Petition and Grounds 1,2,4,5,6,7, of the Supplement are DENIED.[7] IT IS HEREBY FURTHER ORDERED Ground 3 of the Supplement is GRANTED.

DATED this 8 day of April, 2016.

ELLIOTT A. SATTLER
District Judge

[7] The Court notes Ground 1 and Ground 2 of the Petition are subsumed by the Supplement and addressed in further detail.

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this ____ day of April, 2016, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

NONE

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe; that on the 8 day of April, 2016, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

JENNIFER NOBLE, ESQ.

RICHARD CORNELL, ESQ,

Sheila Mansfield
Administrative Assistant

FILED
Electronically
01-28-2013:04:57:45 PM
Joey Orduna Hastings
Clerk of the Court
Transaction # 3493932

CODE 1850

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

STATE OF NEVADA,

Plaintiff,

vs.

Case No. CR12-0326B

ZACH KELSEY,

Dept. No. 10

Defendant.

/

JUDGMENT

The Defendant, having been fourd plea of Guilty by a jury, and no sufficient cause being shown by Defendant as to why judgment should not be pronounced against him, the Court rendered judgment as follows:

That Zach Kelsey is guilty of the crime of Murder In the Second Degree, a violation of NRS 200.010, NRS 200.030 and NRS 195.020, a felony, as charged in the Indictment, and that he be punished by imprisonment in the Nevada Department of Corrections for a minimum term of ten (10) years to a maximum term of twenty-five (25) years, with credit for three hundred thirty seven (337) days time served. It is further ordered that the Defendant pay the statutory Twenty-five Dollar ($25.00) administrative assessment fee, that he submit to a DNA analysis test for purpose of determining genetic markers and pay a testing fee of One Hundred Fifty Dollars ($150.00), if not previously ordered and reimburse the County of Washoe the sum One Thousand Dollars ($1,000.00) for legal services rendered.

Dated this 28 day of January, 2013.

(Nunc pro tunc to January 24, 2013)

STEVEN P. ELLIOTT
DISTRICT JUDGE

EXHIBIT 115

EXHIBIT 115

CODE: 4185
LORI URMSTON, CCR #51
Hoogs Reporting Group
435 Marsh Avenue
Reno, Nevada 89509
(775) 327-4460
Court Reporter

SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

HONORABLE ELLIOTT A. SATTLER, DISTRICT JUDGE

ZACHARY NICHOLAS KELSEY,

Petitioner,

vs.

STATE OF NEVADA,

Respondent.
_____/

Case No. CR12-0326B

Dept. No. 10

TRANSCRIPT OF PROCEEDINGS - DAY 1

POST-CONVICTION EVIDENTIARY HEARING

JANUARY 13, 2016; WEDNESDAY

RENO, NEVADA

Reported by: LORI URMSTON, CCR #51

APPEARANCES:

FOR THE PETITIONER: RICHARD F. CORNELL, ESQ.
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2nd Floor
Reno, Nevada 89501

FOR THE RESPONDENT: JENNIFER P. NOBLE
Deputy District Attorney
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I N D E X

RENO, NEVADA; WEDNESDAY, JANUARY 13, 2015; 9:25 A.M.

--o0o--

THE COURT: This is CR12-0236B, Zachary Kelsey, petitioner, versus the State of Nevada as the respondent. We're here on a post-conviction petition for writ of habeas corpus, the defendant having been found guilty by jury of second degree murder in 2012.

As a preliminary matter, I think I need to put something on the record. It really has no bearing on the case, but I don't want there to be some issue down the road.

When I was a prosecutor in the Washoe County District Attorney's Office, I was the prosecutor in CR06-2089 which was the State of Nevada versus Schnueringer, but it was Karl Schnueringer, Sr., who I prosecuted. Mr. Schneuringer killed his wife during an argument and eventually pled guilty to voluntary manslaughter in that case. On February 8th of 2007 Judge Berry sentenced Mr. Schneuringer, Sr., to four to ten years in the Nevada Department of Corrections. I believe he's still there, but I'm not one hundred percent positive about that.

The reason I raise that issue is this: One of the co-defendants in this case was Robert Schneuringer, as

I recall. And Mr. Schneuringer, Robert Schneuringer, is the son of Karl Schneuringer, Sr. As we know, there were twins, Karl, Jr., and Robert. I have never met to my knowledge the defendant in this case.

I went back and looked at the transcript of the sentencing for CR06-2089. In that case the victim advocate read a statement from Karl, Jr., as a victim impact statement. It may be that I met Karl, Jr. I think I've spoken to him. But, again, it has no bearing on the outcome of this case or my involvement in the case, but I think the rules of judicial conduct require me to disclose that fact.

I don't think it will affect my ability to preside over this case at all, because, as I said, I had no contact at all with the co-defendant of Mr. Kelsey. I had contact, I believe, with his twin brother, and that contact was brief. I think he was about 14 years old at the time that his mother was murdered by his father. But I didn't want somebody down the road to look at this and say, "Oh, wait. Judge Sattler somehow knew something about this family or about this case."

I know that Mr. Schneuringer, Jr., is the subject of a post-conviction petition for writ of habeas corpus as well. The Nevada Supreme Court has affirmed all

three co-defendants' convictions in this case, so Robert Schneuringer has got his case pending.

And, Ms. Clerk, I know -- excuse me -- Ms. Reporter, I know I've said this repeatedly, but it's S-c-h-n-u-e-r-i-n-g-e-r is how you spell the name Schneuringer.

So I just want to put that on the record. I don't know if there's anything beyond that that you wish me to address.

Ms. Noble.

MS. NOBLE: Not from the State, Your Honor.

THE COURT: Mr. Cornell.

MR. CORNELL: No. I'm very confident that you can render a fair, just and impartial decision in this case, that none of that has any bearing on the issues in this case whatsoever.

THE COURT: I will make a similar disclosure when Robert Schneuringer's case comes before me, assuming that it does, on a petition for writ of habeas corpus. But just because these three people were co-defendants, I thought it was important to let you know that as well, Mr. Cornell.

MR. CORNELL: Thank you.

THE COURT: But, again, as I sit here right now, I

don't think I ever spoke to Robert. I believe I may have spoken to Karl, Jr., but I only spoke to him briefly. I think more of my interactions were with Mrs. Schneuringer's family members as opposed to her children.

But when I did see this case -- when I was in the D.A.'s Office I heard about this case -- given the uniqueness of the name, it did pique my curiosity, so I was wondering what the relationship was. I had no involvement in the prosecution of this action other than that, but I just assumed that it was somehow part of the family.

MR. CORNELL: I suppose I should ask, did you have any conversations with Karl Hall or Patricia Halstead about the facts of the case?

THE COURT: I did not. I was not involved in the prosecution of this case in any way, shape or form. I never consulted with Mr. Hall who was a team chief at the time. I was not a team chief. I never was. I was a line deputy. So I never spoke to Ms. Halstead who was a peer, nor did I speak to Mr. Hall who was a superior of mine in the D.A.'s Office about this case in any way, shape or form.

MR. CORNELL: Okay. I have no motion to make.

THE COURT: Okay. Thank you.

So let's go forward. I know we started late today because there were some issues regarding Mr. Kelsey being transported and some confusion. I know that there was some suggestion of apologies. No apologies are necessary from anybody. Mr. Kelsey is here. We're ready to go. But it is my understanding there's some issue that you want to take up before we start talking about the writ itself.

MR. CORNELL: Yes, Your Honor. Two. I'll start with the minor one first. I have marked as Exhibit L Mr. Edward's ex parte motions for allowing payment of attorney's fees and costs, first, second and fifth interim billings. I inherited Mr. Edwards' trial file, and I looked and I could not find a fourth and third interim billing. And because those are confidential when they're filed, I can't access them off of eFlex, and neither can Ms. Noble for that matter. Your clerk has graciously printed them out.

I would like to augment Exhibit L with the third and fourth interims. And, in fact, there are some questions I'm going to have -- would otherwise have for Mr. Edwards based on those.

THE COURT: By making -- what are the three that

you have?

MR. CORNELL: I have one, two and five.

THE COURT: One, two and five. By making one, two and five exhibits in this case, you are also waiving the confidentiality and the fact that those documents are sealed.

MR. CORNELL: Certainly.

THE COURT: Do you agree to that, Mr. Cornell?

MR. CORNELL: Yes, absolutely.

THE COURT: Okay. So those documents are now no longer sealed and the Court lifts the seal on those documents.

Regarding the two documents that you were not able to access, you would also be waiving the confidentiality and asking me to lift the seal on those and provide them to the State and at least mark them as exhibits. Do you want to do that?

MR. CORNELL: Absolutely. What I would like to do is have them just marked as part and parcel of Exhibit L and just put them all as one lump, if I may.

THE COURT: The Court would also note that it's not admitting the exhibits at this point. There still needs to be a reason to admit them, but the fact that they're being marked as an exhibit waives the fact that

they are sealed.

So I know you're not stipulating to the admissibility of the exhibits, Ms. Noble, but do you have any objection to now receiving those other two documents --

MS. NOBLE: I do not.

THE COURT: -- and making them part of Exhibit L? And then we'll discuss whether or not they're admissible at some other time.

MS. NOBLE: No, Your Honor.

THE COURT: So the Court lifts the seal on all of the documents that have been referenced, and those two additional documents will be made part of Exhibit L.

MR. CORNELL: Thank you, Your Honor.

THE COURT: And what was the other issue?

MR. CORNELL: The other issue is a little more lengthy. That's why I thought I would get the simpler one out of the way first.

The other issue has to do with the State's proposed calling of Dr. Ellen Clark. As you know -- I know you're very thorough and you've read the writ petition -- the first ground is in failing to object to Dr. Clark and Dr. Omalu's testimony regarding Mr. Kelsey.

THE COURT: It's O-ma-lu.

MR. CORNELL: But also --

THE COURT: Hold on a second. Mr. Cornell, it's Dr. O-ma-lu. It's O-m-a-l-u.

MR. CORNELL: Is it O-ma-lu or Om-a-lu?

THE COURT: I think it's -- I've spoken to Dr. Omalu on other cases. I always thought it was that O-ma-lu. I haven't seen the movie.

MR. CORNELL: I was going to say, if I had seen the movie I would know.

THE COURT: But I always referred to him as Dr. O-ma-lu.

MR. CORNELL: Okay. Dr. O-mal-u.

