

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 2 of 3**

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1 A Yeah.

2 Q And how did the fight break up, do you know?

3 A No.

4 Q Did you see Hyde walk away from the fight?

5 A Yeah.

6 Q Describe for me how he did that. I mean, was
7 he walking normally? Was he stumbling? Describe that
8 for me.

9 A Just walking normal, feathers ruffled a little
10 bit, I mean, but --

11 Q Did you hear Hyde say anything after the fight
12 was over?

13 A No.

14 Q Now, after the fight was over, what did you do?

15 A I had some people that came out with us and we
16 loaded them into the vehicle. My friends picked Ricky
17 Bobby up off the ground and put him in the vehicle and
18 we left.

19 Q So then did you see Jared Hyde after that on
20 the ground?

21 A No. To my knowledge, when I left he was
22 perfectly fine, standing, walking around.

23 Q Okay. To your memory what was the last time
24 that you saw Jared Hyde?

1 A That night.

2 Q I mean, was it when you were -- I'll be a
3 little more precise. Was it when you and your friend
4 were loading Ricky Bobby into the car or when exactly
5 relative to that?

6 A Yeah.

7 Q I mean, can you estimate time-wise how many
8 seconds from the time the fight ended until the last
9 time you saw Jared Hyde?

10 A From when the fight ended, I probably saw
11 him -- we left probably three minutes after that, so
12 two minutes.

13 Q And from what you saw three minutes later, how
14 did Jared Hyde seem?

15 A Fine.

16 Q Thank you, sir. I have no further examination
17 for you at this time.

18 THE COURT: Cross-examination, Ms. Noble.

19 MS. NOBLE: Thank you.

20 CROSS-EXAMINATION

21 BY MS. NOBLE:

22 Q That night was actually the first time you had
23 ever seen Jared Hyde; right?

24 A Yes.

1 Q In fact, do you remember meeting with a
2 detective from the Washoe County Sheriff's Office?

3 A Yeah.

4 Q And you remember him telling you that your
5 conversation was being recorded?

6 A Um-hum.

7 THE COURT: Is that a "yes" or a "no"?

8 THE WITNESS: Yes.

9 THE COURT: Thank you.

10 BY MS. NOBLE:

11 Q And you told him you didn't even know Jared's
12 name; right?

13 A Yeah, I didn't know Jared's name, no.

14 Q Do you remember telling him you were getting
15 all the Js mixed up?

16 A Yes.

17 Q Do you remember calling Jared Jacob?

18 A Yes.

19 Q There was also a Jake at the fight?

20 A Yes.

21 Q It was kind of a confusing conversation?

22 A Yeah.

23 Q Did you ever tell him that you saw Jared Hyde
24 striking Mr. Kelsey? Did you tell that to the

1 detective?

2 A I don't recall. I'm sure I did, yes.

3 Q You did? Would it help you to review a
4 transcript of your interview and you can tell me where
5 in there you told him that?

6 A Yes.

7 So I don't necessarily say that Jared hit Zach, but
8 they were fighting. I know that they were fighting.

9 Q Okay. So let me just grab that back from you.
10 So you told him that they were fighting?

11 A Yes.

12 Q But you didn't tell him that you saw Jared Hyde
13 hit Kelsey?

14 A No.

15 Q Didn't you also tell the detective that your
16 primary concern at that time was getting the girls you
17 were with out of there?

18 A Yes.

19 Q It was a chaotic situation, wasn't it?

20 A Yeah.

21 Q You didn't even know Jared Hyde?

22 A No.

23 Q You weren't hyper focused on him, were you?

24 A No.

1 Q In contrast, you know Zach Kelsey pretty well?

2 A Yeah.

3 Q Do you remember meeting with Mr. Cornell's
4 investigator in June of this year -- or sorry -- 2015?

5 A Yes.

6 Q Would it surprise you to know that in his
7 report he wrote that you said you saw Zach Kelsey and
8 Jake Graves fighting?

9 A That would just be a miscommunication.

10 Q Okay. So that would surprise you?

11 A Yeah.

12 Q You also told him that you don't feel that Zach
13 should be in prison for what he did?

14 A Yeah.

15 Q So you would like to see him get out of prison?

16 A Yes.

17 Q So coming here today, is that one of the
18 reasons you're here?

19 A No. I'm here because that's the right thing.
20 I'll here to tell the truth. This is what happened.

21 Q Okay. So the truth is that --

22 A Whether it was Zach or somebody else --

23 THE COURT: Hold on a second. Stop.

24 /////

1 BY MS. NOBLE:

2 Q So --

3 THE COURT: No. Ms. Noble, stop.

4 MS. NOBLE: I'm sorry.

5 THE COURT: Let him finish the answer.

6 Go ahead.

7 THE WITNESS: Whether it was Zach or anybody
8 else -- if it would have been, you know, just two kids
9 that I didn't know at the party, I would have done the
10 exact same thing, because this is what's right.

11 BY MS. NOBLE:

12 Q What do you think that you're doing? What's
13 right?

14 A I'm telling the truth. I don't think the truth
15 got out. That's why he's in jail.

16 Q So the truth also didn't get out during your
17 interview with Detective Sawyer either, did it?

18 A I guess not.

19 Q I have no further questions. Thank you.

20 A Thank you.

21 THE COURT: Redirect based on the
22 cross-examination.

23 MR. CORNELL: Thank you, Your Honor.

24 /////

REDIRECT EXAMINATION

BY MR. CORNELL:

Q To your memory, what time in the day or evening were you interviewed by the sheriff?

A Oh, 6 o'clock in the evening.

Q 6:00 in the evening. Was it -- how soon after the incident at the motocross were you interviewed?

A A week maybe.

Q Was it a week? Okay.

And were you -- I mean, how were you physically that day when you were interviewed? I mean, were you tired? Had you had anything to drink? I mean, were you feeling fine?

A I was nervous.

Q Did the detective specifically ask you whether Jared Hyde threw any punches at Kelsey?

A Not that I recall.

Q Okay. But from your memory, from what you're testifying today, you did see Jared Hyde throw some punches at Kelsey while Kelsey was throwing punches at Hyde?

A Oh, yeah.

Q And are you here today because you were subpoenaed?

1 A No.

2 Q Weren't you -- didn't the process server give
3 you a subpoena that directed you to be here?

4 A Yeah.

5 Q Okay. Thanks, sir. I have no further
6 questions.

7 THE COURT: Recross based on redirect.

8 MS. NOBLE: No, Your Honor. Thank you.

9 THE COURT: Thank you for being here today. You
10 may step down.

11 Mr. Cornell, you may call your next witness.

12 MR. CORNELL: All right. That would be T [REDACTED]
13 C [REDACTED].

14 MS. NOBLE: Your Honor, may we approach the bench?

15 THE COURT: Yes.

16 (Proceedings held at the bench:)

17 MS. NOBLE: I don't know if you can hear it from
18 where you're at, but as I'm conducting my examination,
19 there are people making all kinds of noises in the
20 gallery.

21 MR. CORNELL: I don't -- I'm not hearing it, but I
22 trust what you're saying.

23 THE COURT: I can hear your client and I can hear
24 you. Neither one of you talk particularly with a

1 library voice, but other than that, I haven't heard
2 anything.

3 Okay. Thanks.

4 (End of proceedings at the bench.)

5 THE CLERK: Raise your right hand.

6 (The oath was administered to the witness.)

7 THE WITNESS: Yes.

8 T [REDACTED] C [REDACTED]

9 having been called as a witness herein,
10 being first duly sworn, was examined
and testified as follows:

11 DIRECT EXAMINATION

12 BY MR. CORNELL:

13 Q Please state your name for the record and spell
14 your last name.

15 A T [REDACTED] C [REDACTED], C- [REDACTED]

16 Q And T [REDACTED] is spelled how?

17 A T- [REDACTED]

18 Q Okay. And what city and state do you reside
19 in?

20 A Reno, Nevada.

21 Q And I have down here that your age is May --
22 your date of birth rather is [REDACTED] 1995. Is that
23 correct?

24 A Correct.

1 Q So today you are how old?

2 A Twenty.

3 Q And on February 5, 2012, how old would you have
4 been?

5 A Sixteen.

6 Q What high school did you go to?

7 A North Valleys High School.

8 Q And when you went to North Valleys High School
9 did you know Zach Kelsey at all?

10 A Yes.

11 Q How about Jared Hyde, did you know him?

12 A No.

13 Q Did you know Bobby Schneuringer?

14 A No.

15 Q Did you know Jake Graves?

16 A Yes.

17 Q Did you know Andrue Jefferson?

18 A No.

19 Q Now, were you at the bonfire at the motocross
20 speedway in Lemmon Valley on February 5, 2012, in the
21 evening?

22 A Yes.

23 Q After the incident that resulted in Jared
24 Hyde's death, did you give a statement to the police?

1 A Yes.

2 Q Now, were you ever interviewed by a defense
3 investigator named Ken Peele, a black gentleman?

4 A No.

5 Q You were not.

6 Were you interviewed by my investigator, Mr. Olson,
7 in or about June of this year?

8 A Yes.

9 Q Were you interviewed by the district attorney's
10 office prior to trial?

11 A Yes.

12 Q Did you testify at the trial?

13 A No.

14 Q Did they release you from your subpoena after
15 you spoke with them?

16 A Yes.

17 Q Now, whom did you go to the bonfire with that
18 evening of February 5, 2012?

19 A Jacob Graves.

20 Q And describe your relationship with Mr. Graves.

21 A At the time we were really good friends.

22 Q And did Mr. Kelsey accompany you?

23 A No.

24 Q Have you heard of the group called Twisted

1 Minds at North Valleys High?

2 A Not prior to that night.

3 Q Okay. Did you know Mr. Graves to be a member
4 of Twisted Minds?

5 A No.

6 Q And Mr. Kelsey?

7 A No.

8 Q That night did -- what caught your attention in
9 terms of a fight? What first caught your attention?

10 A The two girls.

11 Q Do you remember who they were?

12 A Amber, and I don't know the other girl's name.

13 Q And how close to this scene were you when Amber
14 and the other girl started fighting?

15 A I wasn't there when it started, but when it had
16 started, I walked over there. So it was just ending
17 when I got over there.

18 Q Okay. And when it just ended, how close were
19 you to the fight?

20 A I don't know. Maybe five feet.

21 Q Okay. Were you able to see faces?

22 A No. There was too many people in the way.

23 Q All right. How was the lighting that evening?

24 A It was dark.

1 Q Was there any backlighting from the bonfire?

2 A Not at the time of the girls' fight.

3 Q How about cell phones, was there any
4 backlighting from cell phones?

5 A I think people were trying to light it with
6 cell phones, but it didn't work out so well.

7 Q How did the fight between the two girls end?

8 A I believe they were pulled apart by Taylor
9 Pardick and another person. I'm not sure who that
10 person was.

11 Q After that was there another -- a second fight?

12 A Yes.

13 Q And how soon after the breakup of the two
14 girls' fight did the second fight happen?

15 A I would say about five minutes.

16 Q And who was involved in the second fight?

17 A Taylor Pardick, Jacob Graves and Ricky Boatman.

18 Q Okay. Describe the fight for me, that second
19 fight.

20 A Well, they started arguing because Taylor
21 Pardick had said something about hitting a girl or
22 something. So Jacob Graves and him were fighting, but
23 they weren't like fist fighting at the time.

24 Q Were they arguing or what were they doing?

1 A Yeah, they were arguing. And then they both
2 walked away. And then I don't know what happened.
3 Someone said something, but then it all just broke
4 loose.

5 Q Okay. We're going to go step by step through
6 the breaking loose. What happened next?

7 A I think Taylor Pardick said something about
8 Jacob Graves, so Jake went back. And I think Taylor
9 ran around a tree and then Ricky got knocked out. I
10 didn't see that part.

11 Q Let me stop you there. Who is Ricky?

12 A Ricky Boatman.

13 Q Did you know him prior to this evening?

14 A Yeah.

15 Q What was Ricky Boatman doing?

16 A I'm not sure. I didn't see that part.

17 Q Well, did you see Ricky Boatman run in and
18 throw a punch at Graves or Pardick?

19 A No. I saw him run around the tree, but I
20 didn't see anything after that.

21 Q In all the time that you've known Jake, is Jake
22 the kind of guy who would hit somebody for no reason?

23 A No.

24 Q Okay. Did you see Jake get into a fight with

1 Ricky Boatman or Ricky Bobby?

2 A No, I didn't see that part, but Ricky was on
3 the ground.

4 Q You saw Ricky hit the ground?

5 A Yes.

6 Q And you don't know why?

7 A Unh-unh.

8 Q Okay. After Ricky hit the ground, what
9 happened next?

10 A They were starting to go down by the fire and
11 then that's when Jared went up behind Jacob Graves.

12 Q Okay. "Jared" being Hyde?

13 A Yes.

14 Q Okay. He ran up behind Jacob Graves. And
15 where was -- when he ran up behind Jacob, do you know
16 where Zach Kelsey was?

17 A Not at the time.

18 Q Were you able to hear what went on between Jake
19 and Jared Hyde?

20 A No.

21 Q Were you able to see what happened with Jake
22 and Jared Hyde?

23 A No.

24 Q After Jared Hyde ran into the scene, what

1 happened next?

2 A Jared went up behind Jake and then Zach pulled
3 Jared Hyde off Jake.

4 Q So Zach came in and pulled Jared off of Jake.
5 How soon after Jared ran into the -- or ran in and
6 confronted Jake, I guess we could say, how much time
7 elapsed, if you know, or if you can estimate?

8 A Five seconds, maybe more.

9 Q All right. After Zach Kelsey came in behind
10 Jared -- first off, do you know what a pair of brass
11 knuckles look like?

12 A Yes.

13 Q Was Zach Kelsey wearing brass knuckles that
14 evening?

15 A No.

16 Q He was not?

17 A No.

18 Q Have you ever seen him wear brass knuckles?

19 A No.

20 Q After Zach runs in, what happens between him
21 and Jared that you saw?

22 A I saw Zach try to hit him, but from what I saw,
23 he missed the first time and then tried to knee him. I
24 don't know if he made contact or not.

1 Q What part of -- could you tell what part of
2 Jared Hyde's body where Zach's knee went?

3 A Probably his shoulder.

4 Q About his shoulder. Did it look to you like he
5 was kneeling him in the head?

6 A No.

7 Q So somewhere on his body below his neck.

8 In the time you've known Zach, what kind of jeans
9 does he wear?

10 A I don't know.

11 Q Okay. Now, after you see that -- did you see
12 Zach hit Jared?

13 A Once.

14 Q Okay. And could you tell where on Jared's body
15 or head that Zach hit him?

16 A I think probably his jaw, but Jared's back was
17 toward me, so I couldn't --

18 Q Then did you see anything go on between Zach
19 and Jared and their shirts?

20 A I know that Jared's shirt got ripped on the
21 shoulder, but I didn't see them like pulling their
22 shirts off or anything.

23 Q Okay. Did you -- were you able to tell whether
24 Jared threw a punch at Zach?

1 A Not that I can remember.

2 Q How long did the fight between Jared and Zach
3 last per your memory?

4 A No longer than 30 seconds.

5 Q Okay. And so that I understand -- and correct
6 me if I'm wrong -- in the 30 seconds you saw Zach hit
7 Jared near the jaw one time?

8 A Um-hum.

9 THE COURT: Is that a "yes" or a "no"?

10 Stop, Mr. Cornell.

11 Is that a "yes" or a "no"?

12 THE WITNESS: I'm sorry. What was the question?

13 MR. CORNELL: In other words --

14 THE COURT: Stop.

15 You made a noise. You didn't say a word. In court
16 we have to say words like "yes" and "no."

17 THE WITNESS: Okay.

18 THE COURT: So were you saying "yes" or "no" to
19 Mr. Cornell's question?

20 THE WITNESS: Can you repeat the question?

21 MR. CORNELL: Sure.

22 BY MR. CORNELL:

23 Q So that I understand, you saw Zach hit Jared
24 one time --

1 A Yes.

2 Q -- near the jaw?

3 And you saw Zach knee Jared on his body, not his
4 head, one time?

5 A Correct.

6 Q Okay. Did you see Zach hit Jared any other
7 times other than those two that you mentioned?

8 A No.

9 Q And you did not see Jared hit Zach or throw a
10 punch at Zach?

11 A No.

12 Q And the fight lasted about 30 seconds I think
13 is what you said.

14 A Correct.

15 Q At the end of the fight what happened?

16 A They both walked away or Jared went toward the
17 Durango.

18 Q Now, in this fight did Zach hit the ground?

19 A No.

20 Q In this fight did Jared hit the ground?

21 A No.

22 Q Did you see either Zach or Jared slip down to a
23 knee and then come right back up?

24 A Not that I can remember.

1 Q Okay. Was this a fight that somebody jumped in
2 and broke up or did they just quit fighting on their
3 own, could you tell?

4 A I didn't see anyone break it up.

5 Q And when you saw Jared walk towards the
6 Durango -- whose Durango, first off?

7 A I have no idea.

8 Q Did you notice anything unusual in the manner
9 in which Jared walked towards the Durango? Was he
10 stumbling? Was he falling? Was he running? How was
11 he moving?

12 A He was just walking.

13 Q Normally?

14 A Yes.

15 Q Now, from that point where Jared is walking
16 towards the Durango, did you see Jared again before
17 leaving?

18 A Yes, when he was on the ground unconscious.

19 Q Okay. Do you know how he got on the ground?

20 A No.

21 Q Did you see any individuals hit Jared after he
22 was walking towards the Durango?

23 A No. I was nowhere near the Durango.

24 Q When he was walking towards the Durango, do you

1 know where Zach was?

2 A No.

3 Q When Jared was on the ground, could you hear
4 him say anything?

5 A No.

6 Q How did he appear to you to be?

7 A Completely unconscious, not responsive.

8 Q To your knowledge, on that evening was Zach in
9 any kind of a gang?

10 A No.

11 Q And have you known Zach either to hang out with
12 Schneuringer or with Jefferson?

13 A No.

14 Q Is your testimony today to your memory
15 consistent with what you told the district attorney
16 when you were interviewed by them prior to trial?

17 A The first day?

18 Q Yeah. You testified that before Zach's trial
19 you were subpoenaed and interviewed by the district
20 attorney's office.

21 A Correct.

22 Q Is your testimony today consistent with what
23 you told the district attorney's office when they
24 interviewed you?

1 A Yes.

2 Q Thank you. I have no further examination.

3 THE COURT: Ladies and gentlemen, we're going to
4 take our recess for the afternoon. Court will
5 reconvene at 1:15.

6 I would like to admonish the people in the audience
7 that at no time are they to make any noises or say
8 anything that's audible. These proceedings need to be
9 solemn and respectful. And so if there's people in the
10 audience making noises or making comments, I'll have
11 them excused from the courtroom.

12 Court is in recess until 1:15.

13 (A recess was taken.)

14 --o0o--

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1 RENO, NEVADA; WEDNESDAY, JANUARY 13, 2016; 1:16 P.M.

2 --oOo--

3 THE COURT: We'll go back on the record in Kelsey
4 versus State, CR12-0326B. The record will reflect that
5 the petitioner is present with his attorney,
6 Mr. Cornell. Ms. Noble is here on behalf of the State
7 of Nevada. Ms. C [REDACTED] is present. And we are
8 going to now begin cross-examination.

9 Ms. C [REDACTED], I will remind you that you are
10 still under oath.

11 Ms. Noble, go ahead.

12 MS. NOBLE: Thank you.

13 CROSS-EXAMINATION

14 BY MS. NOBLE:

15 Q Good afternoon. Let me ask you this question:
16 How long have you known Zach Kelsey?

17 A A little over four years.

18 Q Four years. And how did you know him?

19 A We met through mutual friends.

20 Q Which mutual friends?

21 A Mark Rankin and Tyler Allison.

22 Q Is he your friend?

23 A Zach?

24 Q Yes.

1 A Yes.

2 Q Sorry. That was a bad question. Thank you for
3 clarifying it.

4 Do you remember meeting with a detective in the
5 case?

6 A No.

7 Q A police officer.

8 A Yes.

9 Q Okay. Do you remember him talking to you and
10 explaining to you they were going to record your talk?

11 A Correct.

12 Q Okay. Now, when Mr. Cornell was asking you
13 questions, I believe you testified that you saw Jared
14 Hyde run up behind Jake Graves. Did you tell that to
15 the detective?

16 A I believe so.

17 Q Are you sure?

18 A As far as I can remember.

19 Q Okay. Well, I have a transcript here of that
20 conversation. I wasn't able to find it in there, but
21 would you like to look for it?

22 A No.

23 Q Okay. Let me ask you this: Could you please
24 find that part for me.

1 MS. NOBLE: May I approach the witness?

2 MR. CORNELL: Sure. It's not my call, but yes, I
3 have no objection.

4 THE COURT: I appreciate the input, Mr. Cornell.

5 BY MS. NOBLE:

6 Q Are you done?

7 A Yes.

8 Q Okay. Were you able to find that part in
9 there?

10 A No. It just skipped straight from the Ricky
11 Bobby and Jake Graves to the Jared Hyde.

12 Q Now, when you say it skipped, are you saying
13 that there's part of it missing?

14 A No.

15 Q Okay. So would it be fair to say then that you
16 did not mention that when you talked to the detective?

17 A Correct.

18 Q I have the same question with respect to -- you
19 testified just now or before the lunch break that you
20 never even saw Jared Hyde fall to the ground or kneeled
21 in any way?

22 A Correct, I never saw that.

23 Q And did you also testify that you never saw
24 Kelsey try to knee him?

1 A No, I said I saw that.

2 Q Okay. Thank you for correcting me, because my
3 notes are messy.

4 Did you ever tell the detective that you saw the
5 fight at all between Jared Hyde and Zach Kelsey?

6 A Not in this one.

7 Q Okay. Before today have you told any member of
8 law enforcement that?

9 A I told the investigator.

10 Q And you mean Mr. Cornell's investigator?

11 A Yes.

12 Q Okay. And so that was in 2015; right?

13 A Yes.

14 Q In June? Summertime?

15 A Um-hum.

16 Q And do you remember also telling him that there
17 was a lot going on at that time and it was a really
18 chaotic environment?

19 A Correct.

20 Q And a lot of time has passed since this event
21 and it's hard to remember everything?

22 A Yes.

23 Q Did you know Jared Hyde?

24 A I think I might have met him once or twice, but

1 not that I can remember.

2 Q But he wasn't your friend?

3 A No, not at all.

4 Q And Zach Kelsey is your friend?

5 A Yes.

6 MS. NOBLE: I have no further questions at this
7 time. I would pass the witness.

8 THE COURT: Redirect based on the
9 cross-examination.

10 MR. CORNELL: Thank you.

11 REDIRECT EXAMINATION

12 BY MR. CORNELL:

13 Q Ms. C [REDACTED], Zach was your friend for about
14 four years I believe you said?

15 A Yeah, about a few months before this happened.

16 Q Okay. During that period of time did you know
17 Zach to hang out with either Bobby Schneuringer or Karl
18 Schneuringer?

19 A Karl, but not Bobby.

20 Q Okay. Did you know who Bobby was?

21 A No.

22 MS. NOBLE: Objection. It exceeds the scope of the
23 cross-examination.

24 MR. CORNELL: Well, we're talking about that

1 they're friends and all that. It seems to me that it
2 opens it up. I mean, I think we've covered this on
3 direct, but --

4 THE COURT: Well, the method and order of
5 questioning pursuant to NRS 50.115 is direct and cross
6 and then redirect based on the questions asked on
7 cross-examination and recross based on the questions
8 asked on the redirect examination, but I do have
9 latitude under that statute to allow you to ask some
10 additional questions, so go ahead, Mr. Cornell.

11 MR. CORNELL: Thank you. Thank you very much,
12 Your Honor.

13 BY MR. CORNELL:

14 Q So you knew who Bobby was?

15 A Not prior to this incident.

16 Q Okay. I mean, you didn't know him personally;
17 right?

18 A I didn't know him at all.

19 Q Okay. Did you know who Zach used to hang out
20 with when you and Zach were friends?

21 A Yeah. We hung out with about the same people.

22 Q Okay. Jake Graves being one of them, I assume?

23 A Correct.

24 Q And when you knew Zach in those four years --

1 let me ask you this: Would he be one to wear skinny
2 jeans or tight jeans, do you know?

3 MS. NOBLE: Objection; exceeds the scope of the
4 cross-examination.

5 THE COURT: I can give you some latitude, but what
6 do his jeans have to do with it?

7 MR. CORNELL: You know what, if I may --
8 I'll let it go. I'll strike it.

9 THE COURT: Okay.

10 BY MR. CORNELL:

11 Q When you gave your statement to law
12 enforcement, tell me when you gave it relative to Jared
13 Hyde's death. Do you know? Can you tell me when it
14 was relative to that?

15 A I think we went to the hospital maybe around
16 2:00 or 3:00 in the morning, and I went to Washoe
17 County probably like 7:00 in the morning.

18 Q So you had been up all night; correct?

19 A Correct.

20 Q And you gave your statement to the detective
21 about 7 a.m.?

22 A Yeah. It might be 8 a.m.

23 Q Okay. Did the detective specifically -- from
24 what you read, did the detective specifically ask you

1 if you saw a fight between Zach Kelsey and Jared Hyde?

2 A No.

3 Q When you were interviewed by the District
4 Attorney's Office prior to trial, do you recall telling
5 them that you saw the fight between --

6 MS. NOBLE: Objection; exceeds the scope of the
7 direct.

8 MR. CORNELL: I don't think that does.

9 THE COURT: Hold on. One person talks at a time.
10 I hope I don't have to remind anybody of that again in
11 the future.

12 It does not exceed the scope of cross-examination,
13 because you were asking about the witness making
14 statements, so at least you opened the door to that
15 issue, and so I'll overrule the objection.

16 You can answer the question.

17 BY MR. CORNELL:

18 Q Yes. The question is: Did you tell the
19 District Attorney's Office about seeing the fight
20 between Jared Hyde and Zach Kelsey?

21 A I can't remember.

22 Q Regardless, they excused you from the subpoena
23 and said they didn't need your testimony; is that
24 correct?

1 A Correct.

2 MR. CORNELL: Thank you. That's all I have.

3 THE COURT: Recross based on the redirect.

4 MS. NOBLE: Thank you, Your Honor.

5 RECROSS EXAMINATION

6 BY MS. NOBLE:

7 Q When you were interviewed by the detective, he
8 was asking you about what you saw that night; correct?

9 A Yes.

10 Q And you talked to him about when you saw Jared
11 Hyde?

12 A In which -- I'm confused.

13 Q Well, I think there's a part in there --
14 correct me if I'm wrong -- where you're talking about
15 how you saw him and he was unresponsive and people were
16 worried about him.

17 A Yes, by the Durango.

18 Q And you describe other parts of other people
19 fighting?

20 A Yes.

21 Q But you don't describe a fight between Zach
22 Kelsey and Jared Hyde?

23 A Not in the first one.

24 Q What do you mean "the first one"?

1 A Not in the first statement.

2 Q The statement that you gave right after this
3 incident?

4 A Correct.

5 Q Thank you.

6 THE COURT: Was there some other statement that you
7 gave?

8 A I went to the D.A.'s and talked to them.

9 THE COURT: Right. And you've testified that you
10 don't recall whether or not you mentioned it there or
11 not either; correct?

12 THE WITNESS: Correct.

13 THE COURT: Okay. Was there some other statement
14 that you're thinking about?

15 THE WITNESS: No.

16 THE COURT: Any additional questions based on my
17 questions, Ms. Noble?

18 MS. NOBLE: No, Your Honor.

19 THE COURT: Mr. Cornell?

20 MR. CORNELL: No, thank you, Your Honor.

21 THE COURT: Thank you, ma'am. You may step down.

22 MR. CORNELL: Our next witness would be S [REDACTED]
23 L [REDACTED].

24 THE CLERK: Raise your right hand.

1 (The oath was administered to the witness.)

2 THE WITNESS: Yep.

3 THE COURT: What was that?

4 THE WITNESS: Yes.

5 THE COURT: Thank you. Have a seat.

6 S [REDACTED] L [REDACTED],

7 having been called as a witness herein,
8 being first duly sworn, was examined
and testified as follows:

9 DIRECT EXAMINATION

10 BY MR. CORNELL:

11 Q Please state your name for the record and spell
12 your name, please.

13 A S [REDACTED] L [REDACTED] S [REDACTED] Last name
14 too?

15 Q Last name too, yes.

16 A L [REDACTED]

17 Q Thank you.

18 And what is your date of birth?

19 A [REDACTED] 95.

20 Q So that makes you 20 years old today?

21 A Yes, sir.

22 Q And on February 5, 2012, you were 16; correct?

23 A Yes, sir.

24 Q What high school did you go to?

1 A ACE High School.

2 Q ACE?

3 A Yes, sir.

4 Q Where is that located?

5 A It's like 2800 Vassar Street.

6 Q And were you at the bonfire on February 5,
7 2012, the bonfire party at the motocross freeway in
8 Lemmon Valley?

9 A Yes, sir.

10 Q Whom did you go to that party with?

11 A I was with my friend Jordan, Beau and Russell.

12 Q Now, after the death of Jared Hyde did you give
13 a statement to the police?

14 A Yeah. Detective Cox.

15 Q Okay. Do you remember when and where you gave
16 that statement?

17 A Parr Boulevard.

18 Q Okay. And do you remember when?

19 A I don't remember the exact date. I know it was
20 the week after the incident.

21 Q Okay. Were you ever interviewed by a defense
22 investigator prior to Zach Kelsey's trial, a fellow by
23 the name of Ken Peele?

24 A No.

1 Q Were you interviewed by my investigator, Justin
2 Olson, in or about May of last year?

3 A Yeah, I think -- it might have been -- I don't
4 know if it was May. I think it was a little later.

5 Q But last year?

6 A Yeah, last year.

7 Q Okay. Did you testify at Zach Kelsey's trial?

8 A No.

9 Q Were you called or subpoenaed by either side to
10 testify at Zach Kelsey's trial?

11 A No.

12 Q Have you been subpoenaed to testify today?

13 A Yes.

14 Q Now, from your memory, at the bonfire on
15 February 5, 2012, did you see a fight break out?

16 A Yes.

17 Q And who was involved in that fight?

18 A There was Bobby, A.J., and a few of A.J.'s
19 friends. Definitely not him.

20 Q Well, what I'm talking about and referencing is
21 a fight between two girls.

22 A Oh, yeah. Yes.

23 Q And tell me what you saw there.

24 A That all started because one of them said

1 something to the other one. They fought for a little
2 bit and then it was -- it was Josh or Jake Graves and
3 Taylor -- Taylor said something to Jake Graves or Josh
4 Graves' sister and then they kind of-- they got into a
5 little -- they weren't like -- you know, it wasn't
6 physical. They were just kind of squared up talking to
7 each other and then it escalated from there.

8 Q Okay. Let me ask you this question: Now, you
9 mentioned Jake Graves. Did you know him fairly well?

10 A No, I didn't really know those people.

11 Q Okay. Did you know Jared Hyde at all?

12 A No. I met him that night.

13 Q How about Bobby Schneuringer?

14 A No.

15 Q How about Zach Kelsey?

16 A No.

17 Q And how about A.J. or Andrue Jefferson?

18 A No, never seen him before.

19 Q You went to high school not at North Valleys
20 but at ACE High School?

21 A Um-hum, but I was friends with all the kids
22 that went to North Valleys and stuff. I lived around
23 there.

24 Q But not with those particular individuals?

1 A No.

2 Q And so you're identifying these individuals as
3 kind of based on what people have told you after the
4 fact in terms of here's --

5 A I knew the face and then I had seen that they
6 showed up -- you know, I saw their mug shots and stuff.
7 And that's how I got their names. I didn't know their
8 names that night.

9 Q Okay. Who showed you mug shots?

10 A I think -- it might have been like Facebook; I
11 saw them rolling down. And I heard about it. That
12 night I did not know what happened exactly. I mean, I
13 saw what happened, but I didn't understand the severity
14 of it all.

15 Q In the fight that you saw, did you see
16 Mr. Kelsey involved in that fight at all?

17 A No.

18 Q Okay. It's not to say he wasn't involved in
19 the fight; it's to say you didn't see it. Okay.

20 After the fight did you see the person you realized
21 was Jared Hyde walk away?

22 A No.

23 Q Where exactly was the fight at?

24 A Between Jared and the other ones?

1 Q Between -- well, between the two girls.

2 A The two girls, it was like down by the bonfire.

3 And then they were like rolling around and it rolled

4 off into the bushes a little bit.

5 Q Okay. Did you see that ultimate fight that
6 involved Jake and Taylor and maybe some other -- did
7 you finally see that stop?

8 A That never really -- no, I did not see that
9 stop. I was leaving and --

10 Q Later that evening did you see a person you
11 know as Jared on the ground?

12 A Um-hum.

13 THE COURT: Is that a "yes" or a "no"?

14 THE WITNESS: Yes.

15 THE COURT: Thank you.

16 BY MR. CORNELL:

17 Q Tell me about that. What did you see?

18 A From the beginning?

19 Q Yeah.

20 A Okay. So as that whole fight is going on --
21 the two girls fought and now it's Taylor and Jake or
22 Josh. I'm not exactly sure on that name. But anyways,
23 those two are standing there. And the A.J. guy, he's
24 got his phone over it. He's like "Catch a fade. Catch

1 a fade," trying to get them to fight. That finally
2 breaks out. It's going crazy.

3 Q Let me stop you there. Did you have an
4 understanding of what "catch a fade" means?

5 A Like step up, man up and do it.

6 Q Okay.

7 A You know, fight.

8 Q That was your understanding?

9 A Yeah.

10 Q All right. Now, go ahead. I'm sorry to have
11 interrupted you.

12 A So anyways, they're standing there, they're
13 doing that, and then somebody said, "Fuck TM."

14 Sorry if that's --

15 Q That's exactly what they said?

16 A That's exactly what they said. I don't know
17 who said that. There was a little crowd there. That's
18 when Taylor and Jake or Josh, they were still kind of
19 squared up. And then that like broke out and everybody
20 is like, you know, walking way, because it's like a war
21 zone. Everybody is trying to kill each other
22 basically.

23 And so as I'm walking away or I'm trying to get
24 away from this, then here comes Bobby. And so is

1 Jared. Jared is walking away. Okay. And here comes
2 Bobby running up behind him saying, "This guy said,
3 'Fuck TM.'" This guy said, 'Fuck TM.'"

4 And Jared turns around and looks at him, and the
5 last words he said was "What? Wait. No."

6 Boom. Dropped like a sack of rocks.

7 Q Tell me how loud the sound was.

8 A Very loud. It sounded like somebody -- two
9 rocks, boom, rolling a rock down a hill and it hitting
10 another rock. It was solid.

