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 3 of 3

Rene Valladares
Federal Public Defender,
District of Nevada
*Kimberly Sandberg
Assistant Federal Public Defender
411 E. Bonneville Ave., Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
Kimberly_Sandberg@fd.org

*Counsel for Zachary Kelsey

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cause instruction, and so forth, and figure it out without some assistance, properly, of counsel. You just can't assume that.

Nor can you assume this. We know that Karl Hall is an extremely forceful advocate. I certainly know it. I've done battle with him, believe it or not. But if we sit here and say, with closing argument waived, what if Mr. Edwards was to say, "Look, ladies and gentlemen of the jury, even if we accept Dr. Omalu and Dr. Clark's testimony, all they're saying is that all blows contribute to the death. All they're saying is that what my client did was a cause, in fact, of the death of Master Hyde. That doesn't make him a murderer. It just means that he's guilty of some degree of crime. The evidence in this case, ladies and gentlemen, from all of the witnesses, from the force of the witnesses is, what he did was commit a series of batteries that in and of itself wouldn't have taken the life of someone else, but in connection with what the other guys did, did so, per Clark and Omalu. What the evidence suggests to you, ladies and gentlemen, is those two guys are guilty of second degree murder, but this guy, Kelsey, he's guilty of involuntary manslaughter."

Had Mr. Edwards made that argument -- and we don't know that -- what he would have done, because he waived it -- what would Mr. Hall have said to that in response? We don't know. Would he have said, "Ladies and gentlemen of the jury,

you'd better believe Mr. Opperman, and you'd better disbelieve Ms. Hawkinson, and you'd better disbelieve Mr. DePriest, and you'd better disbelieve Mr. Naastad, and you'd better disbelieve Mr. Molder, and you just better do it"? Would he have said that? I don't think so. But it's purely speculative to know.

When we talk about sufficiency of the evidence, what we're talking about is, while a jury could have cherry-picked Mr. Opperman's testimony and decided to believe him and disbelieve all the others in terms of the actual nature of the fracas between Mr. Kelsey and Master Hyde, and they could have decided, "We believe Opperman and not everybody else" -- I mean, from the appellate perspective, they had the right to do that.

In reality, did the jury do that? We don't know. But if a jury were otherwise inclined to do that, that's why testimonies of witnesses, such as Ms. C[redacted] and Mr. C[redacted] really would have been important to -- to turn the tables of the factual justice in this case away from Mr. Opperman.

What I will say about that is, taking on a murder case that has medicolegal issues like this is the center point, and not even hiring a forensic pathologist has to fall below the standard. Almost as egregious as taking on a murder case that

is so fact intensive, with so many witnesses, and not hiring an investigator to do anything. In effect, not hiring an investigator at all.

Our theory is not that Mr. Edwards should have gotten Mr. Peele to go out and absolutely interview everybody on the planet. That's not it. Our theory relative to Ground 7 is to go out and interview the witnesses who were actually closest to the fracas, see what they have to say. Those witnesses, apart from the ones that testified, were Ms. C[redacted] and Mr. C[redacted].

Isn't it strange -- I mean, the case isn't going to rest or fall on this -- that the State actually interviewed Ms. C[redacted] and decided not to call her? What do we make of that? I don't know. It's just a little hickey on the record, if you will.

In any event, I would urge the Court, of course, to take it under advisement and get the transcript of these proceedings. I think -- well, the Court has indicated, I think, it's going to take -- the Court is going to take it under advisement. I think that would be a good idea.

If you want a brief on cumulative deficiencies or cumulative errors and how it can result in either below the standard or prejudice, I'm happy to do that for you next week, though. And, otherwise, I'll submit, Your Honor.

THE COURT: Thank you, Mr. Cornell.

I do think it would be helpful to have a supplemental brief from both sides regarding the cumulative error issue, because I did raise it, and so I do like to give the parties the opportunity to fully brief issues once I've raised them. I don't want to write an order that you look back on and say, "Well, if I had the chance to say something about the issue that you raised during oral argument, this is what I would have said." And so I will give the parties the opportunity to brief that issue.

And I will also give Mr. Cornell the opportunity to recuperate --

MR. CORNELL: Thank you.

THE COURT: -- from whatever ails him today and yesterday.

The supplemental briefs will be no more than five pages in length. They will not discuss the facts of this case at all, because the facts have already been fully litigated. It is simply the opportunity to address the discrete legal issue that is raised.

And that's why I think five pages is more than ample. If you don't need to use five pages, then don't. Use fewer pages if you would like to.