But the second sub issue of ground 1 is a failing to retain an own defense expert in an attempt to link the blows that happened in this case to the other defendants exclusively. Now, Dr. Clark has already testified. Her testimony is part of the entire record. Once we're done with this hearing we'll have an expanded record. The defense did not call a forensic pathology. Mr. Edwards did not, neither did Mr. Ohlson or Mr. Molezzo.

My position at this point is that for purposes of the expanded record Dr. Clark really can't add

anything. Her testimony at this point is irrelevant because she's already testified. However, it has the potential to be prejudicial. If the position of the State is going to be that any reasonable jury would credit Dr. Clark and/or Dr. Omalu and discredit my expert, that's a jury call. That's not a habeas judge call. The habeas judge call would be the converse: Could a reasonable jury credit the defense expert? And if so, what would the result be?

I don't think it would be proper to bring Dr. Clark back to try to persuade you that no reasonable jury would ever believe the defense expert and, therefore, deny ground 1 on that ground. I think that would be proper.

THE COURT: Well, Mr. Cornell, I doubt that Ms. Noble will be calling Dr. Clark to offer an opinion about what a jury would conclude. So if your concern is that Dr. Clark would come in and testify that no reasonable jury would have found any proposition, I would agree that she has no ability to make that type of -- or to offer that type of testimony. And so -- and I don't know Ms. Noble would be calling her for that purpose.

I don't know why Dr. Clark is here. I have no idea

what her testimony will or will not be. But as you know, when judges make decisions and listen to testimony, we have to disregard testimony all the time and not use it when we make our decisions if at some point I find it to be irrelevant.

So I think that it's premature to object to Dr. Clark's testimony before I know what it is. If at some point I hear it and I find that it is either irrelevant or that she doesn't have the training and experience to offer her opinion on a certain issue, then I can always just disregard that testimony and not use it in forming my decision.

MR. CORNELL: But my point at this point is it would be cumulative at best. And I don't know -- I guess, like you said, we've got to see what she has to say, but I'm having a difficult time understanding what she's going to add to what she's already testified to.

THE COURT: Well, in a vacuum I don't know either, so I'll just wait and hear what Dr. Clark has to say. And you can certainly make a contemporaneous objection if you think that her testimony violates any rule of evidence, including admissibility, hearsay, relevance, all of those good things we talk about all the time.

Ms. Noble.

MR. CORNELL: It would be relevant to the subject matter of what was the proximate cause of the death of Master Hyde, certainly, but like I say, understanding my position that she's already testified to that, what else is there? I mean, we'll go forward.

THE COURT: I don't know. I guess we'll cross that bridge when we come to it.

Ms. Noble, anything to add?

MS. NOBLE: Yes, Your Honor. The question with respect to the assertion that counsel was ineffective for failure to call an independent forensic pathology, of course, we apply the Strickland standard. Was it an unreasonable decision and did it cause actual prejudice? At trial had Dr. Llewellyn been called, the State certainly would have been able to --

THE COURT: Dr. what? What was his name?

MS. NOBLE: Dr. Llewellyn is the expert that Mr. Cornell has here today.

THE COURT: Okay. Is Dr. Llewellyn the person that -- excuse me -- the doctor who Mr. Ohlson consulted with?

MR. CORNELL: No.

THE COURT: Okay.

MR. CORNELL: That's Dr. Katz. You'll find that

out when we read in his deposition.

THE COURT: Gotcha.

Go ahead, Ms. Noble.

MS. NOBLE: Thank you, Your Honor. The question -- certainly at trial if the defense presents an expert, it's not that the State is not permitted to have its experts respond to that testimony. That's not how that works at trial. And certainly in this case we know from -- or at least I assume from Dr. Llewellyn's report that her testimony is going to be different from that of Dr. Clark and Dr. Omalu.

At a post-conviction hearing it's accepted that Your Honor is permitted to hear expert testimony if it would assist the trier of fact. And that's under Brown versus State which is at 110 846, a Nevada case, of course.

If we have an expert testifying that the other two experts are wrong, it would seem almost silly to not allow Your Honor to hear the State's expert's reaction to that testimony. So my intent here is not to have Dr. Clark go through all of her trial testimony but instead to respond to what Dr. Llewellyn has to say.

THE COURT: And so Dr. Clark is here today. I saw her. I can see her seated outside of the courtroom.

She's here. Is it anticipated that Dr. Clark will listen to the testimony of Dr. Llewellyn and then at some point during the State's presentation of evidence offer her opinion at that point --

MS. NOBLE: Well --

THE COURT: -- or is it anticipated that you're going to call her out of order?

MR. CORNELL: Our agreement is if you're going to allow her to testify, we'll take her out of order so that she doesn't have any more wait-around time than need be.

THE COURT: Well, the good thing about Dr. Clark's patients is that they can wait.

MR. CORNELL: Well, that's true.

THE COURT: It's kind of an interesting part of her job as the coroner. But I don't want to make her wait, because I understand that she has important tasks to deal with.

The Court will hear the testimony of Dr. Clark.

Mr. Cornell, if you feel that an evidentiary objection needs to be made to some specific portion of her testimony, then you're free to make the objection and the Court will rule on the objection contemporaneous. But just in a vacuum not knowing

exactly what Dr. Clark is going to testify about, I think it would be inappropriate to exclude her testimony. And so she'll be allowed to testify subject to reconsideration at some later time.

The Court has received and reviewed the September 15th, 2014 file-stamped Petition for Writ of Habeas Corpus Post Conviction filed in pro per by the defendant, Mr. Kelsey. The Court has also received and reviewed the April 9th, 2015 file-stamped Supplemental Petition for Writ of Habeas Corpus Post Conviction filed by Mr. Cornell on the defendant's behalf.

Further, the Court has received and reviewed the June 2nd, 2015 file-stamped Answer to the Petition and Supplemental Petition for Writ of Habeas Corpus Post Conviction filed by Mr. McCarthy from the D.A.'s Office. The Court has also received and reviewed the January 6th, 2015 -- strike that -- 2016 file-stamped State's Bench Memorandum Regarding the Evidentiary Hearing filed by Ms. Noble.

MR. CORNELL: I've not seen that document.

THE COURT: Well, it shows that it was served upon you on January 6th.

MR. CORNELL: All I can tell you is I've not seen it.

MS. NOBLE: It's also the State's understanding that Mr. Cornell is an eFiler. It was filed in the system.

MR. CORNELL: We just entered right about that time. Oh, boy.

THE COURT: The Court would note that it was a week ago.

Mr. Cornell, I'll direct my court clerk to please print you a copy of it at the break. So you'll have a copy of it at the break and you'll be able to review it.

MR. CORNELL: Thank you.

THE COURT: And you'll be able to review it over the lunch recess.

The Court would also note that it has received and reviewed the following three orders of affirmance from the Nevada Supreme Court, specifically Order of Affirmance No. 62570 entitled Zachary Nicholas Kelsey versus the State of Nevada, Order of Affirmance No. 62509 entitled Robert Schneuringer versus the State of Nevada and Order of Affirmance No. 62508 entitled Andrue, A-n-d-r-u-e, Jefferson versus the State of Nevada.

All three orders of affirmance were entered on

February 27th of 2014. And the Court would note that the panel who entered each order was comprised of Justices Pickering, Parraguirre and Saitta. And there are many similarities in the orders.

So I'm not saying that to suggest that there's anything inappropriate about that. I just want the parties to know that I did go and review all of the orders. The issues are very similar in all three cases. I wasn't sure, because I don't do appellate work, whether or not it was one hearing with three defendants that generated three separate orders or if each of the separate defendants had their own hearing with their own --

MR. CORNELL: I think what happened is you had three separate appeals, because the Nevada Supreme Court tracks the case number by the notice of appeal. They were not consolidated. There was no oral argument. I think all three were decided in chambers. I think that's what happened.

MS. NOBLE: That's correct, Your Honor. I litigated all three of those, and they were decided without oral argument and were separate.

THE COURT: Gotcha. The Supreme Court did enter those orders of affirmance and it did appear that the

issues were very similar.

The issues regarding the petition for writ of habeas corpus filed in pro per were an ineffective assistance of counsel claim in Count I and a due process violation in Count II. In the supplement filed by Mr. Cornell, the issues are all ineffective assistance of counsel.

As Mr. Cornell noted in his argument regarding Dr. Clark's testimony, ground No. 1 deals with the testimony of the experts, specifically Dr. Clark and Dr. Omalu, the fact that Mr. Edwards who was trial counsel did not retain an expert, that he did not file a motion in limine and some other issues regarding the testimony of the experts, how they were cross-examined and the fact that he was -- "he," Mr. Edwards, was ineffective during the cross-examination. So those are all under ground No. 1.

Ground No. 2 is the ineffective assistance of counsel for failing to seek severance of Mr. Kelsey from his co-defendants.

Ineffective assistance of counsel ground No. 3 was regarding the waiver of the closing argument.

Ineffective assistance of counsel ground No. 4 was regarding the failure to offer a self-defense

instruction after arguably evidence was presented regarding Mr. Kelsey acting in self-defense.

Ground No. 5 was the failure to object to Mr. Ohlson and Ms. Halstead's arguments or questions that were made, some of them directed to Dr. Clark by Mr. Ohlson, others about the Straight Edge being Nazis and things along those lines that Mr. Ohlson made, and then finally, Ms. Halstead asking witnesses whether or not the defendant or his co-defendants went to the victim's funeral.

Ground 6 was the ineffective assistance of counsel for not seeking a limiting instruction after an issue had been raised and at least there was some suggestion during the trial that a limiting instruction would be considered but was not never actually offered.

And then ground No. 7 was the ineffective assistance of counsel for failing to call certain people as witnesses and to conduct a thorough examination or investigation of the case.

And so I am familiar with everything, as Mr. Cornell said. And as he knows, I read all of the documents myself, so I've read everything. If counsel ever needs to refer to some portion of the transcript of the proceedings, I have that here on my bench. So

if you just tell me what you want to look at and give me a second, I'll be able to pull it up. And with that, we can go forward with the hearing.

Mr. Cornell.

MR. CORNELL: Yes. Thank you. Our first witness then will be Dr. Llewellyn.

THE COURT: Hold on a second. Before we do that, if there's an agreement to have Dr. Clark testify out of order --

MR. CORNELL: Yeah, she can watch.

THE COURT: She can come in and watch Dr. Llewellyn and then testify after that?

MR. CORNELL: Right.

MS. NOBLE: Yes, Your Honor.

MR. CORNELL: I mean, my understanding is the rule of exclusion doesn't apply to experts.

THE COURT: That's my understanding as well.