11 Q And you mentioned you were at the party with
12 Jordan?

13 A Yes.

14 Q I think his name is Jordan Beck.

15 A Yes.

16 Q And where was Jordan relative to you when
17 Bobby --

18 A When that happened, you know, and all --
19 everything going on, I have no idea where he was or my
20 other two friends, but I know that I was right there
21 and I saw it. I'm pretty sure they were headed on over
22 the hill by then, and I was just standing there for
23 whatever reason.

24 Q Now, before Bobby did that, you said you saw

1 Jared walking?

2 A Yeah, Jared was walking away.

3 Q Did you notice anything unusual about how he
4 was walking?

5 A No. He was perfectly fine.

6 Q Okay. How far of a distance did you see Jared
7 walk?

8 A You know, he was walking away from the fire
9 headed up the hill. He probably -- I mean, 15 feet,
10 you know, roughly, maybe a little farther.

11 Q And you say Bobby is the one who said, sic,
12 "Fuck TM," and he said, "What? Wait. No." Is that
13 what you just testified to?

14 A Yes.

15 Q And are those the precise words that he said?

16 A "What? Wait. No," the last thing he said. As
17 Bobby comes running up on the scene, "He said, 'Fuck
18 TM.' This guy said, 'Fuck TM.' This guy said, 'Fuck
19 TM.'", running up at him. Boom.

20 Q How much time, if any, elapsed between Jared
21 saying, "What? Wait. No," and Bobby hitting him?

22 A None.

23 Q Okay. It was instantaneous?

24 A A blink of an eye maybe.

1 Q After Bobby hit him, what did you see next?

2 A All of his little -- his black friends running
3 over there stomping on him.

4 Q And that would include A.J.?

5 A Yes. And I didn't know like the other guys.
6 Maybe if I had seen pictures -- I had never met them
7 before. But there was one white guy stomping on Jared,
8 and that was Bobby.

9 Q That was Bobby?

10 A Yes.

11 Q When Bobby and A.J. are doing -- and the other
12 black guys are doing this, do you know where Zach
13 Kelsey is?

14 A No. And honestly, I did not -- maybe I saw him
15 at the party, but I don't recognize him. I never
16 really remembered his face there.

17 Q Okay. But are you certain that Zach was not
18 with Bobby or A.J. when --

19 A Yes. Yes, I am certain that he was not there.
20 There was one white guy.

21 Q And that was Bobby?

22 A Yes, sir.

23 Q In the first fight that started with the two
24 girls, to your memory can you tell how many people were

1 involved in that fight?

2 A I mean, the whole party was watching. You
3 know, two people fighting, they're all "Woo, woo, woo,
4 my God."

5 Q I mean, did you see other people jump in the
6 fight?

7 A No, it was just the two girls that I recall.

8 Q So you didn't see anybody -- did you know who
9 Jake Graves was offhand?

10 A No. I know -- if I had seen a picture of
11 him -- I can't remember if it was Josh or Jake. I know
12 it was a short, little, chubby guy, big gauges. Yeah,
13 that guy.

14 Q Okay. Did you see that guy who you just
15 described involved in a fight at all?

16 A Yeah, he was fighting people, but that was
17 because of him and Taylor, but he was -- that was just
18 like a drunken brawl. That was nothing -- I mean, it
19 has nothing to do with what -- it escalated to this,
20 but, I mean --

21 Q Sure. And after the fight with Jake and
22 Taylor, did you see anybody else jump into the fight or
23 otherwise start fighting?

24 A Jake -- okay. So it was like Jake or Josh

1 knocked out Taylor and then -- his name was Ricky
2 Boatman. It's like "Hey, that was my friend," ran
3 after him. And then he's on the ground sleeping next.
4 That was like from me to her when that happened. And
5 I'm walking away. I'm like "This is out of control."
6 You know, I'm walking away, and then that's when Bobby
7 comes up. Jared was walking away and Bobby comes
8 running up behind him.

9 Q How far of a distance to your memory did you
10 walk from the time you decided to walk away from this
11 fight to the time Bobby hits Jared, do you know? How
12 far of a distance?

13 A Maybe from here to the door, maybe a little
14 farther.

15 Q Okay. So about 50 feet maybe?

16 A Yeah, something like that. It wasn't real,
17 real far.

18 Q Okay. Thank you, sir. I don't have any
19 further questions on direct for you.

20 THE COURT: You're not finished yet.

21 Cross-examination, Ms. Noble.

22 MS. NOBLE: Thank you.

23 /////

24 /////

1

CROSS-EXAMINATION

2

BY MS. NOBLE:

3

Q Who said, "What? Wait. No"?

4

A Jared.

5

Q Jared did?

6

A Yes.

7

Q And how did you learn his name was Jared?

8

A Afterwards.

9

Q From whom?

10

A I heard that he had died that night, and that's

11

how I knew. I didn't know his name when I was at the

12

party, but I learned his name afterwards that I heard

13

that he had died that night there when the whole case

14

unraveled. That's how I heard.

15

Q That's okay. Thank you for answering my

16

question.

17

And you said he was perfectly fine at that point.

18

Are you basing that on the fact that he was walking

19

away from the fight?

20

A Yes.

21

Q I have no further questions for you, sir.

22

Thank you.

23

THE COURT: Not yet.

24

MR. CORNELL: I have no redirect.

1 THE COURT: Now you're free to go. Thank you for
2 being here.

3 Petitioner's next witness.

4 MR. CORNELL: Yes. That would be Tom Qualls.

5 (The oath was administered to the witness.)

6 THE WITNESS: I do.

7 THOMAS QUALLS,
8 having been called as a witness herein,
9 being first duly sworn, was examined
and testified as follows:

10 DIRECT EXAMINATION

11 BY MR. CORNELL:

12 Q Please state your name for the record and spell
13 your last name.

14 A Thomas Qualls, Q-u-a-l-l-s.

15 Q In what city and state do you reside?

16 A Reno, Nevada.

17 Q And your occupation, sir?

18 A I'm an attorney.

19 Q And as an attorney do you handle appeals to the
20 Nevada Supreme Court Court of Appeals?

21 A I do.

22 Q And were you appointed to represent Zach Kelsey
23 in this case?

24 A Yes.

1 Q There's a folder in front of you. There you
2 go. Take a look, if you will, at Exhibit handwritten
3 as 6, but it's actually P. Excuse me. Wrong. Well,
4 we can look at Exhibit 6.

5 THE COURT: I don't believe the exhibits are
6 numbered.

7 MR. CORNELL: Yeah. I -- I'm sorry, Your Honor.
8 The problem is I started with numbering and realized we
9 changed it to lettering, so actually O is the old 6 and
10 P is the old 7.

11 THE COURT: Just tell me which one is it,
12 Mr. Cornell.

13 MR. CORNELL: Okay. All right.

14 THE COURT: The Fast Track Statement, if that's
15 what you're looking for, is Exhibit O.

16 MR. CORNELL: Right.

17 MS. NOBLE: Your Honor, at this time the State
18 would object to this line of questioning. No
19 assertions of ineffective assistance of counsel with
20 respect to the appellate brief were asserted, nor were
21 any particular claims asserted with respect to the
22 appellate process at all.

23 THE COURT: I remember reading the supplemental
24 petition, and there was one reference to the

1 ineffective assistance of appellate counsel. As
2 Mr. Qualls was taking the stand, I was trying to flip
3 through and find it, but, Mr. Cornell, why don't you
4 assist me by directing me to the grounds in the
5 supplemental petition that address Mr. Qualls's
6 performance.

7 MR. CORNELL: Well, my recollection is it's
8 particularly with respect to ground 5, sub A, the
9 neo-Nazi issue.

10 THE COURT: One moment. Hold on. Let me get
11 there.

12 MR. CORNELL: Page 28.

13 THE COURT: That was the one. I don't recall that
14 there were any other references to Mr. Qualls'
15 performance. That was the only reference that I
16 remember reading as I reviewed the supplemental
17 petition. Can you -- is there any other issue that
18 you'd like to direct me to or is it just this specific
19 issue?

20 MR. CORNELL: Well, here's the issue, Your Honor,
21 if I may. I seem to have this dance an awful lot with
22 Mr. McCarthy. Sometimes when you allege that trial
23 counsel was ineffective in not doing such and such,
24 he'll respond saying, "Well, appellate counsel could

1 have raised that as plain error on the appeal, so your
2 complaint is with appellate counsel." The problem is
3 in Washoe County we don't get to know those positions
4 until the time is now.

5 If Ms. Noble is not going to argue that, then, you
6 know, that's fine, but if she is, it seems to me like
7 there are a number of issues in here involving plain
8 error that theoretically could have been raised. I
9 mean, I think it's fair to ask Mr. Qualls, "Why
10 wouldn't you have raised these?"

11 THE COURT: Ms. Noble.

12 MS. NOBLE: Your Honor, I do apologize. I
13 missed -- in reviewing over the lunch break I did miss
14 that sentence on page 28. However, I think to go
15 through every single issue in this case that could have
16 possibly been raised on appeal wouldn't be appropriate.
17 The State hasn't been noticed that there's an assertion
18 of ineffective assistance of appellate counsel but for
19 this Straight Edge neo-Nazi business.

20 THE COURT: The Court would note that there are no
21 allegations in the petition for writ of habeas corpus
22 that Mr. Kelsey filed regarding the performance of
23 appellate counsel. As we review the supplemental
24 petition, it's clear that ground 1 is a trial counsel

1 issue. Specifically on page 1 at lines 22 through 25,
2 it is alleged, quote, "Petitioner was deprived of his
3 Fifth, Sixth and Fourteenth Amendment rights to a fair
4 trial, to due process of law and to the effective
5 assistance of counsel at trial." So that's clearly a
6 trial issue in ground 1. It has nothing to do with
7 Mr. Qualls or his performance at the appellate at
8 level.

9 Ground 2, it's alleged on page 11, quote,
10 "Petitioner's Fifth, Sixth and Fourteenth Amendment
11 rights to a fair trial, to due process of law and to
12 the effective assistance of counsel were impinged in
13 the following regard." And then it discusses trial
14 issues. It's not appellate issues.

15 Ground 3 begins on page 15 at line 24 through 26.
16 Quote, "Petitioner's federal constitutional rights
17 under the Fifth, Sixth and Fourteenth Amendments to a
18 fair trial, to due process of law and to the effective
19 assistance of counsel were impinged in the following
20 regards." It goes on to the next paragraph on the
21 following page talking about trial counsel's
22 performance.

23 Ground 4 is on page 20. Again, it begins with,
24 quote, "Petitioner was deprived of his Fifth, Sixth and

1 Fourteenth Amendment rights to a fair trial, to due
2 process of law and to effective assistance of counsel
3 at trial," close quote.

4 Ground 5 begins on page 24 on line 18. Quote,
5 "Petitioner was deprived of his Fifth, Sixth and
6 Fourteenth Amendment rights to a fair trial, to due
7 process of law and to the effective assistance of
8 counsel at trial and/or on appeal."

9 So there was an additional one. But that's ground
10 5. We've already discussed the fact that ground 5 is
11 where the appellate issue is raised in sub B.

12 Ground 6 is on page 30 beginning at line 9.
13 "Petitioner was deprived of his Fifth, Sixth and
14 Fourteenth Amendment rights to a fair trial, to due
15 process of law and to the effective assistance of
16 counsel," close quote. And then it begins to discuss
17 trial rights as well.

18 Ground 7 is on page 33 beginning at line 25
19 continuing on to the next page. "Petitioner's Fifth,
20 Sixth and Fourteenth Amendment rights to a fair trial,
21 to due process of law and to the effective assistance
22 of counsel were impinged in the following regards."

23 So I would agree, Mr. Cornell, that the State
24 wasn't put on notice that you intended to argue

1 anything about Mr. Qualls's performance beyond what's
2 alleged in ground No. 5.

3 MR. CORNELL: And I understand. And I'm not put on
4 notice by the State that they're contending that my IAC
5 at trial issues are really IAC on appeal issues either.
6 So that's my point.

7 THE COURT: Explain that to me a little bit better,
8 Mr. Cornell.

9 MR. CORNELL: Well, sure. What the State typically
10 does in the Second JD, unlike every other JD in Nevada,
11 is they file a simple general denial answer. And you
12 don't know what their positions are really until you
13 come into the hearing. Everywhere else in Nevada that
14 I've seen, Third, Fourth, First, Eighth even, they file
15 an extensive answer where they say exactly what their
16 positions are.

17 So as a result, I've seen it happen from
18 Mr. McCarthy where he says, "Well, you're raising an
19 IAC at trial issue, it's really IAC on appeal, so you
20 lose."

21 And all I was trying to do was counteract that.
22 Now, if the fact of the matter is that the only thing
23 at issue here is IAC on ground 5, that's fine. And as
24 long as I don't have to deal with the issue of, well,

1 you could have raised what you're talking about in
2 ground 6 or 4 as plain error on appeal, I'm fine with
3 that. I mean, I'm just trying to, you know, make a
4 record as far as that goes.

5 THE COURT: Well, as we know, writs of habeas
6 corpus are a hybrid of both civil and criminal
7 proceedings. The rules of civil procedure apply. And
8 if the petitioner in this case or any other case feels
9 that the responsive pleading from the State is not
10 adequate, you certainly have the right under the Nevada
11 Rules of Civil Procedure to file a motion for more
12 definitive statement if you don't like the way that
13 Mr. McCarthy has responded to the writ of habeas
14 corpus.

15 I would note that Mr. McCarthy in this case filed
16 an answer that was very similar to what you have
17 referenced.

18 MR. CORNELL: A general denial.

19 THE COURT: Just a general denial. And my
20 experience with Mr. McCarthy as a representative of the
21 State and with my acting as a representative of the
22 judicial branch is that is his general practice, just a
23 general denial. But I still think, Mr. Cornell, you've
24 got an obligation to put the State on notice what the

1 allegations are. And the State has the right to
2 appeal -- or excuse me -- the right to prepare its
3 argument from what you've given them notice of. And
4 you've given them pretty extensive notice about what
5 occurred in this case and what your allegations of the
6 ineffective assistance of Mr. Edwards were, but I'm
7 still just lost as to what Mr. Qualls would be
8 testifying to beyond the ground 5 allegation that you
9 talked about.

10 MR. CORNELL: I will tell you this. I think,
11 having interviewed Mr. Qualls, how he responds to
12 ground 5 is probably going to be his response to
13 anything else having to do with plain error in this
14 case, so --

15 THE COURT: Why don't we just hear what happens
16 with ground 5.

17 MR. CORNELL: Yeah. And if you want me to confine
18 my questions to ground 5, I'm happy to do that.

19 THE COURT: Okay. Why don't we just start there.
20 I'm not saying you can't do anything. Ms. Noble can
21 certainly object, and I'll rule on the evidentiary
22 objection as it's made, but she's objected that it's
23 beyond the pleadings. I pointed out that there is an
24 allegation in Count V -- or ground 5 of the writ of

1 habeas corpus, and so Mr. Qualls can testify.

2 Go ahead.

3 MR. CORNELL: Okay. Thank you.

4 BY MR. CORNELL:

5 Q Going back to where we were, Mr. Qualls, do you
6 recognize, first off, Exhibit O?

7 A I do.

8 Q And what is that?

9 A That is the Fast Track Statement filed in this
10 case.

11 Q By whom?

12 A That was filed by Mr. Edwards.

13 Q Okay. Now, under the rules of appellate
14 procedure, if you're appointed as appellate counsel,
15 what do you do when trial counsel files a Fast Track
16 Statement?

17 A You generally file a supplement, which I did,
18 which is Exhibit P, the Supplemental Fast Track
19 Statement.

20 Q And Exhibit P, what is that?

21 A That is what I said. That's the Supplemental
22 Fast Track Statement that I filed after Mr. Edwards
23 filed the fast track.

24 Q Okay. And Exhibit Q, what is that?

1 A The Court's indulgence. There aren't tabs, so
2 I've got to --

3 Q It would have been 8 as it was originally
4 tabbed.

5 A Did I drop something? Sorry.

6 Okay. Is the question "What is Q"?

7 Q Right.

8 A That is the Order of Affirmance filed
9 February 27th, 2014, from the supreme court, Nevada
10 Supreme Court.

11 Q Now, Judge Sattler already made a record of
12 this, but for purposes of asking you, what were the
13 issues in Exhibit O that Mr. Edwards raised?

14 A I'm trying not to drop this whole thing again.
15 Ground 1 is insufficient evidence; ground 2 is a
16 complaint regarding certain demonstrative evidence that
17 was admitted by the district court; and ground 3 is a
18 claim involving the introduction of gang information
19 which was claimed to be irrelevant in the case due to
20 the fact that there wasn't a gang case, there wasn't
21 any official gang charge.

22 Q Did Mr. Edwards actually raise an issue that
23 there was insufficient evidence of proximate causation
24 on the part of Mr. Kelsey as the cause of death of --

1 A No, not specifically. It's actually worded as
2 insufficient evidence of malice or intent to kill.

3 Q Okay. In the Supplemental Fast Track Statement
4 of Exhibit P, what issues did you raise?

5 MS. NOBLE: Your Honor -- Oh, I may be looking at
6 the wrong document. Excuse me.

7 THE WITNESS: So the claim in the supplemental fast
8 track is that NRS 200.070 contains unconstitutional
9 language and/or that the State failed to meet the
10 two-prong second degree felony murder rule test.

11 BY MR. CORNELL:

12 Q And those are the issues you raised; correct?

13 A Yes. I believe that's the sole issue raised.
14 I'm just making sure.

15 Q And, again, just to make it clear, you were not
16 raising the issue that the evidence was insufficient to
17 establish proximate cause of death by Zach Kelsey?

18 MS. NOBLE: I'm going to object to this question as
19 beyond the pleadings. This does not pertain to the
20 Straight Edge issue.

21 THE COURT: Well, he's already testified -- he's
22 testified to what he alleged, Mr. Cornell.

23 MR. CORNELL: Right.

24 THE COURT: Therefore, everything --

1 MR. CORNELL: -- that he didn't allege --

2 THE COURT: -- that he didn't allege, he didn't
3 allege.

4 MR. CORNELL: That's all I'm saying.

5 THE COURT: He testified to what alleged.

6 MR. CORNELL: I'm not saying that he should have
7 alleged that the evidence was insufficient of proximate
8 cause. I'm just asking him -- you know, just stating
9 that he didn't allege that. That's all.

10 THE COURT: He alleged one thing in the supplement.
11 Is that correct, Mr. Qualls?

12 THE WITNESS: That's correct, Your Honor.

13 THE COURT: Next question.

14 MR. CORNELL: Okay. Thank you.

15 BY MR. CORNELL:

16 Q Does Exhibit P appear to be a true and correct
17 copy of the Supplemental Fast Track Statement that you
18 issued -- or that you filed?

19 A Yes.

20 Q Okay. And does Exhibit Q appear to be a true
21 and correct copy of the Nevada Supreme Court's Order of
22 Affirmance?

23 A Yes, it does.

24 MR. CORNELL: Your Honor, I move for admission of P

1 and Q.

2 THE COURT: Any objection?

3 MS. NOBLE: I have no objection, Your Honor.

4 They're part of the record.

5 THE COURT: They will be admitted.

6 (Exhibits P and Q were admitted.)

7 BY MR. CORNELL:

8 Q Now, it has been alleged in ground 5 that
9 there's an issue regarding Mr. Ohlson in
10 cross-examining Mr. Kelsey bringing out the fact that
11 Mr. Kelsey is associated with Straight Edge, and
12 Straight Edge allegedly is associated with neo-Nazis.
13 Do you remember seeing that when you reviewed the trial
14 transcript?

15 A I do recall that.

16 Q Did you have a reaction on that, on whether to
17 raise that as an issue?

18 A Yes, I considered raising that as an issue.

19 Q Okay. And is there a reason you did not?

20 A At least three reasons.

21 Q Sure.

22 A One was that Scott didn't object to it, so it
23 would had to have been raised on plain error. Two is
24 that I had raised the gang issue which I felt like in a

1 lot of ways may have covered that. It was the whole
2 idea of the TM and the Straight Edge being completely
3 irrelevant.

4 Q Well, let me stop you there. Would you agree
5 in Exhibit P, your Supplemental Fast Track Statement,
6 that there's no mention about the testimony regarding
7 Straight Edge being neo-Nazi or potentially neo-Nazi?

8 A I have just reviewed this again this morning,
9 and I know there's nothing in there. I can go back
10 through it here, if you like.

11 Q Sure.

12 A Yes, there's nothing in Exhibit P about that.

13 Q Okay. So first problem is Mr. Edwards didn't
14 object to the evidence, didn't move for a mistrial
15 either based on the evidence; correct?

16 A That's correct. Well, certainly if there was a
17 mistrial, if there was a motion for mistrial, if that
18 were an issue in the trial, that certainly would have
19 been something that I would have strongly considered
20 raising. In this case I definitely would have raised
21 that as an issue.

22 Q Okay. And you mentioned that there was a third
23 reason why you didn't raise this issue on appeal. Do
24 you remember?

1 A Well, that is the sort of prevalent thought on
2 direct appeal that you kind of pick your strongest
3 horses and don't put a lot of fluff in so as to detract
4 from the credibility of those issues. I thought the
5 insufficient evidence of the State's case was strong
6 enough to carry the day.

7 Q Talking about the second degree murder charge
8 conviction?

9 A Correct.

10 Q Okay. Without regard to proximate cause?

11 A Proximate cause became addressed in response to
12 the State's answer to Mr. Edwards' first claim that
13 there was insufficient evidence of malice and intent to
14 kill. The State pointed out that it was sort of an
15 open murder thing and that there were various theories
16 and they weren't just relying upon, for instance,
17 second degree felony murder or malice in and of itself.

18 And so then I went into detail as to each of the
19 State's theories, including the issue of proximate
20 cause, which I happen to think is the linchpin here. I
21 don't think there's any proximate cause.

22 Q Sure. But in Exhibit Q, the Nevada Supreme
23 Court didn't address proximate cause, didn't say
24 anything about it, did they?

1 A Absolutely not, not in the Order of Affirmance
2 and not in the order denying the petition for rehearing
3 despite the fact that I raised it in those and I raised
4 it in the en banc petition. But, no, they never
5 considered it and there's not any findings.

6 Q Okay. But on this issue of Mr. Ohlson
7 examining Mr. Kelsey and bringing out the proposition
8 that Straight Edge used to be associated with
9 neo-Nazis, had there been objection and a motion for
10 new trial, your testimony is you would have raised that
11 issue on direct appeal?

12 A Absolutely.

13 Q Okay. Sub B of ground 5 talks about an issue
14 where when Mr. Ohlson was examining Dr. Clark he says,
15 "Thank you, Doctor. You remain as brilliant as usual."
16 Did that strike you as an issue at the time you were
17 reviewing the --

18 A I don't have a strong recollection of that. I
19 remember thinking it was odd. I remember knowing
20 exactly why Ohlson raised that. So two things. I
21 don't recall that there was any objection to that --

22 Q There wasn't.

23 A -- at all. And so that -- I would have --
24 unless it's really critical in my mind, I try not to

1 fight the plain error fight. And that wasn't a plain
2 error fight.

3 Q Although Dr. Clark was a very important witness
4 for the State relative to Mr. Kelsey, was she not?

5 A Certainly. And with respect to the fact that
6 Mr. Kelsey's case and the other two co-defendants' case
7 were inherently in conflict. And so I saw exactly what
8 Mr. Ohlson was trying to do with that, by trying to --

9 Q When you say "inherently in conflict," what did
10 you mean from reading the record?

11 A Well, in my mind it's night and day. In my
12 mind what Mr. Kelsey did was essentially misdemeanor
13 battery, and what the other two did -- again, I'm just
14 telling you my reasoning when I'm analyzing the facts.
15 Obviously this isn't any kind of legal conclusion.

16 You've got in essence an intervening criminal act
17 which breaks proximate cause, breaks foreseeability.
18 And that inherently makes the cases in conflict. That
19 inherently makes Mr. Edwards' case very different from
20 Mr. Ohlson's and Mr. Molezzo's case. They're -- you
21 know, it's the old paradigm of Mr. Kelsey is
22 essentially facing more than one prosecutor with
23 Mr. Ohlson.

24 MR. CORNELL: Your Honor, I'm not even going to get

1 into sub C. I mean, it's, frankly, not the essence of
2 this case.

3 BY MR. CORNELL:

4 Q So the non-objection to -- I mean, let's put it
5 this way. When John Ohlson says to Dr. Clark, "Thank
6 you, Doctor. You remain as brilliant as usual," did it
7 strike you that that's a form of vouching?

8 A That's certainly how I took it.

9 Q And you've raised anti-vouching issues before
10 on direct appeal when the prosecutor does that?

11 A Absolutely.

12 Q And do I understand that the primary reason for
13 not raising that here is simply because Mr. Edwards
14 didn't object to it?

15 A Yes, that would be the primary reason.

16 Q Okay. You didn't want to raise another plain
17 error in a case where you had something strong to talk
18 about in your view; is that the case?

19 A That was -- yeah, that was my thinking.

20 Q Okay. I mean, have you ever had appeals where
21 you've raised plain error?

22 A Of course. And sometimes you have to.

23 Q Yeah. But you did not feel that this was one
24 of them?

1 A No.

2 Q Okay. Thank you.

3 MR. CORNELL: That's all the questions I have on
4 direct.

5 THE COURT: Cross-examination, Ms. Noble.

6 MS. NOBLE: Thank you.

7 CROSS-EXAMINATION

8 BY MS. NOBLE:

9 Q Mr. Qualls, is your primary area of practice
10 appellate and post conviction?

11 A Primarily appellate. The only post-conviction
12 work I really do is death penalty work.

13 Q Do you do jury trials often?

14 A No.

15 Q How many jury trials have you done?

16 A I think three.

17 Q Three. It's a little bit different when you're
18 in a jury trial versus looking at things on appeal;
19 wouldn't you agree with that?

20 A I would certainly agree with that.

21 Q With respect to the Straight Edge issue, I'm
22 going to direct you to what I believe is the original
23 Fast Track Statement that Mr. Edwards filed, which is
24 Exhibit O, and specifically to page 11.

1 A Okay.

2 Q He does raise, does he not, the Straight Edge
3 affiliation evidence or testimony about that?

4 A Correct. And that's what I was answering on
5 direct. There is -- there was an issue at trial
6 about -- and I think -- I think Ohlson and Molezzo
7 raised that as far as TM and then Mr. Edwards joined as
8 well. But, yeah, there was an issue about whether --
9 because it wasn't a gang case officially, that it was
10 inappropriate to bring in that kind of evidence. And
11 so I reraised that issue on appeal.

12 Q And it was rejected by the Nevada Supreme
13 Court; correct?

14 A It was.

15 Q So he did raise the Straight Edge issue, just
16 not Mr. Ohlson's comment about "Son, did you know they
17 were Nazis," or something like that?

18 A Certainly I think one could distinguish between
19 what the general understanding of Straight Edge is, if
20 it's just -- there's just testimony about Straight Edge
21 versus the jury hearing something about a neo-Nazi
22 organization. I would say those are two different
23 issues. You know, I suppose depending on who you are,
24 you could say that's splitting hairs or not. If,

1 again, it had been objected to, I probably would have
2 raised that as a separate issue.

3 Q You would have. Do you think that would have
4 been a winning issue? You've litigated a lot of
5 appeals.

6 A As I said before, your primary thing is to pick
7 some strong horses, though occasionally not every issue
8 is a wall. Some issues are bricks, and you get enough
9 bricks, and you got a wall.

10 Q So in this case we've got the Straight Edge
11 issue raised but not Mr. Ohlson's non-testimonial
12 comment about Nazis or reference to Nazis. Given the
13 supreme court's response to the Straight Edge argument,
14 do you think that that would have carried the day in
15 this case? Would that be a winning horse?

16 A Can I review the supreme court's order again
17 real quick on that?

18 Q Certainly.

19 MR. CORNELL: And I suppose I'm late off the dime,
20 but I'm going to object. Speculation. I mean,
21 honestly, who -- what lawyer can say how the Nevada
22 Supreme Court is going to rule on a given issue? I
23 mean, some issues, sure. If you say the reasonable
24 doubt instruction was unconstitutional, you know how

1 they're going to rule on that. On something like this,
2 to me putting a non-supreme court justice or even staff
3 in the position -- in the shoes of those, I think it's
4 impossible. I think it's as much speculation as
5 anybody's opinion, frankly.

6 THE COURT: Ms. Noble.

7 MS. NOBLE: Your Honor, I would just respond that
8 Mr. Qualls was asked on direct about appellate
9 strategy. It's not an important question. I can
10 withdraw it.

11 THE COURT: Okay. Then I'll sustain the objection
12 if the question is withdrawn. Go ahead and ask your
13 next question.

14 BY MS. NOBLE:

15 Q Going back to causation, you said that the
16 Nevada Supreme Court didn't address causation at all in
17 its order. Looking at page 3 of the Order of
18 Affirmance, the first -- I'm sorry -- the last
19 paragraph addresses the question of the causation, does
20 it not?

21 A The last paragraph --

22 Q Not to your liking.

23 A -- on page 3 of --

24 Q The Order of Affirmance.

1 A -- Exhibit Q?

2 Q Yes, sir.

3 A I think my testimony, just to clarify, was that
4 they didn't address proximate cause. If I misstated
5 that, I apologize, but that was my intention and that's
6 what I maintained, as you know, on appeal, that they
7 never addressed proximate cause. And they did not use
8 the word "causation" here.

9 What they did was in addressing the malice issue
10 make a conclusion that his attack caused his death, but
11 there's no analysis there. And there's certainly --
12 they did not address proximate cause in the two-prong
13 way that I argued it on appeal which is that proximate
14 cause includes the but for element which is that but
15 for the acts of Mr. Kelsey, the deceased would not have
16 died. That's the first element.

17 And then the second is foreseeability. And as a
18 matter of law, if you have intervening criminal acts,
19 you break the foreseeability chain. And the supreme
20 court never addressed either one of those and did not
21 address the legal issue of proximate cause other than
22 to make a conclusory statement almost offhand that this
23 incident caused his death.

24 Q But just above that they do go through all the

1 medical evidence in this case, don't they?

2 A Yes, they discuss the medical evidence. And as
3 I argued before them, again, none of the medical
4 experts said but for Mr. Kelsey's acts the deceased
5 would not have died. And that is required for
6 proximate cause. Simply saying, as Dr. Omalu said,
7 that each blow contributed to his death is not
8 sufficient to get to proximate cause.

9 Q But the supreme court disagreed with your
10 argument; correct?

11 A The supreme court did not address that
12 argument, period.

13 Q Well, they didn't grant the appeal, did they?

14 A They did not address the proximate cause issue.
15 That's the answer to your question. They did deny the
16 appeal.

17 Q I don't think it's the answer to my question.
18 The question was whether or not the appeal was granted
19 or any relief was given.

20 A No, no relief was given.

21 Q No further questions for you at this time, sir.
22 Thank you.

23 THE COURT: Redirect based on the
24 cross-examination.

1 MR. CORNELL: I have no redirect. Thank you, sir.

2 THE COURT: Thank you, Mr. Qualls.

3 THE WITNESS: Thank you, Your Honor.

4 THE COURT: Nice to see you. Have a good day.

5 THE WITNESS: You too.

6 MR. CORNELL: Your Honor, what we're going to do is
7 have Mr. Qualls contact Mr. Edwards, because I really
8 didn't know what time we were going to need him.
9 However, what I would like to do in any event before we
10 get Mr. Edwards on the stand is call John Ohlson, but
11 pursuant to stipulation, we took Mr. Ohlson's
12 deposition on August 18, 2015, with the idea that it
13 would be a hearing deposition.

14 The thought was Mr. Ohlson is so busy with his
15 schedule that trying to find a time when he,
16 Mr. Edwards and Mr. Qualls would be available would be
17 difficult. And so rather than try and stretch this
18 over separate days to accommodate everybody, we simply
19 took Mr. Ohlson's deposition with the idea of reading
20 it at the hearing. I have --

21 MS. NOBLE: Your Honor, if I may just make a brief
22 record.

23 THE COURT: Sure.

24 MS. NOBLE: That is accurate. Mr. McCarthy did

1 make that agreement in my absence over the summer. I
2 am honoring it here today. However, I would note for
3 the record I made quite a few objections during that
4 deposition, and I trust that Your Honor can look at
5 those and decide which ones are valid and which ones
6 are not.

7 THE COURT: Okay. So what we're doing is marking
8 the transcript of Mr. Ohlson's deposition and admitting
9 it by stipulation; is that correct?

10 MR. CORNELL: Correct.

11 THE COURT: So it's Exhibit R, if I remember
12 correctly. Exhibit R is admitted.

13 (Exhibit R was marked and admitted.)

14 THE COURT: And I'll read it at some other time.

15 MR. CORNELL: Your Honor, it's up to you. I mean,
16 since this is a court of record where the
17 non-prevailing party presumably would appeal, I am also
18 comfortable just reading it into the record and having
19 it as though Mr. Ohlson were here.

20 THE COURT: I see no value in reading the
21 deposition of Mr. Ohlson into the record, because I am
22 representing to both parties that I will read the
23 deposition prior to rendering any decision in this
24 case. And I will read it prior to argument in this

1 case. So to have my court reporter listen to somebody
2 read what somebody else has said and make record of
3 that with the associated objections I think is not an
4 efficient use of anyone's time and certainly not an
5 efficient use of my court reporter's exceptional
6 ability. And, therefore, it will not occur. I'll read
7 it.

8 MR. CORNELL: Okay.

9 THE COURT: Do you have another witness that you
10 would like to call?

11 MR. CORNELL: Well, I have Mr. Edwards, but I doubt
12 that he's here at this point. Perhaps this would be a
13 good time to take a break.

14 THE COURT: Well, it's actually not a good time to
15 take a break, because we've only been at this for an
16 hour and five minutes, and I usually like to go for
17 about an hour and 45 minutes. I do also know, though,
18 that Mr. Kelsey did not have the opportunity to eat the
19 lunch that was provided to him from the sheriff's
20 office, so we will take a brief recess and allow him to
21 do that. Court is in recess.

22 (A recess was taken.)

23 THE COURT: We'll go back on the record in
24 CR12-0326B, Zachary Kelsey versus the State of Nevada.

1 During the recess the Court did have the opportunity to
2 read the transcript of Mr. Ohlson's deposition, so I am
3 now familiar with what Mr. Ohlson said.

4 Mr. Edwards, good afternoon, sir. If you would
5 please step forward. It's my understanding that you
6 are the petitioner's next witness.

7 MR. CORNELL: That's correct, Your Honor.

8 (The oath was administered to the witness.)

9 THE WITNESS: Yes.

10 SCOTT EDWARDS,

11 having been called as a witness herein,
12 being first duly sworn, was examined
and testified as follows:

13 DIRECT EXAMINATION

14 BY MR. CORNELL:

15 Q Please state your name for the record and spell
16 your last name.

17 A My name is Scott Edwards, E-d-w-a-r-d-s.

18 Q And what city and state do you reside in?

19 A Reno, Nevada.

20 Q Your occupation, sir?

21 A I'm a criminal defense attorney here in town.

22 Q When were you admitted to practice in Nevada?

23 A 1988.

24 Q And have you been a criminal defense attorney

1 the whole time since your admission?