The supplemental brief will be due no later than the

close of business on Friday, January 29th of 2015.

MR. CORNELL: '16?

THE COURT: 2016.

MR. CORNELL: Thank you.

THE COURT: I keep messing that up. So thank you, Mr. Cornell.

And, Mr. Cornell, if you would resubmit the motion for consideration. And by "the motion" I mean the Petition For Writ of Habeas Corpus. At that point, once I have all of the briefing, the Court will take it under advisement.

Further, the Court will order the transcripts of these proceedings, yesterday and today's testimony, so I can accurately review the testimony of Dr. Llewellyn in comparison to the testimony of Dr. Omalu and Dr. Clark and come to the appropriate decision regarding that very important issue that has been identified. And it will also give me the opportunity to compare the testimony of Mr. C[redacted] and Ms. Carlson to that of the other witnesses who have testified in the trial and see if I really think that their testimony is duplicative of the testimony that was provided by those other witnesses, to include Mr. Kelsey, or it actually would have added something that would assist the jury in their determination. I think it's appropriate to have the transcripts to make those comparisons, and so I will order the transcripts.

MR. CORNELL: Your Honor, may counsel have, also, copies of the transcripts? Because I think, in reality, whoever doesn't prevail is going up on appeal, most likely, so it would probably be a good idea to have the transcripts now rather than later, if that's okay.

THE COURT: Well, as soon as the transcripts are prepared, they get filed with the court. How you receive access to those, I have absolutely no idea.

MR. CORNELL: Oh, that's true. We can get them on eFlex.

THE COURT: Yes. So it will be --

MR. CORNELL: So, okay, that's fine.

THE COURT: It will be just filed with the Court and you will have the ability to get the transcript that way.

MR. CORNELL: Okay.

THE COURT: So with that, the Court will take the matter under advisement.

Thank you, Counsel.

Court is in recess.

(Proceedings concluded.)

STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

I, MARIAN S. BROWN PAVA, Certified Court Reporter in and for the State of Nevada, do hereby certify:

That the foregoing proceedings were taken by me at the time and place therein set forth; that the proceedings were recorded stenographically by me and thereafter transcribed via computer under my supervision; that the foregoing is a full, true, and correct transcription of the proceedings to the best of my knowledge, skill, and ability.

I further certify that I am not a relative nor an employee of any attorney or any of the parties, nor am I financially or otherwise interested in this action.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing statements are true and correct.

Dated this 29th day of January 2016.

/s/ Marian S. Brown Pava

Marian S. Brown Pava, CCR #169

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

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

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

MR. CORNELL: A general denial.

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

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

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

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

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

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

habeas corpus, and so Mr. Qualls can testify.

Go ahead.

MR. CORNELL: Okay. Thank you.

BY MR. CORNELL:

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

A I do.

Q And what is that?

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

Q By whom?

A That was filed by Mr. Edwards.

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

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

Q And Exhibit P, what is that?

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

Q Okay. And Exhibit Q, what is that?

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

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

A Did I drop something? Sorry.

Okay. Is the question "What is Q"?

Q Right.

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

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

A I'm trying not to drop this whole thing again.

Ground 1 is insufficient evidence; ground 2 is a complaint regarding certain demonstrative evidence that was admitted by the district court; and ground 3 is a claim involving the introduction of gang information which was claimed to be irrelevant in the case due to the fact that there wasn't a gang case, there wasn't any official gang charge.

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

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

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

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

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

BY MR. CORNELL:

Q And those are the issues you raised; correct?

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

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

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

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

MR. CORNELL: Right.

THE COURT: Therefore, everything --

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

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

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

THE COURT: He testified to what alleged.

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

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

THE WITNESS: That's correct, Your Honor.

THE COURT: Next question.

MR. CORNELL: Okay. Thank you.

BY MR. CORNELL:

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

A Yes.

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

A Yes, it does.

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

and Q.

THE COURT: Any objection?

MS. NOBLE: I have no objection, Your Honor. They're part of the record.

THE COURT: They will be admitted.

(Exhibits P and Q were admitted.)

BY MR. CORNELL:

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

A I do recall that.

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

A Yes, I considered raising that as an issue.

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

A At least three reasons.

Q Sure.

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

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

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

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

Q Sure.

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

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

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

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

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

Q Talking about the second degree murder charge conviction?

A Correct.

Q Okay. Without regard to proximate cause?

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

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

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

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

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

A Absolutely.

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

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

Q There wasn't.