So, Deputy, if you could let Dr. Clark know that she's free to come in the courtroom and listen to the testimony of Dr. Llewellyn.

And where is Dr. Llewellyn?

MR. CORNELL: She's here, right around the corner.

MS. NOBLE: Your Honor, otherwise the State would invoke the rule of exclusion. There are several

persons in the courtroom today. I'm not sure who is testifying and who is not.

MR. CORNELL: The three witnesses I have under subpoena are outside. None of them are here.

THE COURT: Ladies and gentlemen, the rule of exclusion has been invoked. What that means is that if it is anticipated that any of you will testify as an expert in these proceedings -- as an expert -- as a witness in these proceedings, you need to leave the courtroom.

Mr. Cornell has informed the Court that he doesn't believe that he has any potential witnesses in the courtroom today.

THE CLERK: Raise your right hand.

(The oath was administered to the witness.)

THE WITNESS: I do.

AMY LLEWELLYN, M.D.,

having been called as a witness herein, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CORNELL:

Q Please state your name for the record and spell your last name.

A Amy Llewellyn, L-l-e-w-e-l-l-y-n.

Q And your business address, ma'am?

A Well, I work at Renown Hospital.

Q Okay. And your occupation or profession?

A Pathologist.

Q Now, I'm going to show you an original Exhibit J. Can you identify that document?

A This is my resume or CV.

Q Okay. And when was this document prepared, do you know?

A I checked it last -- a couple weeks ago.

Q Okay. So it is current as we speak?

A Yeah. I reviewed it 1/4/2015.

Q And does it list all of your professional experience, your medical licenses, your speciality board statuses and your teaching and research, your honors and awards, your membership in professional societies and your publications?

A Yes.

MR. CORNELL: Move to admit Exhibit J.

THE COURT: Any objection?

MS. NOBLE: I'm not really sure why it's necessary, but I have no objection.

THE COURT: Exhibit J will be admitted.

(Exhibit J was admitted.)

BY MR. CORNELL:

Q And have you ever testified in a court of law or in a deposition as a forensic pathologist on the cause of death in a multiple blow type of case?

A Yes.

Q And have you been accepted as an expert in those cases?

A Yes.

Q And do you have any idea how many times you have rendered expert opinion testimony regarding cause of death?

A Roughly in court 30.

THE COURT: Is that cause of death regarding multiple blow injuries or just cause of death, period?

MR. CORNELL: We'll break it down.

BY MR. CORNELL:

Q Cause of death, period, how many times, do you know?

A About over 30.

Q And cause of death in cases of multiple blunt force trauma impacts?

A Approximately five.

MR. CORNELL: Your Honor, I'm not sure how -- because I've seen different judges do this different

ways. I would offer her as an expert at this point if counsel wants to voir dire, or some judges say just go forward. What's your pleasure?

THE COURT: Any objection to Dr. Llewellyn testifying as an expert?

MS. NOBLE: I just want to clarify as an expert in pathology? forensic pathology? neuropathology? What is she being offered as?

MR. CORNELL: Forensic pathology.

THE COURT: Any objection?

VOIR DIRE EXAMINATION

BY MS. NOBLE:

Q Of those five blunt force cases did you testify in the capacity of a forensic pathologist?

A Yes.

Q What percentage of your practice involves forensic pathology?

A At this point probably less than two percent.

Q And what courts were you qualified as an expert in?

A I've worked in Indiana, I've worked in Colorado, Wyoming and Nevada and testified in those states.

Q Have you testified previously in the Second

Judicial District Court as an expert?

A Yes.

Q When was that?

A I don't recall. Probably several years ago.

MS. NOBLE: I have no objection, Your Honor.

THE COURT: Thank you, Ms. Noble.

Go ahead, Mr. Cornell.

DIRECT EXAMINATION (Resumed)

BY MR. CORNELL:

Q Let me have you turn to Exhibit K. Do you recognize that document?

A Yes.

Q And what is it?

A It's -- let's see. This is a letter to you, Mr. Cornell, with my opinions from this case.

Q All right. When you are retained or appointed to render an expert opinion, do you write an opinion letter in the ordinary course of your business?

A Occasionally, yes.

Q Okay. You have done that?

A Yes.

Q Prior to this one?

A Yes.

Q And does this letter contain your opinions

regarding the cause of death of Master Hyde --

A Yes.

Q -- on or about February 5, 2012?

A Yes.

Q And does this appear to be a true and correct copy of the original of your letter?

A Yes.

MR. CORNELL: Move for admission of Exhibit K.

MS. NOBLE: Objection, Your Honor. It's hearsay.

THE COURT: Sustained.

BY MR. CORNELL:

Q All right. Are you able to testify today without referencing Exhibit K?

A Yes.

Q Okay. Let's begin. Before rendering an expert opinion in this case, what documents did you review?

A I reviewed the autopsy report; I reviewed the autopsy photos; I reviewed witness testimonies.

Q Let me ask you this: In terms of witness testimony at the trial of Mr. Kelsey and the other two co-defendants, whose testimony did you review?

A Dr. Clark, Dr. Omalu.

Q We've determined that his last name is actually pronounced O-ma-lu. I've been pronouncing it wrong all

this time.

A So it's your fault.

THE COURT: Maybe you're right.

MR. CORNELL: I don't know. One of us is, I guess.

BY MR. CORNELL:

Q Anyhow, did you also review Dr. Omalu's neuropathology report?

A Yes. That's part of the autopsy record.

Q Did you reference or review any of the witness statements that were made to the police prior to trial?

A Yes.

Q All right. What witness statements did you review?

A I have them listed here in Exhibit K. Tyler DePriest, Michael Opperman, Brandon Naastad, Cliffton Fuller, Brandon Smolder, Aubree Hawkinson. And actually this letter is incomplete. There was a L[redacted].

Q S[redacted] L[redacted]?

A Yes. And I think it was probably a minor. It was Jordan B.

MR. CORNELL: By the way, Ms. Reporter, I know you're going to be asking me, so I'll tell you. Aubree, A-u-b-r-e-e, Hawkinson, H-a-w-k-i-n-s-o-n;

St[redacted], S-[redacted], L[redacted]

L-[redacted] Brandon Naastad, N-a-a-s-t-a-d; Cliffton, C-l-i-f-f-t-o-n, Fuller; Brandon Smolder, S-m-o-l-d-e-r; Tyler DePriest, T-y-l-e-r; DePriest is D-e-P-r-i-e-s-t; and Michael Opperman is O-p-p-e-r-m-a-n.

BY MR. CORNELL:

Q Did you also review the supplemental petition part that contains a description of testimonies of the witnesses?

A Yes.

Q How important is it for you in rendering an opinion in a case like this to review witness statements or witness testimonies?

A It's critical to making a decision. This is a complicated case with multiple assailants, multiple injuries. And getting the opinions of multiple witnesses helps place what injuries might have happened when.

Q Okay. Let me ask you then, can you say to a reasonable degree of medical probability that the blows delivered by Zach Kelsey to Master Hyde's face prior to Schneuringer and Jefferson's attack of the victim were the cause of Hyde's ultimate death?

A No, I cannot.

Q Okay. Can you say it's possible?

A It's possible, yes.

Q Okay. To a reasonable degree of medical certainty what blows do you think it was that killed Master Hyde?

A The second attack where he was hit by two different assailants, Schneuringer and Jefferson, was an assault that was not consensual. It was one individual coming up and hitting Mr. Hyde in the head and the second individual hitting him as well. And he dropped to the ground at that point. And then he was repeatedly hit while on the ground according to multiple witnesses.

Q Now, in this case were you able to determine from the autopsy protocol and the photos that there was a series of blood vessels in Master Hyde's head leading to and from his brain that were severed?

A Yes, that's evidenced by the hemorrhage in the brain area. It was called subarachnoid hemorrhage.

Q And would it be your opinion that that severing of those blood vessels is what led to Master Hyde's death?

A Yes, as well as probably other brain trauma

from being hit.

Q Are you able to tell from the autopsy protocol and the autopsy photos which particular vessels, i.e., arteries or veins or capillaries -- are you able to tell which vessels actually were severed?

A It's difficult to determine which ones are severed. It's a difficult dissection taking the brain out once there's blood there too. And it's not critical. What's important is there was bleeding, subarachnoid hemorrhage on the brain as well as spinal cord.

Q Can you point to the judge where those blood vessels in the body are located?

A At the base of the brain. So if you take --

THE COURT: Not on me personally.

MR. CORNELL: No, no, not on him personally.

THE WITNESS: No, we would have to open your scull.

THE COURT: I would rather you not do that.

THE WITNESS: It would be on the bottom side of the brain in just the base of it.

BY MR. CORNELL:

Q Okay. So what from your understanding of the facts of the case would be the most likely cause of tearing of those particular blood vessels?

A Head trauma.

Q And can you tell -- are you able to link blows from the facts of this case to that particular head trauma?

A I can't link one specific blow to that head trauma.

Q Okay. But if the facts are that after Kelsey punched Hyde on two or three occasions that Schneuringer hit him blindsided, he went down to the ground, Hyde did, and then Schneuringer and Jefferson kicked Hyde in the head, can you say to a reasonable degree of medical probability that what Schneuringer and Jefferson did would have been that which disrupted those blood vessels?

A It's more probable, yes.

Q Okay. What about the injuries as shown at the autopsy? Can you link those injuries to blows delivered by any of the assailants as the likely cause of Master Hyde's death?

A There are multiple blows to the head well documented in the autopsy report. There is a roughly golf ball size, deep, deep bruise on the side of the head, more in the parietal area, but on the side of the head, and it was very deep hemorrhage from a very

strong blow. I would attribute that likely to kicking on the ground or stomping.

He also had another one on the -- I'm sorry. That was the left side of the head, correct.

The right side of the head, there was a larger area of deep hemorrhage in the scalp next to the scull that was probably one and a half times the size of a golf ball that was very, very deep. And it would appear that probably would be secondary to a stomping as well.

He also had a smaller area of deep hemorrhage on the scalp on the right back occipital area. It was a little bit smaller, probably the size of a lima bean, but it still looked like a site of impact. And those are all towards the side to the back of the head.

On the front of the face there was a -- I'm going to say six-by-five centimeter area of bruising around the side of the left face right next to the eye orbit, and there were some abrasions there. That would have been one or more impacts. It's difficult to tell.

Q Let me ask you this: If the facts of this case have Mr. Kelsey jabbing Mr. Hyde in a face-to-face confrontation with his right hand twice to Master Hyde's cheek area, would the injuries you've described be consistent with two or three punches delivered under

those circumstances?