2 A No. I began my career at the Legislative
3 Counsel Bureau and then became a deputy district
4 attorney here in Washoe County and then in Las Vegas in
5 Clark County. I followed that up with a five-year tour
6 of duty in the Attorney General's Office as a
7 prosecutor as well and then became a criminal defense
8 attorney full-time in 1998.

9 Q Okay. So criminal defense attorney full-time
10 since 1998. Is there any other area of law that you
11 practice besides criminal defense?

12 A I do some select civil work and I've done
13 family law in the past. I don't practice it anymore.

14 Q Don't blame you. Okay.

15 How many cases other than this one have you tried
16 to a verdict, first off, as a defense lawyer?

17 A Oh, goodness. I would say at least 20.

18 Q Okay. And how many of those were murder cases?

19 A Three I can think of at least.

20 Q Okay. And that's prior to being appointed to
21 Mr. Kelsey's case to the best of your knowledge?

22 A Yes.

23 Q Had you ever tried cases with John Ohlson,
24 Esq., as a co-counsel prior to this case?

1 A Not trial, no. I had never tried a case with
2 Mr. Ohlson.

3 Q Okay. Now, we have marked Exhibit L. Yeah,
4 you have that book that should have it.

5 A Okay. I'm looking at it.

6 Q Sure. Okay. And for the record, what is
7 Exhibit L?

8 A It's an interim -- it's an ex parte motion for
9 interim attorney's fees in this case.

10 Q Okay. Does it reflect five ex parte motions
11 that you filed for payment?

12 A Oh, I see. One, two --

13 Q If it helps you, we may have gone out of order
14 on three and four.

15 A Yes.

16 Q Okay. And does the sum total of those five
17 interim reflect all the work that you did from first
18 appointment to the end of the trial?

19 A It should, yes.

20 Q Okay. If you don't bill it, you don't get
21 paid; right?

22 A That's right.

23 Q Okay. As far as you can tell, Exhibit L is
24 true and correct copies of the ex parte motions that

1 you submitted for payment?

2 A Yes, as far as I can tell.

3 MR. CORNELL: Move to admit L, please.

4 THE COURT: Any objection, Ms. Noble?

5 MS. NOBLE: Objection; relevance.

6 THE COURT: What's the relevance of the --

7 MR. CORNELL: Well, L is going to show -- I just
8 indicated that it shows everything that he did. What
9 it's going to show is what he did or more accurately
10 not did, and I'm going to examine him on the substance
11 of that shortly.

12 THE COURT: Wouldn't Exhibit L be part of the
13 proceedings anyway, Ms. Noble? I mean, they're part of
14 the file.

15 MS. NOBLE: Yes, Your Honor, it would be part of
16 the file. I'm concerned for appellate purposes that,
17 you know, if we're representing that everything
18 Mr. Edwards did was on that piece of paper, I think
19 that's not going to be accurate, but I'll --

20 THE COURT: I don't know if that is accurate,
21 though the record -- the records, I should say, will be
22 admitted. Certainly you'll be allowed to cross-examine
23 Mr. Edwards about any issues that arise regarding these
24 five documents.

1 (Exhibit L was admitted.)

2 BY MR. CORNELL:

3 Q From Exhibit L can you tell when you were first
4 appointed in this case?

5 A Yes.

6 Q And when was that?

7 A It says in March of 2012.

8 Q Okay. And Mr. Kelsey was actually indicted,
9 was he not, in this case as opposed to a preliminary
10 hearing?

11 A That's correct.

12 Q Did you develop a theory of defense for
13 Mr. Kelsey?

14 A Yes.

15 Q And what was that?

16 A Well, that he was guilty at best of the lesser
17 included offense of simple battery and that he was not
18 guilty of murder. And along with that there was the
19 causation issue which was central to the case.

20 Q Okay. And can you explain that, please, for
21 the record.

22 A The causation issue?

23 Q Yes.

24 A Well, as you recall the facts in the case,

1 Mr. Kelsey and Mr. Hyde had an initial altercation in
2 which Mr. Hyde suffered somewhat of an injury, a blow,
3 in combat with Mr. Kelsey, and he walked away from the
4 altercation. I believe he said, "I want to go home. I
5 just got rocked," and then moved to a different
6 location at the scene of the party that was going on
7 there and was assaulted by two other individuals who
8 were the co-defendants in the case and lapsed into
9 unconsciousness and death proceeded.

10 Q So that I understand, your theory is that, A,
11 from that incident at best Kelsey committed a battery,
12 and, B, Kelsey was not the cause in fact -- or rather
13 the proximate cause of the death of Schneuringer --
14 excuse me -- of Jared Hyde?

15 A Yes.

16 Q Did you have an alternate theory that if --
17 even if he's the cause in fact of the death of the
18 victim that it's not a second degree murder but at best
19 an involuntary manslaughter?

20 A The instructions were submitted that way, yes.

21 Q Okay.

22 A That was available.

23 Q All right. And in looking at Exhibit L, the
24 second billing --

1 THE COURT: Can you tell me what the date is on it,
2 because it might be that they're not exactly --

3 MR. CORNELL: I have June 28, 2012, the date that
4 Mr. Edwards signed it and the date it was filed with
5 the court.

6 THE COURT: One moment. Found it. Go ahead.
7 BY MR. CORNELL:

8 Q Okay. It appears that what you did was after
9 reviewing discovery, additional discovery, that you did
10 research on superseding intervening cause; is that
11 correct?

12 A I did.

13 Q So you were alighting on that as the theory of
14 defense as early as June 12, 2012; is that correct?

15 A I was certainly researching it, yes.

16 Q Okay. Now, is it fair to say that in
17 developing this theory of defense you did not contact a
18 forensic pathologist as an expert witness?

19 A That's correct.

20 Q Okay. Looking now at Exhibit N, which is a
21 letter from Mr. Molezzo to you and Mr. Ohlson of
22 August 7, 2012 --

23 A From Mr. Molezzo?

24 Q Correct. If I said M as in Mary, I meant N as

1 in Ned.

2 A Yes, I see it.

3 Q Did you receive that letter in the ordinary
4 course from Mr. Molezzo?

5 A I imagine I did, yes.

6 MR. CORNELL: Move for admission of N.

7 MS. NOBLE: Objection; hearsay.

8 THE COURT: How is it not hearsay, Mr. Cornell?

9 MR. CORNELL: Well, it's not being offered for the
10 truth of the matter asserted. It's basically offered
11 in terms of what did Mr. Edwards do in connection with
12 Exhibit N.

13 THE COURT: Ms. Noble.

14 MS. NOBLE: Your Honor, I don't think that makes it
15 not hearsay.

16 Perhaps you could just ask him about whether he
17 received a letter.

18 THE COURT: Oftentimes counsel for both the State
19 and for the defense argue that some piece of evidence
20 is not being offered for the truth of the matter
21 asserted, it's being offered for the effect upon the
22 listener, but I don't think that means that the
23 document itself comes in.

24 I think what would happen under those circumstances

1 is that Mr. Edwards would review the document, and he
2 can read it certainly, and say as a result of that
3 document what did you do or what didn't you do. That
4 would be the effect upon the listener. So it doesn't
5 automatically mean that the letter in and of itself
6 becomes admissible. So I still think it's hearsay.
7 I'll sustain the objection, but you can talk to him
8 about it.

9 MR. CORNELL: Thank you.

10 BY MR. CORNELL:

11 Q Again, focusing on Exhibit N, August 7, 2012,
12 is it fair to say that as of that date, August 7, 2012,
13 you knew that Mr. Ohlson had retained a forensic
14 pathologist but didn't know what that forensic
15 pathologist was going to testify to?

16 A For sure by that date -- well, I would have
17 been put on notice about it on this date, but I can't
18 remember the exact date that I talked to Mr. Ohlson
19 about that.

20 Q Okay. Do you remember talking to Mr. Ohlson
21 about that prior to trial?

22 A Yes.

23 Q Okay.

24 A Distinctly.

1 Q Okay. And can you remember how soon prior to
2 trial or how close in time to the trial that you talked
3 to Mr. Ohlson about a forensic pathologist?

4 A Not precisely I can't. It wasn't the day
5 before trial or anything. It was in the Reno Justice
6 Court. We were there on another matter and we
7 discussed it.

8 Q Did he, Mr. Ohlson, say that the expert he
9 hired simply can't help, do you remember?

10 A I think it was more of in the nature it wasn't
11 good. I was looking for a contradiction in Dr. Clark's
12 findings or Dr. Omalu's findings, and he said that his
13 expert wouldn't do that.

14 Q Okay. Let me ask you this: Suppose in fact he
15 had an expert, Dr. Terri Haddix, H-a-d-d-i-x, from
16 Hayward and that what she had advised Mr. Ohlson --

17 MS. NOBLE: Your Honor, at this time the State
18 would renew its objection made during the deposition to
19 what Mr. Ohlson says his purported expert said.

20 MR. CORNELL: Well, I want --

21 THE COURT: Finish the question first.

22 BY MR. CORNELL:

23 Q Okay. Suppose the information that Mr. Ohlson
24 actually had was that his expert had identified the

1 primary injury that was the factual cause of death of
2 the deceased and what that was was a rupture or
3 severing of the cranial artery, cranial artery bundle
4 that serves the brain with blood, and that it was
5 ruptured by the torquing motion of the head that
6 resulted from a blow that the deceased received. First
7 off, is that what Mr. Ohlson told you when you were
8 over in Reno Justice Court?

9 A No.

10 Q Can you see how that information could have
11 been exculpatory or helpful to Mr. Kelsey if you had
12 known about it?

13 A Perhaps if it could have contradicted the
14 State's theory that the accumulation of blows that took
15 place that day --

16 Q Well, can you --

17 THE COURT: Hold on. Let him finish answering the
18 question.

19 MR. CORNELL: I'm sorry.

20 THE WITNESS: If it could limit it to Mr. Kelsey's
21 blow being not a cause of death, it would have been
22 helpful.

23 BY MR. CORNELL:

24 Q Sure. And if that torquing motion factually

1 could have been tied to what Schneuringer and Jefferson
2 did after what Kelsey did, could you see arguing that
3 that really is the cause of death, that what
4 Schneuringer and Jefferson did was the cause of the
5 death, not Kelsey?

6 A I could have argued that, yes.

7 Q But you didn't have that evidence to present to
8 make that argument; correct?

9 A No. And that's not what the doctor said.

10 Q That's not what Dr. Clark said?

11 A Right, or Dr. Omalu.

12 Q Or Dr. Omalu. Thank you.

13 So you didn't know that there was an expert out
14 there who could deliver that type of testimony; is that
15 correct?

16 MS. NOBLE: Your Honor, I'm going to just one more
17 time renew that objection. We're summarizing the
18 testimony of some expert that Mr. Ohlson summarized the
19 testimony of.

20 THE COURT: Mr. Cornell.

21 MR. CORNELL: I think I've already asked the
22 question. I'll move on to the next one.

23 THE COURT: I'll sustain the objection then as
24 needlessly cumulative. Go ahead.

1 BY MR. CORNELL:

2 Q Let's suppose further there's another expert
3 out there that would testify that while it's possible
4 that the blows administered by Kelsey could have been
5 fatal or contributed to the death of the victim, to a
6 reasonable degree of medical probability the blows
7 administered by the second group of assailants,
8 Schneuringer and Jefferson, were in fact fatal in
9 nature and resulted in the death of the victim. If
10 there had been an expert out there to render that kind
11 of testimony, would you have wanted to present that?

12 A Can you repeat the initial part of your
13 question again regarding Mr. Kelsey.

14 Q Sure. While it is possible that the blows
15 administered by the first assailant, that is, Kelsey,
16 could have been fatal or contributed to the death of
17 the victim, to a reasonable degree of medical
18 probability the blows administered by the second group
19 of assailants, i.e., Schneuringer and Jefferson were in
20 fact fatal in nature and in fact resulted in the death
21 of the victim. If that kind of information had been
22 out there, would you have wanted to present it in
23 developing your defense?

24 A Yes, I think so.

1 Q Okay. But you didn't know whether there was an
2 expert out there who held that opinion or not; correct?

3 A No, I didn't.

4 Q Okay. Did you consider filing a motion in
5 limine to argue that Dr. Clark and Dr. Omalu shouldn't
6 be permitted to testify to what was possible but only
7 to what is reasonably medically probable? Did you
8 consider filing a motion in limine in that regard?

9 A No, I didn't consider that.

10 Q Have you ever filed a motion like that? I
11 guess you could call it a Hallmark motion since we
12 don't have Daubert. Have you ever filed a motion like
13 that?

14 A I can't recall.

15 Q If in fact Mr. Ohlson's expert held -- if he
16 held the opinion or she held the opinion that the
17 primary injury in this case was a rupture or severing
18 of the cranial artery that serves the brain with blood
19 and it was a rupture by the torquing motion of the head
20 that resulted from a blow that the deceased received,
21 if that's what his expert told him, is that
22 inconsistent with what Mr. Ohlson told you?

23 A No, I don't think so.

24 Q Okay. Did the fact that Mr. Ohlson was not

1 willing to share precisely what his expert had to
2 say -- did that raise any kind of red flag to you prior
3 to trial?

4 A No, it didn't. No, it didn't.

5 Q And why not?

6 A Well, I didn't have any reason to distrust what
7 he was saying to me. You know, one of the things in
8 this trial was that the State would have loved if we
9 had just turned on each other and everything became a
10 finger point.

11 Q Let me ask you --

12 THE COURT: No. Let him finish answering the
13 question.

14 MR. CORNELL: I thought he just did. I'm sorry.

15 THE WITNESS: Well, I didn't have any lack of
16 cooperation with Mr. Ohlson or Mr. Molezzo during this
17 trial, so --

18 BY MR. CORNELL:

19 Q Let me focus on that for a second. Prior to
20 the trial did you and Mr. Ohlson and Mr. Molezzo have a
21 meeting where you discussed not having finger pointing
22 at each other?

23 A I think that was independently done. I had a
24 meeting with Mr. Molezzo and I met with Mr. Ohlson, but

1 I don't remember -- perhaps there was -- yes, there was
2 a joint meeting at Mr. Molezzo's office at one point in
3 time. And it may have been spawned by this letter,
4 Exhibit N.

5 Q Now --

6 A But there were independent meetings as well.

7 Q Exhibit L, the fifth interim billing --

8 THE COURT: What date are you talking about?

9 MR. CORNELL: That one is dated December 12, 2012,
10 it looks like. Yeah, it's dated that and filed that
11 day.

12 THE COURT: Okay.

13 THE WITNESS: Yes.

14 BY MR. CORNELL:

15 Q Okay. Do you see where you billed two hours
16 for a conference with co-counsel?

17 A Yes. November 27th.

18 Q Okay. Looking back on it, do you believe that
19 that would have been the meeting where you, Mr. Molezzo
20 and Mr. Ohlson talked about "Let's not have a trial
21 where we're pointing fingers at one another"?

22 A Yeah, I'm sure we discussed that.

23 Q Okay. Somewhere along the way or at that
24 meeting?

1 A Certainly. I mean, you know, I recall we did a
2 coin flip about the progression of the
3 cross-examination, things like that.

4 Q But your theory of defense for Mr. Kelsey
5 really was pointing a finger at them, was it not?
6 Wasn't your theory of defense that Kelsey committed at
7 best a misdemeanor battery and the other two guys were
8 the intervening superseding cause and the actual
9 proximate cause of the death of Hyde?

10 A That's right.

11 Q So really in a sense your theory of the defense
12 is pointing fingers at them; correct?

13 A Well, I didn't make it my job to convict them
14 but distinguish Mr. Kelsey from their acts.

15 Q Okay. Did you think from your pretrial
16 meetings that Mr. Ohlson was going to present a defense
17 that would, you know, put the blame solely on
18 Mr. Kelsey?

19 A No, I did not.

20 Q Do you recall Mr. Ohlson's opening statement?

21 A Yes. Well, some of it.

22 Q Okay. When did Mr. Ohlson disclose his
23 witnesses that he was going to call in his case in
24 chief?

1 A I'm not sure if he did some disclosure way
2 prior to trial, but I know on the Friday before the
3 commencement of the trial on Monday he disclosed some
4 witnesses about an incident at Mr. Schneuringer's
5 house.

6 Q Okay. And prior to trial did you have an
7 investigator go talk to those witnesses to find out
8 what they were going to say?

9 A Prior to trial, no.

10 Q And did Mr. Ohlson indicate to you specifically
11 what they were going to say prior to trial?

12 A No.

13 Q So the first time you learned what those
14 witnesses were going to say, Mr. Fallen and Mr. Smith
15 and Mr. Simpson, was when Mr. Ohlson gave his opening
16 statement; correct?

17 A Right.

18 Q And he didn't give it at the beginning of the
19 trial, he reserved it to before his case in chief?

20 A That's correct.

21 Q Okay. When he gave his opening statement did
22 it occur to you that he was running a defense pointing
23 the finger at Mr. Kelsey?

24 A Yeah, somewhat.

1 Q Yeah. Well, his defense was based on the
2 testimony of those three guys, that Mr. Kelsey bragged
3 about killing Hyde; right? And if he killed Hyde, Hyde
4 was dead before Schneuringer and Jefferson ever laid a
5 hand or a foot on him. Wasn't that his defense?

6 A I don't know if he said it that way, but --

7 Q Wasn't that the implication?

8 A I mean, he got on the bandwagon of the forensic
9 evidence that Mr. Kelsey's blow could have been the
10 cause of death, but --

11 Q But from the opening statement, was that the
12 first time that you were aware that Mr. Ohlson was
13 pushing it further than any blow could have done it,
14 that Mr. Kelsey actually bragged about and took
15 responsibility for the death of Mr. Hyde?

16 A That was nowhere in the discovery anywhere.

17 Q Okay. I mean, were you surprised or shocked
18 when Mr. Ohlson made the opening statement?

19 A When I saw the witnesses I inquired into on the
20 Friday -- the witnesses when the trial began that he
21 listed, I inquired about that and found out he was
22 going down the bragging about the brass knuckles.

23 Q When did you find that out?

24 A That was first day of trial.

1 Q Okay. Did you feel that Mr. Ohlson sandbagged
2 you by doing that?

3 A In a way, yeah. I mean, it wasn't -- I don't
4 know if it was unethical, but it wasn't very
5 cooperative.

6 Q Okay. Did you consider moving to sever the
7 trials at that point when Mr. Ohlson gave his opening
8 statement?

9 A No.

10 Q Now, do you remember during the trial Mr. --
11 you put Mr. Kelsey on the stand; correct? And do you
12 remember when Mr. Ohlson cross-examined Mr. Kelsey and
13 brought up that Straight Edge is a neo-Nazi movement?
14 Do you remember that?

15 A Yes. That was out of the blue.

16 Q Did you see that coming at all?

17 A No.

18 Q Did you have anything from the pretrial
19 discovery suggesting that Mr. Kelsey belonged to a
20 movement that ascribed neo-Nazi philosophies?

21 A I discussed with Mr. Kelsey the nature of his
22 membership in Straight Edge as a lifestyle choice and
23 what it meant. And nowhere in the course of those
24 discussions was there any mention of Nazis or white

1 supremacy philosophy.

2 Q The record reflects you did not object when
3 Mr. Ohlson was bringing that up; correct?

4 A That's right.

5 Q I mean, did you think to object or --

6 A It crossed my mind. It shocked me. It wasn't
7 very enduring, you know, it went on. And Mr. Kelsey
8 was able to, you know, disabuse that notion about
9 Straight Edge in his own testimony.

10 Q But then Mr. Ohlson -- I mean, the record
11 reflects Mr. Ohlson said, "Well, it is, son." Correct?
12 Do you remember that?

13 A Well, Mr. Kelsey I think replied, "No, I didn't
14 know that."

15 Q And Mr. Ohlson replied in front of the jury,
16 "Well, it is, son," meaning that Straight Edge is a
17 neo-Nazi philosophy, did he not? Do you remember that?

18 A If that's what he said.

19 Q Okay.

20 A That was the end of it.

21 Q I mean, did you find yourself feeling shocked
22 or surprised by that?

23 A Yeah, I was surprised by it. It wasn't my
24 understanding of what Straight Edge was about.

1 Q Did you consider objecting, moving to strike or
2 even moving for a mistrial when you heard that?

3 A He moved on from it from pretty quickly, and
4 Mr. Kelsey defended himself I thought adequately. I
5 didn't want a limiting instruction or something that
6 would bring more attention to it than already had been.

7 Q Now, we'll talk about limiting instructions in
8 a second, but the record reflects that you waived
9 closing argument; is that correct?

10 A That's correct.

11 Q And looking back on it now, did it feel like
12 Mr. Ohlson sandbagged you again on that one?

13 A I don't know -- I'm certain he had his own
14 motive for doing that, but the reason I engaged in that
15 conduct was not to help out his client. My feeling --
16 my sense was at the time we were discussing this that
17 obviously all three counsel had to waive or it would be
18 useless. We didn't want Mr. Hall, the number one
19 prosecutor, to come in with an argument that made a
20 first degree murder conviction a possibility at all.

21 Q Well, let's -- we're going to break this down a
22 little bit, but let's stop there. You were -- based on
23 your research, you were the one who prepared the
24 proximate cause intervening superseding instruction?

1 A I do remember preparing those instructions.

2 Q That instruction based on the record that you
3 had was available to Mr. Kelsey; correct?

4 A Yes.

5 Q Do you think it was realistically available to
6 Mr. Ohlson or to Mr. Molezzo?

7 A Available? I mean, it was part of the record.

8 Q I mean, do you think --

9 A Whether they could have argued it factually?

10 Q Yeah, that's my question.

11 A Probably not.

12 Q Now, you also prepared a misdemeanor battery
13 lesser included instruction and verdict for Judge
14 Elliott; correct?

15 A I believe so, yes.

16 Q Okay. Was that instruction, looking back on
17 it, arguable for Mr. Ohlson or Mr. Molezzo on behalf of
18 their clients, that they committed a mere misdemeanor
19 battery?

20 A No, I don't -- factually I don't think the
21 facts played out that way.

22 Q Okay. Now, Mr. Hall certainly could have
23 argued for first degree murder on the co-defendants
24 because they're associated with TM and the TM people

1 are yelling out "Catch a fade. Catch a fade," meaning
2 knock him out so that he can't get up; right?

3 What realistically could Mr. Hall have argued to
4 make Mr. Kelsey guilty of first degree murder based on
5 the way this case was charged?

6 A Well, the classic prosecutorial argument that
7 the premeditation and deliberation can take part in a
8 second.

9 Q Sure. But that would be a violation of Byford
10 if he were to argue that, wouldn't it?

11 A Well, I don't know about that.

12 Q I mean, premeditation can be formed in a
13 second, but deliberation requires a weighing process
14 before deciding to go to the dark side, doesn't it?

15 A There is, again, a time period that's discussed
16 in Byford.

17 Q Based on the facts as you know them to be, what
18 time period in this case on what evidence would suggest
19 that Mr. Kelsey engaged in a weighing process before
20 deciding to take the life of Jared Hyde?

21 A Well, I didn't think it was there, but --

22 Q In fact --

23 THE COURT: Let him finish answering the question.

24 MR. CORNELL: Well, he answered my question.

1 But go ahead.

2 THE WITNESS: I don't -- I wouldn't say that
3 Mr. Hall wouldn't have argued that.

4 BY MR. CORNELL:

5 Q Well, let me ask you this: After the
6 sentencing didn't Mr. Hall come up to Mr. Kelsey and
7 shake his hand?

8 A Yes.

9 Q And didn't he say some nice things to
10 Mr. Kelsey in your presence?

11 A I don't remember his exact words. It was, you
12 know, "I hope you understand" --

13 MS. NOBLE: Objection; hearsay.

14 THE WITNESS: -- or something.

15 MS. NOBLE: Objection; hearsay.

16 THE COURT: Sustained.

17 BY MR. CORNELL:

18 Q But from Mr. Hall's demeanor towards
19 Mr. Kelsey, didn't that suggest to you that he really
20 wouldn't have argued a first degree murder case?

21 A I don't know what --

22 MS. NOBLE: Objection; calls for speculation.

23 THE COURT: Sustained.

24 THE WITNESS: That wasn't --

1 I sustained the objection, Mr. Edwards.

2 BY MR. CORNELL:

3 Q Ms. Halstead in her opening remarks, was she
4 arguing for a first degree murder conviction on
5 Mr. Kelsey?

6 A Not really. Not at all, frankly.

7 Q Didn't she actually specifically ask for second
8 degree murder?

9 A I think that was where she left it.

10 Q Did you really think there was a risk that
11 Mr. Hall was going to say, "Second degree murder? No.
12 First," in rebuttal and contradict his colleague?

13 A I wasn't sure of that. I couldn't say that for
14 sure, no. That went into my calculation in deciding to
15 waive the closing argument.

16 Q Also, we talked about this earlier, but the
17 involuntary manslaughter choice was out there. Could
18 you have seen making an argument had you not waived it
19 that "Look. Even if you buy into Mr. Kelsey being the
20 proximate cause of the death of Hyde, that what he did
21 was not an act that inherently and naturally tends to
22 destroy life, ladies and gentlemen, and, therefore, at
23 best he's guilty at best of involuntary manslaughter"?
24 Did you consider that type of argument?

1 A Yeah, that was part of my argument, but I
2 really --

3 Q Okay. Now --

4 THE COURT: No. Stop.

5 MR. CORNELL: But, no, he's not --

6 THE COURT: Mr. Cornell.

7 MR. CORNELL: He's answering ten questions I didn't
8 ask.

9 THE COURT: Mr. Cornell, you don't correct me, sir,
10 with all due respect.

11 MR. CORNELL: With all due respect, Your Honor,
12 I've been letting this go on, but when I ask a question
13 that calls for one and I get ten --

14 THE COURT: Then you can object.

15 MR. CORNELL: I am objecting.

16 THE COURT: Fine. The word is "objection,"
17 Mr. Cornell, and then I'll address the objection, but
18 you can't just interrupt the witness, not in my
19 courtroom, and direct him in some other way, because I
20 don't know what he's saying. And certainly he had not
21 continued on with some prolonged answer, Mr. Cornell.
22 So I appreciate your frustration, but I direct the
23 questioning of the witnesses pursuant to the Nevada
24 Revised Statutes, not you. So if you want to raise an

1 objection, object.

2 MR. CORNELL: I appreciate that. I apologize.

3 THE COURT: Next question.

4 MR. CORNELL: Yes. Thank you.

5 BY MR. CORNELL:

6 Q Based on the evidence as you knew it, could
7 Mr. Ohlson or Mr. Molezzo have realistically argued for
8 involuntary manslaughter on behalf of their clients?

9 A I don't know what they had in mind.

10 Q Okay. But from the facts as you knew them to
11 be, would you have anticipated the likelihood that
12 either one of them would have argued involuntary
13 manslaughter?

14 A I don't know for sure.

15 Q Okay. Did it occur to you in making this
16 decision that by waiving argument you were putting your
17 client in the appearance of being in the same boat to
18 the jury as Schneuringer and Jefferson?

19 A No, I didn't feel that way.

20 Q Did Ms. Halstead specifically argue "This can't
21 be a misdemeanor battery. Ignore that. This proximate
22 cause, ignore that"? I mean, did she make those
23 specific arguments?

24 A I don't recall what she argued regarding

1 misdemeanor battery. And in terms of proximate cause,
2 I believe there was some discussion about at least the
3 instruction. I can't recall for sure. Whatever the
4 record reflects is what she argued.

5 Q Certainly if she's arguing for second degree
6 murder implicitly, she's arguing to the jury to
7 ignore -- discount or reject misdemeanor battery and to
8 find that Mr. Kelsey is the proximate cause of the
9 death of the victim; correct?

10 A By arguing for second degree murder?

11 Q Right.

12 A Right.

13 Q Okay. By waiving that argument, you're waiving
14 the ability to tell the jury "No. These are the
15 instructions you need to key on, the proximate
16 causation instruction, the misdemeanor battery
17 instruction, the involuntary manslaughter instruction,
18 and here's why." By waiving the argument you waive
19 your ability to key in on those arguments; correct?

20 A I waived my ability to address the jury
21 regarding them, yes.

22 Q Okay. Now, when Mr. Hall cross-examined
23 Mr. Ohlson's witnesses, he was pretty tough, didn't you
24 think? Mr. Fallen, Mr. Smith, Mr. Simpson.

1 A What do you mean by "tough"?

2 Q I mean, he asked them some hard questions,
3 in-your-face designed-to-squirm kind of questions.
4 That's what I mean.

5 A If you say so.

6 Q Well, I mean, I wasn't there. You were. You
7 tell me.

8 A Yeah, he employed a certain technique, I guess,
9 in his cross-examination of them. They were young
10 people, you know. He handled it the way he chose to
11 handle it.

12 Q Did you feel that Zach Kelsey handled himself
13 pretty well in Mr. Hall's cross-examination?

14 A I did.

15 Q So, again, that being the case, what did you
16 think Mr. Hall was going to say to link Zach Kelsey to
17 a first degree murder?

18 A Well, we hadn't been able to shake the
19 causation issue, and so he was part of the killing.

20 Q Okay. Now, the record reflects that you put
21 Mr. Kelsey on the witness stand; correct?

22 A Yeah, with his consent. I mean, not against
23 his will.

24 Q And when you put him on the stand, you

1 certainly didn't think he was going to lie; correct?

2 A No.

3 Q Okay. He was not.

4 His testimony essentially was that Hyde came at him
5 with balled-up fists and made a threat towards him. I
6 mean, that was Kelsey's testimony; correct?

7 A Okay.

8 Q You knew that Kelsey was going to testify to
9 that before you put him on the stand, didn't you?

10 A I knew what -- yeah, what he was going to say.
11 We had been over that many a time.

12 Q Okay. Prior to trial you went over his
13 testimony with him many times; is that correct?

14 A During trial when issues would come up that he
15 would need to address in his examination.

16 Q Did it occur to you that that testimony could
17 lend itself to a self-defense instruction?

18 A It didn't, no.

19 Q I mean, not strongly, perhaps, but that it
20 could lend itself to a self-defense instruction?

21 A I didn't really see it that way.

22 Q If it did lend itself to a self-defense
23 instruction, no matter how weak or incredible, that's
24 another way to distinguish the case from Schneuringer

1 and Jefferson; correct? Because there's no way
2 Schneuringer and Jefferson could ever claim
3 self-defense; right?

4 A I don't think so.

5 Q Okay. Whereas, based on Kelsey's testimony
6 didn't you think that at least was enough to get a
7 self-defense instruction?

8 A No, I wasn't thinking along those lines at all.

9 Q Now, Dr. Clark and Dr. Omalu's testimonies were
10 the ones that hurt Mr. Kelsey the most of all the
11 testimonies in this case; wouldn't you agree with that?

12 A I would agree with that.

13 Q When Mr. Ohlson -- do you remember when
14 Mr. Ohlson complimented Dr. Clark and called her
15 "brilliant as usual"?

16 A I saw that in your petition.

17 Q But, I mean, do you remember it at trial?

18 A Not very distinctly, no.

19 Q So not remembering it, I assume then that for
20 that reason you didn't object to the comment?

21 A No. That's Mr. Ohlson's style.

22 Q Did you consider that his comment might be a
23 form of vouching for the witness?

24 A For Dr. Clark?

1 Q Yeah.

2 A No.

3 Q Do you recall the issue of referencing the
4 Twisted Mind as a gang?

5 A Yes. That was addressed at the beginning of
6 the trial.

7 Q In fact, take a look, if you will, at Exhibit O
8 I believe it is.

9 A The Order of Affirmance?

10 Q No, the document entitled Fast Track Statement.

11 A All right.

12 Q Okay. And is this a document that you
13 authored?

14 A Yes. Yes, I authored it, I filed it, but it
15 was researched and written in conjunction with
16 Mr. Qualls.

17 Q And does that appear to be a true and correct
18 copy of the Fast Track Statement that you filed?

19 A Yes.

20 MR. CORNELL: Move for admission of O, Your Honor.

21 THE COURT: It's already in, I think.

22 MR. CORNELL: Oh, is it?

23 THE COURT: Oh, it's not? I apologize. I thought
24 that we had stipulated to that, Mr. Cornell, so I

1 apologize for being mistaken.

2 Exhibit O, any objection?

3 MS. NOBLE: No, Your Honor.

4 THE COURT: Exhibit O is admitted.

5 (Exhibit O was admitted.)

6 BY MR. CORNELL:

7 Q In fact, you made an issue out of the gang
8 affiliation being unfairly prejudicial in this case,
9 did you not?

10 A Do you recall which claim that was?

11 Q Claim 3, pages 11 through 13.

12 A Yes, TM and Straight Edge affiliation.

13 Q Do you recall during the trial that the subject
14 of TM and Straight Edge, even if admitted, that there
15 should be some kind of a limiting instruction prepared?

16 A As in limiting it not applying to Mr. Kelsey?

17 Q Well, yeah, two things. Number one, that the
18 evidence regarding Twisted Minds as a gang being
19 relevant and admissible only as to the co-defendants
20 and not Kelsey. Do you recall that issue coming up?

21 A No. I mean, that's the way it went.

22 Q Do you recall an issue coming up about limiting
23 evidence of the Twisted Minds only to the issue of
24 motive for those members of Twisted Minds to do what

1 they did?

2 A That may have been in the discussions at the
3 beginning of the trial that Mr. Ohlson or Mr. Molezzo
4 had with the court.

5 Q Did it occur to you that a good move would be
6 to prepare a limiting instruction that said evidence of
7 Twisted Minds is relevant only to those two defendants
8 and relevant only to their motives and not admitted for
9 any other purpose?

10 A No. I thought it was quite clear that
11 Mr. Kelsey wasn't motivated by Twisted Minds. He was
12 Straight Edge.

13 Q Let's consider Exhibit M. Do you remember
14 filing a motion on or about July 12, 2012, to get
15 Mr. Peele appointed in the case?

16 A Yes, I did. That looks like my motion.

17 Q Okay. And in looking -- and actually did the
18 court grant the order and give you some money to hire
19 Mr. Peele?

20 A I don't know. I saw this issue in your
21 supplement, and I can't --

22 Q Did you ever direct --

23 MR. CORNELL: I'm sorry, Your Honor.

24 /////

1 BY MR. CORNELL:

2 Q Go ahead.

3 A I commonly employ Mr. Peele in my cases that go
4 to trial. Sometimes it's for in depth investigation of
5 witnesses; sometimes it's merely for ministerial
6 duties, going to the jail with me and things like that.

7 Q Did you direct Mr. Peele to do anything in this
8 case?

9 A I can't recall at all.

10 Q Okay. Looking at Exhibit --

11 MR. CORNELL: Your Honor, actually, first off,
12 based on that foundational I'll move for admission of
13 Exhibit M, the ex parte motion for authorization.