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

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

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

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

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

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

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

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

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

BY MR. CORNELL:

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

A That's certainly how I took it.

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

A Absolutely.

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

A Yes, that would be the primary reason.

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

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

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

A Of course. And sometimes you have to.

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

A No.

Q Okay. Thank you.

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

THE COURT: Cross-examination, Ms. Noble.

MS. NOBLE: Thank you.

CROSS-EXAMINATION

BY MS. NOBLE:

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

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

Q Do you do jury trials often?

A No.

Q How many jury trials have you done?

A I think three.

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

A I would certainly agree with that.

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

A Okay.

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

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

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

A It was.

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

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

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

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

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

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

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

Q Certainly.

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

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

THE COURT: Ms. Noble.

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

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

BY MS. NOBLE:

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

A The last paragraph --

Q Not to your liking.

A -- on page 3 of --

Q The Order of Affirmance.

A -- Exhibit Q?

Q Yes, sir.

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

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

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

Q But just above that they do go through all the

medical evidence in this case, don't they?

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

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

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

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

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

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

A No, no relief was given.

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

THE COURT: Redirect based on the cross-examination.

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

THE COURT: Thank you, Mr. Qualls.

THE WITNESS: Thank you, Your Honor.

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

THE WITNESS: You too.

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

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

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

THE COURT: Sure.

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

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

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

MR. CORNELL: Correct.

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

(Exhibit R was marked and admitted.)

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

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

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

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

MR. CORNELL: Okay.

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

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

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

(A recess was taken.)

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

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

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

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

(The oath was administered to the witness.)

THE WITNESS: Yes.

SCOTT EDWARDS,

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

DIRECT EXAMINATION

BY MR. CORNELL:

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

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

Q And what city and state do you reside in?

A Reno, Nevada.

Q Your occupation, sir?

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

Q When were you admitted to practice in Nevada?

A 1988.

Q And have you been a criminal defense attorney

the whole time since your admission?

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

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

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

Q Don't blame you. Okay.

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

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

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

A Three I can think of at least.

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

A Yes.

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

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

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

A Okay. I'm looking at it.

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

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

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

A Oh, I see. One, two --

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

A Yes.

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

A It should, yes.

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

A That's right.

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

you submitted for payment?

A Yes, as far as I can tell.

MR. CORNELL: Move to admit L, please.

THE COURT: Any objection, Ms. Noble?

MS. NOBLE: Objection; relevance.

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

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

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

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

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

(Exhibit L was admitted.)

BY MR. CORNELL:

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

A Yes.

Q And when was that?

A It says in March of 2012.

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

A That's correct.

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

A Yes.

Q And what was that?

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

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

A The causation issue?

Q Yes.

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

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

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

A Yes.

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

A The instructions were submitted that way, yes.

Q Okay.

A That was available.

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

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

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

THE COURT: One moment. Found it. Go ahead.

BY MR. CORNELL:

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

A I did.

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

A I was certainly researching it, yes.

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

A That's correct.

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

A From Mr. Molezzo?

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

in Ned.

A Yes, I see it.

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

A I imagine I did, yes.

MR. CORNELL: Move for admission of N.

MS. NOBLE: Objection; hearsay.

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

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

THE COURT: Ms. Noble.

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

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

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

I think what would happen under those circumstances

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

MR. CORNELL: Thank you.

BY MR. CORNELL:

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

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

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

A Yes.

Q Okay.

A Distinctly.

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

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

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

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

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

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

MR. CORNELL: Well, I want --

THE COURT: Finish the question first.

BY MR. CORNELL:

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

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

A No.

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

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

Q Well, can you --

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

MR. CORNELL: I'm sorry.

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

BY MR. CORNELL:

Q Sure. And if that torquing motion factually

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

A I could have argued that, yes.

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

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

Q That's not what Dr. Clark said?

A Right, or Dr. Omalu.

Q Or Dr. Omalu. Thank you.

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

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

THE COURT: Mr. Cornell.

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

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

BY MR. CORNELL:

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

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

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

A Yes, I think so.

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

A No, I didn't.

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

A No, I didn't consider that.

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

A I can't recall.

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

A No, I don't think so.

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

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

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

Q And why not?

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

Q Let me ask you --

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

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

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

BY MR. CORNELL:

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

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

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

Q Now --

A But there were independent meetings as well.

Q Exhibit L, the fifth interim billing --

THE COURT: What date are you talking about?

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

THE COURT: Okay.

THE WITNESS: Yes.

BY MR. CORNELL:

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

A Yes. November 27th.