A The bruising around the eye could potentially be from the jabbing.

Q Okay. And are there other blows that you could attribute the bruising around the eye to, though?

A That Schneuringer from witness testimony came up and -- what I call a sucker punch. It was not an engaged fight. Schneuringer came up and hit him very hard. And I think Lau -- what is his name?

Q L[redacted].

A -- L[redacted] said it sounded like two rocks hitting together. And then Jason B. said it sounded like a baseball bat cracking when he was hit. And that was a hit he wasn't prepared or was able to protect himself from, and that's when he started to go down. Whether he was unconscious or semiconscious at that time, we wouldn't know, but it did take him to the ground, that one blow. And other witnesses said that Jefferson may have hit him on the way down. And that's when they were witnessed to do multiple stepping and stomping on his head.

Q Let me ask you this: In your opinion if the arteries or veins or vessels at the base of the neck are severed, that person who experiences that, how

quick is it from that to death? I mean, is it pretty instant?

A That's not something you can define very clearly. Somebody might have bleeding in the brain and survive for days, whereas another person might get the bleeding and then they go unconscious very quickly.

Q If Master Hyde hit the ground when Schneuringer and Jefferson attacked him and didn't get up, would that suggest to you to a reasonable degree of medical probability that that's when the severing of those arteries or veins happened?

A It's possible, yes. It could have been a severe concussion that almost knocked him out or knocked him out at that point, but then you compound that with the hits while on the ground and the severe bruising. It's not just -- the bruising on the scalp didn't look like just a punch to the head. They were pretty deep. And I think those were really more of a stomping injury.

Q Would any of the injuries to Master Hyde's head be consistent with him falling and hitting the pavement or hitting a hard surface?

A That is one of the problems when somebody goes semiconscious or unconscious and falls, that additional

injuries can occur just from the fall. They can hit their head on the -- but at that point if they're semiconscious or unconscious, they're not going to protect their head, and they can go down and they can hit the ground. And some of those injuries usually are classic-type injuries where you get abrasions and contusions over bony prominences of the face where you wouldn't normally see them in somebody protecting themselves going down.

Also, in the witness statements, one individual -- and I don't recall who it was -- said that he hit the car before he went down. And the injuries to the front of his face near his eye socket -- there were two small abrasions. And these were small, about a centimeter, less than a centimeter, two of them -- they were fairly level, even abrasions that potentially could be impact marks from a terminal fall or hitting the car while going down.

Q Now, as I understand the pathology -- and please correct me if I'm wrong -- when a person has these arteries or veins severed, it takes a significant amount of force to basically shear -- a rotational force to basically shear those blood vessels, doesn't it?

A It takes enough force to tear the vessels. The brain is a fairly fragile organ in the fact that we've got the brain sitting in the scull surrounded by fluid and the blood vessels are traversing through that to get to the brain. So if the brain gets knocked and it's going to move in that fluid, it's going to tear at those vessels. So any amount of force to tear a vessel -- again, it takes some force; however, it's variable from case to case.

Q Okay. In this case if the facts are that Kelsey jabbed Hyde in the left cheek two, three times, and the facts are that Hyde was not knocked down, he was not knocked out, and Hyde walked away and was speaking clear English, would that suggest to you to a reasonable degree of medical probability that the shearing injury in this case happened when Kelsey jabbed Hyde in the face?

A I think you have to take it in the context of the whole fight. There are situations where jabbing can cause bleeding in the brain or cause a concussion. It's variable. You may hit somebody in the face and cause no injuries at all except a loss of ego, a bruised nose or a black eye, and you may not have damage to the brain, or there are rare occasions where

somebody can get hit and these vessels can tear, but they are -- they're the exception rather than the rule.

Q And from everything you've read in this case, is this case that rare exception? That's my question.

A I think it favors that, yes.

Q Well, favors what?

A It favors that -- in the Exhibit K I made a note that all of these injuries that I can see at autopsy could have all been explained by the second attack by the two assailants, whereas I can't say that all of these injuries could have been produced by the first assailant.

Q Okay. You cannot say that all of these injuries --

A I cannot. It would not be explained by the -- all the deep contusions, hemorrhage on the head and the back of the head. The fight -- the initial fight was I would consider a consensual fight. They both agreed they were going to fight.

MS. NOBLE: Objection. That's a legal conclusion or a summary of facts not --

THE WITNESS: Well, I --

THE COURT: Hold on a second, Doctor. I get to rule on the evidentiary objection.

Mr. Cornell.

MR. CORNELL: She can rephrase it.

THE WITNESS: I'll rephrase it.

THE COURT: Hold on a second. I get to do my job. So you don't get to tell the witness what she gets to do; I do.

Now, I'll sustain the objection.

You get to rephrase the question. She doesn't get to rephrase the answer. Go ahead.

BY MR. CORNELL:

Q Okay. If it's a face-to-face fight between Kelsey and Hyde -- and that's what you understood from the witness statements you reviewed; correct?

A Yes.

Q Okay. Then what?

A Then both of them were facing each other and they both were looking at each other in the fight, I'm assuming. This is an assumption, but I'm assuming they're looking at each other to assess how they're going to fight or how they're going to punch. That means they're going to be able to react to punches, and maybe if they do get hit, they might pull their head back and be able to lessen the forces going into their head when they're hit. So most of those injuries

should be more towards the front of the body rather than the back or the side of the head.

Q But in this case they were in the back or the side of the head; is that right?

A Yes, there was some a little bit more forward on the cheek area around the eye, but that's the only one that really stands out in the autopsy as something more towards the front part of the head.

Q Let me ask you this question: I think you may have already testified to it, but is it reasonably medically possible or likely that all of the injuries Dr. Clark identified at autopsy came from the second assailants, meaning Schneuringer and Jefferson, and not from Kelsey?

THE COURT: Don't answer that question.

Ms. Noble.

MS. NOBLE: Objection, Your Honor. The phrasing "reasonably medically possible," I'm not sure where that is coming from or what it means to this witness.

THE COURT: I'll sustain the objection. You can just rephrase the question.

BY MR. CORNELL:

Q To a reasonable degree of medical probability, all of the injuries Dr. Clark identified at autopsy,

did they come from the second assailants, Schneuringer and Jefferson, and not from Kelsey?

A Probable being percentage?

Q More likely than not.

MS. NOBLE: Your Honor, objection. This is exactly what the State is concerned about. I would like to know what this witness considers a reasonable degree of medical probability, because it appears there is some confusion about that.

THE COURT: Mr. Cornell.

MR. CORNELL: Well, we can ask.

THE COURT: I'll sustain the objection. Go ahead.

BY MR. CORNELL:

Q In your lexicon what does "reasonable degree of medical probability" mean?

A More likely than not.

Q Okay. So in your opinion is it more likely than not that the injuries identified in Dr. Clark's autopsy protocol come from attacks from the second group of assailants, Schneuringer and Jefferson, as opposed to the first assailant or Kelsey?

A Yes.

Q And why do you say that?

A Well, we go back to the first fight. The first

fight was jabs or punches to the face. There might have been a knee in there. I don't know from the witnesses. He may or may not have received injuries from that.

Q Is it possible medically that what he received was a subconcussion from that?

A There's a range of injuries that can occur from a fight ranging from just bruises to the face to maybe a subconcussion to a full concussion to potential bleeding. The bleeding is not as common. And one of the examples I use in a lot of -- you know, a face-to-face fight where you're able to react is that if it was true that you died every time you got in a punching fight, then there would be a lot of hearses at boxes matches, and there aren't.

It's a fairly rare occurrence to have a death at a boxing match. The stats on that are relatively low. Is it possible that he could have died from several jabs to the face? Yes, it is possible. But concerning the scenario of the second assault being completely different in severity and the fact that he was unable to defend himself, two different situations, it's much more probable that most, if not all, injuries were from the second assault.

Q Okay. And we talked about subconcussion. If hypothetically Master Hyde sustained a subconcussion from his encounter with Mr. Kelsey, is there a reasonable medical probability or, perhaps, a reasonable medical improbability that someone would die from a subconcussion?

THE COURT: Hold on a second. Now I'm confused by your question. Pick a standard, Mr. Cornell.

BY MR. CORNELL:

Q Is there a reasonable probability, medical probability, that a person that suffers a subconcussion will die from the subconcussion minutes later just from the subconcussion alone?

A It's not probable.

MR. CORNELL: I have no further direct at this time.

THE COURT: Cross-examination, Ms. Noble.

MS. NOBLE: Yes, Your Honor. Thank you.

CROSS-EXAMINATION

BY MS. NOBLE:

Q Good morning, Doctor.

A Good morning.

MR. CORNELL: Oh, I'm sorry. I apologize. My client pointed out an area of examination that I

neglected. Can I reopen just on one small area?

THE COURT: That's kind of a Colombo moment, Mr. Cornell. He walks away and turns around and says, "Wait a minute. One more thing." I will allow you to continue your direct examination.

MR. CORNELL: It won't be a Colombo moment; I promise.

DIRECT EXAMINATION (Resumed)

BY MR. CORNELL:

Q Was there anything that you saw from the autopsy protocol, the autopsy photos suggesting that Mr. Kelsey in jabbing Master Hyde in the face did so while wearing brass knuckles?

A There are no distinctive marks to suggest brass knuckle.

Q Thank you.

MR. CORNELL: Now I'll turn it over to Ms. Noble.

THE COURT: Go ahead, Ms. Noble.

MS. NOBLE: Your Honor, may the State have permission to conduct cross-examination while seated?

THE COURT: Yes.

MS. NOBLE: Thank you.

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CROSS-EXAMINATION (Resumed)

BY MS. NOBLE:

Q Good morning again, Doctor.

You referred to, I believe, Exhibit K which is your opinion letter in this case; correct?

A What? Is it -- repeat.

Q Your opinion letter is Exhibit K -- it's in front of you, I believe -- is that right?

A Yes.

Q And I don't mind, of course, if you refer to it throughout our questions, because I have several questions about the opinions in that letter.

MR. CORNELL: Excuse me, Your Honor. I'm sorry to interject, but if we're going to reference the letter, it seems like the successful objection should be revisited. If we're going to reference the letter, it seems like it should go into evidence.

MS. NOBLE: Your Honor, I simply referenced the letter for the witness's convenience. I'll call it the letter. It's no problem.