14 THE COURT: Aren't there multiple parts of Exhibit
15 M?

16 MR. CORNELL: No. Of course, it is part of the
17 court record, but --

18 THE WITNESS: The exhibit I have -- I beg your
19 pardon, Your Honor.

20 THE COURT: Go ahead, Mr. Edwards.

21 THE WITNESS: The exhibit I have as M does not have
22 a file stamp on it.

23 THE COURT: Well, that's true. Neither does mine.
24 I think that's because it was sealed possibly.

1 Is that the one that was sealed?

2 THE CLERK: No. Exhibit L.

3 THE COURT: Well, let's take this in smaller
4 pieces, Mr. Cornell. Exhibit M, at least in my folder,
5 has the ex parte motion for authorization of --
6 authorization to employ private investigator and
7 affidavit of counsel. That's a three-page document
8 concluding with Mr. Edwards' signature on July 12th of
9 2012. Is that correct?

10 MR. CORNELL: Yes.

11 THE COURT: Okay. Then after that in my binder --
12 or my folder that you've given me, the next thing I
13 have is the ex parte motion for order allowing payment
14 of attorney's fees and costs, third interim billing,
15 that's dated August 13th.

16 MR. CORNELL: Oh, that goes into L.

17 THE COURT: Into L.

18 MR. CORNELL: That explains that.

19 THE COURT: These might have been put together
20 inaccurately. So that goes into L. And that's the one
21 dated August 13th, 2012. And then the next one is
22 dated November 14th of 2012, and that is another
23 ex parte motion. Does that go into L also?

24 MR. CORNELL: Yes.

1 THE COURT: Okay. So the only thing in M is in
2 reference to Mr. Peele. All of the other ones are in
3 reference to payment for Mr. Edwards; correct?

4 MR. CORNELL: Correct.

5 THE COURT: Okay. Now, that we've cleared that
6 issue up, Ms. Noble, any objection to the admission of
7 M?

8 MS. NOBLE: No, Your Honor.

9 THE COURT: Exhibit M will be admitted.

10 Let me just put these other ones in Exhibit L
11 together. Hold on.

12 Okay. I think we've got it all straightened out
13 here.

14 Exhibit M is admitted.

15 (Exhibit M was admitted.)

16 BY MR. CORNELL:

17 Q Looking, Mr. Edwards, at Exhibit L, and
18 particularly your third interim billing of August 13,
19 2012 --

20 A Okay.

21 Q -- you show a motion for investigator,
22 telephone call, client, on July 16, 2012, an hour and a
23 half. And then on August 2, 2012, you have telephone
24 calls with client and investigator for one hour.

1 Now, I need to ask you, because it seems like you
2 billed two things in one entry. Do you know how much
3 of that one hour was spent talking to Ken Peele?

4 A No, I don't.

5 Q Okay. Is it possible that the call with Ken
6 Peele was as simple as "Hey, Ken, I may be needing your
7 help on this case and I'm going to file a motion to get
8 you on," or "I've filed a motion to get you on and I'll
9 get back to you later"?

10 A It could have been, yeah. Or "Go up to the
11 jail with me."

12 Q I will tell you this: The billings don't show
13 any other billing item regarding an investigator. And
14 typically if you were to meet with Mr. Peele or write a
15 letter to Mr. Peele telling him what you wanted him to
16 do, you would be billing that time, would you not?

17 A Yeah, typically.

18 Q Okay. So with the absence --

19 A I mean, Mr. Peele would be billing that time
20 more than me.

21 Q Right. Would the absence of that billing
22 suggest to you that you really didn't meet with
23 Mr. Peele and direct him to do anything substantive in
24 this case?

1 A I don't -- I can't tell you that. This is --

2 Q Now --

3 A I don't know about that.

4 Q You don't know about that?

5 A I don't know about that. I've asked Mr. Peele,
6 and he doesn't have any recollection.

7 MR. CORNELL: Okay. And I think the Court can
8 probably take judicial notice of its own file, that
9 there's no application on behalf of Mr. Peele to get
10 paid by the county in this case.

11 THE COURT: Well, I haven't gone through the file
12 today that I can take judicial notice of that, but I
13 would observe that Mr. Peele doesn't submit bills to
14 the court to my knowledge. It's counsel requests
15 payment and indicates that he needs payment for
16 specific reasons. So I've been looking or reviewing
17 those. The chief judge actually signs all those, but
18 he sends them to the individual district court judges
19 to review. And to my recollection, I've never seen one
20 from Mr. Peele. I've seen them from counsel, but
21 nothing submitted by Kenny Peele or any other
22 investigator requesting payment.

23 THE WITNESS: I think this being one through the
24 court-appointed administrator that I seek authorization

1 from the Bell Group for a certain amount and then
2 Mr. Peele submits whatever his billing is within that
3 maximum authorized amount.

4 THE COURT: And then those funds are distributed by
5 Mr. Bell?

6 THE WITNESS: Right. Through the county, but yes.

7 THE COURT: Okay. I think I understand. Go ahead.

8 BY MR. CORNELL:

9 Q You had copies of witness statements from a
10 number of witnesses in this case; correct?

11 A Quite a few.

12 Q All right. And did you have a sense as you got
13 to trial which witnesses the State was really going to
14 call out of this bunch and which ones they weren't?

15 A Yes, in reviewing them I could tell. I mean,
16 they listed everyone on the witness list, but --

17 Q The only witness that you called was
18 Mr. Kelsey; is that correct?

19 A That's right.

20 Q Okay. Suppose if there's a witness out there
21 named Z [REDACTED] C [REDACTED] C [REDACTED], suppose that his
22 version of the events would have been something along
23 this line, that he was at the motocross bonfire, that
24 he saw the two girls fighting. He saw Ricky Bobby

1 Boatman enter the fight. He saw Graves knock out
2 Boatman. He then saw Kelsey and Hyde get into a fight
3 and throwing punches at each other. He saw Hyde and
4 Kelsey both having their shirts over their heads.

5 He heard some Twisted Mind guys yell out "Catch a
6 fade." Mr. Kelsey was Straight Edge, not Twisted
7 Minds. Schneuringer and Jefferson, of course, were
8 Twisted Minds. He saw Mr. Kelsey grab Mr. Hyde. He
9 saw Mr. Kelsey hit Hyde two times in the face. They
10 continued fighting after that and then they broke
11 apart. Mr. Kelsey did not have brass knuckles and
12 nobody hit the ground between Mr. Kelsey and Mr. Hyde.

13 Is that evidence that would have been consistent
14 with your theory of defense?

15 A Yeah, and consistent with what the other
16 witnesses testified to. Well, not entirely, put it
17 that way.

18 Q Can you see any strategic reasons that you know
19 of not to present that evidence?

20 A It was probably already testified to.

21 Q Okay. But would that evidence have played into
22 your proximate cause theory, that Mr. Kelsey is not the
23 proximate cause of the death of Jared Hyde?

24 A It would have been consistent with it.

1 Q And consistent with the notion that at worse
2 Mr. Kelsey committed a misdemeanor battery?

3 A Yes.

4 Q All right. If that evidence was out there,
5 would you have wanted to present it?

6 A It was out there, and I didn't, so I chose not
7 to.

8 Q Okay. Now, let me reference -- suppose there's
9 a witness out there, T [REDACTED] C [REDACTED] all right, and
10 suppose her testimony would have gone something like
11 this: She saw the fight between the two women. She
12 saw Taylor Pardick break up the fight. She saw Pardick
13 and Graves start to fight. She saw Graves knock out
14 Ricky Bobby Boatman. She saw Hyde then come up behind
15 Graves and then saw Kelsey come up behind Hyde and
16 Kelsey threw a punch at Hyde, missed, grabbed his
17 shirt, ripped the shoulder, kind of stumbled back
18 forward, Hyde left the fight going towards the Durango
19 walking normally. And it was several minutes later
20 she's walking along that she sees Hyde laid out
21 unconscious on the ground. And Mr. Kelsey did not have
22 brass knuckles, and Mr. Kelsey was not in a gang.
23 Would all of that evidence have been consistent
24 with your theory of the defense?

1 A I don't know about the part about Mr. Kelsey
2 coming up from behind Mr. Hyde.

3 Q In other words, Hyde was in the fight before
4 Kelsey.

5 A Well, I believe they met head on basically.

6 Q Okay. Beyond that, I mean, is that -- beyond
7 that, is the evidence as I just described it to you
8 consistent with your theory of proximate cause and
9 misdemeanor battery?

10 A Yeah. Yeah, I think so.

11 Q Was there any strategic reason for not
12 presenting it?

13 A Again, I think that was evidence that came out.
14 I mean, that was where I was going in my
15 cross-examination with most of those lay witnesses who
16 had things to say about that fight.

17 Q So was that the reason that you decided not to
18 present the consistent additional testimony?

19 MS. NOBLE: Your Honor, objection. May we
20 approach?

21 THE COURT: Why do you need to approach?

22 MS. NOBLE: Well, okay. I guess -- I feel -- Your
23 Honor, the State's objection is that at this point
24 Mr. Edwards is being misled about what testimony was

1 out anywhere based on the testimony of those witnesses
2 earlier today.

3 THE COURT: It will be my decision whether or not
4 the hypotheticals presented by Mr. Cornell are
5 consistent or inconsistent with the testimony that has
6 been provided today by Ms. C [REDACTED] and Mr. C [REDACTED] to
7 this point. So I'll overrule the objection.

8 I'll compare my notes and the transcript of these
9 proceedings to the way that the question was phrased by
10 Mr. Cornell and draw any conclusions about it that I
11 think are appropriate.

12 In a general sense I think that Mr. Cornell's
13 representations to what the witnesses testified to are
14 accurate, though they not be verbatim exactly what she
15 or he said.

16 Go ahead.

17 MS. NOBLE: Your Honor, I didn't state my objection
18 very well, and I understand the Court's ruling. It is
19 that -- the representation is that these folks had made
20 those statements at that time, at the time of trial.
21 And that representation would be inaccurate based on
22 their testimony today.

23 THE COURT: Okay. Mr. Cornell.

24 MR. CORNELL: Perhaps I was a little inartful. We

1 know they didn't testify at trial. Ms. C [REDACTED] is a
2 little unusual because her testimony, and for that
3 matter Mr. C [REDACTED]'s testimony, covers areas that
4 weren't asked and not revealed to the detectives, but,
5 again, our position is hire an investigator, go out and
6 talk to them, and that's what they would have said.

7 And it seems to me that Ms. Noble can certainly
8 cross-examine on this part of the examination and ask
9 Mr. Edwards, "Well, gee, if they had also said this or
10 that, would you have wanted to bring them?" I mean,
11 she can do that, but, I mean, I think it's admissible
12 at this point.

13 THE COURT: The Court's decision to overrule the
14 objection stands.

15 Your next question, Mr. Cornell.

16 BY MR. CORNELL:

17 Q Okay. Really is it fair to say that you can't
18 determine whether you would have wanted to bring those
19 witnesses without first interviewing them? Wouldn't
20 that be a fair statement?

21 A I had witness statements from 40 plus juveniles
22 interviewed at the high school during school. And from
23 a fair reading of what they had to say, I had a picture
24 of who was going to be coming and who was going to be

1 testifying and what they were going to say. So I
2 didn't call everybody; I didn't interview everybody.
3 The police had done that. I had no reason to believe
4 what they had told the investigating officers was
5 untrue.

6 Q I'm sorry. It would be plodding, but I've got
7 to be thorough and ask as to the third witness.
8 Suppose there's a witness out there, S [REDACTED]
9 I [REDACTED], and his version of the events is that he
10 was at the party, a fight started with Taylor Pardick
11 and his girlfriend and another girlfriend. A brawl
12 goes on. He doesn't see who exactly is involved in the
13 brawl, but he sees Jared Hyde walk away a good 50 feet,
14 walking normally, that Schneuringer comes up from
15 behind and says something along the lines of "Hey, you
16 said, 'Fuck TM.'"

17 Hyde says, "Wait. No."

18 And then Schneuringer hits him and he hits him with
19 a sound that sounds like two rocks banging together.

20 Now, would that have been consistent with your
21 theory of the case, that the proximate cause of Master
22 Hyde's death was Schneuringer and Jefferson and not
23 Kelsey?

24 A Yeah, I think that's what came out. Maybe not

1 the two rocks or whatever you said, but there was
2 testimony to the effect that -- I can't remember -- I
3 think the Order of Affirmance said something like
4 Jefferson was celebrating and saying, "I stomped him,"
5 or "slept him."

6 Q "Slept him."

7 A "Slept him," I think. That was out there.

8 Q But, I mean, the testimony of Mr. L [REDACTED]
9 or the version -- not testimony, but the version of
10 Mr. L [REDACTED] as I just described was consistent
11 with evidence with your theory of the case; right?

12 A Right.

13 Q And without interviewing him, you can't know
14 whether to call him or not; is that correct?

15 A Well, I knew -- if he was -- had been a witness
16 that was interviewed, then, yeah, I knew what he was
17 going to say.

18 Q You knew what those witnesses were going to
19 say, but you didn't know what Mr. Fallen and Mr. Smith
20 and Mr. Simpson, the three witnesses that Ohlson
21 called, were going to say prior to trial; correct?

22 A Right. The State told me that.

23 Q Pardon me?

24 A The State told me where they -- what they had

1 to do with on the morning of trial.

2 Q The first day of trial or when?

3 A I think the first day of trial.

4 Q So wait a minute. Let's get this straight. So
5 you knew at the beginning of the trial that Mr. Ohlson
6 was going to call three witnesses who were going to
7 claim that Kelsey bragged that he killed Hyde; correct?

8 A Not necessarily that, but that he had bragged
9 about having brass knuckles.

10 Q Okay.

11 A "Don't mess with me," or something like that.

12 Q So the State's investigators told you what they
13 thought Kelsey -- what those three witnesses were going
14 to testify to; correct?

15 A The witnesses were allied with Ohlson's client,
16 Mr. Schneuringer, so, yeah, I put it together.

17 Q And you knew in the beginning of trial that
18 they were going to claim something that's not true,
19 that Mr. Kelsey did not have brass knuckles, there's no
20 evidence from any seeing witness that he was wearing a
21 pair of brass knuckles?

22 A I wasn't sure they were going to do that, but
23 that's what I thought they were there for.

24 Q Okay. Well, did it occur to you then that,

1 wait a minute, if he's going to call witnesses who are
2 going to claim this, that we really are running into
3 inconsistent defenses and we need to have a severance?

4 A No.

5 Q I mean, because I'm understanding your
6 testimony that Mr. Ohlson's opening statement is the
7 first time you realize this, and it's a surprise to
8 you, but what I'm understanding from you now is that
9 the State's investigator told you what these three
10 witnesses were going to say per what the investigator
11 thought they were going to say.

12 A It might have been the prosecutor herself that
13 told me.

14 Q Ms. Halstead?

15 A Yeah.

16 Q Okay. What exactly to your memory did
17 Ms. Halstead tell you?

18 A I think she said "Did you know about this?"
19 when Mr. Ohlson noticed the witnesses. And I believe
20 one of them was Mr. Schneuringer's brother or relative.
21 I was very closely allied with Mr. Schneuringer.

22 Q Are you talking about Karl Schneuringer?

23 A That may have been it. I can't remember.
24 There was some medical emergency during the trial

1 involving a relative of his. I don't remember the
2 entirety of it.

3 Q At any time did you consider the idea of moving
4 for a severance based on inconsistent defenses?

5 A No.

6 MR. CORNELL: Let me check my notes. I think we've
7 got a ruling on all the exhibits, so no further direct
8 examination at this time. And I've stipulated with
9 Ms. Noble that rather than, you know, limiting her
10 cross to my direct and then having her recall
11 Mr. Edwards as the State's witness, she can just ask
12 whatever she wants to ask.

13 THE COURT: Well, I appreciate that stipulation. I
14 would also note that NRS 50.115 gives the court the
15 discretion to do exactly what you've suggested, that
16 is, not limit cross-examination to simply the scope of
17 direct but to allow it to be questions that could have
18 been asked on direct. That's a rough way to paraphrase
19 it, but the court has discretion to do that, and it's
20 my practice to always do that in every case in every
21 trial because I think it's just horribly inefficient to
22 limit the cross-examining attorney's ability to
23 question a witness who is here when the witness
24 actually is here. So we might as well just question

1 them and have a full cross-examination. I only start
2 limiting the questions to the scope of the previous
3 questions on redirect and recross. So I appreciate the
4 professionalism, Mr. Cornell, that you've shown to
5 Ms. Noble. And I just do that anyway. Thank you.

6 Go ahead, Ms. Noble.

7 MS. NOBLE: Thank you, Your Honor.

8 CROSS-EXAMINATION

9 BY MS. NOBLE:

10 Q Mr. Edwards, in preparing for trial did you
11 review the discovery that you received from the State?

12 A Yes.

13 Q Did that include transcripts of witness
14 statements taken by the sheriff's office of the people
15 that were at the party?

16 A Yes. There were a lot of them. I recall that.

17 Q Did you review them all?

18 A Um-hum. Yes.

19 Q With that in mind, I'm going to work backwards
20 a little bit here. With regard to Z [REDACTED] C [REDACTED], I
21 believe it is, Mr. Cornell asked you what if there were
22 certain testimony out there; right? Do you recall
23 that?

24 A Yeah, he asked me if this was inconsistent or

1 consistent with our theory.

2 Q What if I represented to you that most of or
3 almost all of what Mr. Cornell represented to you was
4 not documented anywhere until 2015, in other words, not
5 contained in the sheriff's office interview and that
6 the witness admitted that on the stand here today?

7 A What about that?

8 Q Right. Would there be another way for you to
9 know that they were going to add more in a few years?

10 A No, I wouldn't know that.

11 Q And how does it look when you have a witness
12 who talks to law enforcement and then at some later
13 date makes up or -- sorry. Strike that -- has a very
14 different story to tell, lots of details are added?
15 Does that tend to look good to a jury in your
16 experience?

17 A No. It happens, but it doesn't -- it's a
18 source of cross-examination for sure.

19 Q Had anything in Mr. C [REDACTED]'s interview with the
20 sheriff's office struck you as particularly helpful to
21 you, would you have subpoenaed him as a witness?

22 A If there was something particularly necessary
23 about that person, yeah. Yes.

24 Q Because you did not subpoena him; correct?

1 A I did not.

2 Q Is it safe to assume that you evaluated his
3 statement and didn't see anything in there that was
4 particularly helpful?

5 A That's right.

6 Q With regard to Ms. -- I'm going to try to say
7 this name right -- C [REDACTED] same question. What if
8 you were to learn that the details Mr. Cornell
9 attributed to Ms. C [REDACTED] were not documented
10 anywhere until 2015? Would that be something you
11 should have known in 2012?

12 A No.

13 Q And you would have reviewed her interview with
14 the sheriff's office as well; correct?

15 A I did.

16 Q Had there been anything particularly helpful
17 would you have called her as a witness?

18 A Yes.

19 Q And last, Mr. S [REDACTED] L [REDACTED], the
20 testimony presented was that it sounded like two rocks
21 being hit together as Mr. Cornell just told you. Was
22 there other testimony at trial that when Schneuringer
23 and Jefferson were attacking the victim, it was a
24 brutal beating?

1 A Oh, absolutely.

2 Q Multiple witnesses in fact?

3 A Multiple witnesses.

4 Q I'm going to move to the issue of the medical
5 testimony in this case. In the Nevada Supreme Court's
6 Order of Affirmance they recite a particular factual
7 scenario, do they not?

8 A They do.

9 Q And that was a factual scenario that was set
10 forth by the State at trial; correct?

11 A Yes. The approach that the Nevada Supreme
12 Court took was in their recitation of facts they looked
13 at the facts most favorable to the State that were
14 adduced at trial.

15 Q Now, some representations were made to you
16 about possible expert opinion that might have been,
17 quote, out there. If that expert opinion were premised
18 upon the assumption that Mr. Hyde was only jabbed once
19 or twice by Mr. Kelsey, that would be one way you could
20 present it to the expert, but that would not have been
21 the only facts or scenario presented to the expert;
22 correct?

23 That was a horrible question.

24 MR. CORNELL: Yeah, I'm not sure I understood it.

1 THE COURT: I think we're four for four that no one
2 understands your question, even you, Ms. Noble, so I'll
3 let you rephrase the question.

4 MS. NOBLE: I'm going to work on it, Your Honor. I
5 apologize.

6 BY MS. NOBLE:

7 Q Do you think it would have made a difference if
8 you had an expert testify that if Mr. Kelsey only hit
9 Mr. Hyde once or twice he couldn't have caused the
10 damage or might not have caused the damage that was
11 later seen?

12 A Yeah, sure, that might have helped.

13 Q Now, how much --

14 A I didn't have anybody to say that, but --

15 Q How much do you think it would have helped,
16 though, when the jury obviously rejected that factual
17 scenario?

18 MR. CORNELL: Well, I'm going to object. That
19 calls for speculation, and I don't think he can
20 properly answer. We don't know what the jury would
21 have done.

22 THE COURT: Ms. Noble.

23 MS. NOBLE: Well, he's been asked to speculate
24 throughout Mr. Cornell's examination with regard to

1 wouldn't this have helped, wouldn't that have helped.

2 My question is: Do you think that would have helped?

3 THE COURT: But there was no objection interposed,
4 and Mr. Cornell has interposed an objection. I will
5 sustain the objection because it's totally speculative
6 what the jury may have done with that information.

7 I think that Mr. Edwards is allowed to testify
8 whether or not he thinks that it would be of benefit,
9 but he can't -- but the benefit is to him presenting
10 the evidence, not what the jury's conclusion would be.
11 That would be an attempt to crawl into the minds of the
12 12 jurors, and I don't think he's able to do that.

13 MS. NOBLE: Yes, Your Honor.

14 THE COURT: But I think he has testified and it's
15 fair testimony that, yeah, if I would have known that,
16 I would have put it on or it may have been helpful, but
17 not that it specifically would have helped.

18 BY MS. NOBLE:

19 Q How would you describe your relationship with
20 Mr. Kelsey?

21 A Oh, very good. We got along great the whole
22 time. He was under a lot of stress, but we had open
23 conversation and communication. I got to know a lot
24 about him independent of the evidence in the case and

1 the trial itself. Kind of a learning experience for
2 him, you know, so I got him prepared. You know, we
3 were both very disappointed in the outcome.

4 Q Had Mr. Kelsey identified to you certain
5 witnesses whose testimony would help him, would you
6 have interviewed those witnesses or followed up on that
7 information?

8 A Yeah. We went through the witnesses and talked
9 about the people that were out there and what the trial
10 would look like and who was saying what before trial.
11 And I was interested in his relationship with
12 particular people there, you know, Mr. Graves
13 obviously. You know, he gave me his insight about who
14 these people were and what happened in his opinion that
15 night. So, yeah, I don't feel like I said no to him
16 about "We shouldn't do that, Zach."

17 Q So if the supplemental -- I'm sorry -- the
18 original petition alleges that Mr. Kelsey was
19 essentially forced to testify because you refused to
20 call witnesses that would help him, would that be
21 accurate?

22 A No.

23 MR. CORNELL: I'm going to object. I'll let the
24 petition speak for itself, but I don't know that I said

1 that.

2 THE COURT: She's saying the original petition, not
3 the --

4 MR. CORNELL: Oh, the original petition. I
5 withdraw my objection. Okay.

6 THE COURT: And the answer to that question was --

7 THE WITNESS: Was "No," Your Honor.

8 THE COURT: No, that would not be accurate?

9 THE WITNESS: No, that would not be accurate.

10 THE COURT: Next question.

11 BY MS. NOBLE:

12 Q With respect to the waiver of closing argument,
13 when did you first make that decision?

14 A It was after Ms. Halstead's opening close. We
15 took a break, a lunch break, somewhat extended break,
16 and the idea was floated by Mr. Ohlson. We had all had
17 the same kind of opinion, well, that we shared with
18 each other during that break and that was a decision
19 that we made.

20 Q What was the opinion of her close that you're
21 talking about?

22 A Well, it wasn't the most vigorous closing
23 argument I had ever seen in a prosecution, put it that
24 way.

1 Q Had you ever seen Karl Hall do a closing
2 argument?

3 A Yes.

4 Q Would you characterize that as, perhaps, more
5 vigorous?

6 A Yes.

7 Q So was the decision to waive that close
8 predicated in part on a desire to keep Mr. Hall from
9 addressing the jury about the evidence in the case?

10 A Absolutely. Mr. Hall knew it too.

11 Q With respect to Mr. Ohlson's comment about
12 Dr. Clark being brilliant, you stated that you did not
13 object because that's, quote, his style?

14 A Yeah. He's flattering -- I don't know --
15 engaging, old school type. You know, I think he talked
16 about how long they had been around this process and
17 how many times they've, you know, been on -- in this
18 relationship.

19 Q During direct examination Dr. Clark's
20 qualifications were discussed; correct?

21 A Yes.

22 Q And her experience in terms of how many -- her
23 experience with respect to the field of forensic
24 pathology, that was discussed?

1 A Yeah, she set forth her qualifications.

2 Q Would it be safe to say that the jury probably
3 didn't think that she was an unintelligent person?

4 MR. CORNELL: Well, objection. Again, same
5 problem.

6 THE COURT: Sustained.

7 MR. CORNELL: We don't know what the jury thought.

8 THE COURT: That would be speculation. Sustained.

9 BY MS. NOBLE:

10 Q Okay. Did you feel that comment prejudiced
11 your client?

12 A No.

13 Q Was Mr. Ohlson acting as an agent of the
14 government or part of the State at that time?

15 A No.

16 Q So he wasn't vouching in terms of trying to put
17 the power of the government behind the witness?

18 A No. It was a compliment. It was a polite
19 ending to his examination.

20 Q What about him getting somewhat argumentative
21 with Mr. Kelsey about "Did you know that Straight Edge
22 used to be associated with neo-Nazi?"

23 A Yeah, that surprised me a little bit, but I
24 believe Mr. Kelsey handled himself fine.

1 Q And so you made a strategic decision not to
2 object?

3 A Yeah. It went by very quickly, and I thought
4 Mr. Kelsey held his own. You know, I don't think they
5 believed that he was a Nazi.

6 Q If you did object and asked for a limiting
7 instruction, could there be some risk associated with
8 that in terms of the jury's impression?

9 A Sure. It would be -- it would call more
10 attention to it, emphasize it a little more, bring it
11 up again.

12 Q With respect to -- you did not proffer a
13 self-defense instruction; correct?

14 A I did not.

15 Q And your testimony earlier on direct was that
16 the facts solicited at trial didn't seem to support it
17 in your opinion?

18 A That's right.

19 Q Had you proffered it do you think it would have
20 been given?

21 MR. CORNELL: Well, objection. That's speculation.

22 THE WITNESS: I know the law on it, but --

23 THE COURT: Hold on a second.

24 What's your response to the speculation?

1 MS. NOBLE: Well, what's being challenged is his
2 trial strategy, so I have to ask him why he did or did
3 not do certain things. I'm not asking about the jury's
4 conclusion. Certain strategies are more successful
5 with judges than others. Certain motions are worth
6 making; certain are not. I mean, there is some
7 judgment call involved in this.

8 THE COURT: Mr. Cornell.

9 MR. CORNELL: I don't disagree with any of that,
10 but the specific question has to do with would Judge
11 Elliott have given the instruction if he proffered it.
12 Only Judge Elliott can say, and he's not here as a
13 witness, understandably so. It's speculation.

14 THE COURT: The Court will overrule the objection
15 for the following reason. It is a tactical decision
16 that is made by Mr. Edwards. A defendant is entitled
17 to a jury instruction on his theory of the case no
18 matter how implausible assuming that there is some
19 evidence that supports that instruction, but that
20 doesn't mean that counsel needs to offer the
21 instruction every time.

22 So it is an issue that has been raised in the
23 petition for writ of habeas corpus, and I believe that
24 Mr. Edwards has the right to respond to why he did not

1 choose to give that instruction.

2 Whether or not Judge Elliott would actually give
3 the instruction is not relevant to me, because I agree,
4 I don't know, but there has to be some explanation for
5 why he chose not to do it.

6 Go ahead. So you can answer that portion of the
7 question, why you chose not to do that.

8 THE WITNESS: I didn't think this was a
9 self-defense case. I thought this was a simple battery
10 by Mr. Kelsey. That was what I thought about this
11 case, not a self-defense.

12 BY MS. NOBLE:

13 Q With respect to Dr. Omalu and Dr. Clark, you
14 were asked why you did not seek to -- let me rephrase.
15 Why didn't you seek to exclude their testimony on the
16 basis that they didn't use the phrase "to a reasonable
17 medical probability"?

18 A Exclude their testimony?

19 Q Yes.

20 A Prohibit the State from calling them as
21 witnesses?

22 Q That is a claim in the petition, supplemental
23 petition.

24 A I don't think I could do that.

1 Q Are you aware of any criminal case in Nevada
2 that requires that?

3 A Perhaps I'm misunderstanding you. Are you
4 saying keeping the State's witnesses from testifying,
5 the experts?

6 Q Yes, because their testimony did not include
7 that characterization, "to a reasonable degree of
8 medical probability."

9 A I'm not aware that that's a requirement for
10 their being able to testify, at least in a criminal
11 case maybe.

12 Q You've answered my question. Thank you.

13 A Okay.

14 Q With respect to severance, what basis -- did
15 you identify any basis to move to sever this case in
16 the middle of the trial after Ohlson's statement?

17 A No. I didn't figure that was so antagonistic
18 that it would warrant separate trials.

19 Q Was it your analysis that if you had made such
20 a motion, it was likely to be successful?

21 A You know, I didn't really consider doing it, so
22 I don't know what would have happened.

23 Q With respect to the references to Straight Edge
24 and Twisted Minds, do you recall in a pretrial hearing

1 Judge Elliott heard argument from counsel about that?

2 A I don't think it was necessarily about Straight
3 Edge so much.

4 Q Just the Twisted Minds?

5 A Twisted Minds. I remember it was either
6 Mr. Molezzo or Mr. Ohlson saying, "There's no gang
7 enhancement here. Why are you bringing this up?" And
8 they -- whatever the record said. I think Judge
9 Elliott ruled upon it, but it didn't have much to do
10 with Mr. Kelsey as I recall.

11 Q Did you raise an issue pertaining to that in
12 the original Fast Track Statement?

13 A If I could look and refresh my recollection.

14 Q Certainly. I believe it is Exhibit O. I don't
15 know if you have the exhibits up there, Mr. Edwards.

16 A I do. I do. That would have been the third
17 claim.

18 Q So you did raise that issue?

19 A Yes. I had researched the -- as well as talked
20 to Mr. Kelsey about the nature of Straight Edge. My
21 recollection is at that time there was a debate going
22 on in the police department gang unit about whether
23 they should be classified as a gang, so to speak,
24 within the meaning of the law or some other kind of

1 affiliation.

2 Q But you argued that the court's call as to the
3 res gestae analysis for references to TM or Straight
4 Edge was incorrect?

5 A Well, that's in the appeal, yeah. Of course I
6 did.

7 Q So are you sure that that wasn't addressed
8 pretrial?

9 A I think it was. And I think the conclusion of
10 the supreme court was that that was not a meritorious
11 issue.

12 Q With respect to Mr. Kelsey's decision to
13 testify, did he want to testify?

14 A Yes. I mean, he wasn't -- we spent a lot of
15 time discussing that prior to trial. And then as the
16 trial went on, you know, things would happen. I would
17 say, "I'm going to ask you about this," you know.
18 "Well, during your testimony you will be addressed
19 about this issue or that issue."

20 And, yeah, he wanted to testify. I certainly
21 didn't coerce him into getting on the stand.

22 Q Did he ever indicate to you that he felt that
23 he had to testify because you had not called witnesses
24 he wished to be called?

1 A No.

2 MS. NOBLE: The Court's indulgence.

3 BY MS. NOBLE:

4 Q Do you recall during the State's case Michael
5 Opperman testifying that at that party Kelsey had brass
6 knuckles, was telling people he had just gotten some
7 brass knuckles?

8 A Somebody testified to that.

9 Q During the State's case?

10 A Yeah, somewhere along the line somebody
11 testified about that.

12 Q Prior to Mr. Ohlson bringing up the subject of
13 brass knuckles?

14 A I think it was part of -- it had been -- in my
15 opinion I had diminished the, you know, probative value
16 of whoever that was about that issue.

17 Q On cross-examination?

18 A Yeah. And Mr. Kelsey had, you know, flat out
19 said that wasn't true. So I knew to look for that when
20 it came up.

21 Q Mr. Edwards, I have no further questions for
22 you at this time.

23 MS. NOBLE: I would pass the witness, Your Honor.

24 THE COURT: Redirect based on the

1 cross-examination, Mr. Cornell.

2 MR. CORNELL: Yes. Thank you.

3 REDIRECT EXAMINATION

4 BY MR. CORNELL:

5 Q In determining what witnesses to call or not
6 call, basically you have to have an investigator go out
7 and talk to them and the investigator has to report
8 back to your feeling about the witness, whether the
9 witness has problems or whether the witness is straight
10 up; right?

11 A I don't necessarily feel that way.

12 Q Well, what's the role of an investigator in
13 your practice then?

14 A Sometimes that very thing, but if I read the
15 report, I watch the statement, I look at them -- you
16 know, give a statement to the police with audio, you
17 know, sometimes it's not very useful at all to send an
18 investigator, especially with 43 juveniles in high
19 school.

20 MR. CORNELL: The Court's indulgence.

21 BY MR. CORNELL:

22 Q But this case is one that deals with
23 eyewitnesses. I mean, the State is going to present
24 what it presents through witnesses as far as setting

1 the scene for the forensic pathologist; correct?

2 A They presented eyewitnesses, yes.

3 Q If there are eyewitnesses out there who at
4 least are nearby the fight between Kelsey and Hyde, you
5 would like to at least be able to shed some light on
6 what that's all about. Don't you think it would be a
7 good idea at least to send an investigator out to
8 interview them to see specifically what it is they have
9 to say, whether it's going to be helpful or not?

10 A Sometimes and sometimes not.

11 Q Okay. When would it be helpful?

12 A If it was pertaining to a critical issue that I
13 couldn't find any kind of, you know, truth to in the
14 other statements, corroborating evidence, things like
15 that.

16 Q Okay. Well, when -- let me get at it this way.
17 When was the decision made to put Mr. Kelsey on the
18 stand?

19 A Not until -- I mean, effectively not until he
20 got on the stand.

21 Q So middle of the trial?

22 A Yeah. And we discussed it long before, but,
23 you know, depending on how the trial went, we were --

24 Q If there are witnesses out there that can give

1 some strength to his testimony, make his testimony
2 appear more credible to a jury, don't you want to bring
3 in those witnesses for that reason?

4 A Could be.

5 Q But you don't know whether there are witnesses
6 out there that can do that until you interview them; is
7 that correct?