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

A Yeah, I'm sure we discussed that.

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

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

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

A That's right.

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

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

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

A No, I did not.

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

A Yes. Well, some of it.

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

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

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

A Prior to trial, no.

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

A No.

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

A Right.

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

A That's correct.

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

A Yeah, somewhat.

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

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

Q Wasn't that the implication?

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

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

A That was nowhere in the discovery anywhere.

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

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

Q When did you find that out?

A That was first day of trial.

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

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

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

A No.

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

A Yes. That was out of the blue.

Q Did you see that coming at all?

A No.

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

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

supremacy philosophy.

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

A That's right.

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

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

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

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

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

A If that's what he said.

Q Okay.

A That was the end of it.

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

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

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

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

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

A That's correct.

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

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

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

A I do remember preparing those instructions.

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

A Yes.

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

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

Q I mean, do you think --

A Whether they could have argued it factually?

Q Yeah, that's my question.

A Probably not.

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

A I believe so, yes.

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

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

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

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

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

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

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

A Well, I don't know about that.

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

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

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

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

Q In fact --

THE COURT: Let him finish answering the question.

MR. CORNELL: Well, he answered my question.

But go ahead.

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

BY MR. CORNELL:

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

A Yes.

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

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

MS. NOBLE: Objection; hearsay.

THE WITNESS: -- or something.

MS. NOBLE: Objection; hearsay.

THE COURT: Sustained.

BY MR. CORNELL:

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

A I don't know what --

MS. NOBLE: Objection; calls for speculation.

THE COURT: Sustained.

THE WITNESS: That wasn't --

I sustained the objection, Mr. Edwards.

BY MR. CORNELL:

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

A Not really. Not at all, frankly.

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

A I think that was where she left it.

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

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

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

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

Q Okay. Now --

THE COURT: No. Stop.

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

THE COURT: Mr. Cornell.

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

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

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

THE COURT: Then you can object.

MR. CORNELL: I am objecting.

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

objection, object.

MR. CORNELL: I appreciate that. I apologize.

THE COURT: Next question.

MR. CORNELL: Yes. Thank you.

BY MR. CORNELL:

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

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

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

A I don't know for sure.

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

A No, I didn't feel that way.

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

A I don't recall what she argued regarding

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

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

A By arguing for second degree murder?

Q Right.

A Right.

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

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

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

A What do you mean by "tough"?

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

A If you say so.

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

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

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

A I did.

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

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

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

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

Q And when you put him on the stand, you

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

A No.

Q Okay. He was not.

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

A Okay.

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

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

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

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

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

A It didn't, no.

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

A I didn't really see it that way.

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

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

A I don't think so.

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

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

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

A I would agree with that.

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

A I saw that in your petition.

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

A Not very distinctly, no.

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

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

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

A For Dr. Clark?

Q Yeah.

A No.

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

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

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

A The Order of Affirmance?

Q No, the document entitled Fast Track Statement.

A All right.

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

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

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

A Yes.

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

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

MR. CORNELL: Oh, is it?

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

apologize for being mistaken.

Exhibit O, any objection?

MS. NOBLE: No, Your Honor.

THE COURT: Exhibit O is admitted.

(Exhibit O was admitted.)

BY MR. CORNELL:

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

A Do you recall which claim that was?

Q Claim 3, pages 11 through 13.

A Yes, TM and Straight Edge affiliation.

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

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

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

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

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

they did?

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

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

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

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

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

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

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

Q Did you ever direct --

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

/////

BY MR. CORNELL:

Q Go ahead.

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

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

A I can't recall at all.

Q Okay. Looking at Exhibit --

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

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

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

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

THE COURT: Go ahead, Mr. Edwards.

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

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

Is that the one that was sealed?

THE CLERK: No. Exhibit L.

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

MR. CORNELL: Yes.

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

MR. CORNELL: Oh, that goes into L.

THE COURT: Into L.

MR. CORNELL: That explains that.

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

MR. CORNELL: Yes.

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

MR. CORNELL: Correct.

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

MS. NOBLE: No, Your Honor.

THE COURT: Exhibit M will be admitted.

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

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

Exhibit M is admitted.

(Exhibit M was admitted.)

BY MR. CORNELL:

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

A Okay.

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

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

A No, I don't.

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

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

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

A Yeah, typically.

Q Okay. So with the absence --

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

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

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

Q Now --

A I don't know about that.

Q You don't know about that?

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

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

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

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

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

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

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

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

BY MR. CORNELL:

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

A Quite a few.

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

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

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

A That's right.