THE COURT: Well, Mr. Cornell, if there are specific objections that you want to make about the letter after the question is asked, then you can make those objections, but simply referring to a document

doesn't mean that the document, therefore, is admissible in toto. It might be a prior inconsistent statement, it might be used for impeachment purposes or something along those lines, but it still doesn't mean that the entire hearsay document comes in. So it's still not admissible yet as one exhibit, as Exhibit K. The Court won't consider it as an exhibit yet.

Go ahead.

MR. CORNELL: May I inquire? I tried to lay the foundation that it's a business record, that she writes this in the ordinary course of her business. And a business record is an exception to the hearsay rule. What's the Court's ruling on that?

THE COURT: Well, you never suggested that it was a business record.

MR. CORNELL: Oh. All right. I now --

THE COURT: The objection was hearsay.

MR. CORNELL: I'll move to reconsider that sustaining of the objection. Considering it's a business record, it's an exception to the hearsay rule.

MS. NOBLE: Your Honor, business record exception, I believe, applies if we don't have a witness here to cross-examine them. It means that the document is reliable. There is a lot of hearsay in this document,

including facts or reported facts pertaining to this case. There's no reason that I can't cross-examine this expert about her report, which is what this letter is, without having the entire report admitted.

THE COURT: Mr. Cornell.

MR. CORNELL: Well, the hearsay exception doesn't rest or fall on availability of the witness, you know, unlike some others like dying declaration and that sort of thing. And I don't know, frankly, what the hearsay on hearsay is in this case. Basically she says that she's reviewed witness statements, but unlike her testimony, her letter doesn't specifically reference the witness statements.

MS. NOBLE: Your Honor, it absolutely does. In two paragraphs it talks about factual scenarios that are drawn from those witness statements apparently.

THE COURT: NRS 51.135, which is what the business record rule is, is contained under the section that says the declarant's availability is immaterial. And, therefore, it has no bearing on the Court's determination of whether or not the doctor is here to testify. And so the Court would not sustain the objection based on the fact that Dr. Llewellyn is present. However, business records are created, but

they're not created for the purpose of testimony, which is what this document is. It may be the true that Dr. Llewellyn creates a letter during the course of her business activities, because she was retained by Mr. Cornell to do that, but you don't create a document as an expert and then come in and say it's a business record.

Business records are prepared specifically not for the purpose of testimony. Therefore, the Court will continue to sustain the objection. And the letter itself can continue to be referred to. So Ms. Noble can cross-examine the witness, the witness can refer to those sections of the letter if she doesn't recall them. That's the purpose of cross-examination.

Go ahead.

MS. NOBLE: Thank you, Your Honor.

THE COURT: If it were the other way, by the way, what would happen is that counsel, not a specific counsel, but counsel for the plaintiff or counsel for the defendant could always go out and retain any expert they want, provide all the information they want to to the expert, and then the letter would just come in. And that's not the purpose of the hearing.

So go ahead.

MS. NOBLE: Thank you, Your Honor.

BY MS. NOBLE:

Q Doctor, your opinion letter in this case, did you type it?

A I corrected it and I did do some of the typing.

Q Okay. How much of the typing did you do?

A I would probably say maybe only ten percent.

Q Who did the other 90 percent?

A The secretary in Dr. Cornell's office.

Q Mr. Cornell's office?

A Yes. A business letter is more of a question/answer-type letter.

Q Okay. So you wrote ten percent of the words in here, but you agree with them?

A Well, I said these words. It was dictated, but when you say actually typed --

Q Right.

A -- I did corrections, and that might have been ten percent of it.

Q Thank you.

Your curriculum vitae lists three publications in the 1990s; correct?

A When I was a resident.

Q None of them appear to pertain to blunt force

trauma to the head; is that right?

A That's correct.

Q What percentage of your current practice is forensic pathology?

A About two percent.

Q Two percent. Are you a neuropathologist?

A No, I am not.

Q So then it would be safe to assume you're not board certified in neuropathology?

A No, I am not.

Q What board certifications do you currently hold?

A I have anatomic pathology, clinical pathology and forensic pathology.

Q And you didn't examine Jared Hyde, the decedent, in this case?

A No, I did not.

Q How many brains have you examined?

A Over 2,000.

Q Over 2,000. Now, were those brains where you were examining them specifically to analyze the role of blunt force trauma?

A Many of them were, yes. Percentage-wise, probably ten percent.

Q I would like to direct you to paragraph two or at least number 2 on page 2 of your letter. You assume in there that the encounter between Mr. Kelsey and the decedent in this case was face to face; correct?

A I'm assuming that, yes, from the witness statements.

Q And I wanted to actually -- thank you for reminding me of that. The witness statements you reviewed, those weren't sworn court testimony, were they?

A I don't recall.

Q Were they transcripts?

A Printed. I don't know exactly if they were court testimony. I don't have those in front of me.

Q Okay. So you're not sure if you reviewed any of the transcripts in this case?

A I'm not sure.

MR. CORNELL: Well, Your Honor, I'm going to object to clarify, because we have two different sets of transcripts. The interviews with the Washoe County Sheriff's Office of the witnesses were provided in transcript form. There's also trial transcripts. So when you say "transcripts," it may be a little confusing to the witness.

THE COURT: Ms. Noble.

MS. NOBLE: I a hundred percent agree, Your Honor. I'm trying to determine whether or not the witness's understanding of these facts is based on unsworn testimony and transcripts provided by the Washoe County Sheriff's Office or Mr. Cornell's investigator versus sworn trial testimony.

THE COURT: Dr. Llewellyn, do you know whether or not the transcripts that you reviewed to form your expert opinion were transcripts that were prepared as the result of unsworn statements to law enforcement or statements that were made here in court under oath?

THE WITNESS: I didn't read statements to the police, so it must have been from court testimony, but I do not know for sure.

THE COURT: Okay. And how do you come to that conclusion?

THE WITNESS: It was in the format of court reporting.

THE COURT: And are you able to determine the difference in formatting between what may be produced from a law enforcement transcript versus a court reporter?

THE WITNESS: The question/answer aspect of it.

THE COURT: Okay. Next question.

It was the nature of the questions is what you're saying and how they were phrased as opposed to the way the document itself looked?

THE WITNESS: Yes.

THE COURT: Next question.

BY MS. NOBLE:

Q So in paragraph two, or number 2, you assume that it was a face-to-face encounter and that there were two jabs to Hyde's cheek. What's a "jab" mean to you?

A A punch.

Q Does it mean a hard punch? a less hard punch?

A A punch.

Q So you can't tell me if it's a hard punch or a less hard punch?

A No.

Q So it could be a very hard punch?

A It could be a very hard punch.

Q In paragraph three you say that given that the victim, Mr. Hyde, was not knocked down by Kelsey -- so in rendering your opinion you've assumed that during that initial fight, if you want to call it that, the victim was not knocked down?

A Yes.

Q If he was knocked down, could that have some bearing on the opinion you rendered in this case?

A It would give a greater probability of a concussion or an injury to the brain.

Q What about if you learned that he fell to his knees and was then kneed twice in the head?

A That would be further injuries which may bear on his injuries.

Q So it could cause concussive type of injury; correct?

A Yes.

Q It could cause the brain to bleed?

A Possibly, yes.

Q Now, is it your testimony that if somebody has bleeding on their brain they're not going to be able to be conversant?

A No.

Q Okay. So they could be if they were -- if their brain was starting to bleed, they could still be able to walk and talk?

A Yes.

Q And that's what Dr. Omalu said at trial; right?

A Correct.

Q There were five separate injuries on the brain in this case; would you agree with that?

A There were five separate external injuries that correlate to the confluence of injuries in the brain.

Q Okay. What about areas of bleeding in the brain? It wasn't just the back of the brain; correct?

A No. There was subarachnoid hemorrhage that was fairly extensive and then it was extending down the spinal cord.

Q Okay. Were you -- do you recall looking at the brain in this case?

A I looked at autopsy photos.

Q Okay. Do you recall just bleeding at the back of the brain?

A There was diffuse subarachnoid hemorrhage primarily at the base.

Q But it extended to other areas as well, did it not?

A Yes.

Q When you're arriving at your opinion about the severity of the injuries that Mr. Kelsey inflicted upon the victim in this case, how important was your understanding of how many blows and whether they were a knee or a fist?

A I don't think it really matters. A hit is a hit.

Q It doesn't matter. So a kick to the head would be the same as a punch to the head?

A No.

Q So a hit isn't a hit really, is it?

A No.

Q Okay. What about if you learned the testimony at trial was that Mr. Kelsey, in fact, bragged about possessing brass knuckles the night of the fight and later bragged about using them on this victim? Could that change your opinion about whether or not he could possibly have been severely injured in the initial attack by Mr. Kelsey?

A That could change my opinion if there were marks that were consistent with brass knuckles.

Q So are there always going to be knuckles -- sorry. Let me rephrase. When somebody is hit with brass knuckles, are you always going to see the same types of marks?

A No. And especially where there's hair, you may not see a pattern injury.

Q Okay. So it's possible he could have been hit with brass knuckles and there's just not a pattern

injury?

A Yes.

Q You also state in paragraph two that jabs to the cheek would unlikely cause a rotational or torquing type of injury.

A It's less likely that it would cause bleeding or injuries. In normal fighting it's relatively uncommon for somebody to have a bleeding injury and die from this. You working in law enforcement, me working in forensics, we see deaths from one or two jabs in a bar fight, but it's a relatively uncommon occurrence.

Q Let me ask you this: If someone -- you referenced boxing. If someone is hit with a left hook, what direction does their head tend to go?

A I don't know. A left hook, if you're giving them a left hook, I guess they would be going off to the left.

Q So it would cause their head to rotate?

A Rotate, or there would be acceleration/deceleration injuries.

Q So if your head is rotating and you have an acceleration or deceleration type of injury, that can cause brain bleeding; right?

A Yes.

Q Is there any reason for you to think that the jabs or punches to the victim in this case didn't cause his head to rotate?

A No.

Q Would it be fair to say that you agree with most of Dr. Clark's report in this case?

A Yes.

Q How about Dr. Omalu's?

A Much of it, yes.

Q Now, the part that you don't agree with, could you explain that for the Court?

A If I went through the whole document line by line -- I would have to do that at this point.

Q Okay. Well, on page 3 you talk about Dr. Omalu's opinion and why you cannot agree with it. It's in the last paragraph. And I would be happy to sit here while you have an opportunity to review your report.

Okay. So does that refresh your recollection as to why you had a difference of opinion?

A Yes.

Q Okay. Could you explain your difference of opinion?