8 A Well, if I know what they have to say
9 already --

10 Q If you don't know what they have to say
11 already, because you haven't interviewed them, then you
12 can't bring them?

13 A Well, why wouldn't I know what they had to say
14 if I read what they had to say?

15 Q Did you know in this case that in the cases of
16 Z█████ C█████ and T█████ C█████ that they had
17 additional information that they hadn't given to the
18 deputy sheriff who interviewed them initially?

19 A Obviously not.

20 Q Okay. And you can't know that unless you send
21 an investigator out to interview them prior to trial;
22 correct?

23 A And I might not even know it then.

24 Q Now, let's talk about the waiver of the closing

1 argument. In the trials you've tried before, both
2 murder and non-murder, had you ever waived closing
3 argument?

4 A Never before.

5 Q This is a first?

6 A This is a first.

7 Q And --

8 A It might be the last.

9 Q Okay. And the waiver of the closing argument
10 is something that Mr. Ohlson suggested. He brought the
11 subject up; you didn't.

12 A He did.

13 Q Had Mr. Ohlson said nothing about that, you
14 would have gone forward with your closing argument?

15 A I was prepared to do so.

16 Q Okay. And Mr. Hall cross-examined Mr. Ohlson's
17 witnesses in a pretty tough style, wouldn't you agree?

18 A Yeah.

19 Q Okay. And if you give a closing argument,
20 Mr. Ohlson will have to give a closing argument, and at
21 that point we can anticipate that Karl Hall is going to
22 come back and have some pretty harsh things to say
23 about Mr. Ohlson's witnesses, would you agree?

24 A I don't know if Mr. Ohlson would have had to

1 give a closing argument, but Mr. Hall would have had
2 the opportunity for sure.

3 Q Okay. And if that scenario happens, that
4 doesn't help Mr. Ohlson at all; correct?

5 A I don't know.

6 Q Okay. Can you see where Mr. Ohlson had a good
7 strategy reason for his client to waive argument?

8 A I can see that.

9 Q Okay. Can you see where Mr. Molezzo would have
10 had a good strategy reason to join in that?

11 A Um-hum. Yes. And me as well.

12 Q But your client was in a different position
13 than Schneuringer and Jefferson; correct?

14 A A little bit different.

15 Q Okay. I'm a little unclear, and maybe it was
16 from the tenor of Ms. Noble's question, but in the
17 supplemental petition I'm not suggesting that there
18 should have been a limiting instruction on the neo-Nazi
19 information. Can you think of a limiting instruction
20 on that that would have been given?

21 A No. Did I say I should have requested a
22 limiting instruction?

23 Q No. I mean, there was apparently the
24 allegation that I claimed that you should have, and I

1 didn't claim that. I guess I'm asking you, what
2 limiting instruction after Mr. Ohlson does that do you
3 think maybe you could have given?

4 A I don't know. It could be stricken.

5 Q Yeah, I was going to say, wouldn't that be the
6 procedure, you just do a motion to strike it?

7 A Or the judge instructs the jury to disregard
8 it.

9 Q Right. Okay. Disregard it completely, not
10 consider it only for a particular purpose; correct?

11 A Correct.

12 Q All right. You said that you weren't aware of
13 any -- you didn't file a motion in limine to limit
14 expert testimony on what is possible because you didn't
15 know of any authority that might support that; correct?

16 A To keep Dr. Omalu and Dr --

17 Q -- Clark from testifying that possibly
18 Mr. Kelsey's blows could have caused the fatality of
19 Mr. Hyde.

20 A No, I didn't file that motion.

21 Q Okay. Were you -- and you were asked if you
22 were aware of any authority that could have supported
23 such a motion. Were you aware of Frutiger versus State
24 from 1995?

1 A You know, I have been aware of Frutiger, but, I
2 mean, if you're going to hold me to certain lines in
3 it --

4 Q Well, do you remember in Frutiger's case that
5 was where Dr. Ritzland talked about the cause of death
6 possibly could have been natural causes, possibly could
7 have been a criminal agency, and the Nevada Supreme
8 Court reversed on sufficiency of the evidence. Do you
9 remember that?

10 A That sounds familiar.

11 THE COURT: Wasn't Frutiger the case where --

12 THE WITNESS: The guy in the closet.

13 THE COURT: -- the victim was in the closet or in a
14 car or something like that?

15 MR. CORNELL: Yeah. It was a three-to-two opinion.

16 BY MR. CORNELL:

17 Q And are you familiar with Higgs in the criminal
18 realm but also the Hallmark v. Eldridge case in terms
19 of gatekeeper duties of the trial judge in keeping out
20 certain kinds of expert testimony?

21 A The stuff based on speculation you mean?

22 Q Right.

23 A I'm familiar with the concept, yeah.

24 Q Okay. So you were familiar with the concepts

1 that could have lent itself to a motion in limine; is
2 that correct?

3 A Well, that's not the way I viewed Dr. Omalu's
4 testimony in particular. I mean, he said every blow
5 was a contributing factor to the demise of Jared Hyde.
6 And he wouldn't shake from that opinion.

7 Q Okay. But he also said that a punch to the
8 face could cause a subconcussion; correct?

9 A Okay.

10 Q And apparently Dr. Clark is not willing to go
11 along with that. Did you know that?

12 MS. NOBLE: Misstates her testimony. Objection.

13 THE COURT: Sustained.

14 Don't respond to that question.

15 It's not that she won't go along with it. She just
16 said she does not use that terminology.

17 MR. CORNELL: All right. She does not use that
18 terminology. Thank you.

19 BY MR. CORNELL:

20 Q Were you aware of Dr. Omalu's testimony in that
21 regard?

22 A About what?

23 Q About a punch to the face could actually cause
24 a subconcussion only.

1 A That might have come out in his testimony.

2 Q In fact, it came out through your
3 cross-examination, didn't it?

4 A Okay.

5 Q And if it's a subconcussion only, wouldn't it
6 strike you that a subconcussion by itself wouldn't
7 likely lead to the death of the person receiving the --

8 MS. NOBLE: Objection; calls for a medical
9 conclusion.

10 THE COURT: It's beyond the witness's expertise
11 unless you can lay some additional foundation.

12 BY MR. CORNELL:

13 Q Well, I mean, did you consider asking Dr. Omalu
14 that question?

15 A I considered asking Dr. Omalu what I asked him.
16 And I didn't get the answer I wanted, and I could not
17 shake him from that opinion.

18 Q And wouldn't consulting with an expert,
19 perhaps, enable you to better cross-examine Dr. Omalu
20 and ask more focused questions to get the information
21 you really want out of him?

22 A Perhaps. I didn't feel like I was undermanned.
23 I just -- that was his opinion, and he was sticking to
24 it.

1 Q I don't have any other questions. Thank you.

2 THE COURT: Recross based on the redirect.

3 MS. NOBLE: No, Your Honor. Thank you.

4 THE COURT: Thank you for being here today,

5 Mr. Edwards. You're free to go.

6 THE WITNESS: Thank you, Your Honor.

7 THE COURT: One moment.

8 Not you. You're free to go.

9 MR. CORNELL: Your Honor, actually I am going to --

10 THE COURT: Hold on one second.

11 MR. CORNELL: I'm sorry.

12 THE COURT: Counsel, rather than calling another
13 witness today, we'll take our recess for the afternoon.

14 It's about 20 minutes after 4:00. And so we will
15 reconvene tomorrow. The Court does have its calendar
16 in the morning that begins at 8:30, so I would
17 anticipate being ready to go about 10:30 in the
18 morning.

19 MR. CORNELL: Very well.

20 THE COURT: Tomorrow it might be a little bit later
21 than that, but we'll get going as quickly as possible
22 after the court's calendar.

23 MR. CORNELL: Your Honor, may I ask for tomorrow --
24 I mean, we'll finish the evidentiary portion for sure.

1 You had -- I thought you had indicated that you wanted
2 to see the transcript of these proceedings before
3 deciding. Maybe I misunderstood.

4 THE COURT: No, I just said that I guarantee you
5 that I will read Mr. Ohlson's transcript from the
6 deposition, which I did while we were on recess waiting
7 for Mr. Edwards to be here. So I've read that. I have
8 copies of the transcripts on my computer.

9 MR. CORNELL: From the trial.

10 THE COURT: From the trial. So I've got the entire
11 trial transcript. And the reason I referenced that was
12 if there was ever an opportunity or a necessity, I
13 should say, for counsel to direct me to something in
14 the transcript, I would be able to immediately pull it
15 up.

16 MR. CORNELL: Okay.

17 THE COURT: It's not sitting here on the bench. I
18 don't want you to think I don't have access to it as we
19 sit here. All I have to do is click something on my
20 computer and I've got the whole transcript right there.
21 You could direct me to whatever line and page you
22 wanted me to look at.

23 MR. CORNELL: Okay. Point being you want us to
24 argue tomorrow after the evidence is done?

1 THE COURT: If we get to that point, that would be
2 great.

3 MR. CORNELL: I think we will.

4 THE COURT: Excellent. If not, we can come back
5 and reschedule it for some additional time in the near
6 future. I know that my calendar on Friday is
7 completely booked up. So I've got my calendar in the
8 morning and then I've got you guys set for the rest of
9 the day tomorrow. So assuming we get it finished, then
10 we will go to argument. And by "it" I mean the
11 testimony.

12 What I will not do is bifurcate the arguments. I
13 think that would be unfair to you, Mr. Cornell, if I
14 had you argue first and then we take a break and then
15 Ms. Noble gets to go and prepare a more extensive
16 argument in response to what you're doing immediately
17 after the close of evidence.

18 So if I don't think we can do the closing arguments
19 all at once, then we reschedule it for some later time.
20 But if I think we can get them all done, then we will
21 do so.

22 MS. NOBLE: Yes, Your Honor.

23 THE COURT: Court's in recess.

24 (The proceedings were adjourned at 4:20 p.m.)

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Criminal

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STATE VS. ZACH KELSEY (D10)

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8 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

9 IN AND FOR THE COUNTY OF WASHOE

10 * * *

11 ZACHARY KELSEY,

12 Petitioner,

13 v.

Case No. CR12-0326B

14 THE STATE OF NEVADA,

Dept. No. 10

15 Respondent.
16 _____/

17 STATE'S POST-HEARING POINTS AND AUTHORITIES REGARDING CUMULATIVE
18 ERROR

19 Pursuant to *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), a finding of
20 ineffective assistance of counsel must be supported by both deficient performance and actual
21 prejudice. The second part of a *Strickland* analysis—the question of prejudice—has been
22 approached differently by various courts. No decision of the United States Supreme Court
23 indicates that the doctrine of cumulative error may be properly applied to satisfy the prejudice
24 requirement for claims of ineffective assistance of counsel. *Accord Moore v. Parker*, 425 F.3d
25 250, 256 (6th Cir. 2005); *Lorraine v. Coyle*, 291 F.3d 416, 447 (6th Cir. 2002); *Baze v. Parker*,
26 371 F.3d 310, 330 (6th Cir. 2004).

Among the federal circuits, there is a split of authority as to whether otherwise harmless errors may be cumulated in order to demonstrate prejudice sufficient to seriously undermine

1 judicial confidence in a conviction. While many federal circuits recognize claims of prejudice
2 based on cumulative error, the Fourth, Sixth, Eighth, and Eleventh Circuits do not allow errors
3 not individually unconstitutional to be added together to create a constitutional violation. *See*
4 *Ballard v. McNeil*, 785 F. Supp. 2d 1299, 1336 n. 22 (N.D. Fla. 2011); *Wainwright v. Lockhart*,
5 80 F. 3d 1226 (8th Cir. 1996); *Fisher v. Angelone*, 163 F.3d 835, 852-3 (4th Cir. 1998). *See also*
6 Ruth A. Moyer, To Err is Human; To Cumulate, Judicious: The Need for U.S. Supreme Court
7 Guidance On Whether Federal Habeas Courts Reviewing State Convictions May Cumulatively
8 Assess *Strickland* Errors, DRAKE L. REV., Winter 2013, at 453-474.

9 Other circuits are muddy on the issue, demonstrating ambiguity and inconsistency in
10 their willingness or unwillingness to apply the cumulative doctrine in a *Strickland* analysis. *Id.*
11 The Ninth Circuit is no exception. In *Harris v. Ramseyer*, 74 F. 3d 1432 (9th Cir. 1995), the
12 Ninth Circuit considered whether the cumulative impact of multiple deficiencies prejudiced the
13 defense, and aggregated 11 deficiencies to satisfy the prejudice requirement. The *Harris* court
14 noted, however, that “[w]e have found prejudice resulting from cumulative errors only once in
15 the post-*Strickland* era.” *Harris*, 64 F. 3d at 1438 (citing *Mak v. Blodgett*, 970 F. 2d 614 (9th
16 Cir 1992). Less than ten years later, the same court declined to add errors not individually
17 unconstitutional together to support reversal. In *Mancuso v. State*, 292 F.3d 939 (9th Cir.
18 2002), the court explained:

19 Cumulative error applies where, “although no single trial
20 error examined in isolation is sufficiently prejudicial to
21 warrant reversal, the cumulative effect of multiple errors
22 may still prejudice a defendant.” *United States v. Frederick*,
23 78 F.3d 1370, 1381 (9th Cir.1996). Because there is no single
24 constitutional error in this case, there is nothing to
25 accumulate to a level of a constitutional violation.

26 *Mancuso v. Olivarez*, 292 F.3d 939, 957 (9th Cir. 2002)(*overruled on other grounds by Slack*
v. McDaniel, 529 U.S. 473, 120 S.Ct. 1595, 1603, 146 L.Ed.2d 542 (2000)).

///

1 For its part, the Nevada Supreme Court appears to disfavor cumulating instances of
 2 deficient representation to create prejudice. In *McConnell v. State*, 125 Nev. 243, 259, 212
 3 P.3d 307 (2009), the court was “not convinced that this [cumulative error] is the correct
 4 standard” as applied to a *Strickland* prejudice analysis. Though it acknowledged a split of
 5 authority among courts as to this issue, the *McConnell* court also cited an 8th circuit opinion
 6 holding that “[e]ach claim of a constitutional deprivation asserted in a petition for federal
 7 habeas corpus must stand on its own, or, as here, fall on its own.” *McConnell*, 125 Nev. 243, fn.
 8 17 (*internal citation omitted*).¹

9 In some earlier Nevada decisions, the court has considered assertions of cumulative
 10 error in the context of a post-conviction petition. But the analysis in those decisions still treats
 11 each claim of ineffectiveness individually. See *Doyle v. State*, 116 Nev. 148, 995 P.2d 465
 12 (2000)(where petitioner sought habeas relief based on cumulative error theory, individually
 13 evaluating each claim for prejudice, and denying relief); *Evans v. State*, 117 Nev. 609, 848; 28
 14 P.3d 498 (2001)(where petitioner sought relief based upon cumulative error, analyzing each
 15 claim individually for both deficient performance and actual prejudice.)
 16 Even courts applying the cumulative error doctrine in a habeas context do so inconsistently
 17 and rarely. With regard to the deficiency prong of the *Strickland* test, “judicial scrutiny of
 18 counsel's performance must be highly deferential. It is all too tempting for a defendant to
 19 second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for
 20

21 ¹ In his “Post-trial Brief,” Petitioner cites to two recent unpublished Nevada Supreme Court
 22 Decisions, *State v. Elmazoub*, 2015 WL 9464444 (December 18, 2015) and *Chappell v. State*,
 23 2015 WL 3849122 (June 18, 2015). The State notes that while ADKT 504 repealed Nevada
 24 Supreme Court Rule 123 forbidding any citation to unpublished authorities, the change only
 25 applies to those cases decided after January 1, 2016. Second Judicial District Court Rule 10
 26 (f)(10) and District Court Rule 12 (f)(5) both require any decision cited be accompanied by a
 citation to a reporter. Moreover, both unpublished decisions actually support the State's
 position. *Chappell* declines to grant relief “even assuming that counsel's deficiencies may be
 cumulated”; *Elmazoub* cites *McConnell*, *supra*, in commenting that “this court has never
 determined whether multiple deficiencies in counsel's performance can be considered
 cumulatively for purposes of the prejudice prong of *Strickland*.”

1 a court, examining counsel's defense after it has proved unsuccessful, to conclude that a
2 particular act or omission of counsel was unreasonable." *Strickland v. Washington*, 466 U.S.
3 668, 104 S.Ct. 2052 (1984). In the absence of a showing that counsel's performance was
4 tantamount to no legal representation at all, *see United States v. Cronin*, 466 U.S. 648, 654-55
5 (1984), finding that counsel's performance was repeatedly and cumulatively deficient is not a
6 substitute for the prejudice portion of the *Strickland* test. Adding otherwise harmless errors
7 together in order to support a prejudice finding only increases the risk that a court will use
8 hindsight and subjective standards of reasonableness to overturn a conviction. This Court
9 should not apply the cumulative error doctrine by adding errors of non-constitutional
10 dimension together to purportedly satisfy the prejudice requirement.

11 AFFIRMATION PURSUANT TO NRS 239B.030

12 The undersigned does hereby affirm that the preceding document does not contain the
13 social security number of any person.

14 DATED: January 29, 2016.

15 CHRISTOPHER J. HICKS
16 District Attorney

17 By /s/ JENNIFER P. NOBLE
18 JENNIFER P. NOBLE
19 Appellate Deputy
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I hereby certify that this document was filed electronically with the Second Judicial District Court on January 29, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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HONORABLE ELLIOTT A. SATTLER

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Criminal

Case Title:

STATE VS. ZACH KELSEY (D10)

Document(s) Submitted:

Transcript

Filed By:

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8 SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

9 IN AND FOR THE COUNTY OF WASHOE

10 THE HONORABLE ELLIOTT A. SATTLER, DISTRICT JUDGE
11 --oOo--

12 ZACH KELSEY, Case No. CR12-0326B
13 Petitioner, Dept. No. 10
14 vs.
15 THE STATE OF NEVADA,
16 Respondent.

17 TRANSCRIPT OF PROCEEDINGS
18 EVIDENTIARY HEARING

19 Volume 2 of 2
20 Pages 253-362

21 Thursday, January 14, 2016
22 Reno, Nevada
23
24

1 APPEARANCES:

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RENO, NEVADA, THURSDAY, JANUARY 14, 2016, 10:46 A.M.
-oOo-

THE COURT: We'll go back on the record in Kelsey versus the State of Nevada, CR12-0326B. This is a continued hearing on a Post-Conviction Petition For Writ of Habeas Corpus. The petitioner is present in court in custody with his attorney, Mr. Cornell.

Good morning to both of you gentlemen.

THE DEFENDANT: Good morning.

MR. CORNELL: Good morning, Your Honor.

THE COURT: And Ms. Noble is here on behalf of the respondent, the State of Nevada.

Good morning, Ms. Noble.

MS. NOBLE: Good morning, Your Honor.

THE COURT: When we broke yesterday, I think we had concluded with Mr. Edwards' testimony. Do you have additional witnesses that you would like to call, Mr. Cornell?

MR. CORNELL: I do. And I also want to indicate to Your Honor, I am really feeling under the weather, and I apologize for being snappish. It's kind of a combination of being sick and exhausted, and I will try to hold myself together today, Your Honor.

THE COURT: I appreciate that, Mr. Cornell. And you

1 have always been very professional, and so no apology is
2 necessary. It's just one of my pet peeves, if we have judicial
3 pet peeves, is, I just can't stand it when people talk over the
4 top of each other. So that was the only point I was trying to
5 make, and I appreciate the apology, but it was unnecessary.

6 MR. CORNELL: Thank you, Your Honor.

7 THE COURT: And if you are not feeling well -- I don't
8 know what "not feeling well means" -- but if you need to leave
9 the courtroom in a hurry, please feel free to do so.

10 MR. CORNELL: I will let you know.

11 THE COURT: Okay.

12 MR. CORNELL: I don't think that will happen, but if
13 it does, I'll let you know.

14 THE COURT: All right.

15 MR. CORNELL: All right. I'll call Mr. Kelsey.

16 THE COURT: Okay. Mr. Kelsey, if you could please
17 stand and raise your right hand to be sworn as a witness.

18

19 ZACH KELSEY,

20 being first duly sworn by the clerk

21 was examined and testified as follows:

22 DIRECT EXAMINATION

23 BY MR. CORNELL:

24 Q. Please state your name for the record once you are

1 ready to go.

2 A. Zach Kelsey.

3 Q. Okay. And are you the petitioner in this case?

4 A. Yes, sir.

5 MR. CORNELL: Your Honor, I am going to have just two
6 limited areas of inquiry for Mr. Kelsey.

7 BY MR. CORNELL:

8 Q. Number one, in your meetings and conferences with
9 Mr. Edwards, at what point in time was the decision made for
10 you to testify?

11 A. If not the morning of my testimony, it would have been
12 the day before, after Mr. Ohlson called his witnesses.

13 Q. Okay. And what was the reason for you taking the
14 stand?

15 A. To rebuttal what those witnesses said. There was no
16 chance to prep for that. As he said, he found out about it the
17 day -- the first day of trial.

18 Q. Before you heard Mr. Ohlson's opening statement and
19 the testimony of those witnesses, did you know that those
20 witnesses were out there to testify to what they testified to?

21 A. No.

22 Q. All right. Second limited area of inquiry.

23 In your pretrial meetings with Mr. Edwards, did you
24 bring up the subject of interviewing Ms. C [REDACTED] and/or

1 Mr. C [REDACTED]?

2 A. Yes. On numerous occasions I told Mr. Edwards that I
3 wanted to speak with an investigator so we could flesh out
4 who -- who he should go talk to.

5 Q. Why did you want the investigator to talk to those
6 particular issues -- to those particular witnesses? I'm sorry.

7 A. Because those were witnesses that I knew were in the
8 area during my altercation with Mr. Hyde.

9 Q. Okay. Having now heard their testimonies yesterday,
10 would you have wanted Mr. Edwards to present those testimonies
11 at trial?

12 A. Absolutely.

13 Q. And why do you say "absolutely"?

14 A. Because what they had to say corroborated my defense.

15 Q. Okay. Meaning -- meaning what, exactly?

16 A. That my altercation with Jared Hyde was very brief and
17 it was a mutual combat situation.

18 Q. Okay.

19 MR. CORNELL: All right. I have no further questions.

20 THE COURT: Cross-examination, Ms. Noble?

21 MS. NOBLE: Your Honor, I believe that Mr. Edwards
22 covered these areas in his testimony yesterday. I have no
23 questions for Mr. Kelsey.

24 THE COURT: Mr. Kelsey, thank you for your testimony

1 today. You may step down.

2 MS. NOBLE: Your Honor, in an abundance of caution, I
3 did have Mr. Edwards outside in case I needed to call him in
4 rebuttal today. May I let him go?

5 THE COURT: You can let him go if you don't want to
6 recall him. I don't know if anything that Mr. Kelsey just
7 testified to would cause you to recall him. That's --

8 MS. NOBLE: It would not, Your Honor.

9 THE COURT: Okay. Then he's free to go.

10 DEPUTY SHERIFF: I can let him know.

11 MS. NOBLE: Thank you.

12 MR. CORNELL: With that testimony, Your Honor, the
13 petitioner would rest.

14 THE COURT: Okay. Thank you, Mr. Cornell.

15 Ms. Noble, do you have any witnesses that you would
16 like to call?

17 MS. NOBLE: No, Your Honor.

18 THE COURT: Okay. Well, as was predicted late
19 yesterday afternoon, we'll move right into argument.

20 Counsel, in speaking with my staff after the hearing
21 yesterday, I think I pieced together, possibly, why it is you
22 think that I was going to need a transcript, or the nature of
23 the transcript comment.

24 I did mention during my comments in response to an

1 objection that was made by Ms. Noble, if I remember correctly,
2 about the phrasing of certain questions by Mr. Cornell in his
3 description of hypothetical situations, and the hypotheticals
4 were about the testimony that Mr. C [REDACTED], Ms. C [REDACTED] and
5 Mr. L [REDACTED] (phonetic), I believe was his name--

6 MR. CORNELL: L [REDACTED].

7 THE COURT: -- L [REDACTED], not even close -- had
8 provided. And my comment was, is that I can go back and look
9 at the transcript and compare what they actually said to the
10 testimony -- or, excuse me, to the way that Mr. Cornell phrased
11 the question.

12 I won't be waiting for a transcript of these
13 proceedings. However, if I need one, I can certainly order
14 one. I think it would have been more accurate for me to say I
15 can review my notes and I can judge the way that the question
16 was phrased by Mr. Cornell and make a determination based on
17 that. But it's not -- there's no transcript needed. Let's put
18 it that way.

19 MR. CORNELL: Sure. That's fine.

20 THE COURT: Go ahead, Mr. Cornell. I have your
21 petition here with me, I've got all of the exhibits, and so you
22 may proceed with argument.

23 MR. CORNELL: Thank you, Your Honor.

24 If it please the Court, I try to be extremely thorough

1 in my supplemental petitions in the hopes that it will cut down
2 the necessity of saying too much at this point. But in this
3 case, there is more to be said, and particularly so since the
4 trial judge happened to be the Honorable Steven Elliott.

5 There are some -- and I'm very, very well aware of the
6 Strickland standard. And let me start with that. There -- in
7 a case like this where you are doing an expanded record,
8 presenting witnesses who were never presented at trial, the
9 issue, in a sense, becomes one of prejudice, the prejudicial
10 prong in Strickland. As we all know, if the petitioner doesn't
11 carry its burden on prejudice, he loses. He's got to carry his
12 burden on both prongs, both below the standard and prejudice.

13 And there are some cases out there, quite frankly,
14 where -- where a habeas petitioner is never going to be able to
15 establish prejudice. There are some cases out there where the
16 defendant went to trial so plainly guilty as charged that you
17 can establish that the trial lawyer didn't do this or didn't do
18 that, or did something that was -- he shouldn't have done or
19 she shouldn't have done, and at the end of the day you can even
20 say the lawyer fell below the standard of reasonably effective
21 counsel, but the petitioner wasn't prejudiced because a
22 reasonable jury, hearing things differently, the way the habeas
23 petitioner now says it ought to have been heard, wouldn't have
24 come to any other conclusion but guilty as charged.

1 THE COURT: Arguably the defense attorney sleeps
2 through the trial, and the defendant is so clearly guilty, it
3 wouldn't have mattered anyway.

4 MR. CORNELL: You can have that -- you can have that
5 happen. I've seen published opinions where, in fact, that's
6 been the result.

7 And I would suggest to you, Your Honor, that this is
8 not that case. When you have Mr. Edwards telling you, "I
9 thought it was" -- "I was very disappointed in the jury
10 verdict," you know something isn't quite right. When you have
11 Mr. Qualls stating his frustration --

12 THE COURT: Well, hold on a second, Mr. Cornell. I
13 ask a lot of questions, and so I want to interrupt you right
14 there.

15 Why does Mr. Edwards' disappointment in the jury
16 verdict demonstrate to me that something isn't quite right?

17 MR. CORNELL: It -- it -- no. It sets the -- all
18 right. I'll get to my argument in a slightly different way.

19 There is enough in this record to suggest that if a
20 reasonable jury hears the rest of the story as we presented it,
21 there is a reasonable likelihood -- certainly a reasonable
22 possibility -- that that jury comes to a different result.

23 And if I may expound from there?

24 THE COURT: Okay.

1 MR. CORNELL: Okay. It has been suggested by the
2 State that I've misstated what the actual evidence was and what
3 my client actually did. So let's clear that up.

4 Looking at the testimony of Aubree Hawkinson, which is
5 at page 1425 of your transcript, she is asked:

6 "All right. And did you see-- while that was going on
7 did you notice where Jared Hyde was?"

8 Talking about the fracas near the bonfire. Her answer
9 is:

10 "No, not until they came around the tree and Ricky
11 Bobby got into the middle of it. And then Jacob and him got
12 into like a very short fight, it was Jacob pretty much hit
13 Bobby, he was out. And then out of the corner of my eye Zach
14 grabbed Jared by the shirt and kneed him in the face and hit
15 him a couple of times.

16 "Question: Zach --

17 "Answer: Zach Kelsey, I think that's his last name,
18 yeah.

19 "Question: All right. You saw that?

20 "Answer: Yeah."

21 So that witness is talking about two hits and a knee
22 to the face.

23 Brandon Naastad testified at trial. His testimony, as
24 appears at pages 1178, -79, and -88. At -79 and seven -- at

1 page 1179, he's identifying Zach Kelsey as the one that he
2 sees. Mr. Hall doing the examination:

3 "All right. So you said you saw they were kind of
4 struggling, pulling the shirts off and then Jared was hit a
5 couple, three times?

6 "Answer: Yes.

7 "Mr. Edwards: Objection; leading.

8 "By Mr. Hall: Was that your testimony that you just
9 told us?

10 "Answer: Yes, he was hit a few times after his shirt
11 got pulled off.

12 "Question: All right. And then what happened after
13 that?

14 "Answer: He got hit a few times and then they broke
15 that up. I don't know who broke it up. It was somebody that
16 broke it up. And then Jared went to a car that was down here
17 just to get away from everyone and everything. And then that
18 was it for the Jared thing until later on."

19 So then we have Brandon Molder's testimony. And this
20 appears at page 1409. And this is in Mr. Edwards'
21 cross-examination:

22 "Mr. Molder, when you saw Jared Hyde wrestling on the
23 ground, did you see who he was wrestling with?

24 "Answer: No.

1 "Question: Okay. So you don't know what that was
2 about?

3 "Answer: No.

4 "Question: Can you tell us how long it went on?

5 "Answer: I just saw them for a couple seconds when I
6 looked over there, because there was so much stuff going on. I
7 just remember seeing him wrestling somebody over there."

8 So we don't know exactly how many blows were thrown,
9 where on Mr. Hyde's body Mr. Kelsey's knee went, which is
10 understandable because you're talking about a bonfire with very
11 limited ambient lighting, a fracas near that. We don't know
12 whether it was two punches, as Ms. Hawkinson and yesterday
13 Ms. C [REDACTED] said. We don't know if it was more than two,
14 possibly three, as Mr. Molder indicated it might have been. We
15 don't know whether the knee happens while they're wrestling on
16 the ground or whether they're standing up. I said Mr. Molder
17 when I meant Mr. Naastad. Per Mr. Molder, maybe it happened
18 while they were wrestling on the ground. But I don't know that
19 any of that matters.

20 What we do know, what can't be controverted, is that
21 at the end of this fracas that lasts 20 seconds, maybe, they
22 both get up, they both walk away. They're broken up, they get
23 up, whatever. They both walk away. Mr. Hyde walks 50 feet up
24 the hill towards the Dodge Durango. And from the perspective

1 of the witnesses who see it, there's nothing wrong with him at
2 that point.

3 And it begs the question, even if you can somehow link
4 those punches to the death of Mr. Hyde, even if you can do
5 that, how from there do we determine that those punches or that
6 knee or acts are inherently dangerous to life? I know that
7 that's what Mr. Qualls's frustration about this case ultimately
8 was, and I share that. How can that be? The best we can say
9 at this point is it is not a strong case for second degree
10 murder, because this case has that question begging at it.

11 The only thing that we can say from this record on how
12 a jury could have gotten there from hearing the evidence, and
13 how the Nevada Supreme Court could have upheld it, was the
14 testimonies of Drs. Clark and Omalu that every blow
15 contributes. And the notion that somehow Mr. Kelsey and
16 Mr. Schnueringer and, slash, Mr. Jefferson are somehow
17 associated, that somehow they're acting in concert in this
18 case.

19 And what we have established in this hearing is those
20 two assumptions are not carved in stone, whatsoever. If a jury
21 hears the additional evidence that we presented, we can't say
22 that they are going to, nevertheless, find Mr. Kelsey guilty of
23 second degree murder. But could they have found him guilty of
24 involuntary manslaughter? More likely. Could they have found

1 him guilty of misdemeanor battery? Even more likely. That's
2 our position. But with that setup in mind, let me go to the
3 grounds.

4 And I will tell you this, I am going to be thorough.
5 We're both thorough, but I am going to tell you, tipping my
6 hat, the grounds that I really think the Court needs to
7 concentrate above all are Ground 1(b) and Ground 3. One(b) is
8 the one that charges counsel being ineffective for not having a
9 forensic pathologist to testify, and Ground 3 is the one that
10 charges counsel is ineffective for waiving closing argument. I
11 think -- I don't want to diminish everything else I've written
12 by any means, but I think those are the grounds that really
13 jump out in this case.

14 Now, Ground 1(a), which is counsel should have
15 challenged the admissibility of this "possibility evidence" of
16 Dr. Clark and Dr. Omalu at all. The State asks, "Where is that
17 from?" And in the petition my argument was: Well, wait a
18 minute. If -- if we say -- I mean, not "we." If the Nevada
19 Supreme Court says that in a medical malpractice case when an
20 expert witness comes in and testifies to cause of death, it has
21 to be to a reasonable degree of medical probability, why is
22 there a higher standard in a medical malpractice case than
23 there is in a criminal case when the criminal case has the
24 highest burden of proof, guilt beyond a reasonable doubt, and,

1 I would submit, the most severe consequence, which is potential
2 life imprisonment. Why? Why is that?

3 The Court hasn't addressed that. What the Court has
4 said is interesting, in the West case, in the Berkey West case
5 from 2003. There are some cases where the State doesn't have
6 to bring in an expert at all. You know, the facts of cause of
7 death just from the surrounding circumstances are there.

8 There are other cases, like the Middleton case, where
9 it may be ripe with possibilities, but we can look at the
10 surrounding circumstances and say the cause of death had to
11 have been what the defendant did.

12 But we also, as I indicated yesterday, have the
13 Frutiger case. And the cite for Frutiger, by the way, is
14 111 Nev. 1385, 907 P.2nd 158, where Dr. Ritzlin is talking
15 about the possible -- possible methods of death in that case,
16 and the Court makes pretty clear in reversing and vacating the
17 judgment that possibility isn't enough.

18 And in this case -- oh. And we also have Hallmark vs.
19 Eldridge, where the Nevada Supreme Court -- that one -- cite is
20 124 Nev. 492, 189 P.3rd 646, a 2008 -- where the Supreme Court
21 holds that a biomechanical expert should not have been allowed
22 to testify in a negligent action involving an automobile
23 accident because there was no demonstration that his testimony
24 was based on a reliable methodology and, therefore, his

1 testimony didn't assist the jury in understanding the source of
2 injury the motorist sustained when a truck driver backed a
3 company truck into the driver's side of the motorist's vehicle,
4 and it was reversible error to allow that in.

5 Now, I'll grant the State's point in a way. You know,
6 what specific manner do we have that would allow an expert --
7 excuse me -- allow a District Court on a motion in limine to
8 keep that expert's out -- testimony out beyond all that, beyond
9 the burden of proof.

10 And it kind of came out yesterday, quite frankly. I
11 had talked to Dr. Clark about second impact syndrome, and
12 that's the medical syndrome where the brain swells rapidly when
13 there's a first hit, and then a short period of time after that
14 there's a second hit.