A Omalu or -- how is it pronounced?

Q I believe it's Omalu.

A Omalu. I might as well be respectful and say his name right.

Dr. Omalu stated that each successive hit would be compounding the injuries, so, therefore, every hit in the succession of a fight or a group of fights would result in his death and contribute. I agree with that to a certain respect. However, not every hit is equal. You can hit somebody in the face and not produce a subconcussion, concussion or bleeding. It could produce just soft tissues injuries or it just can produce pain. Therefore, you can't necessarily say every single hit along a series of hits, as in this case with three sets of people hitting the individual, that every single hit would have necessarily contributed to his death.

Q Assume this for me. Assume that Mr. Hyde was hit twice in the face or cheek area, fell to his knees and then was kneed twice in the head. Can you say to any degree that you are comfortable with that that would not have caused bleeding on his brain?

A It's less likely than the second group of attacks.

Q Why?

A The severity of the blow that sounded like two rocks hitting together, a baseball bat, was a very severe hit and it did cause him to go unconscious or semiconscious. And then to be repeatedly hit -- and the injuries are consistent with a stomping and the witness testimony that he was stomped in the head while on the ground. That scenario is much more likely to cause the bleeding injuries.

Q Well, how unlikely is it then for somebody to be kneed twice in the head, struck twice in the head and fall down, for them to not -- are you saying that it's very unlikely he -- that he would have bleeding on his brain?

A It's less likely than the second attack, yes.

Q Okay. But how unlikely is it then?

A That would be a very difficult thing. You can only look at studies of boxing. And I don't know -- if you're thinking about injuries to the brain, it's difficult to say, oh, bleeding or a concussion occurred with each fight, but in boxing -- the deaths in boxing -- there's, I think, 41 deaths per a million minutes of boxing.

Q What happens when somebody gets -- when somebody shows signs of concussion in boxing? Are they

still in the match?

A They may stay in the match. They might get the standing eight count or they may stay in and get further injuries. But if you look at the cumulative history of boxing and deaths, it's a relatively rare occurrence.

Q How often is it that people in boxing matches get concussions?

A I think it's probably very, very frequent.

Q And would you agree some concussions are more severe than others?

A Absolutely.

MS. NOBLE: If I could retrieve Exhibit F.

THE COURT: I think I think she's got the entire packet of exhibits with her on the bench.

Oh, no? I was mistaken.

MS. NOBLE: May I approach the witness, Your Honor?

THE COURT: You may.

BY MS. NOBLE:

Q I'm showing you what's been marked for purposes of this hearing as Exhibit F. Do you recognize that?

A Exhibit F is a picture of the brain looking at the base of the brain showing extensive subarachnoid hemorrhage.

Q Can you point out which areas on Exhibit F of bleeding were caused by the other two defendants versus Mr. Kelsey? Can you parse that out?

A No, it cannot be parsed out.

Q Can a concussion create a substantial risk of death?

A It can create a risk of death.

Q But not a substantial one?

A You'll have to place that in a context.

Q Okay. I'll give an example. Natasha Richardson, do you know who she is?

A Yes.

Q I think it's a fairly well-known case where she fell skiing.

A Yes.

Q And her brain started to bleed?

A Yes.

Q She was conversant; right?

A Yes.

Q Able to talk?

A Yes.

Q And she died later, a couple hours later?

A Yes.

Q So for her wouldn't that have caused a risk of

death?

A Yes.

Q So it is possible?

A It's possible, yes.

Q Do people die from concussions?

THE COURT: Well, hold on a second, Ms. Noble. The difficulty I have with your analysis is that you were asking the doctor about a substantial risk of death, and then you gave one example where somebody died. I don't know how that raises to the level of a substantial risk of death.

The doctor has testified that you can die as a result of a concussion. Correct?

THE WITNESS: Yes.

THE COURT: Okay. Next question.

BY MS. NOBLE:

Q And you didn't conduct any microscopic examination of Jared Hyde's brain cells, did you?

A No, I did not. I read the autopsy report.

MS. NOBLE: The Court's indulgence.

THE COURT: Sure.

BY MS. NOBLE:

Q Is it fair to say that you do not know whether or not Jared Hyde's brain was bleeding after Mr. Kelsey

hit him?

A Yes.

MS. NOBLE: I have no further questions for this witness. Thank you.

THE COURT: Redirect based on the cross-examination.

MR. CORNELL: Yes, Your Honor. The Court's brief indulgence.

REDIRECT EXAMINATION

BY MR. CORNELL:

Q With respect to Exhibit K, your opinion letter, were you with me in my office when I dictated that letter?

A The question-and-answer period, yes.

Q And were you the one interrupting me and directing me what exactly to say as opposed to this just being my words?

A Yes.

Q Okay. In this case did you need a neuropathy or neuropathology certification in order to render an opinion?

A No.

Q Did you need or feel the need to consult with a neuropathologist before rendering an opinion?

A No.

Q And did you, in fact, consult with a neuropathologist before rendering an opinion?

A No.

Q There are some cases where that might be necessary or useful, aren't there?

A Yes.

Q And what kind of cases would those be?

A Subtle injuries that cause death.

Q Okay.

A Very rare diseases that could cause death that I wouldn't be aware of.

Q How about cases of shaken impact syndrome, would those be the kind of cases where consulting with a neuropathologist would be useful?

A It would be useful, yes.

Q Okay. But this case is not any of those cases that you described; is that correct?

A This is not a subtle case.

Q Okay. I just want to clarify. Do I understand your testimony correctly that punches to the face, two or three, and a knee either to the chest or even to the face could cause the severing of arteries in the plexus you described, but it wouldn't be likely? Is that

correct?

A In and of itself, not likely.

Q When you read the autopsy report and read the microscopic examination that Dr. Clark did, did you take that information at face value? In other words, did you have an issue with her saying that she did a microscopic evaluation; you saying, "Oh, that couldn't be. She couldn't have seen what she saw," or anything like that?

A I have no issues with her report.

Q Okay. Thank you.

MR. CORNELL: That's all the redirect I have.

THE COURT: Recross based on the redirect examination.

RECROSS EXAMINATION

BY MS. NOBLE:

Q Based on the information available to you, is it possible in this case to say for certain exactly which arteries were severed to cause that subarachnoid hemorrhage?

A No.

MS. NOBLE: No further questions.

THE COURT: Dr. Llewellyn, thank you for being here today. You may step down.

THE WITNESS: Thank you.

THE COURT: And it's my understanding that the parties have agreed to allow Dr. Clark to testify out of order. Is that correct, Mr. Cornell?

MR. CORNELL: Correct.

THE COURT: Bailiff, if you could collect the exhibits and return them to the clerk, please.

MS. NOBLE: That's correct, Your Honor.

Your Honor, may I have the Court's indulgence?

THE COURT: You may.

MS. NOBLE: Your Honor, the State would call Dr. Ellen Clark.

THE COURT: Dr. Clark, good morning. If you could step forward and be sworn as a witness, please.

(The oath was administered to the witness.)

THE WITNESS: I do.

ELLEN CLARK, M.D.,

having been called as a witness herein, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. NOBLE:

Q Good morning, Dr. Clark.

A Good morning.

Q You were in the courtroom just now listening to

Dr. Llewellyn testify; correct?

A Yes.

Q And in listening to her testimony, does it appear to you that you, in fact, probably agree about a lot of things with respect to the decedent in the case?

A Yes.

Q What do you disagree about?

MR. CORNELL: Well, again, Your Honor, I'm going to object. It's irrelevant and prejudicial. I mean, this is a call for a jury to make, not Your Honor. The question is -- as I said before, the question for you to determine is could a reasonable jury credit Dr. Llewellyn and, if so, what would the result be, not whether do I credit Dr. Llewellyn.

THE COURT: Well, how would I make that determination, though, in a vacuum without hearing the testimony of another witness? Certainly Dr. Clark could have testified at the trial had Dr. Llewellyn testified. And this would be the testimony, I'm assuming, that Dr. Clark is going to offer now. So if Dr. Clark testifies at the trial as an expert, then you're saying we should have called Dr. Llewellyn to offer a contrary opinion; correct?

MR. CORNELL: Okay.

THE COURT: And then the jury would have weighed that contrary opinion and come to a potential conclusion that was different than that which they rendered in this case. I think it's reasonable that Dr. Clark would be allowed under those circumstances to testify at the trial. So the testimony she's offering now is simply the testimony that she would have offered contrary to what Dr. Llewellyn testified to today and by extrapolation at the trial as well.

So I'll overrule the objection in a general sense. If you have a specific objection that you'd like to make to something that Dr. Clark says, you're certainly allowed to do that, Mr. Cornell. I'm not suggesting that you're not allowed to object, but just the general objection she can't testify, I'll overrule that.

Go ahead.

BY MS. NOBLE:

Q Dr. Clark, again, you were listening to Dr. Llewellyn testify here today. And you said that, I believe, most of -- with respect to the decedent and what happened to him and what can be shown from the autopsy, you agree; correct?

A Correct.

Q Are there any areas where you disagree?

A Yes.

Q Okay. Where do you disagree?

A In brief, I cannot exclude the initial fight or the initial exchange of blows involving the petitioner today from causing severe and potentially lethal injury to the brain.

Q And, Dr. Clark, in your analysis does it matter how many times -- what facts you're presented with, in other words, how many times the decedent was struck by Mr. Kelsey? Is that a factor in your opinion?

A There are circumstances or certainly many reported cases involving a single impact resulting in injuries as Mr. Kelsey presented with and -- excuse me -- Mr. Hyde presented with and died with. I'm not certain if that answers your question.

Q I believe it does.

There was a reference during Dr. Llewellyn's testimony to bleeding from the artery at the back of the head.

A That's correct.

Q Is that the only place where the bleeding could have proceeded from?

A No.

Q Could it have proceeded from somewhere other

than the vertebral artery?

A Yes.

Q And could that bleeding have started after the first attack in this case?

A Yes.

Q Do you agree that a hit is a hit?

A No.

Q Why not?

A There are so many variables involved in describing a fight or a hit, as you are phrasing it, that I don't think that terminology or that statement is accurate.

Q Injury to the subarachnoid area, could that incite other kinds of injury to the brain?

A Yes.

Q Would they all be overt or would some of them be subtle?

A Many may be subtle.

Q Because they might be subtle, would that mean they wouldn't count in terms of contributing to death?

A No.

Q Could the blows that Mr. Kelsey caused during the initial attack cause initial tearing that could have been exacerbated or increased by subsequent blows

in the second attack?