15 She wasn't testifying at trial about second impact
16 syndrome per se, but what she was testifying about, I would
17 submit, is something very similar to that. And when I
18 confronted her, just by reading the Wikipedia article on second
19 impact syndrome and the fact that due to poor documentation of
20 the injury, some professionals think it's overdiagnosed and
21 some doubt the validity of the diagnosis altogether, her answer
22 is, "Well, I haven't studied second impact syndrome."

23 But she's testifying to something that if it isn't
24 second impact syndrome, it's awfully, awfully close. I -- and

1 my question is: How can you take the stand and testify to
2 something that is equal to or very closely related to a
3 phenomenon you haven't studied?

4 It seems to me that if it comes out in a motion in
5 limine, and that's how the testimony goes, a district judge
6 well exercises his discretion, saying, "You're talking about
7 possibility on a theory that you haven't studied. The jury
8 doesn't hear that. As the gatekeeper, I keep that out."

9 I would certainly hope the Nevada Supreme Court would
10 ultimately agree with that observation, especially in a
11 criminal case where the standard is beyond a reasonable doubt.
12 It bothers me tremendously that doctors can come in and talk
13 about possibilities, and somebody can be sentenced potentially
14 to life imprisonment based on what's merely possible, as
15 opposed to probable, but --

16 THE COURT: But the analysis that a criminal case, the
17 ultimate burden of proof is higher than in civil cases and,
18 therefore, we should somehow bring that standard over doesn't
19 really work, in my mind, at this moment, Mr. Cornell. Because
20 beyond a reasonable doubt isn't a standard regarding everything
21 in a criminal case. As we know, there is a preponderance of
22 the evidence standard to certain things. Petrocelli evidence,
23 for example.

24 MR. CORNELL: Clear and convincing.

1 THE COURT: Right. Clear and convincing. I
2 apologize.

3 MR. CORNELL: Yes.

4 THE COURT: I said "preponderance."

5 But there are all kinds of different standards that
6 are applied in criminal cases that are much more lenient than
7 beyond a reasonable doubt.

8 MR. CORNELL: Well, sure. And another example is
9 allowing in hearsay of a co-conspirator, although that -- that
10 creates a separate can of worms. But we have the old McDowell
11 case that says only slight evidence of the conspiracy is
12 allowed before we allow it in.

13 In any event -- and as I indicated before, you have
14 the West case that says you don't need a forensic pathologist
15 to testify to cause of death at all, in certain cases like that
16 one.

17 THE COURT: Yeah. If I shoot you in the head and you
18 drop dead --

19 MR. CORNELL: Yeah.

20 THE COURT: -- I don't need a pathologist to come in
21 and say that you died from the big hole in your head.

22 MR. CORNELL: Right. If we find your dead body buried
23 six feet under in the desert years after the fact -- I think
24 sort of playing the facts of West -- we can infer death by

1 criminal agency just from the facts. But in this case, as I
2 said, if you look at the testimonies of those witnesses that I
3 just read in, plus the two that we heard yesterday, and
4 Mr. Kelsey, how did we go from a brief skirmish to an act that
5 inherently causes, you know, the inevitable death of life or
6 whatever your standard of 200.070 is? In this case how do we
7 get from that to the cause of death under the facts of our
8 case? It has to come from the experts.

9 And I don't think anybody can look at this record and
10 disagree with us. The key witnesses against Mr. Kelsey in this
11 case, the witnesses who sunk his ship, were Dr. Clark and
12 Dr. Omalu. If this case is tried without them, I don't see any
13 reasonable jury finding second degree murder on this case if
14 it's presented right.

15 Now, that leads into Ground 1(b), which is --

16 THE COURT: Hold on a second. Let's take -- let's
17 take that last thought that you just had. So you're saying
18 that if the State tried to prove this case without Dr. Clark
19 and without Dr. Omalu, there is no way that there would be a
20 conviction. I don't disagree --

21 MR. CORNELL: Of second degree murder.

22 THE COURT: I don't disagree with that at all.

23 MR. CORNELL: Okay.

24 THE COURT: But why would I have -- why would I go

1 with that supposition that the State somehow would come in and
2 try and present a case of the nature of Mr. Kelsey's,
3 Mr. Schnueringer's, and Mr. Jefferson's, and not present
4 evidence, expert testimony, on cause of death?

5 Is it your argument that just they should have been
6 kept out? There should have been a motion in limine filed,
7 Dr. Omalu and Dr. Clark shouldn't testify and, therefore, the
8 State would be left with nothing other than the description of
9 the facts as they were relayed by the witnesses to the
10 altercations that resulted in Mr. Hyde's death?

11 MR. CORNELL: As far as my client goes, that is my
12 position. As far as Schnueringer and Jefferson, I don't think
13 so. I think -- I mean, my opinion is Schnueringer and
14 Jefferson were good for the second degree murder conviction
15 with or without Drs. Clark and Omalu. But I -- my position is
16 very different with my client.

17 But that leads to the next point. Let's suppose
18 Mr. Edwards files his -- his gatekeeper motion and Your Honor
19 or Judge Elliott denies it. Then what? Why -- you know going
20 in as Mr. Kelsey's lawyer that the key witnesses are the two
21 doctors. Why on earth would you not at least consult with a
22 forensic pathologist and, if necessary, call that pathologist
23 to testify to create that evidence to give the jury something
24 to weigh, to give the jury something to say, "Hey, wait a

1 minute. There's another way to look at this evidence
2 medically, and if we look at it the way the defense pathologist
3 says, we come to a different result." Why wouldn't you do
4 that?

5 Yesterday I read to Mr. Edwards when he testified John
6 Ohlson's exact description of what Dr. Terri Haddix would have
7 testified, the expert that he retained, and I asked him if that
8 kind of evidence would have been available for you, would you
9 have wanted to present it? He said, "Yes."

10 I then read to him the bottom-line opinion of
11 Dr. Llewellyn -- not all of the sub-opinions, but the bottom
12 line -- if that evidence had been available to you, would you
13 have wanted to present it? And the answer is, "Yes." That's
14 what he testified to.

15 And certainly the answer has to be yes if you are
16 defending Mr. Kelsey. Because what that testimony does is it
17 forces the jury to say, "Wait a minute. Let's get out of the
18 possibility realm." You know, let's -- let's not take it at
19 face value that if a victim suffers a number of blows, they all
20 are the cause of death. Maybe in some other case that's true,
21 like the one that I described to Dr. Clark when three
22 assailants are just pummeling somebody simultaneously. That's
23 not this case, of course. That forces the jury to weigh
24 evidence. And if -- could a reasonable jury credit

1 Dr. Llewellyn or presumably Dr. Haddix or whoever else the
2 defense may call that's consistent with them, could that
3 happen? Absolutely it could happen.

4 And I will tell you something else. I was shocked
5 when I asked Dr. Clark the question, the hypothetical question,
6 "Suppose this scenario: Defendant one punches the victim in
7 the cheek twice, the victim walks away, goes and eats lunch or
8 dinner, comes out of the restaurant 25 minutes later.
9 Assailant number two comes from behind and hits him in the head
10 with a shovel and he dies of subarachnoid bleeding. Are you
11 saying that number one's punches are not contributory?"

12 She says, "Oh, no, I'm not saying that."

13 I would submit it for your consideration. A
14 reasonable jury, acting on common sense, could hear that and
15 say, "Un-huh. No, we're going to credit Dr. Llewellyn," or
16 Dr. Haddix if she's the one, or whoever. "We are going to look
17 at this case through her eyes." And if they do that, what
18 result do we have? We do not have a result of guilty of second
19 degree murder, that's for sure, on Mr. Kelsey. We may have a
20 verdict of involuntary manslaughter. I would say more likely
21 they separate out the actions of Mr. Kelsey from the other two
22 and they say, "No, misdemeanor battery," or not guilty of
23 anything -- and we'll get to that in a second -- but certainly
24 not second degree murder if they credit those experts.

1 An expert such as Dr. Llewellyn absolutely should have
2 been called in this case. This case was a medicolegal case.
3 Why in the world would a defense lawyer not at least consult
4 with a forensic pathologist?

5 I have cited to you a number of cases in the brief, in
6 the petition, where that happened, where the defense lawyer
7 didn't consult with an expert, much less prepare -- present the
8 expert, and it resulted in a finding of below the standard.
9 And I submit to you, that's below the standard. In this case
10 is it prejudicial? Oh, yeah. It's very prejudicial.

11 Let me talk about Ground 2. Here is where I take
12 issue with Mr. Ohlson, for whom I have the highest respect and
13 regard. His testimony in his deposition is, they weren't
14 inconsistent defenses, that his defense is you can't tell which
15 punch caused the death and, therefore, his client could be no
16 more guilty than Mr. Kelsey.

17 If you look at his opening statement at pages 1675
18 through 1677. That's not what he presented to the jury. Now,
19 I will plead guilty to overstating what he was saying a little
20 bit. I would say not overstating so much, but rephrasing. He
21 didn't say, "Our theory of the case is that Mr. Kelsey killed
22 Jared Hyde, and all our guys did was hit a dead guy." He
23 didn't say it that way.

24 Here's what he did say. Mr. Ohlson gives -- sort of

1 surprises the Court when he says, "I want to give my opening
2 statement." And he gets up there and says:

3 "The reason I'm giving an opening statement now,
4 unlike the other lawyers in the case who gave you one at the
5 beginning of the case, is that I had the option and I reserved
6 mine because I intended on calling some witnesses. And I
7 intend to call three witnesses before you. And I think that
8 those three witnesses are going to give you testimony that will
9 answer two questions for you, who did it and how was it
10 accomplished."

11 Okay. Who did it and how was it accomplished. Now,
12 what's -- what's the tenor of those three witnesses? Who did
13 it? Zach Kelsey. He bragged to us. He said he hit the guy
14 with brass knuckles. He killed him. He said so after the
15 fact. We weren't there, but that's what he said. That's the
16 gist of Mr. Fallen's, Mr. Smith's, and Mr. Simpson's testimony.

17 And Mr. Ohlson goes on to say, "Now, in order to put
18 their testimony in perspective" -- he talks about how he got
19 out of Dr. Clark the notion that the injuries in question could
20 have been caused by brass knuckles. Now, here was the factual
21 problem with his defense. The closest he came to brass
22 knuckles was Mr. Opperman, who said that Mr. Kelsey had bragged
23 about owning a pair of brass knuckles. Is there any witness
24 that said Mr. Kelsey was wearing brass knuckles, that he

1 brought them to the scene of the crime, so to speak, and that
2 he hit him while wearing brass knuckles? Not one witness
3 testified to that.

4 If Mr. Edwards knows that that's the defense going in,
5 he has the ability to examine every one of these scene
6 witnesses -- like I did, with Ms. C [REDACTED] and Mr. C [REDACTED] --
7 "Did you see Zach Kelsey wearing brass knuckles?"

8 They both said, "Absolutely not, no."

9 I submit to you from the absence of evidence that if
10 that question is asked of the other student witnesses that the
11 State called, even Mr. Opperman, the answer is no. The whole
12 notion of Mr. Ohlson's theory has got a big problem right
13 there. You know, it's supposedly Mr. Kelsey bragging about
14 something that the scene witnesses can't confirm and -- but did
15 Mr. Ohlson say, "We're going to show that he, Mr. Kelsey,
16 killed poor Mr. Hyde, and my client, all my client did was hit
17 a dead person"? Not in those precise words. Is that the
18 import of his defense? Sure it is. Does it have a problem?
19 It had a problem going in, before Karl Hall blistered those
20 witnesses. But, yeah, it's a big problem.

21 Now, Mr. Qualls let it slip that he thought the
22 defenses were inconsistent. I fully concur. The testimony
23 from Mr. Ohlson and Mr. Edwards is they got together and said,
24 "Let's not put each other on trial, because if we do, we are

1 going to have second prosecutors and, you know, Karl Hall is
2 going to take great advantage of that." Oh, yeah, he would.
3 No question about that if -- if you don't have inconsistent
4 defenses.

5 But Mr. Kelsey's defense -- and Mr. Edwards admitted
6 this -- necessarily puts the blame on Mr. Schnueringer and
7 Mr. Jefferson. It necessarily does. My client was involved in
8 a brief skirmish where he hit him twice, three times, whatever
9 it was. They walked away. The guys who actually killed him
10 were Schnueringer and Jefferson. So his defense necessarily,
11 the proximate cause and so forth, is putting the finger on
12 those two.

13 It's not clear, certainly to Mr. Kelsey, until the
14 middle of trial that Ohlson's defense is the exact opposite:
15 No, the guy who killed -- the guy who killed Mr. Hyde was not
16 my guy, it was that guy. Those are -- that's about as
17 inconsistent a defense as you get, quite frankly. Again --

18 THE COURT: But how does Mr. Edwards' conduct on that
19 front fall below the standard? As I think of it, Mr. Ohlson,
20 it sounds like from the testimony, did not inform Mr. Edwards
21 of his intention to call these witnesses and to point the
22 finger, as we say, at Mr. Kelsey. But it certainly could be
23 argued he had an ethical obligation not to do that, that by
24 revealing his trial strategy, he may be affecting his own

1 client to his client's, Mr. Schnueringer's detriment.

2 MR. CORNELL: Um-hum.

3 THE COURT: So Mr. Edwards -- the argument is
4 Mr. Edwards didn't anticipate these witnesses coming in and
5 testifying in this way and, therefore, did not cross-examine
6 the other witnesses about brass knuckles.

7 But how do you know that? You know, that gets back to
8 the standard prong of Strickland. How would Mr. Edwards have
9 known that? Mr. Ohlson is not going to tell him what his trial
10 strategy is.

11 MR. CORNELL: No. Well, I will -- here's your answer.
12 Believe it or not, I did try 30 jury trials in my career before
13 I became an appellate and post-conviction lawyer, so I
14 understand the pressures that trial lawyers undergo. And
15 believe me, I had something very similar to what happened to
16 Mr. Ohlson happen to me on a case, that I remember vividly.

17 If for the first time you learn what your co-counsel
18 is really doing in opening statement, if for the first time you
19 realize, "Oh, my God, I've been sandbagged. Here I've been
20 working with this guy and all of a sudden, boom, he's working
21 against me, he's sandbagging me" -- and Mr. Edwards testified
22 that he felt that way. Yes, trials happen, like that.

23 And thinking it through and saying, "Well, wait a
24 minute," you know -- you can sit there and say, "I can

1 understand a lawyer being so geared into everything else he's
2 doing that he can't think of that sort of thing." I get that.

3 In this case, though -- and this is why it's nice to
4 have evidentiary hearings and -- but judge these things on the
5 record. Mr. Edwards testified that he learned of this the
6 first day of trial when either the DA investigator or
7 Ms. Halstead or -- or Mr. Hall -- it probably was Halstead, I
8 would guess, but that doesn't matter -- told him what those
9 three witnesses were there.

10 THE COURT: Well, my --

11 MR. CORNELL: They had been investigated by the cops.

12 THE COURT: My recollection of the testimony,
13 Mr. Cornell, was not that it was the first day of trial, it was
14 when it became time for the defendant's case in chief that
15 Ms. Halstead relayed that information to Mr. Edwards. So he
16 was caught off guard. But it was during the trial. It wasn't
17 like -- and not only during the trial, but contemporaneous with
18 the events occurring. So I'm not quite sure, logistically, how
19 it worked. But Ms. Halstead kind of leans over euphemistically
20 to Mr. Edwards and goes, "Hey, by the way, these three guys are
21 about to testify, and this is what's about to happen."

22 MR. CORNELL: Well, your recollection is going to
23 control. My recollection is his testimony is it happened on
24 the first day of trial. And that makes sense to me for this

1 reason. Mr. Ohlson waited until Friday before trial to reveal
2 the names of his three witnesses.

3 I can well imagine the three witnesses come up out of
4 the blue. Ms. Halstead or Mr. Hall look at it and say, "Who
5 are these people? They're not people the sheriffs ever
6 interviewed." They get the DA investigator right on it. "Go
7 interview these guys. Find out what they have to say." And
8 knowing how things go, I can well picture that that's what
9 happens.

10 And it's on the first day that Ms. Halstead, let's
11 say, tells Mr. Edwards, "By the way, here's what John Ohlson's
12 witnesses have to say." And it seems to me, if he learns of
13 that early on, it's a different story. At that point he's got
14 time to think about it. At that time he's got the ability to
15 say, "Whoa. We've got inconsistent defenses here. That isn't
16 what this trial is supposed to be about." And at that point
17 somewhere in the trial, he's got the ability to say, "Judge,
18 we've got to have a severance."

19 THE COURT: Well --

20 MR. CORNELL: It might not happen that day, but it
21 certainly -- and the ability -- you know, I'm sure you know
22 this. A motion to sever is something that you have to bring up
23 throughout the proceedings when prejudice appears.

24 I don't lay blame on Mr. Edwards, at least for not

1 filing a motion prior to trial. He would have lost at that
2 point. There was nothing in his discovery to make it appear to
3 him that Mr. Ohlson's defense is going to be inconsistent.

4 THE COURT: Mr. Cornell, I just want you to know I did
5 go back, as you were talking, and look at any notes for
6 Mr. Edwards, and you're correct. I was mistaken in my
7 recollection. I now will, more than likely, go back and review
8 a transcript of this hearing to make sure that I can clarify
9 those issues. But my notes do reflect that Mr. Edwards
10 testified that he found out that Mr. Ohlson was going to be
11 calling three witnesses to say that the defendant had brass
12 knuckles on the first day of trial, so --

13 MR. CORNELL: Okay.

14 THE COURT: I don't want you to think I'm laboring
15 under some false assumption. I went back and checked my own
16 notes, and you're right.

17 MR. CORNELL: Okay. Fair enough. Thank you very
18 much.

19 My position would be, wait a minute. The duty to seek
20 a severance, if prejudice appears, falls on counsel and on the
21 trial judge throughout the whole proceeding, not just prior to
22 trial. We often see it, where a motion like that happens and
23 the judge denies it and it's without prejudice.

24 It has to be without prejudice in light of Kentucky

1 vs. Stincer, the U.S. Supreme Court case that puts the duty on
2 the prosecution, the defense, and also, really, the judge to
3 make sure that we're not having a joint trial with inherent
4 prejudice to -- to either or both -- really, to both. I mean,
5 when the case gets to the point where the defense lawyers are
6 acting as second prosecutors, that's your classic case of
7 inconsistent defenses. And I submit on this record that's what
8 happened. Now, that's all I want to say about Ground 2.

9 Ground 3 is the one that I really want to focus on,
10 and that's waiving closing argument. I went overboard in the
11 petition to give you a memorandum of law when waiving closing
12 argument would be appropriate and when it's not. And I would
13 submit that what this hearing has shown in this case, as far as
14 Mr. Edwards goes, it was not.

15 And interestingly -- and I'm sure you've caught this,
16 again -- when I asked the question to Mr. Edwards, "Have you
17 ever waived closing argument in any other trial before?" His
18 answer was "No. And I would never do it again."

19 THE COURT: I think his answer was, "I don't think I
20 would ever do it again."

21 MR. CORNELL: All right. "I don't think I would ever
22 do that again." You may well be right.

23 But what is that? He shouldn't have done it in this
24 case. Look at Mr. Ohlson's testimony on that from his

1 deposition, pages 24 and 25. I asked him:

2 "You were appointed to represent Mr. Schnueringer.
3 You could have been appointed to represent Mr. Kelsey or
4 Mr. Jefferson. Knowing the case as you knew it, if you had
5 been appointed to represent Mr. Kelsey, would you have waived
6 closing argument?"

7 And his answer was -- the short answer is no. And it
8 has to be no. Why? Because of what Mr. Edwards testified to.
9 Mr. Kelsey is the one of these three who enjoys proximate
10 causation as a defense. And to Mr. Edwards' credit, he keys in
11 on that as early as six months prior to trial, does his
12 research, gets his jury instructions together, and gets Judge
13 Elliott to give it. Proximate cause doesn't apply to
14 Mr. Jefferson or Mr. Schnueringer, because they're the last
15 ones who hit Mr. Hyde before he died.

16 He also candidly admitted that the misdemeanor battery
17 instruction, which he sought and which Judge Elliott granted,
18 really doesn't apply to Mr. Schnueringer or Mr. Jefferson.

19 He also, I believe, candidly admitted that his client,
20 Mr. Kelsey, is one that, if the jury thinks about it, has a
21 case for involuntary manslaughter, assuming you believe the
22 testimony of the forensic pathologists.

23 Do the other two guys have a case for involuntary
24 manslaughter? When you have a witness like Jordon Beck, who

1 testifies that Schnueringer hit him so hard it sounded like a
2 crack of a baseball bat, and when you have two guys kicking the
3 guy who goes down in the head and chanting out stuff and
4 saying, "I slept that guy" -- not an exact quote -- no, that
5 doesn't sound like an involuntary manslaughter case. That
6 sounds like acts that really are designed, in their nature, to
7 take human life, even if there's no specific intent to do so.
8 Those two guys don't have an involuntary manslaughter case.

9 This man does, assuming that we credit the testimonies
10 of Drs. Clark and Omalu. But you've got to argue it. If you
11 don't argue it, if everybody waives it, what does that look
12 like to the jury? It looks like they're all in the same boat.
13 And in this case, the proof of the pudding is in the eating.
14 The jury is out what, three hours and they come back guilty of
15 second degree on all of them.

16 Now, Mr. Edwards testified that it was a strategy to
17 waive closing argument. Sure. What -- what Strickland
18 questions though is, is it a reasonable strategy?

19 Mr. Edwards's testimony is, "Well, yeah, because
20 Mr. Hall could have come back and argued for first degree
21 murder."

22 First off, he was getting Byford mixed up.
23 Premeditation and deliberation are different -- are different
24 elements of first degree murder. Also specific intent to kill.

1 The question I had for him is, what evidence in this
2 record would -- would lead a reasonable jury to believe that
3 Mr. Kelsey had a specific intent to kill Mr. Hyde, and he had
4 deliberated and decided to go to the dark side in carrying out
5 the intent to kill. There is no evidence. There is none.
6 Mr. Hall could not have credibly argued that. And with respect
7 to Mr. Hall -- who is one of the toughest advocates I've ever
8 had to deal with -- I just can't imagine that he would. But I
9 particularly can't imagine that he would because of what
10 Ms. Halstead's argument was.

11 THE COURT: Well, let's just take that for a second.
12 The State charged all three defendants with open murder.

13 MR. CORNELL: Right.

14 THE COURT: And so your argument is, is that in
15 essence Mr. Hall could not go in and with a straight face argue
16 first degree murder, which is one of the four homicides that
17 are contemplated by open murder. So you think that he would
18 just go in and say, you know, "We charged open murder, but we
19 really acknowledge, regarding at least Mr. Kelsey, we've got no
20 evidence of that. Just disregard open murder. Let's talk
21 about second and then voluntary and involuntary."

22 MR. CORNELL: I believe that and I'll tell you why.
23 Number one, Mr. Hall is not the kind to try and create a silk
24 purse out of a sow's ear. But besides that, even if he were,

1 look at what Ms. Halstead argued in her opening argument. She
2 said, and I'm quoting from pages 2042:

3 "This was more than a tragedy; this was a murder. And
4 as I close, I again submit to you that this was second degree
5 murder, because while there was malice aforethought, there
6 wasn't the admixture of premeditation and deliberation. But
7 they engaged in malicious conduct that was naturally intending
8 to take the life of Jared."

9 So Ms. Halstead right there, and towards the end of
10 her closing remarks, is telling the jury, "We're not going for
11 first degree on this case against any of them, any of the three
12 defendants, we're going for second." It would really look bad
13 for Mr. Hall to get up there in rebuttal and say, "Forget about
14 what my colleague and office mate Ms. Halstead said. This is a
15 first degree murder."

16 I just -- especially to Mr. Kelsey -- I just can't see
17 Mr. Hall going there. The State had set the boundary right
18 there. First is off the table. What we're talking about at
19 the -- at the high end is second.

20 Now, that gets me to Ground 4. And Ground 4 is the
21 failure to seek a self-defense instruction. And maybe the
22 problem there, quite frankly, as Mr. Kelsey testified, without
23 his testimony there's no self-defense at all. The decision to
24 put him on the stand doesn't happen until Mr. Ohlson's

1 witnesses testify, and Mr. Kelsey in his mind realizes, "I've
2 got to testify because these three guys, they're not" -- you
3 know, "they're not telling the truth," I mean in his mind.

4 And oftentimes we prepare jury instructions beforehand
5 and we don't prepare them -- we don't think about them once the
6 trial starts.

7 But in this case, that happens. And what was
8 Mr. Kelsey's testimony in that regard? You will see it at
9 pages 1794 through 1802. But in particular, at 1796, 1797,
10 1798, 1799, that's where the essence of this happens. He
11 testifies as follows:

12 "I'm standing and I'm watching Jake, and while I'm
13 watching Jake fight with Taylor, someone punches almost
14 directly in front of me. I saw two hands go by my face. I
15 turned and looked and it was Bobby and when I turned and looked
16 to my right there were three kids rushing in.

17 "Question: Do you remember who those three kids were?

18 "Answer: It was three or four actually and I'm not a
19 hundred percent sure.

20 "Question: Was one of them Jared Hyde?

21 "Answer: Yes. Or who I understand to be Jared Hyde."

22 We skip over to 1797. Mr. Edwards continues:

23 "What did you do next?

24 "Answer: These kids started running in and I jumped

1 between them and Jake and swung at the first two. I told them,
2 'Stay back. Get the fuck back.' The first two backed off, the
3 first one -- or the third one came closer and I hit him and he
4 backed off and that's when I got in my fight with Jared Hyde.

5 "Question: All right. Let's talk about that.

6 "Did Jared Hyde say anything to you?

7 "Answer: He said, 'If you are going to swing on me
8 I'm going to knock you out,' and that's when he came forward
9 the second time.

10 "Question: He came forward to you?

11 "Answer: Yes, sir.

12 "Question: And you had your back to Jake?

13 "Answer: Yes, sir.

14 "Question: Who was engaged with Taylor and --

15 "Answer: And Ricky and whoever else was rushing in as
16 far as I knew.

17 "Question: All right. How do you engage Jared Hyde.

18 "Answer: Jared came forward with his fists balled up.
19 I punched him twice. He ended up grabbing my shirt. When he
20 grabbed my shirt I tried to kick him off me. That didn't work.
21 I actually ended up losing my balance and I was falling over.
22 I tried it a second time and the same thing happened. So I
23 ended up just leaning back and putting my weight into putting
24 him off of me and when I did that he pulled my shirt over my

1 head."

2 And, I mean, that's the essence of it, but --

3 THE COURT: But even by then Mr. Kelsey's own
4 testimony, he would not be entitled to a self-defense
5 instruction because the initial aggressor is not allowed to
6 seek self-defense.

7 MR. CORNELL: But on that testimony, Hyde is the
8 initial --

9 THE COURT: You would agree with that basic premise,
10 that the initial aggressor cannot seek self-defense?

11 MR. CORNELL: From Culverson v. State, absolutely.

12 THE COURT: Right.

13 MR. CORNELL: Yeah. But on his version, Hyde is the
14 one who says -- Hyde is the one who doubles up his fists at him
15 and he's the one who says, "If you're going to swing at me, I
16 am going to knock you out," and he comes forward.

17 THE COURT: Right. But let's think about that quote.
18 And that's what stood out in my mind, Mr. Cornell. "If you're
19 going to swing at me." So by Mr. Kelsey's admission, he goes
20 into the fray first, and he is taking the first swings. And
21 then Mr. Hyde, taking the argument from Mr. Kelsey's
22 perspective -- and we have to acknowledge that it's not what
23 everybody else says, but it's what Mr. Kelsey says --
24 Mr. Kelsey is saying -- or Mr. Kelsey says that Mr. Hyde tells

1 him, "If you are going to swing at me" -- so he's already swung
2 at him -- "then I'm going to come at you too." And then at
3 that point, arguably, Mr. Kelsey is saying there is this affray
4 or mutual combat that takes place.

5 MR. CORNELL: Mr. Hyde -- you know, I see your point.
6 And part of the problem is exactly what is said when.
7 Self-defense in this case? Weak. Okay? I'll give you that.
8 Under the standard, even if it's weak, if he's entitled to the
9 instruction, the Court has a duty to give it. And I'm --

10 THE COURT: I agree.

11 MR. CORNELL: And I'm thinking of *Rosas v. State*,
12 122 Nev. 1258, where they hold that the defense is entitled to
13 a lesser included instruction even if his theory is to deny all
14 liability.

15 And what self-defense would do in this case, it would
16 get -- and this ties into Ground 3. It doesn't make Ground 3,
17 but it ties into it. You have to have a way in your jury
18 instructions to distinguish Mr. Kelsey from the other two, and
19 self-defense would be another one. Because the other two
20 simply -- there's no way they have self-defense, whatsoever.

21 In this case I would grant you that it's a weak
22 theory. But based on the evidence, it would be enough at least
23 to give the instruction and give the jury another option to
24 think about Mr. Kelsey, as opposed to Mr. Schnueringer and

1 Mr. Jefferson.

2 Let me go on to Ground 5. And I have to say
3 Ground 5(a) bothers me a lot. Ground 5(b) bothers me not so
4 much. Ground 5(c), almost a throwaway. I'm not even going to
5 argue Ground 5(c), I'll just let it -- I'm not going to dismiss
6 it, I'll just let it stand on the petition.

7 But 5(a) bothers me a lot. And what bothers me is
8 that when the case has no racial overtones to it, whatsoever,
9 it's -- the victim is white, my client's white. It's not
10 charged as a hate crime. There is nothing in the discovery to
11 suggest that straight edge in North Valleys High is a Neo-Nazi
12 organization.

13 When there's none of that, to bring race into a case
14 that's not relevant to race, I find really, really bothersome.
15 I mean, for one thing -- think about this -- we -- maybe today
16 in 2016, the notion of somebody being a Neo-Nazi isn't quite so
17 bothersome. But if you had anybody on that jury who is Jewish,
18 they might be extremely bothered by that. If you knew that was
19 going to come up and come in, you would want to talk about that
20 in voir dire. We don't know that that happened.

21 But this is what Mr. Ohlson is getting at in his
22 deposition when he said he would want to do a motion in limine
23 to keep that out. And I'm sure it would have been stipulated
24 to.

1 The notion that Mr. Ohlson brings this up in
2 cross-examining Mr. Kelsey, and Mr. Kelsey handling himself, I
3 suggest to you is a little bit on the questionable side. The
4 pages 1901, 1902 reveal the testimony.

5 "Question: Aren't you a tough guy?

6 "Answer: No.

7 "Question: Straight edge has been around for a long
8 time, haven't they?

9 "Answer: Yes, around here.

10 "Question: And you know a little bit about straight
11 edge history, don't you? Nothing? You just joined?

12 "Answer: There's not really a joining. It's a way to
13 lead a life.

14 "Question: Straight edge used to be associated with
15 the neo-Nazis, didn't they?

16 "Answer: No."

17 Then Mr. Ohlson says: "Question: They did, son. Did
18 you know that?"

19 Now, what is that? How is young Zach Kelsey supposed
20 to respond to that? Well, "No, I didn't know that."

21 The older and wiser lawyer is telling him, "As a
22 matter of fact, my friend, you belong to an organization that
23 has ties to neo-Nazis." That's what -- that's a fair comment
24 on what that record reveals.

1 And he says, "No, I didn't know that."

2 And Mr. Ohlson says: "Part of the culture used to be
3 fighting; did you know that?"

4 "Answer: No, I didn't know that.

5 "Question: They used to shave their heads; did you
6 know that?"

7 Mr. Kelsey, seeing where this is going, says, "Wait a
8 minute. "I don't have a shaved head. Does that mean I'm not
9 straight edge?"

10 And Mr. Ohlson says: "No, I think you are straight
11 edge."

12 Well, Mr. Qualls put it right. If there is an
13 objection and a motion for mistrial and it's sustained and the
14 mistrial is denied, improperly though it would be, that's an
15 issue to be raised on appeal. But without objections, you
16 know, why -- why put in a plain error issue if it's the only
17 plain error issue you have? It's not going to get you
18 anywhere.

19 THE COURT: But isn't it a tactical decision that
20 criminal defense attorneys, and attorneys in general, make all
21 the time? In the heat of battle, as the case is going on and
22 the questions and answers are coming one after the other, you
23 need to decide whether or not to object to just about every
24 question.

1 MR. CORNELL: Sure.

2 THE COURT: And with questions of this nature, whether
3 or not you want to object and draw attention back to the issue
4 again. I think Mr. Edwards has said that.

5 As a person who has done a couple of trials myself --

6 MR. CORNELL: More than a couple.

7 THE COURT: -- as an attorney, you know you've got to
8 make decisions whether or not, in the blink of an eye, do I
9 want to let that go or do I want to re-raise that issue in the
10 jury's mind and stop everything and now start talking about
11 something maybe that I just hope I -- it glosses over.

12 And I don't think Mr. Ohlson, to the best of my
13 recollection, came back and started arguing it -- well,
14 actually, he didn't argue anything in closing argument. But it
15 really didn't become an issue again during the trial. It was
16 just one of those fleeting moments that came and went. And
17 Mr. Edwards, by his statements in the court yesterday, said he
18 made a tactical decision really not to draw any more attention
19 to it than he thought was necessary.

20 MR. CORNELL: Again --

21 THE COURT: How does that fall below the standard?
22 That's the first question I have.

23 MR. CORNELL: Here's -- here's what I have to say to
24 that. Is it a tactic? Sure. Is it a reasonable tactic?

1 That's what Strickland asks. What possible reasonable strategy
2 could a trial lawyer have for allowing racism to inject its,
3 quite frankly, ugly head in this case?

4 I quoted to you in Ground 5(a) cases from the Ninth
5 Circuit and the D.C. Circuit where that sort of thing happened,
6 and those courts, quite frankly, when you read the opinions,
7 went ballistic. It's far too late in the day to allow this
8 sort of thing to go on in our courtrooms.

9 We have Dawson vs. Delaware, a capital case, where the
10 U.S. Supreme Court, where they allow, and even by stipulation,
11 that the guy belongs to the Aryan Brotherhood. And racism had
12 nothing to do with that case. And the U.S. Supreme Court said,
13 "No. We're not going to allow racist philosophies to enter
14 this courtroom if the case is not about racist philosophies."

15 And had Mr. Ohlson simply just said, "Wow, you know,
16 isn't it true that these guys" -- or, "that straight edge is a
17 Neo-Nazi philosophy?" and Mr. Kelsey said, "No, not that I've
18 ever heard," that would have been the end of it. I'd have a
19 hard time talking about prejudice. But then he says, "They
20 are, son."

21 When you look at this case -- again, in going back to
22 Ground 2 -- what was Mr. Ohlson doing? He was becoming a
23 second prosecutor. But he was doing it by injecting race into
24 the equation. And even he admitted, if he had been

1 representing Mr. Kelsey, he would have made a motion in limine
2 to keep it out. It has no business being in this courtroom at
3 all. When there's no race hate crime alleged it just has no
4 business being here at all. That's my strongly-held position.