A Yes.

Q In other words, Kelsey could have started it and the others finished it? Would you agree with that statement?

A I would agree.

MS. NOBLE: I have no further questions for Dr. Clark at this time.

THE COURT: Cross-examination of Dr. Clark.

MR. CORNELL: Yes. Thank you.

CROSS-EXAMINATION

BY MR. CORNELL:

Q Dr. Clark, you recall we met one time before in Elko on the McCormick case? Do you remember that?

A I don't recall our meeting.

Q Well, where I was the attorney for the petitioner and you were called by the State as a witness. That's what I mean.

A Okay.

Q And the controversy in that case was over the subject of in a multiple blunt force trauma to the head that the last blow is always the fatal blow. Do you recall that?

A I don't recall that specific reference.

Q Can you explain to me what second impact syndrome is?

A Second impact syndrome typically refers to an exacerbating or a cumulative injury if there's an initial impact that may render the brain more vulnerable to injury under lesser magnitude or lesser force trauma. And, again, the injury is cumulative to the brain.

Q But that condition is rare, is it not?

A No, it is not rare.

Q Well --

THE COURT: When you say "condition," I just need some clarification, Mr. Cornell. Are you saying it's like a physiological condition that a person has or as a result of the mechanism that's going on, the repeated punches?

MR. CORNELL: Let me just read from Wikipedia and see if she agrees.

THE COURT: I don't know if Dr. Clark is going to recognize Wikipedia as a learned treatise that she would rely on in forming her opinion, but I guess we'll wait and see.

MR. CORNELL: We'll see.

/////

BY MR. CORNELL:

Q Reading from Wikipedia, "Though the incidence of second impact syndrome is unknown, the condition is rare; very few cases have been confirmed in medical literature. In the 13-year period from 1980 to 1993, 35 American football-related cases of second impact syndrome were recorded but only 17 of those were confirmed by necropsy or surgery and magnetic resonance imaging to be due to second impact syndrome, and 18 cases were found to be probably SIS related. Additionally, the initial trauma commonly goes unreported, adding to the confusion about how often the syndrome occurs.

"In part due to the poor documentation of the initial injury and continuing symptoms in recorded cases, some professionals think that the condition is over diagnosed and some doubt the validity of the diagnosis all together."

Do you disagree or agree with any of that?

A I don't have any opinion at all based upon that. It's just a reading of something from Google, and I would have to study it in much more detail.

Q Okay. Apparently second impact syndrome is something you've heard of but not studied in great

detail; is that the case?

A I have not studied it in great detail. It's fairly well known in the medical literature. The references there just in your brief read are quite dated, so those regard old cases and there's likely much more available at this point in time than is referenced there.

Q I want to clarify something that you testified to on Ms. Noble's examination. You cannot exclude the possibility that Mr. Hyde's (verbatim) two or three punches and possibly knee to the face of Master Hyde caused his death; correct?

A That's correct.

Q Okay.

A Or contributed to causing the death.

Q Can you say to a reasonable degree of medical probability that those punches and knee are what caused Master Hyde's death?

A I don't typically use the terminology "reasonable degree of medical probability." My understanding is that there is not a good standard definition for that, and I have not used that terminology in my testimony.

Q Well, have you testified in a medical

malpractice case before?

A I may have. In particular, I've done transcripted deposition testimony.

Q You're aware in a medical malpractice case in terms of talking about cause of death you do have to testify to a reasonable degree of medical probability? Are you aware of that?

A In some states and jurisdictions. I don't typically testify or act as an expert in medical malpractice cases.

Q So you don't know what that standard is in Nevada; is that correct?

A That's correct.

Q Okay.

A For criminal cases in particular.

Q Okay. Trying to determine which blows were the fatal blows or probably the fatal blows really depends on the facts of the case, doesn't it?

A Yes.

Q Okay. I mean, to give you two simple examples, if the facts of the case are three guys are punching and pummeling the victim simultaneously and the victim dies, in that case we can say we can't tell which one blow is fatal, but they all contributed to the death of

the victim; correct?

A I would concur.

Q Okay. Contrast that to a situation where the victim -- or person No. 1 hits the victim two times in the cheek, the victim walks away, goes and eats dinner, comes out of the restaurant, 25 minutes later a guy comes up from behind him and hits him on the head with a shovel and he dies of subarachnoid hemorrhaging. In that hypothetical situation we could say that No. 2 -- the cause of the death was the subarachnoid from the shovel hit and the two punches 25 minutes prior really didn't contribute to the cause of death, can't we?

A I don't know if we can definitively say that.

Q In this case you indicated that severing of arteries or veins at the plexus of the base of the neck could have been the cause of Master Hyde's demise, but there could have been other areas of bleeding from the brain that did that as well; is that correct?

A That's correct.

Q Okay. When the arteries or veins or other vessels at the plexus of the base of the neck are severed, what can we expect to happen to that victim?

A First of all, when you speak to severed, we don't -- that terminology is not necessarily accurate.

Q How would you term it?

A So we may have a rent or a small tear in a vessel which progresses. In fact, that's a common occurrence with vascular injury. It need not be a complete -- excuse me -- a complete severing or --

Q And it can be a small tear --

THE COURT: Hold on a second. Let her finish the answer. She hasn't finished.

MR. CORNELL: I thought she did. I'm sorry.

THE COURT: Go ahead, Dr. Clark.

THE WITNESS: So when you speak to severing of a vessel, that implies potentially a different circumstance or a different progression of bleeding. In a case such as the one we're speaking to where I did not find a transected or a completely severed artery, for example, the bleeding source may be any of multiple vessels, including not just arteries but veins and other smaller structures. So when you speak to severing of an artery, I'm not certain that --

Q But it would certainly --

A -- that's the circumstance here.

MS. NOBLE: Your Honor, she's still answering the question. I can't even hear the answer.

MR. CORNELL: I thought she was done and was

answering a bunch of questions I didn't ask, but I apologize. I thought she was done.

THE COURT: Dr. Clark, is the distinction you're trying to make that in the terminology you're using, severance in essence means a complete transection, it was together and now it's completely apart?

THE WITNESS: That's correct.

THE COURT: And that what we had in this case was not a complete severing of the blood vessel, it was a tear or rupture? So it was bleeding, but it's not completely ripped apart?

THE WITNESS: To some extent that's correct. In this case I did not identify the bleeding site for the injury. In some cases we're able to do that, we're able to identify a severed vertebral artery or a torn middle cerebral or internal carotid artery or something to that effect. I did not do such in this case, so I don't know what the precise bleeding source was.

BY MR. CORNELL:

Q Okay. My questions were going this way. And I apologize for the inartful terminology. There's not a severance of the arteries at the plexus, but if there is a tear and the victim suffers that, what would happen to that victim typically?

A There would be a progression of the bleeding and the person could potentially succumb. Sometimes victims survive and if placed on life support they will continue to survive.

Q If that victim then has the tear in the arteries in the plexus and hits the ground and then is kicked in the head, would you expect that the kicking would exacerbate the tear and make it a more prominent tear, I guess?

A It may, yes.

Q And would you expect in that instance that that victim would not be able to get up off the ground under his own power?

A It's more likely if there's a progression or an increased severity of the hemorrhage that they would not be able to recover.

Q And if that person is being kicked in the head, then that likelihood of an increased hemorrhage is there, isn't it?

A Yes.

Q And would you expect that if that person could not recover that he could be put into a car, driven to a nearby hospital within a matter of 20, 25 minutes and be declared dead on arrival --

A Yes.

Q -- from having that tear and then the extended tear, if you will, in that plexus of the arteries? Is that correct?

A Please restate your question.

Q Okay. Would it be surprising to you that if the victim has a small tear in that plexus of arteries at the base of the brain, at the neck, and then that person is kicked in the head, exacerbating the tear, that that person not only would not get up under his own power but would be dead within 20, 25 minutes?

A That's entirely possible.

Q Okay. Let me ask you since we're talking now about possibilities and probabilities. If Mr. Kelsey, in fact, punched Mr. Hyde two times in the cheek and, say, he kneed him in the chest and Mr. Hyde was not knocked out and Mr. Hyde walked away, is there a possibility at that point that what Mr. Hyde would have suffered is a subconcussion?

A I don't use the terminology subconcussion.

Q Okay. Well, Dr. Omalu does; correct?

A Correct, he did in his testimony.

Q And you consulted with Dr. Omalu before testifying in this case -- or actually before writing

the autopsy report, did you not?

A Dr. Omalu prepared a consultative report and review of the brain.

Q Okay. So you do not use the terminology subconcussion?

A No.

Q Why not?

A I just don't typically use subconcussion.

Q Okay. So if I were to ask you if what Mr. Hyde had at that point was a subconcussion, you can't say to a reasonable degree of probability but for the subconcussion he would not have died, I mean, you can't render an opinion one way or another on that question?

A I don't have an opinion on that question.

Q And I believe you testified to this at trial. I just want to be clear. Where the vertebral artery wasn't severed but torn, would that typically come from a rotational type of force?

A It may be a rotational force or a shearing force, referred to as a shearing force.

Q And I know Judge Sattler is going to be familiar with this, but for the record can you explain the difference between the two?

A When we talk about a shearing force, there may

be rapid acceleration and deceleration of the brain. There's not implicit rotation necessarily involved. So when we see shearing injury, we often see -- I mean, it may be associated with tearing of large arteries, it may be associated with damage to very small vessels, it may be associated with profound global damage even to the cellular level. In Mr. Hyde's case there was likely a combination of those injuries.

Q Okay. Now, what would rotational force be?

A Rotational force is when the head moves on the axis of the body and the brain moves within the scull.

Q Do you believe that it's possible or likely that rotational force played into Mr. Hyde's cause of death?

A I think there is rotational force or shearing injury. I mean, it's a constellation of dynamics and mechanics that caused the injuries.

Q And certainly the rotational or shearing force in this case could have happened when the one guy came up from his side and hit him without him seeing it and hitting him hard enough that it sounded like the crack of a baseball bat or two rocks coming together; would you agree to that?

A Yes.

MR. CORNELL: If I may consult.

Thank you, Dr. Clark. That's all the examination I have for you.

THE COURT: Redirect based on the cross-examination.

MS. NOBLE: Yes, Your Honor.

REDIRECT EXAMINATION

BY MS. NOBLE:

Q Dr. Clark, Mr. Cornell was referencing a tearing of the vertebral artery. You're not certain that's what happened in this case; is that right?

A That's correct.