5 THE COURT: I'm not quite sure how we would have
6 crafted a motion in limine to keep it out.

7 MR. CORNELL: Pretrial.

8 THE COURT: No, I understand what a motion in limine
9 is, Mr. Cornell --

10 MR. CORNELL: Okay.

11 THE COURT: -- but I wasn't finished with my thought.

12 MR. CORNELL: Sorry.

13 THE COURT: My thought was, is that it appears, at
14 least to me having familiarity with the case, that Mr. Ohlson
15 is just saying this during the trial. So there is no way that
16 the hypothetical Mr. Ohlson representing Mr. Kelsey would have
17 filed a motion in limine to keep it out, because he wouldn't
18 know about it. There's -- you know, there's -- unless you want
19 to come in and say he should have filed a motion in limine to
20 exclude all references to racism or to racist ideologies
21 associated with -- with straight edge. That assumes that he
22 would have done some investigation, and also assumes that maybe
23 someone out there has suggested that they were neo-Nazis, but
24 that's not true and so we're not allowed to say that.

1 MR. CORNELL: Well, that's the interesting part of
2 this case. The only -- or this issue. The only person in that
3 courtroom who had any knowledge about any of this was
4 Mr. Ohlson. And my question to him at his deposition was, "If
5 had you been appointed to represent Mr. Kelsey, would you have
6 objected to that testimony?" And I believe his answer was,
7 "More than that. I would have filed a motion in limine prior
8 to trial to keep it out."

9 And I suspect strongly that if he had done that, the
10 position of Ms. Halstead and Mr. Hall would have been something
11 along the line of, "Well, of course we keep it out. We're not
12 going there. No problem."

13 But the one who went there was Mr. Ohlson. And how do
14 you explain that, except Mr. Ohlson being a second prosecutor,
15 which is exactly what Ground 2 is grounded on.

16 Now, the statement about -- to Dr. Clark, "You remain
17 brilliant as usual," is that going to carry the day by itself?
18 No. But it is vouching. And Dr. Clark is a necessary witness
19 for his defense, which is, "You can't necessarily tag what my
20 client did to the death of Jared Hyde. It's possible." I
21 mean, that's a necessary part of his defense. So, I mean --

22 THE COURT: I can tell you I tend to agree with you
23 and with your analysis that that's not your strongest argument.
24 I've had the pleasure of trying a number of cases against

1 Mr. Ohlson, and presiding over a couple of trials where he's
2 been the trial attorney. And I really look at that comment
3 from Mr. Ohlson more as rhetorical flourish than vouching for
4 Dr. Clark's credibility or vouching for her authority as an
5 expert in any area. Because if he were doing that, when you
6 think about it, he is actually doing it against his client as
7 well. Dr. Clark's testimony isn't just against Mr. Kelsey.
8 Dr. Clark's testimony is damaging to all three defendants,
9 including Mr. Schnueringer. So it really strikes me that's
10 just more Mr. Ohlson being Mr. Ohlson, and not trying to
11 somehow inform the jury that Dr. Clark's testimony is more
12 believable or should be given more weight because he says that
13 she's brilliant.

14 MR. CORNELL: Yeah. Of course, then that goes back to
15 Ground 1(c). By itself, not particularly prejudicial. Why?
16 Because there's no forensic pathologist to rebut Dr. Clark on
17 that record. If there is and co-counsel volunteers that, then
18 we might have more to talk about. On this record, I'm not
19 disagreeing with what you're saying.

20 Let me talk to Ground -- and I'll skip -- I am going
21 revise (c) to the brief. Because I even say in there that
22 Ms. Halstead's statement about Mr. Kelsey not going to the
23 funeral, by itself doesn't carry the day. It's part of an
24 accumulation of problems. That's my position on that. And it

1 still is. But I've said all that I can say about it in
2 Ground 5(c).

3 Ground 6, though, let's go back to what I started on
4 in talking about prejudice. From this brief skirmish that
5 happens, whether it's two punches or three punches, whether --
6 whether it's a knee to the upper shoulder or a knee to the
7 head, whether it happens in a wrestling match or standing up,
8 you can't -- you just can't say from those facts alone that
9 those facts are the kind of facts that -- that naturally tend
10 to destroy the life of another. Not -- not when the victim
11 walks away 50 feet and appears to be fine.

12 And going back to my point. What -- how then can the
13 jury and the Nevada Supreme Court decide the evidence is there
14 to support otherwise? And in this case, as I said before, the
15 only way they can credibly do it is to think that the three
16 individuals are in association with one another to where,
17 really, they're acting in concert. That's the only way that I
18 can see them doing that.

19 The problem that we have is the evidence was really
20 pretty strong at trial of these things. Straight edge is not
21 Twisted Minds. It's not. They're two completely different
22 ideas. Straight edge is not a gang. It's not a club. It's a
23 philosophy on how to live your life. No smoking, no drinking,
24 no drugs, no premarital sex. And in North Valleys High that's

1 what it means.

2 THE COURT: There's also a musical component to it.

3 MR. CORNELL: Well, yeah. It's something that came
4 out of punk. And some -- some jurors may know that.

5 But as far as the trial testimony goes, it's pretty
6 clear that that's what we're talking about. Not even a gang.
7 The fact that -- on this record, the fact that Mr. Graves and
8 Mr. Kelsey ascribe to straight edge is not a problem at all.
9 Twisted Minds is another problem.

10 The testimony that Twisted Minds is something
11 indigenous, if you will, to North Valleys High -- they were
12 thought of as a tagging crew, but after this case they're
13 thought of as a gang, at least by the Sheriff. I believe that
14 came out. And what they're about -- you know, "Catch a fade.
15 Catch a fade." Almost like the movie "Fight Club," you know,
16 "Knock him out to where he doesn't come back."

17 And what caused Schnueringer to do this? And it comes
18 out from -- even from the trial testimony, but clearly from
19 Mr. I [REDACTED] who didn't testify, is that when Hyde
20 supposedly questions the validity of his own words of TM, you
21 know -- "You question the validity of TM?" -- and then, boom,
22 the punch that's loud enough to sound like the crack of a
23 baseball bat or two rocks pounding together.

24 So I have no problem with Judge Elliott's ruling that

1 all of the Twisted Mind and straight edge stuff come in, and
2 even in the Nevada Supreme Court it's res gestae. Agreed.

3 But what should have been done in this case was a
4 limiting instruction. And the limiting instruction -- it
5 probably wouldn't have meant too much to Schnueringer or
6 Jefferson, but it means a lot to Kelsey -- if it says, "The
7 evidence of Twisted Minds is relevant only to show motive of
8 the persons belonging to the Twisted Minds, and this applies
9 only to defendants Schnueringer and Jefferson, and not
10 Kelsey" -- because there is no evidence, even in this record at
11 trial, that Mr. Kelsey was ever a member of Twisted Minds.
12 That came through good and strong, and loudly and clear on the
13 witnesses I presented yesterday, Mr. C [REDACTED] and Ms. C [REDACTED].
14 But even at trial that comes through.

15 If that -- if that limiting instruction is given --
16 and quite frankly I don't see the objection to it. I don't --
17 and it was indicated in the pretrial hearing on it that a
18 limiting instruction would be proffered, only one never was.
19 If that limiting instruction is given that tells the jury this
20 man, Mr. Kelsey, is not associated with Twisted Minds, only
21 apply the evidence on Twisted Minds as the motive for
22 Schnueringer and Jefferson to do what they did, that limiting
23 instruction goes contra to the notion that these guys acted in
24 concert.

1 And, frankly, as I look at this record, I say, "How do
2 we have an upheld verdict on my client committing a second
3 degree murder?" And that's the only answer that I can come up
4 with. You know, that how -- how the jury could decide there's
5 a cause -- that he's involved in the cause of death of
6 Mr. Hyde, but reject involuntary manslaughter. Absent closing
7 argument, of course.

8 So that is one of the deficiencies. Is it going to
9 carry the day by itself in this case? No. But it's a
10 cumulative deficiency. And it is a deficiency because it was
11 out there at trial. Everybody dropped the ball. It was
12 presented.

13 And, of course, whenever you know have uncharged
14 misconduct, including gang evidence from a number of cases, you
15 have a limiting instruction that is given, and none was given
16 here. And a limiting instruction that not only limited the
17 issue to motive, but limited it to those two defendants, would
18 have been extremely helpful to Mr. Kelsey under these
19 circumstances. Those are my comments on Ground 6.

20 Ground 7. Ground 7 is sort of interesting because in
21 a way it cuts through to other grounds that we've alleged.
22 Ground 7 is the one that Mr. Kelsey never -- or, excuse me,
23 Mr. Edwards never really engaged the services of an
24 investigator. He filed a motion to get one appointed and never

1 used him for anything.

2 And in this case what you have with Mr. C [REDACTED] and
3 Ms. C [REDACTED], are two witnesses who gave statements, who were
4 there, who were very close to where the fight happened between
5 Mr. Kelsey and Mr. Hyde -- or the skirmish, if you will -- and
6 at least should -- could shed some light on what was going on
7 there.

8 Now, here -- and Mr. Edwards made the tactical
9 decision not to have his investigator do anything, which in a
10 murder case that's a pretty dicey decision, I would think. But
11 there could be a universe of facts that would say, "Well, even
12 so, that's not below the standard," I suppose.

13 But in this case your problem is this. The decision
14 to have Mr. -- to have Mr. Kelsey take the stand isn't made
15 until the middle of trial, and it is made because of the
16 testimony of Mr. Ohlson's witnesses. Okay? Which, if we have
17 a motion to sever, we've got a completely different universe.
18 Right? A motion to sever is granted. Because in a separate
19 trial the jury doesn't hear, in adjudicating Mr. Kelsey's case,
20 from the testimony of those three witnesses.

21 If Ground 2 is defeated, we're going to have a trial
22 involving, in Mr. Kelsey's case, involving those three
23 witnesses. Now it becomes important to back up what his
24 testimony is.

1 Are Ms. T [REDACTED] C [REDACTED] and Mr. Z [REDACTED] C [REDACTED]
2 perfectly congruent with Mr. Kelsey's version? No, but
3 that's -- not perfectly congruent, but that, on the other hand,
4 could be explained by the lighting conditions. Clearly with --
5 in a dark evening with ambient light from a bonfire being the
6 only light, no witness is going to be able to say with
7 precision what exactly happened. But if you have Mr. C [REDACTED]
8 testifying that he saw Mr. Hyde swing a punch at Mr. Kelsey,
9 whether or not he connected, it gives some credibility to
10 Mr. Kelsey's version of the events.

11 THE COURT: But what we have from the testimony of
12 both Ms. C [REDACTED] and Mr. C [REDACTED] and Mr. Edwards is, both
13 Mr. C [REDACTED] and Ms. C [REDACTED] acknowledging that they did not
14 provide the information that is beneficial to your client to
15 law enforcement.

16 And Ms. Noble cross-examined them on that fact. "You
17 didn't, in essence, say this to the police." So we know that
18 they didn't tell anyone that until they told your investigator,
19 Mr. Olson, I believe is his name.

20 MR. CORNELL: Right.

21 THE COURT: And then we've got Mr. Edwards. And
22 Mr. Edwards says, "I had dozens of statements." I'm
23 paraphrasing. But I think he said he had over 40 statements of
24 kids in the high school who were at this fight, and he didn't

1 have his investigator go out and talk to all of them. I think
2 it's fair to say he didn't have his investigator talk to any of
3 them.

4 MR. CORNELL: Any of them.

5 THE COURT: But that he reviewed them. And in
6 reviewing the statements that they gave to law enforcement,
7 there was nothing there that led him to believe that they were
8 necessary or would provide information that was beneficial to
9 Mr. Kelsey.

10 The argument you're seeming to make is, is that
11 Mr. Edwards should have reviewed all the statements -- as he's
12 acknowledged that he did -- and then have Mr. Peele go out and
13 interview all of these people to see if they're going to change
14 their statements or they have anything else to add. And that
15 by failing to do that, he failed to discover Mr. C [REDACTED] and
16 Ms. C [REDACTED], and therefore didn't present their testimony.

17 MR. CORNELL: Right. In other words, we -- we have to
18 assume, particularly with Ms. C [REDACTED] having been
19 interviewed by the DA's office and then being released from her
20 subpoena, that had Mr. Peele gone out and talked to those two
21 witnesses --

22 THE COURT: But that's contemporaneous with trial.

23 MR. CORNELL: Right. Had he done that then -- then
24 they would have told Mr. Peele, in that case, the same thing

1 that they told Mr. Olson.

2 And remember, I asked them both, "Were you
3 specifically asked, did you see Hyde swing at Kelsey?" "No, I
4 wasn't specifically asked that."

5 In the case --

6 THE COURT: But, you know, I guess -- I mean, I know
7 you want to move on to something else, Mr. Cornell, but I think
8 this is your last ground, anyway, so we can talk about it for
9 another moment, and then we are going to take a break for
10 lunch.

11 But to me it's a sliding scale, to a certain extent,
12 about what is reasonable. Because that's what we are looking
13 at in the Strickland analysis prong dealing with, you know, was
14 it -- did it fall below the standard?

15 So if you've got a murder that happens and there are
16 only two witnesses, it's clearly prudent to have your
17 investigator go talk to those two people. If you have a murder
18 that happens at a football stadium, you don't have to interview
19 all 60,000 people who may have been present. And then there's
20 a sliding scale in between.

21 And so what we've got is Mr. Edwards saying: I
22 reviewed everything, and I've got 40 people, and in reviewing
23 them all, I didn't have anyone go out and speak to Mr. C [REDACTED]
24 and Ms. C [REDACTED], because I just -- in reviewing their

1 statements, there is nothing there that is different or unique
2 that is ogling to help my client. So I'm not -- I don't quite
3 know still how that means that he fell below the standard.

4 MR. CORNELL: Because those are two witnesses who were
5 there. They saw --

6 THE COURT: But all 40 kids were there, sir.

7 MR. CORNELL: Well, no, but not where they were. They
8 were right --

9 THE COURT: Are you saying the proximity to the fight
10 itself?

11 MR. CORNELL: Exactly.

12 THE COURT: Okay.

13 MR. CORNELL: Exactly. I mean, I can -- I can give
14 them a pass on Mr. L [REDACTED], because Mr. L [REDACTED]
15 really saw the end of the fight. And his testimony is somewhat
16 consistent with Jordon B. and Tyler DePriest and those
17 witnesses. Okay?

18 But if we're going to talk about this man being a
19 second degree murderer based on what happened in the -- in the
20 skirmish, let's get a clear version of the skirmish. And two
21 witnesses who are right there proximately are Z [REDACTED] C [REDACTED] and
22 T [REDACTED] C [REDACTED].

23 That's why, I would submit to you, Mr. Kelsey is
24 telling Mr. Edwards, "Go out and interview those two people."

1 Does he know that they are going to be exculpatory?

2 THE COURT: Well, I do have to take into
3 consideration, too, and weigh the credibility, of course, of
4 Mr. Kelsey. But Mr. Kelsey testified today that he
5 specifically identified Mr. C [REDACTED] and Ms. C [REDACTED] as people
6 to interview.

7 MR. CORNELL: Right.

8 THE COURT: So it wasn't that Mr. Kelsey said, "Go
9 interview everybody and see if they are going to change their
10 stories." It is Mr. Kelsey representing to the Court, "I told
11 Mr. Edwards, 'Go talk to these two people. They would
12 have'" --

13 MR. CORNELL: Right.

14 THE COURT: -- "'would back my story up,'" so to
15 speak.

16 MR. CORNELL: And, you know, playing devil's advocate
17 with myself, if we don't have a trial with Mr. Ohlson's
18 witnesses, I could see a strategy of saying, "Well, look.
19 There's no way they can come back with murder based on all of
20 the scene witnesses that the State presents." I mean, that's
21 debatable, but, I mean, at least I can see a strategy that way.

22 But when Mr. Ohlson injects in this notion that
23 Mr. Kelsey killed Hyde with wearing brass knuckles at the
24 scene, then we've got to have more than just Mr. Kelsey coming

1 in and saying what happened. We've got to have some
2 corroborating evidence. And what you heard from Ms. C [REDACTED]
3 and Mr. C [REDACTED] are these things.

4 I mean, again, can we say -- can we nail down, was it
5 two punches or three? No. Can we nail down whether the knee
6 hit Mr. Hyde's chest, shoulder, or head? No. Can we say that
7 it happened while Mr. Hyde was standing up? No. Can we say
8 Mr. Hyde was -- was the one who doubled up his fists and said,
9 "If you punch me, I'm going to knock you out"? Not from those
10 witnesses. They're not close enough to hear what's being said.

11 But what they do add to it is, A, no brass knuckles;
12 B, this man has nothing to do with Twisted Minds. He doesn't
13 hang with Schnueringer. They know him. They know Mr. Kelsey.
14 They know who he hangs with and who he doesn't hang with. No
15 acting in concert with Mr. Schnueringer.

16 C, more importantly, a brief skirmish, where neither
17 Mr. Hyde nor Mr. Kelsey get the better of each other. They're
18 both flailing away, and after 20 seconds or so the fight is
19 over and they both walk on their separate ways.

20 We may assume that Mr. Kelsey, by himself, didn't
21 carry the day with the jury. If those witnesses are in their
22 to corroborate at least those points, at least those points,
23 does a reasonable jury reach a different verdict? I think
24 there is a reasonable probability that they would.

1 And to not interview witnesses who are really close to
2 the skirmish, who can at least give the version of what they
3 saw happen, to me falls below the standard in a murder case.

4 And the only free pass that I think he gets, in tying
5 this back into Ground 2, is if Mr. Ohlson doesn't present those
6 three witnesses. When he does it, he's got to have more than
7 just Mr. Kelsey to explain what really happened.

8 So when we take the universe of all of this, do we
9 have a reliable result based on what we've presented today, in
10 addition to what was presented to the jury? I would submit the
11 answer is no. I submit that this man being convicted of second
12 degree murder is more than "no," it's an injustice. That's my
13 position.

14 How do we correct it? Unfortunately -- you know,
15 unfortunately in habeas work we end up, you know, pointing the
16 finger at the defense lawyers, and, you know, that's what we're
17 required to do. And it's unfortunate in a way, but it's what
18 it is. But in this case --

19 THE COURT: Mr. Hatlestad once said -- and we all know
20 and I think respect Gary Hatlestad --

21 MR. CORNELL: Oh, yes.

22 THE COURT: -- one time Mr. Hatlestad told me that
23 post-conviction attorneys judge in the cool of the evening what
24 men do in the heat of the day. And I always thought that that

1 was somewhat profound as a trial attorney. Go ahead.

2 But it's the nature of the business that you're in,
3 Mr. Cornell. And I don't say that disparagingly towards you at
4 all. It's just, that's what post-conviction work is about is
5 looking back at how trial counsel performed and where their
6 deficiencies were in the heat of the battle, or in preparation
7 for the battle.

8 MR. CORNELL: But the decision to hire or not hire a
9 forensic pathologist, I mean, that's not done in the heat of
10 the battle, that's done months and months before. And what is
11 undisputed is Mr. Edwards knew that. He should have done that.
12 If he has the information from Dr. Haddix, supposedly, or
13 Dr. Llewellyn, he presents it. If that evidence is presented,
14 does a reasonable jury come to a different conclusion? Yes,
15 there's a reasonable probability of that. And that one we
16 can't lay on the heat of the battle and stuff happens. That
17 was a decision made well before trial.

18 Likewise, we do a motion for an investigator. We
19 don't do the -- give the investigator anything to do. That's a
20 decision that's made well prior to the trial.

21 The testimonies of Ms. C [REDACTED] and Mr. C [REDACTED] are
22 consistent with the general point of this skirmish of
23 Mr. Kelsey. We know from the verdict that the jury rejects
24 Mr. Kelsey's testimony. Would a reasonable jury have rejected

1 it if they heard from those witnesses? I would submit the
2 answer is no. But that's not a decision done in the heat of
3 battle. That's a decision done prior to trial. Let's have an
4 investigator, but not have him do anything? Is that
5 reasonable?

6 And, yes, some of what I'm talking about does happen
7 in the heat of the battle. But if you've been going at this
8 trial with the notion that all three lawyers are not going to
9 point fingers at one another -- although, as I said many times
10 before, Mr. Kelsey's defense assumes pointing fingers at the
11 other two -- and suddenly you learn on day one of the trial
12 that your co-counsel is going to present a defense that will
13 point the finger at your client -- I realize that stuff like
14 neo-Nazis comes out of the blue. But that one, if he learns it
15 on the first day of trial, I would submit to you he's got to do
16 something about that.

17 And waiving closing argument when your client has
18 numerous defenses. It's a strategy. How in the world it can
19 be a reasonable strategy, I can't fathom. In my brief I point
20 out to you when it can and when it can't, and this is a
21 situation that doesn't square up with when it can. It simply
22 cannot be. I thank you very much for your careful attention.

23 THE COURT: Thank you, Mr. Cornell.

24 Court will be in recess until 1:30.

1 (Lunch recess taken.)

2 THE COURT: We'll go back on the record in CR12-0326B,
3 Zachary Kelsey, the petitioner, versus the State of Nevada, the
4 respondent. Mr. Kelsey is present in court in custody with his
5 attorney, Mr. Cornell. Ms. Noble is here on behalf of the
6 State. And when we took our break for lunch Mr. Cornell had
7 concluded his argument.

8 And so, Ms. Noble, on behalf of the State.

9 MS. NOBLE: Thank you, Your Honor.

10 Your Honor, over the break I arrived at the somewhat
11 humbling conclusion that I would love to argue at that podium,
12 but I can't see over it very well. So I will be arguing from
13 here.

14 THE COURT: Wherever works for you, Ms. Noble.

15 MS. NOBLE: Thank you.

16 I know this Court is well aware of Strickland versus
17 Washington, but at the outset I would just like to remind Your
18 Honor that in evaluating the reasonableness of what Mr. Edwards
19 did or didn't do, we're to avoid the distorting effects of
20 hindsight, under Strickland. And I would submit to you that
21 most of Mr. Cornell's argument utilized that hindsight.

22 Starting with the issues raised about expert
23 testimony. And perhaps as a precursor to that I should mention
24 that it wasn't that Mr. Cornell entirely misrepresented the

1 facts with respect to what occurred in this case, it's just
2 that he only presented those facts that Mr. Kelsey testified
3 to. There was plenty of evidence at this trial that supported
4 the verdict in this case.

5 And this record, while not particularly voluminous, is
6 eight volumes. And so I would direct Your Honor's attention to
7 Volumes 3 and 4, the testimony of Michael Opperman.

8 Mr. Opperman talks about how he knew Zach Kelsey, and
9 that he was talking to him the night of the party. That's
10 around pages 774-777. And before all this happens Zach Kelsey
11 is bragging to him about a new pair of brass knuckles that he's
12 gotten, but he didn't ever show them to him.

13 In fact, no witness at trial ever testified that they
14 saw Mr. Kelsey use brass knuckles when he hit Mr. Hyde. So I
15 will just get that out of the way right now.

16 But Mr. Opperman testifies that he sees Kelsey pushing
17 Mr. Hyde, and Mr. Hyde has his arms up, like he doesn't want to
18 fight. He sees him be -- sees Mr. Hyde be punched twice in the
19 head, and as he's going down he sees Mr. Kelsey knee the victim
20 in the head twice, as well.

21 He sees Mr. Hyde get up off the ground with blood
22 running down from his nose or mouth. And as Mr. Hyde is trying
23 to walk away from this fight, he hears Zach Kelsey calling him,
24 calling Mr. Hyde, a pussy and a bitch, and screaming, and other

1 people were trying to pull him back because he wants to
2 continue to pursue his assault on the victim in this case.

3 Those are the facts that the Nevada Supreme Court
4 relied upon, it appears, when it issued its order of affirmance
5 in this case. And it's the State's position that those facts
6 were what the Supreme Court based its opinion, in terms of the
7 adequacy of the evidence, and that those facts are now the law
8 of the case.

9 Now, there are questions, of course -- and I'll get to
10 that -- of whether or not any of these witnesses could have
11 changed those facts at trial in any meaningful way that would
12 have made a difference. With that, I would like to go to the
13 experts' testimony.

14 At the trial the jury heard from Dr. Omalu and
15 Dr. Clark. Both of them testified that Mr. Hyde had extensive
16 bleeding over virtually all brain surfaces. They testified
17 that a single blow could have caused this to start, additional
18 blows would have exacerbated that tear. They explained it's
19 not atypical when a person suffers that type of injury to get
20 up, walk away, be conversant, and die minutes later. That's
21 exactly what happened in this case. Critically, each of them,
22 Dr. Omalu and Dr. Clark, testified that each of the blows
23 contributed to Jared Hyde's death.

24 Now, with respect to Mr. Edwards' decision not to

1 consult an independent forensic pathologist, of course we first
2 have to look at, was that an objectively unreasonable decision?
3 Mr. Edwards testified that he had discussions with Mr. Ohlson,
4 that Mr. Ohlson indicated he had consulted a forensic
5 pathologist, and that what that person had to say wouldn't help
6 any of their clients.

7 Now, the first question is, was it objectively
8 unreasonable under Strickland for him to rely in part on that?
9 That's a question for Your Honor. I would submit that it
10 wasn't. Would some attorneys not make that decision? Of
11 course.

12 But the standard is not whether or not somebody is
13 trusting. The standard isn't whether or not somebody maybe
14 should have made a better decision. It's whether it was
15 objectively unreasonable under the circumstances known to
16 Mr. Edwards at that time.

17 THE COURT: Well, let's talk about that, Ms. Noble.

18 MS. NOBLE: Yes, Your Honor.

19 THE COURT: Because as Mr. Cornell points out, and I
20 think Mr. Edwards pointed out, and maybe Mr. Qualls as well,
21 you know, there are arguments that are stronger and weaker.
22 And I don't intend on tipping my hand what arguments I think
23 are stronger or weaker based on the questions. But I am
24 interested in more analysis of that prong. Because, as we

1 know, the cause of Mr. Hyde's death, why he died, based on the
2 facts and circumstances of this case, is of grave importance.

3 And you're saying to me that it's not unreasonable --
4 not objectively unreasonable for Mr. Edwards to consult with
5 counsel for a co-defendant who has no ethical obligation
6 towards Mr. Edwards or towards Mr. Tanker -- or Mr. Kelsey.
7 And the sum and substance, it would seem, of Mr. Edwards'
8 investigation as to why Mr. Hyde died was, he asked Mr. Ohlson
9 if Mr. Ohlson had an expert. Mr. Ohlson said, "I talked to
10 one, and it wouldn't help us." And Mr. Edwards -- or
11 Mr. Edwards said, "Okay." That's it.

12 I mean, that's -- from what I've heard so far, from
13 what I've heard from the testimony of Mr. Edwards, that's the
14 totality of the investigation that he did regarding the medical
15 or forensic cause of Mr. Hyde's death. And you are just
16 saying, "Well that's not unreasonable."

17 If Mr. Hyde had been shot in the head, as I said
18 earlier, as an example, Mr. Hyde is shot in the head and, you
19 know, Mr. Ohlson employed an expert to say, "Well, could he
20 have lived? Could he have survived that injury?" And
21 Mr. Ohlson told Mr. Edwards, "Nah. I talked to the expert and
22 the expert said, 'No, it was just fatal.'" Well, that's just
23 kind of, almost, common sense. You wouldn't think, "I need to
24 do maybe a little bit more on behalf of my client."

1 But in this case we've just got Mr. Edwards, who asks
2 co-counsel a question, and co-counsel says, "No. I talked with
3 somebody and it wouldn't be helpful," and that's it. That's
4 all he did. I don't know that you can just gloss over the fact
5 that that is not unreasonable. How is that reasonable?

6 MS. NOBLE: Well --

7 THE COURT: And I know it's a two-prong analysis and
8 you can fail prong number one and the State -- or, excuse me --
9 I can deny the petition if I find that the outcome would not
10 have been any different had he not acted in that objectively
11 unreasonable fashion. But, you know, that's an important prong
12 and that's an important issue in this case.

13 As I suggested before, you know, I think the failure
14 to object when Mr. Ohlson referred to Dr. Clark as "brilliant
15 as always," I don't think that's either objectively
16 unreasonable or had any effect on the outcome of the case.
17 I'll tell everybody that right now.

18 But that's an important issue. He didn't do anything
19 to investigate how this man is responsible, in some way, for
20 the death of Mr. Hyde. Not only did he not employ an expert --
21 and it's not just you get an expert, but experts assist you in
22 preparing your cross-examination and understanding the forensic
23 testimony, in better understanding how and why Mr. Hyde died.

24 Unfortunately, I've read many more autopsy protocols

1 than I choose to recall, and have attended numerous autopsies
2 myself. And, you know, I don't understand everything. I don't
3 understand the medical terminology.

4 Mr. Edwards is certainly a smart man, and certainly an
5 able and competent counsel. But this is kind of detailed
6 medical testimony. And so far all I know is, he didn't do
7 anything to investigate it.

8 MS. NOBLE: I would agree with Your Honor.

9 And I don't know if I got this out during direct
10 examination or cross, or whatever it was, because Mr. Cornell
11 was kind enough to let me exceed the scope of his direct -- and
12 I will also concede right now that this first prong with regard
13 to this issue is the weakest point in my argument here today.

14 It appeared to me from his testimony -- and also,
15 perhaps, from the fact that Mr. Molezzo didn't retain anybody
16 either -- that they thought that nobody was really going to
17 contradict the opinions of Dr. Clark and Dr. Omalu. ' Okay?

18 THE COURT: But you don't know that, Ms. Noble, until
19 you try. And we've all had the experience as attorneys in
20 private practice or in practice for the State where you at
21 least call an expert. You pick up the phone and call somebody
22 and say, "Can you look at these facts?" And they say, "Hey,
23 those are great for you," or, "No, I can't help you." And then
24 maybe you pick up the phone and call somebody else.

1 The first call is objectively reasonable. Maybe to
2 say that he had to call like 15 people until he found the
3 lowest-level person who would say anything for a fee. If he
4 didn't do that, that's one thing. But here he -- again, I come
5 back to kind of the same point. Mr. Edwards didn't do
6 anything. So --

7 MS. NOBLE: Well --

8 THE COURT: He just relied on co-counsel.

9 MS. NOBLE: Given the Court's comments, I think I am
10 going to move to that second prong now, if that's all right.

11 THE COURT: Okay. Yeah.

12 MS. NOBLE: I think I was talking about how at trial
13 each of the blows contributed to Jared Hyde's death. That was
14 the testimony from Drs. Clark and Omalu. But moving to that
15 second prong of prejudice, which is, as Your Honor just
16 recognized, very important, we have the testimony of
17 Dr. Llewellyn, who testified here in court that her -- two
18 percent of her practice is forensic pathology. She's not a
19 neuropathologist like Dr. Omalu, who, I believe it was admitted
20 at trial, has like a 46-page curriculum vitae specifically in
21 these areas and whose trial testimony indicated that he had
22 examined over 10,000 brains.

23 THE COURT: I am going to guess Dr. Llewellyn has not
24 had a movie made about her recently. One-hour win, but -- I

1 mean, Dr. Omalu is well-known. And as I've said, I've spoken
2 to him in the past in a professional capacity, so I know who he
3 is. He's somebody well-known in the community.

4 MS. NOBLE: Yes. And at the outset, I'll be frank, I
5 thought that Dr. Llewellyn and I were going to have a lot more
6 trouble getting to where I wanted to go. Based on her initial
7 opinion, her opinion letter that I cross-examined her about,
8 she had offered some opinions that were different from
9 Drs. Clark and Omalu.

10 But as I was able to get from her during
11 cross-examination, that was based on certain assumptions.
12 Okay? One of those assumptions was that Mr. Hyde was not
13 knocked down, and that he was, quote, jabbed twice.

14 And she told me initially, "A hit is a hit." But she
15 did, as the Court recalls her testimony, later back down from
16 that position when I asked her, "How important is it in forming
17 your opinion in this case to know the nature and number of
18 blows administered by Kelsey?"

19 She admitted that jabs to the cheek could cause a
20 torquing or rotational injury that would cause sudden
21 acceleration or deceleration of the head on the neck. That
22 agrees with Dr. Clark and Dr. Omalu.

23 She agrees with Dr. Clark and Dr. Omalu that she
24 cannot pinpoint exactly what blood vessels in Mr. Hyde's brain

1 tore. In fact, I got the exhibit of the brain out, not to be
2 dramatic, but I wanted her to take a look at it because it
3 really underscores the horrible condition that this poor
4 gentleman's brain was in and the extensive bleeding. And she
5 admitted that she couldn't parse out what blow caused which
6 part of that damage.

7 She agreed with both the State's experts at trial that
8 in addition to subarachnoid hemorrhaging at the base of the
9 brain there was other brain trauma. She admitted that she
10 could not link that trauma to any specific blow. That also
11 agrees with the State's experts.

12 She admitted that jabbing can cause concussions and
13 blood vessels in the brain to begin to bleed.

14 She admitted that a knee to the head could cause
15 damage to those arteries in the back of the neck that feed into
16 the brain.

17 And Dr. Clark testified, of course, at trial. And the
18 Court can, of course, review that when making its decision
19 about the probable efficacy of Dr. Llewellyn had she testified
20 at trial.

21 But in response to Dr. Llewellyn's testimony,
22 Dr. Clark said a single impact can cause bleeding in the brain,
23 that Mr. Hyde's brain showed cumulative injury. And
24 Dr. Llewellyn did not dispute that. And that the attack from

1 Mr. Kelsey could have exacerbated a tear at the plexus at the
2 back of the neck. That was made worse by the brutal attack of
3 the other two defendants.

4 And incidentally, at trial Dr. Omalu was specifically
5 given the factual scenario that after this defendant or this
6 petitioner hit Mr. Kelsey, Hyde got up, said, "I got rocked,"
7 and walked away. Given that factual scenario, he testified
8 that in addition to the subarachnoid hemorrhaging, Mr. Hyde
9 suffered a massive concussion that would have resulted in
10 cellular injury to the brain, and each and every one of those
11 impacts would have made that worse. That's at pages 1552 to
12 1556 of Dr. Omalu's testimony.

13 In fact, I really can't see any part of
14 Dr. Llewellyn's testimony that differed in any substantial way,
15 when push came to shove, when cross-examination was done, with
16 Dr. Omalu and Dr. Clark's testimony. As soon as she was given
17 the factual scenario that has now been accepted by the Nevada
18 Supreme Court, as supported by the evidence, she agreed with
19 their position. There was no prejudice to this defendant for
20 failure to call Dr. Llewellyn or any other forensic pathologist
21 that's been identified.

22 And with respect to Mr. Ohlson's summary in his
23 deposition about what his expert may or may not have said, I
24 did object to that. But I would say, all it talked about was

1 subarachnoid hemorrhaging, which we all know happened.