Q Instead you testified that it was likely a combination of things.

A Yes. There was certainly disruption of some of the vessels at the base of the brain that resulted in subarachnoid hemorrhage or bleeding in the distribution that we see in this case. I cannot tell you specifically which vessels were involved.

Q So if we suppose that in the second attack the blows might have been harder or worse, does that mean that the attack from Mr. Kelsey did not cause any bleeding on Jared Hyde's brain?

A No.

Q I have no further questions. Thank you, Dr. Clark.

THE COURT: Recross based on the redirect.

MR. CORNELL: No. Excuse me.

Thank you. I have no recross.

THE COURT: Thank you for being here today, Dr. Clark. I appreciate your testimony. You're excused.

We'll go back to the petitioner's case in chief. Mr. Cornell, you can call your next witness.

MR. CORNELL: That's fine. I mean, I'm happy to trudge through to noon if you want to do that.

THE COURT: I do.

MR. CORNELL: Okay. Z[redacted] C[redacted].

THE COURT: It will be a few minutes before noon. I've got a meeting at noon, so we're probably going to go --

MR. CORNELL: We'll probably be able to get through this witness and that will probably be about it, but maybe not. We'll see.

THE CLERK: Please raise your right hands.

(The oath was administered to the witness.)

THE WITNESS: I do.

/////

ZACH CLOUGH,

having been called as a witness herein, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CORNELL:

Q Please state your name for the record and spell your last name.

A Z[redacted] C[redacted] C[redacted].

Q And what city and state do you reside in, Mr. C[redacted]?

A Reno, Nevada.

Q And what's your date of birth?

A [redacted]94.

Q So today you're 21?

A Yes.

Q Okay. On February 5, 2012, how old were you then, on the date of the incident that I'm going to ask you questions about?

A Seventeen.

Q Okay. So you were 17 years old on February 5, 2012. What high school did you go to?

A North Valleys High School.

Q Were you present at a bonfire at the motocross speedway in Lemmon Valley on February 5, 2012?

A I was.

Q Did you after the incident involving Jared Hyde's death give a statement to the police?

A I did.

Q And were you ever interviewed by a defense investigator with the name Ken Peele prior to trial? A black fellow named Ken Peele, were you ever interviewed by him?

A Not that I recall, no.

Q Okay. Were you interviewed by my investigator, Justin Olson, in May of this year?

A Yes.

Q Okay. Let's talk about February 5, 2012, at the motocross. Did you see a fight between two females?

A Yeah.

Q And which two females, if you know, or remember were they?

A Let me think of --

Q Was one named Amber?

A Yeah.

Q Did you know the name of the other one?

A No.

Q After those two got into a fight, what did you

see happen next? Well, before I ask that question, did you know Zach Kelsey at all?

A Yes.

Q And did you come to the bonfire with Mr. Kelsey?

A No.

Q Who did you come to the bonfire with?

A Joel Cohen.

Q Joel Cohen. Okay. How well did you know Mr. Kelsey?

A Pretty well. I grew up around him, with him, a little bit there.

Q Okay. How about Mr. Schneuringer or Mr. Jefferson, did you know either of those individuals?

A I did know Bobby, but just a little bit just from seeing him around.

Q How about Mr. Jefferson, did you know him at all?

A No.

Q All right. Going back to the incident, you see the two girls get into a fight. And then what did you see?

A Two girls got into a fight. And after that was

all said and done, there was some words said.

Q Between whom?

A Taylor Pardick was talking to -- I think it was the girl that Amber was fighting.

Q Was Taylor Pardick the boyfriend of one of the girls, do you know, to your knowledge?

A Yeah, Amber's boyfriend.

Q I'm sorry?

A Amber's boyfriend.

Q Anyway, after that what did you see happen?

A Jake Graves and Taylor Pardick kind of got into an argument.

Q Now, how close were you to this scene between Jake Graves and Taylor Pardick?

A Five feet.

Q I understand that the lighting there was pretty bad.

A Yeah.

Q Was it light enough to where you could see faces?

A Yeah.

Q Now, what did you see happen then between Pardick and Graves?

A They just kind of got into an argument.

Q Did you know anything about the relationship between Jake Graves and Zach Kelsey?

A I knew that they were buddies.

Q Okay. So Pardick and Graves get into an argument. And what did you see happen next?

A It was Andrue, I guess -- well, it was being egged on a little bit. They were trying to get him to fight.

Q Now, who is "they" that trying to get him -- who is "they"?

A I can't -- I didn't know half of them, so just whatever group of kids was there.

Q Have you ever heard of the group from North Valleys called the Twisted Minds?

A Yes.

Q Were these guys egging on the fight part and parcel of the Twisted Minds?

A A little bit, yeah, I would say so.

Q Okay. And to your knowledge is Zach Kelsey one of the members of the Twisted Minds?

A No.

Q Now, what -- the guys are egging the fight on. And what happens?

A It looked as if Taylor and Jake were kind of

getting over it and it was kind of starting to calm down a little bit and Jake was over it. And one of them was starting to walk away and somebody said something and it started up again. And it kind of became -- that's when everything started happening.

Q At some point in this fight did Taylor pull out a knife?

A Yeah, but just to get rid of it. He had a knife on him, but he threw it off of him.

Q When the fight started up again, who was involved? What happened from what you saw?

A Somebody said something and Jake turned around. They were yelling at each other again and it started getting a little bit more physical. And Rickey Boatman came up for who knows why to --

Q Now, let me ask about Rickey Boatman. Is he a guy with a nickname?

A Yeah. They call him Ricky Bobby.

Q And is he friends with any particular one of these people?

A Taylor, yeah.

Q Okay. So Ricky Bobby runs into the fight. What does he do?

A He was trying to say something. I don't know

if he was trying to defend Taylor or break them up, but I think Jake just took it as he was backing Taylor up and proceeded to fight with both of them.

Q Okay. And what -- by the way, is Jake part of the Twisted Minds to your knowledge?

A No.

Q All right. Have you ever heard of Straight Edge?

A Yes.

Q And is Jake and/or Zach members of Straight Edge to your knowledge?

A Yeah.

Q Okay. And what is Straight Edge? What does that mean to you?

A It's the way you live your life, no drugs, no alcohol, no tobacco.

Q No alcohol, no tobacco.

Now, what then happens -- so it was your perception that people are jumping into this fight and that's what Ricky Boatman or Ricky Bobby is doing?

A Well, it was -- I don't know why he came up at all. I don't know what he was -- what his intentions were, but how I saw it, I thought that it looked like Jake took it as Ricky was coming to defend Taylor and

he kind of just had it, I guess.

Q You mean Jake?

A Yes.

Q What did Jake do?

A He hit either -- I think he hit Bobby first. And then him and Taylor went after it and they kind of rolled down the hill there.

Q When you say "Bobby," you mean Ricky Bobby?

A Yeah.

Q Did Jake knock either Taylor or Ricky Bobby down?

A He definitely knocked Ricky Bobby out.

Q In fact, did Jake to your knowledge have a nickname, One Punch Jake? Had you ever heard that?

A No.

Q Okay. In any case, he knocks Ricky Bobby down. Then what happens?

A That's kind of when everything exploded and got crazy and everybody started going every which way, and there was people fighting to the left, to the right, everywhere.

Q Now, did you see either Jared Hyde or Zach Kelsey get into a fight?

A Yes.

Q Describe for the court what you saw in that regard.

A When I looked over, I saw Zach Kelsey and Jared fighting, but it was -- they were both standing up and they were kind of wrestling around. They had gotten their shirts caught up over their heads where they couldn't see anything, so they were kind of just flailing around at each other. And then --

Q Let me understand. So Zach Kelsey has his shirt over his head so he can't see and Jared Hyde has his shirt over his head so he can't see?

A They were wrestling around together. I think they got ahold of like each other's shirts and were pulling on them, and so they were all kind of messed up. And they were trying to get their shirts off, but once they got their shirts fixed, it was about five more seconds of that and then it was over with.

Q Did you see the moment when Zach Kelsey got involved in this fight?

A No.

Q From what you saw and heard, do you have an understanding on why Zach Kelsey was getting involved in this fight at all?

A What I've heard was --

MS. NOBLE: Objection; hearsay.

MR. CORNELL: Well, I mean at the scene, in terms of what people were yelling and screaming at the scene.

THE COURT: I'll sustain the objection.

THE WITNESS: No.

BY MR. CORNELL:

Q Now, did you see -- I mean, were you close enough to where you could hear what Hyde was saying to Kelsey and what Kelsey was saying to Hyde?

A I don't think they were talking too much.

Q Okay. Did you know a guy named Mike Opperman?

A Yes.

Q Where was Mike Opperman relative to you when this fight went on? Was he standing next to you, or do you know?

A I have no idea.

Q Okay. When Hyde and Kelsey are wrestling, I guess, using your words, I mean, were they face to face?

A Yeah.

Q Okay. Did you see Hyde strike Kelsey?

A Yeah.

Q Okay. What did you see in that regard?

A What do you mean?

Q I mean, describe for me what you saw.
A They were just fighting. I mean --
Q What was the strike pattern? Did Hyde throw the first punch? Did Kelsey throw the first punch? Do you remember?
A I don't remember that.
Q But you do remember seeing Hyde strike Kelsey?
A Yeah.
Q How about the other way around? Did you see Kelsey strike Hyde?
A Yeah.
Q How many times did you see Kelsey strike Hyde?
A Twice.
Q Okay. Did you see Kelsey knee -- put his knee into Hyde's body?
A No.
Q Okay. How long did the fight between Kelsey and Hyde last?
A Twenty seconds.
Q Okay. Did you see Hyde hit the ground?
A No.
Q Did you see Hyde, you know, slip down, say, to a knee and then get back up?
A No.

Q How about Kelsey? Did you see Kelsey hit the ground?

A No.

Q Did you see Kelsey slip to a knee --

A No.

Q -- and then get back up?

Now, were you close enough to Kelsey to see whether Kelsey had anything in his hands?

A Yeah.

Q Was he wearing a pair of brass knuckles?

A No.

Q You've seen brass knuckles before?

A Yes.

Q Are you certain that he was not wearing a pair of brass knuckles?

A Yes, certain.

Q Okay. I mean, from what you saw of this fight between Hyde and Kelsey, could you determine who got the better of whom?

A There was no -- nobody got the better of anything. It was so simple and fast that it was just a -- there was no winner. There was barely a fight.

Q Okay. I mean, it was a fight that lasted, I think you just said, maybe 20 seconds?