2 THE COURT: I think you would have to admit that what
3 was important to Mr. Ohlson, in the analysis of his expert's
4 report, would be significantly different than what would be
5 important to Mr. Kelsey. I mean, not significantly. But given
6 the scenario that everyone agrees occurred, an initial
7 confrontation with Mr. Kelsey and Mr. Hyde, a break of some
8 brief duration, and then a subsequent and more prolonged attack
9 by Mr. Schnueringer and Jefferson against Mr. Hyde, where
10 Mr. Hyde never gets up, so to speak. I am guessing Mr. Ohlson
11 is looking for different things than Mr. Kelsey would be
12 looking for.

13 So I'm not sure what -- I don't even know how valuable
14 Dr. Haddix's report would be in the case. I just don't know.

15 MS. NOBLE: And I think that question really goes to
16 the reasonableness of Mr. Edwards' decision and not to the
17 prejudice question, which I think is the stronger argument for
18 the State here. Because what we have is a doctor -- who is a
19 pathologist, who I am sure is a great doctor, but two percent
20 of her practice is in this -- her testimony would go against
21 that of the Washoe County Medical Examiner, Dr. Clark, and all
22 of her credentials, which are admitted as exhibits at trial and
23 her curriculum vitae -- and I know the Court is well aware --
24 against the testimony of Dr. Omalu, whose credentials were also

1 fleshed out during trial.

2 And actually I'm wrong when I say the word "against,"
3 because she really doesn't disagree with anything they have to
4 say.

5 THE COURT: Well, I think that her testimony,
6 Ms. Noble, was, is that had she known that it was two punches
7 to the head and knees to the head, rather than jabs, it would
8 increase the probability. At least that's what my note said.
9 So it's not that she completely came around and said, "No, now
10 that I know those things, Dr. Clark and Dr. Omalu are
11 accurate."

12 The note that I made to myself was along the lines of,
13 if the victim was knocked down, it would increase the
14 probability that he was injured as a result of the attack.
15 Also, if he went to his knees as a result of being kneed in the
16 head.

17 So it's not that she completely supported them, it's
18 just -- I think it's reasonable to infer from Dr. Llewellyn's
19 testimony that she, number one, didn't know those facts, and
20 number two, she would not be as adamant, having known those, as
21 she was initially.

22 The other difficulty for me is, in analyzing the issue
23 of Mr. Ohlson and his expert and how it plays into this
24 situation is, I don't know what Dr. Haddix said. We don't know

1 what Dr. Haddix was presented with as facts.

2 It was clear in Mr. Ohlson's deposition that he
3 specifically requested Dr. Haddix not write a report for him.
4 So we don't know what he told her. Dr. Haddix -- I think it's
5 Terri Haddix, if I remember correctly.

6 MR. CORNELL: Yes, Your Honor.

7 THE COURT: We have no idea what Mr. Ohlson told
8 Dr. Haddix. We don't know what the fact scenario was or if he
9 even said anything about Mr. Kelsey.

10 And so I'm not quite sure, as I sit here, who that
11 cuts in favor of, but -- you know, Mr. Cornell has argued that
12 had, you know, Mr. Edwards called Dr. Haddix, or had that
13 information, would it have helped or would he have used it? We
14 don't even know what the information was. It's just a mystery.

15 MS. NOBLE: I don't think for the purposes of
16 analyzing the prejudice in this case we need to know the answer
17 to that question.

18 THE COURT: Okay.

19 MS. NOBLE: I would -- I know this Court is very
20 thorough and reads the record, but I would in considering this
21 case request that you take a look and compare side by side the
22 testimony of Dr. Llewellyn with those of Dr. Omalu and
23 Dr. Clark. I went down a laundry list of things they agreed
24 about. Those were virtually all of the things that were drawn

1 out on direct and cross-examination from those two doctors at
2 trial, from the State's expert -- experts. So in every way
3 that counts, when she was given that factual scenario, she did
4 not disagree.

5 This is an area that is, I think, confusing for lay
6 people, including myself, and so I think it's really important,
7 and I know Your Honor will pay close attention to all of those
8 types of facts that were listed at trial. In other words,
9 there was torquing and rotational injury, or there could have
10 been, from Mr. Kelsey; that it could have caused sudden
11 acceleration and deceleration; that you could not pinpoint
12 where the bleeds began or where --

13 THE COURT: Hold on a second, Ms. Noble.

14 MS. NOBLE: Yes, Your Honor.

15 THE COURT: Mr. Kelsey, you've been doing this the
16 entire hearing. And by "the hearing" I mean yesterday and
17 today. It's important that you are able to communicate with
18 your attorney, Mr. Cornell, but it's also important that you
19 not disrupt the proceedings in this case. And so Ms. Noble is
20 trying to talk. And if you're loud, which you are even when
21 you whisper, it makes it very difficult for me to focus on her.

22 You actually at times were trying to get Mr. Cornell's
23 attention while he was trying to make his argument, which is
24 distracting me from him. So I would request that you use the

1 piece of paper in front of you, and you use the pencil that you
2 have, and if you need to write something to Mr. Cornell, you do
3 so and you don't disrupt the proceedings anymore.

4 THE DEFENDANT: Yes, Your Honor.

5 THE COURT: Go ahead, Ms. Noble.

6 MS. NOBLE: Thank you.

7 At trial Dr. Clark didn't say, "These blows from
8 Mr. Kelsey absolutely caused this damage." She just answered
9 questions, just like the ones that we asked today or yesterday
10 of Dr. Llewellyn. And the same with Dr. Omalu. But everybody
11 agrees, you can't parse it out.

12 And so what we start to get into is almost a
13 sufficiency of the evidence type of argument. There is no
14 material way, when you compare those testimonies, that they
15 actually vary. And so I would urge the Court to review those.
16 I had to read them many times. Your Honor is smarter than I
17 am, I am sure, but --

18 THE COURT: I don't know about that. I'm not sure
19 about that, but --

20 MS. NOBLE: But there's nothing particularly certain,
21 other than each of these would have -- each of these blows
22 would have contributed to what finally happened in this case.

23 So we've got a pathologist, two percent of her
24 practice -- I've said this three times, I think -- presented

1 with very selective facts, certainly not those facts that have
2 been accepted, and she pretty much still agrees with the
3 State's experts. That's what we have, Your Honor. That's not
4 sufficient to undermine the Court's confidence.

5 And remember that the standard is that it has to
6 undermine it such that confidence in the verdict is rattled to
7 the extent that a new trial has to happen. It's not just that
8 maybe, could have some juror been swayed at some point.

9 There was no prejudice to this defendant, and nobody
10 has demonstrated that a forensic pathologist would have said
11 anything materially different than Drs. Clark and Omalu.

12 And furthermore, I would suggest that Dr. Llewellyn's
13 testimony, with all due respect, given her credentials and the
14 difference between her credentials and Dr. Omalu's, would have
15 been far less persuasive.

16 I would also like to observe that the jury in this
17 case was instructed properly. Instructions 34 and 35 talked
18 about proximate cause, superseding cause, how they could arrive
19 at a decision where Mr. Kelsey would not be held responsible
20 for the murder of this young man. So they took the information
21 that these doctors testified to, which was not fundamentally
22 different from Dr. Llewellyn's testimony, and they arrived at
23 their verdict.

24 Another aspect of the expert series of claims is

1 Mr. Cornell's assertion that Scott Edwards should have made
2 some sort of motion to exclude Dr. Omalu and Dr. Clark's
3 testimony based on the fact that they needed to testify that
4 their opinions were true to a reasonable degree of medical
5 certainty. Okay.

6 That is based -- the only case cited in support of
7 that is a medical malpractice case. It's a civil case in
8 Nevada. It's not the law in Nevada. So how can Mr. Edwards be
9 objectively unreasonable for failing to make some sort of
10 motion with regard to that? I would submit to you that that
11 fails quite plainly the first prong of Strickland, and
12 certainly such a motion would have been unlikely to be
13 successful so prejudice also did not resolve. But you don't
14 even need to get to the prejudice question.

15 Also -- I know I'm bouncing back and forth -- but on
16 cross-examination, Mr. Cornell said that he impeached Dr. Clark
17 with some -- some information about other types of injuries or
18 head injuries. That was from Wikipedia. I don't think that
19 was compelling. And Your Honor can certainly make that
20 determination.

21 THE COURT: Well, it certainly --

22 MS. NOBLE: She did testify --

23 THE COURT: It certainly appeared that she didn't know
24 exactly what Mr. Cornell was talking about when he referenced

1 it, but then when she -- when Mr. Cornell read the Wikipedia
2 entry, it was my impression that she understood what he was
3 talking about. It wasn't something beyond her comprehension,
4 it was just that she hadn't heard it referred to in that way,
5 or it was exactly explained in that way.

6 And it was also interesting to note that once she
7 heard the entire quote she was so familiar with the facts and
8 circumstances that they were discussing, she knew that that
9 information was outdated and that there had been additional --

10 MS. NOBLE: That's exactly the next comment I was
11 about to make.

12 THE COURT: -- additional studies.

13 So with all due to respect to Mr. Cornell, I'm not
14 quite sure that Wikipedia is the Gray's Anatomy type of learned
15 treatise that I would go to, to explain something in the
16 medical field.

17 Go ahead, Ms. Noble.

18 MS. NOBLE: I want to discuss the -- the really
19 failure-to-investigate types of claims with regard to a few
20 witnesses, Ms. C [REDACTED], Mr. C [REDACTED] and Mr. I [REDACTED] --
21 I'm trying to pronounce that correctly.

22 Now, we have Mr. Edwards testifying that he reviewed
23 the interviews of all the kids at the party that talked to the
24 police. He -- there were 40-plus kids, and he reviewed many of

1 those interviews, and had he seen anything that would have
2 helped his client he would have followed up on it.

3 Now, Mr. Cornell's position appears to be, that is
4 objectively unreasonable -- not just something that you might
5 do differently, I might do differently, Mr. Cornell might do
6 differently, but objectively unreasonable under Strickland --
7 to not reinterview all of those witnesses.

8 I don't -- I don't find that that's a particularly
9 good argument. I'll leave that to Your Honor, of course, but I
10 don't believe it's very common to reinterview that many
11 witnesses.

12 Now, that argument becomes different if this Court
13 believes Mr. Kelsey's testimony that he specifically identified
14 those witnesses. So that's a judgment for this Court to make
15 in terms of the credibility of those two witnesses. Because
16 Mr. Edwards testified, "Had he specifically identified anybody
17 to me, I would have followed up on it."

18 I would also suggest that that testimony was less than
19 credible, because Mr. C [REDACTED] and Ms. C [REDACTED] both told me
20 that they didn't know why they didn't tell the police that,
21 except that they weren't asked that precise question.

22 Well, they had interviews. They were recorded. They
23 wanted to know what happened that led up to the death of this
24 boy, this young man. Why didn't they add it until three years

1 later?

2 With regard to Mr., I think, L [REDACTED], the two
3 rocks hitting together, I think Your Honor already commented.
4 I think this is cumulative at best. There is ample testimony
5 during trial -- I'm not focusing on it right now, because we're
6 concerned with Mr. Kelsey -- that the attack by Mr. Jefferson
7 and Mr. Schnueringer was brutal. A number of witnesses
8 testified to that. So that would have been cumulative at best.
9 There's no prejudice there.

10 With respect to the self-defense-instruction argument,
11 Your Honor, there weren't facts that supported self-defense.
12 This is a strategic decision made by counsel. He said he
13 didn't think the facts were there. In looking at the case here
14 in court, the facts still aren't there. But that strategic
15 decision is virtually unchallengeable, absent extraordinary
16 circumstances. And certainly we've heard no such extraordinary
17 circumstances with regard to a self-defense argument during the
18 course of this hearing.

19 THE COURT: Well, its interesting. As I pointed out
20 to Mr. Cornell, the initial aggressor is not entitled to a
21 self-defense instruction. So you don't get to pick a fight and
22 then claim you acted in self-defense. And as I've heard the
23 basic analysis of the case, the argument is, is that Mr. Kelsey
24 is guilty of a battery.

1 Now, Mr. Cornell, I think you've said "guilty at most
2 of a battery, or possibly involuntary manslaughter."

3 But if we enter the analysis by saying, "My client is
4 guilty of battery," then by definition we're acknowledging that
5 he's not acting in self-defense. If you commit the crime of
6 battery, you're not acting in self-defense. You're committing
7 a misdemeanor. So the self-defense argument and the lack of
8 the self-defense instruction really would carry no weight.

9 The interesting thing about that -- and it gets to, I
10 believe it's Ground 3, the waiving of the closing argument. We
11 don't know exactly what that would be. If Mr. --
12 theoretically, if Mr. Edwards' closer in his argument is, "Find
13 my client guilty of battery, that's what he did," then
14 obviously we're not talking about a self-defense instruction.
15 But we simply don't know what that ultimate thought process was
16 because there was no closing argument. It would have been
17 helpful to me.

18 MS. NOBLE: Yes, Your Honor.

19 So moving on to the waiver of the closing argument --
20 excuse me -- that was a tactical decision. And it wasn't a
21 tactical decision just made by Mr. Edwards. It was apparently
22 made by John Ohlson and by Rich Molezzo. I'm not saying that
23 that per se means it was reasonable, but those are
24 circumstances that this Court can take notice of.

1 It's a tactical decision. It's entitled to an
2 incredible amount of deference in terms of reviewing whether or
3 not it was objectively unreasonable. "Virtually
4 unchallengeable" is the language of Doleman vs. State.

5 Mr. Edwards testified, "We heard Patricia Halstead's
6 closing argument, first close, and there was a break. And
7 right then we all decided it wasn't particularly strong. It
8 was not what we feared Mr. Hall would deliver if he had the
9 opportunity."

10 And I don't recollect his testimony as being
11 completely predicated upon the first-degree-murder worry. I
12 asked him, I believe, on cross-examination, "Mr. Hall could
13 have come back and hammered home the State's case, essentially,
14 all the things that supported some degree of culpability with
15 respect to Mr. Kelsey."

16 And I believe he answered in the affirmative that that
17 was one of his concerns, that he had seen Mr. Hall in action.

18 THE COURT: We've all seen Mr. Hall in action.

19 MS. NOBLE: That's true, Your Honor.

20 THE COURT: And that's not a negative comment about
21 Mr. Hall. He's an excellent trial attorney, and was a very
22 successful trial attorney for the 25 years, I think, he was in
23 the Washoe County DA's office.

24 But this is another one of those issues that kind of

1 is a little bit higher up on my concern meter than some of the
2 other ones. I understand that tactical decisions are virtually
3 unassailable. But this would be getting about as -- if it's
4 not, this is about as close as it gets.

5 We're talking about an open murder charge with
6 multiple jury instructions. Many of them, it can be argued,
7 apply to different defendants in different ways. We're talking
8 about legal concepts and medical testimony and expert testimony
9 that is, as you've acknowledged, foreign to most people, to the
10 average person who comes in and sits as a juror.

11 And while I acknowledge Mr. Hall's ability as a
12 litigator, I just -- I'm struggling with the fact that that
13 concern about Karl Hall's persuasiveness outweighs the fact
14 that I would like to discuss my client's case with the 12
15 people who are going to be deciding his ultimate fate.

16 And I would also note that in my mind the nature of
17 the offense is very telling. We're not talking about a grand
18 larceny charge or possession of a stolen motor vehicle or, you
19 know, a -- I'm just trying to think -- like a PCS charge where
20 we've got co-defendants and there are drugs found in the room
21 and it's not quite sure whose are whose, and the State doesn't
22 do a particularly persuasive job in their opening -- in their
23 initial closing argument, and so the defense just says, "We'll
24 just leave it at that."

1 This is a case, as I said, with numerous legal and
2 factual issues that seems to cry out for a -- at least some
3 conversation with the jury. And as Mr. Edwards acknowledged, I
4 think he said it would probably be the last time that he waived
5 a closing argument. And I think that Mr. Ohlson made a similar
6 comment in his deposition. I don't have -- I have the
7 deposition here, but -- he was asked that question either by
8 you or by Mr. Cornell.

9 MS. NOBLE: By Mr. Cornell.

10 THE COURT: And he made kind of a similar comment, if
11 I remember correctly. I read it yesterday, but --

12 MS. NOBLE: And, Your Honor, I remember that comment.
13 And I would like to point out that during that deposition --
14 and if you would like me to be quiet while you are trying to
15 find it --

16 THE COURT: No, no. I can listen and look at the same
17 time.

18 MS. NOBLE: Okay. During that deposition I tried to
19 make clear, "Mr. Cornell, you're not offering Mr. Ohlson as a
20 standard-of-care witness in this case with respect to
21 Strickland, are you?"

22 And he said, "Oh, no. That's not what we're doing."

23 But even if he were, if you look elsewhere in that
24 deposition, towards the end Mr. Ohlson talks about what a great

1 job he thinks Scott Edwards did, and that he was competently
2 representing his client.

3 THE COURT: That's true. He does say that. He makes
4 an observation at the end.

5 MS. NOBLE: In hearing the Court's concerns, what
6 concerns me is that the standard that might be applied is not a
7 constitutional adequacy type of standard that Strickland
8 contemplates. In other words, attorneys' skills vary. Their
9 approaches to cases vary. And that's why that standard is so
10 deferential.

11 And also, we need to remember that none of us were in
12 that courtroom that day. They didn't feel it was a very good
13 closing argument at all. They felt like it wasn't very
14 effective and they waived it. Now, we can look at the
15 transcript of what Ms. Halstead has to say -- she's a fine
16 attorney, I'm not trying to disparage her in any way -- but we
17 don't know how she delivered it, if the jury was paying
18 attention. We don't know any of those things.

19 And there is a reason why we are to avoid hindsight,
20 Your Honor, and this is precisely why. It is not per se
21 ineffective to waive a closing argument. Now, certainly it
22 might not be something that Your Honor would do as a defense
23 attorney, or myself. It would depend on the circumstances.
24 But it's not constitutionally unreasonable.

1 THE COURT: Per se.

2 MS. NOBLE: Per se.

3 THE COURT: There are some cases that have ben cited
4 in the petition where waiving a closing argument is found to be
5 not unreasonable, and there are citations where it is found to
6 be unreasonable. I haven't read them all. But I promise you,
7 Mr. Cornell, that I will.

8 Are any of them murder cases? I mean, do we have any
9 cases where somebody waives a closing argument in a murder
10 trial?

11 MS. NOBLE: Your Honor, I don't know the answer to
12 your question.

13 MR. CORNELL: To be honest with you, I don't remember,
14 either. The cases say what they say.

15 THE COURT: I'll know before I write the orders.

16 Go ahead.

17 MS. NOBLE: With respect to Mr. Ohlson's comments,
18 Your Honor already touched upon the "Dr. Clark, you're so
19 brilliant issue." I don't think that's of concern to the
20 Court. That's what I'm hearing.

21 In terms of the straight edge, "Oh, son, you know they
22 used to be associated with the Nazis" type of argumentative
23 questioning, Mr. Edwards testified, number one, "I felt my
24 client handled it very well"; number two, "I didn't want to

1 call more attention to it"; and, number three, "Instruction 11
2 told the jury, 'Statements of the attorneys are not evidence,'
3 and jurors are presumed to follow instructions."

4 So even if this Court finds that Mr. Edwards was
5 somehow not reasonable within the Strickland case law for not
6 objecting to those comments, there's no reason to believe that
7 the jury in this case disregarded their instructions. And that
8 was the statement of Mr. Ohlson, it was not a statement of a
9 witness in this case. And the cases cited by Mr. Cornell, I
10 believe, pertain to witnesses.

11 With respect to a limiting instruction on the Twisted
12 Minds business. There was no testimony at trial, no suggestion
13 at trial -- I've read these volumes four times, now -- that
14 Mr. Kelsey was a member of Twisted Minds. It's not there. So
15 to suggest that somehow there was some sort of ineffective
16 assistance of counsel with respect to that, is unsupported
17 entirely. There is no reason that that jury would have thought
18 that he was part of that particular group, gang, whatever you
19 want to call it. And the Nevada Supreme Court already deemed
20 that that discussion was part of the res gestae, and that's the
21 law of this case.

22 Moving to the original petition, because I don't want
23 to leave anything out before I sit down. Mr. Edwards flatly
24 denied that he ever declined to present a witness that

1 Mr. Kelsey identified to him. Mr. Kelsey said something
2 different happened. It's Your Honor's job to, of course,
3 decide which is more credible. And, number two, even if Your
4 Honor believes Mr. Kelsey, whether or not that would have made
5 any difference.

6 To prove prejudice in this case Mr. Kelsey has the
7 burden of demonstrating a reasonable probability that but for
8 his counsel's errors, the outcome of the trial would have been
9 different. He has not met that burden, Your Honor, and I would
10 urge the Court to avoid using hindsight in analyzing the
11 decisions that Mr. Edwards made in this case.

12 THE COURT: Ms. Noble, what about the concept of
13 cumulative error in this case, in that, you know, maybe each
14 individual issue that we discuss is not, in and of itself,
15 significant enough to cause the Court to overturn the
16 conviction and order a new trial, but the totality of the
17 issues that are presented rise to the level that the Court
18 should be concerned about the integrity of the jury's verdict?

19 MS. NOBLE: I have not --

20 THE COURT: I'm not saying I'm coming to that
21 conclusion. I'm just saying that it's an issue that -- that
22 certainly should be considered and addressed, is whether or
23 not, based on everything that happened in this case, should I
24 be worried about the fact that Mr. Kelsey was convicted of

1 second degree murder?

2 MS. NOBLE: No. Cumulative error is a concept that's
3 typically applied by the Nevada Supreme Court when they're
4 talking about errors during trial, and it needs to be raised
5 there.

6 With respect to the ineffective assistance of counsel
7 claims here, I have yet to see a post conviction case -- and
8 admittedly, I've only been doing this particular area for four
9 years -- where reversal occurs because of cumulative error.
10 That doesn't mean one doesn't exist. I'm not going to
11 represent to the Court that it doesn't. And I will actually
12 research this when I get back and, of course, provide Your
13 Honor with any authorities that would be relevant.

14 But in this case it seems what the Court is most
15 concerned about is the waiver of that closing argument and the
16 failure to consult an independent forensic pathologist. Now,
17 I'm confident when the Court reviews the testimony of Dr. Clark
18 and Dr. Omalu at trial, and reviews the testimony of Dr. Clark
19 and Dr. Llewellyn, those concerns are going to be assuaged.

20 With respect to waiver of the closing argument, I
21 understand Your Honor's point. However, I think the Strickland
22 standard is very different than the standard that we might hold
23 ourselves to, and I would urge the Court to avoid applying a
24 heightened standard.

1 THE COURT: Well, I promise you I won't apply the
2 "that's not the way Elliott Sattler would have done this trial"
3 standard, because I know that that's not what I am supposed to
4 do. It's an objective standard, but that's -- it's a tough
5 hurdle to get over in this case. I'm not saying that the State
6 hasn't cleared the hurdle, Ms. Noble. I'm just saying that if
7 ever there were a case where you would wonder why you would
8 waive a closing argument, this might be that case. And so then
9 I've got to decide whether or not, assuming that I make that
10 determination, that it was objectively unreasonable to do that,
11 and I have to decide whether it would have affected the outcome
12 of the case.

13 MS. NOBLE: And in considering that, I would urge the
14 Court to consider the possibility that part of the decision
15 that was made by those three attorneys at that time, during a
16 break during a jury trial, was in part due to things that they
17 observed, that we just can't know because we weren't there.
18 And that's precisely why we avoid that hindsight.

19 It was a tactical decision, and it's a very -- it's
20 actually not a hurdle for the State, Your Honor, it's a hurdle
21 for Mr. Cornell, and it's a high one.

22 THE COURT: Well, but I have to avoid being an
23 armchair quarterback. And I understand that. I have to avoid
24 judging in the cool of the evening what men do in the heat of

1 the day. But I don't think I can just reflexively fall back on
2 the fact that Mr. Molezzo and Mr. Ohlson also waived their
3 closing arguments, so it was a group decision of three very
4 experienced trial attorneys. Because Mr. Molezzo and
5 Mr. Ohlson's clients were arguably -- arguably -- in a
6 different boat than Mr. Edwards' client.

7 And Mr. Edwards did say he was fully prepared to do a
8 closing argument. One would have to assume that Mr. Molezzo
9 and Mr. Ohlson were fully prepared to do a closing argument.
10 Because as I recall Mr. Edwards' testimony and the information
11 that I have about the case, had any one of the three chosen not
12 to go along with the no-closing-argument approach, then the
13 others would have done their closing argument. It's hard to
14 think that, theoretically, Scott Edwards and Richard Molezzo do
15 a closing argument, and John Ohlson stands up and says, "No,
16 thank you." But it could happen.

17 But it's just -- they're differently situated. The
18 cases -- the defendants are different. And certainly
19 Mr. Schnueringer and Mr. Jefferson's cases are more similar in
20 factual circumstance than Mr. Kelsey's. At least Mr. Kelsey
21 can make some theoretical different arguments in a closing
22 argument than Mr. Schnueringer and Mr. Jefferson could.

23 MS. NOBLE: I would -- in response to that, if I may,
24 I would say that I am not asking Your Honor to say, "Well, it

1 must have been reasonable because John Ohlson and Rich Molezzo
2 did it." That's not my argument.

3 My argument is that, number one, that's one
4 circumstance among many that Your Honor can consider when
5 evaluating that decision. You will also have to evaluate
6 Mr. Edwards' testimony, and that was that he did not think
7 Ms. Halstead did a very strong closing argument and he didn't
8 want Mr. Hall to have an opportunity to address the jury.

9 Now, whether you agree that was a good decision or not
10 may be influenced, perhaps -- I know you will separate it out,
11 but consider the fact that a seasoned murder prosecutor may
12 evaluate that differently from somebody who it's their first
13 trial. And Strickland does not require that anybody be a
14 seasoned murder prosecutor or seasoned defense attorney. It
15 requires representation that does not violate this person's
16 constitutional rights to be represented by counsel. That's the
17 requirement.

18 THE COURT: You know, it's funny. As I sit here and
19 think about it, Ms. Noble, I think only a seasoned criminal
20 defense attorney would have the intestinal fortitude to waive a
21 closing argument. So, you know, it's -- I can't imagine a
22 recently out of law school or recently employed by the public
23 defender's office, or in private practice attorney thinking,
24 "Hey, I've got a great idea, I'll just waive closing on this

1 murder case." It's -- if anything, it shows a heightened level
2 of sophistication and experience. Because you've got attorneys
3 who at least are able to weigh what they think of Ms. Noble --
4 or, excuse me, not Ms. Noble, I apologize -- Ms. Halstead's
5 argument, they're using their experience and knowledge of
6 Mr. Hall and the efficacy of his rhetorical style, in coming to
7 a conclusion, based on their experience, that waiving closing
8 argument is a good idea. I don't know if that's objectively
9 reasonable or not.

10 MS. NOBLE: Well, I think when you arrive at that
11 decision --

12 THE COURT: You'll know.

13 MS. NOBLE: That's true.

14 Also, it's important to make sure that the Court does
15 not hold Scott Edwards to the reasonable Scott Edwards
16 standard, the reasonable person who has done all these trials.

17 THE COURT: No. Just the objectively reasonable
18 lawyer.

19 MS. NOBLE: Your Honor, that concludes my argument.
20 Unless the Court has more questions about aspects of the
21 petition and supplemental petition, I would suggest that it
22 be -- be denied, rather, in its entirety.

23 THE COURT: Thank you, Ms. Noble.

24 Mr. Cornell, any rebuttal argument?

1 MR. CORNELL: Thank you. May I have the podium when I
2 do this? Otherwise I'm going to be doing this through the
3 argument, which isn't a good idea.

4 MS. NOBLE: It's not that bad.

5 MR. CORNELL: I think, Your Honor, from your questions
6 of Ms. Noble, that my prediction held true. We're keyed into
7 the grounds that matter in this case and the grounds that may
8 not matter quite so much.

9 With respect to Ground 1(b), I'm getting the
10 impression from Your Honor that you're not going to rule today,
11 you want to take this under advisement. I think that's a
12 really good idea. And I think what's a particularly good idea
13 is to review the actual transcript of the testimony of
14 Dr. Llewellyn. Because to suggest that Dr. Llewellyn is
15 completely congruent with Dr. Clark in the end, is not my
16 recollection of the testimony at all.

17 My recollection is that her opinion is this. It is
18 possible, indeed, that Kelsey's blow could have been fatal or
19 contributed to the death of the victim. But her opinion to a
20 reasonable degree of medical probability is that the blows
21 administered by the second group, meaning Schnueringer and
22 Jefferson, were in fact fatal in nature and did in fact result
23 in the death of the victim.

24 And the question is, if a reasonable juror hears that

1 could they credit it? Maybe a reasonable jury would be more
2 impressed by the CV of Dr. Clark or the fact that Dr. Omalu has
3 had a movie with Will Smith, of all people, portraying him,
4 than they would by the CV of whatever doctor that gets
5 presented for the defense at trial. But that's a jury's call.
6 That's -- that's a jury's call, and that's a jury's call after
7 we have that retrial, which only happens when this is granted.

8 Could a reasonable -- could a reasonable jury credit
9 that testimony? The answer is, "Sure they could." And if they
10 credited that testimony, then what? If they credit that
11 testimony they either decide, after proper closing argument,
12 that Mr. Kelsey is not the proximate cause of the death or that
13 what he's guilty of is misdemeanor battery.

14 What else does Dr. Llewellyn testify to? There's a
15 whole plexus of blood vessels at the base of the brain that can
16 tear from blunt force impact. Given the facts of the case it
17 would appear likely, to a reasonable degree of medical
18 certainty, that the tearing of some blood vessels lead to --
19 cause immediate death, and that tearing occurred from the
20 second fight involving Schnueringer and Jefferson.

21 And, indeed, in my cross-examination of Dr. Clark, as
22 well as the examination at trial, she acknowledges that that is
23 possible.

24 If a reasonable jury hears that and decides that they

1 credit that, and they decide those are the facts of this
2 case -- that's how this man died, when the -- when the plexus
3 of arteries leading to the brain were disrupted -- ruptured,
4 not severed, but ruptured -- and the severing was made -- or
5 the rupture was made worse by the kicking, if they decide that,
6 then upon proper instruction argument, what did they decide?
7 They decide that the proximate cause of this death of Mr. Hyde
8 is what Schnueringer and Jefferson did, not what Kelsey did.
9 And a reasonable juror may decide that even if the defense
10 expert has a CV miniscule in comparison to the CV of the
11 State's expert. But it's a jury's call. So --

12 And where Dr. Clark and Dr. -- I think what you will
13 see from the transcripts, where Dr. Clark and Dr. Llewellyn
14 differ is what blood vessels were actually disrupted or what
15 could have caused the subarachnoid hemorrhaging, and could any
16 of the areas of trauma on the skull be -- could all of them be
17 attributed to what Mr. Kelsey did?

18 It's Dr. Llewellyn's opinion, I think, that all of the
19 areas of trauma that she identified could have been the result
20 of what Schnueringer and Jefferson did, but not all of them
21 could have been the result of what Kelsey did. And I believe
22 that's where Dr. Clark disagrees.

23 Now, also, we have the issue of subconcussion, which
24 is a concept brought up by Dr. Omalu, not Dr. Clark. I believe

1 it was the opinion of Dr. Llewellyn that if in fact what --
2 what Master Hyde suffered from Mr. Kelsey was a subconcussion,
3 which would appear reasonably possible, it's highly unlikely
4 that a subconcussion by itself would lead to the death of
5 Mr. Hyde.

6 If that's her testimony -- and I do believe it is --
7 and if the jury credits that testimony, again, they're going to
8 determine the proximate cause of this death of Master Hyde was
9 the action of Schnueringer and Jefferson, not Kelsey.

10 So I would urge the Court, in taking it under
11 advisement, to actually -- let's get the transcript and see
12 exactly what Dr. Llewellyn said, but look at it in the terms of
13 what could a reasonable juror do.

14 We know this much. When I described the testimony
15 briefly of both Dr. Haddix and Dr. Llewellyn, and discussed
16 that with Mr. Edwards, he said, if that evidence was out there
17 and he knew about it, he would have wanted to present it.

18 THE COURT: We didn't know what the testimony of
19 Dr. Haddix would be.

20 MR. CORNELL: Well, no. But I mean, just from the
21 general description of what they had to say.

22 And by the bye, let's be clear on the record. What
23 Ohlson told Edwards was not, "My expert agrees with Clark and
24 Omalu." He didn't say that. He said, "The expert I contacted

1 doesn't help" -- or "doesn't help us."

2 If I'm Mr. Edwards, "Wait a minute. What do you mean,
3 'Doesn't help us'?" Mr. Ohlson is a very sharp guy. He's not
4 going to say anything to hurt his client to his counsel, but
5 he's not going to reveal what he doesn't have to. "It doesn't
6 help us." "Us" being who? Myself and Mr. Molezzo's client?
7 Is that who he means by "us"?

8 Well, what we do know is Mr. Edwards didn't take it
9 further in a case that centers on the legal medical cause of
10 death, to where Mr. Edwards centers in on proximate cause as
11 the very first thing practically he does in this case after
12 he's reviewed the testimony. He doesn't hire the expert after
13 he's told that Ohlson isn't going to bring his because "he
14 doesn't help us," and in this case that centers on that
15 question, I submit to you, is below the standard.

16 Now, by the bye, you asked the question -- and it so
17 happens I have researched and written this. If you want a set
18 of -- a separate set of Ps and As on this, tell us, and I'll be
19 happy to provide one.

20 There is case law out there from the Federal Circuits,
21 and I think even the Nevada Supreme Court, that says that when
22 you have cumulative deficiencies, they can result in prejudice,
23 even if one deficiency wouldn't.

24 Likewise, I think there's cases out there that say

1 when you have cumulative errors or cumulative things that
2 counsel could have done differently, one alone might not be
3 proof of below the standard, but a good number of them would
4 be. And if you want Ps and As on that, I would be more than
5 happy to give you that. Just, you know, so order it, and I'll
6 have it done, but not tomorrow. Okay. I'm taking a day off
7 tomorrow --

8 THE COURT: Good.

9 MR. CORNELL: -- thank you very much.

10 With respect to waiving the closing argument, which is
11 a huge issue in this case, this is not a short trial. The
12 charge is open murder, the most serious charge short of capital
13 murder you can have in our society. I think we would all agree
14 on that.

15 THE COURT: Actually, I wouldn't agree on that.

16 MR. CORNELL: Oh, all right. Sexual assault of a
17 minor child. Okay. You got me there.

18 THE COURT: The potential penalty for sexual assault
19 on a minor child is 35 years to life.

20 MR. CORNELL: Now it is, yeah. I think I would agree
21 with you on that. Okay.

22 Extremely serious charge. Not the kind of case for a
23 short trial. You cannot assume, of course, that a jury is
24 going to look at jury instructions as complex as the proximate