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

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

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

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

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

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

A It was probably already testified to.

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

A It would have been consistent with it.

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

A Yes.

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

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

Q Okay. Now, let me reference -- suppose there's a witness out there, T[redacted] C[redacted], all right, and suppose her testimony would have gone something like this: She saw the fight between the two women. She saw Taylor Pardick break up the fight. She saw Pardick and Graves start to fight. She saw Graves knock out Ricky Bobby Boatman. She saw Hyde then come up behind Graves and then saw Kelsey come up behind Hyde and Kelsey threw a punch at Hyde, missed, grabbed his shirt, ripped the shoulder, kind of stumbled back forward, Hyde left the fight going towards the Durango walking normally. And it was several minutes later she's walking along that she sees Hyde laid out unconscious on the ground. And Mr. Kelsey did not have brass knuckles, and Mr. Kelsey was not in a gang.

Would all of that evidence have been consistent with your theory of the defense?

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

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

A Well, I believe they met head on basically.

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

A Yeah. Yeah, I think so.

Q Was there any strategic reason for not presenting it?

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

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

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

THE COURT: Why do you need to approach?

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

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

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

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

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

Go ahead.

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

THE COURT: Okay. Mr. Cornell.

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

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

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

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

Your next question, Mr. Cornell.

BY MR. CORNELL:

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

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

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

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

Hyde says, "Wait. No."

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

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

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

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

Q "Slept him."

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

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

A Right.

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

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

Q You knew what those witnesses were going to say, but you didn't know what Mr. Fallen and Mr. Smith and Mr. Simpson, the three witnesses that Ohlson called, were going to say prior to trial; correct?

A Right. The State told me that.

Q Pardon me?

A The State told me where they -- what they had

to do with on the morning of trial.

Q The first day of trial or when?

A I think the first day of trial.

Q So wait a minute. Let's get this straight. So you knew at the beginning of the trial that Mr. Ohlson was going to call three witnesses who were going to claim that Kelsey bragged that he killed Hyde; correct?

A Not necessarily that, but that he had bragged about having brass knuckles.

Q Okay.

A "Don't mess with me," or something like that.

Q So the State's investigators told you what they thought Kelsey -- what those three witnesses were going to testify to; correct?

A The witnesses were allied with Ohlson's client, Mr. Schneuringer, so, yeah, I put it together.

Q And you knew in the beginning of trial that they were going to claim something that's not true, that Mr. Kelsey did not have brass knuckles, there's no evidence from any seeing witness that he was wearing a pair of brass knuckles?

A I wasn't sure they were going to do that, but that's what I thought they were there for.

Q Okay. Well, did it occur to you then that,

wait a minute, if he's going to call witnesses who are going to claim this, that we really are running into inconsistent defenses and we need to have a severance?

A No.

Q I mean, because I'm understanding your testimony that Mr. Ohlson's opening statement is the first time you realize this, and it's a surprise to you, but what I'm understanding from you now is that the State's investigator told you what these three witnesses were going to say per what the investigator thought they were going to say.

A It might have been the prosecutor herself that told me.

Q Ms. Halstead?

A Yeah.

Q Okay. What exactly to your memory did Ms. Halstead tell you?

A I think she said "Did you know about this?" when Mr. Ohlson noticed the witnesses. And I believe one of them was Mr. Schneuringer's brother or relative. I was very closely allied with Mr. Schneuringer.

Q Are you talking about Karl Schneuringer?

A That may have been it. I can't remember. There was some medical emergency during the trial

involving a relative of his. I don't remember the entirety of it.

Q At any time did you consider the idea of moving for a severance based on inconsistent defenses?

A No.

MR. CORNELL: Let me check my notes. I think we've got a ruling on all the exhibits, so no further direct examination at this time. And I've stipulated with Ms. Noble that rather than, you know, limiting her cross to my direct and then having her recall Mr. Edwards as the State's witness, she can just ask whatever she wants to ask.

THE COURT: Well, I appreciate that stipulation. I would also note that NRS 50.115 gives the court the discretion to do exactly what you've suggested, that is, not limit cross-examination to simply the scope of direct but to allow it to be questions that could have been asked on direct. That's a rough way to paraphrase it, but the court has discretion to do that, and it's my practice to always do that in every case in every trial because I think it's just horribly inefficient to limit the cross-examining attorney's ability to question a witness who is here when the witness actually is here. So we might as well just question

them and have a full cross-examination. I only start limiting the questions to the scope of the previous questions on redirect and recross. So I appreciate the professionalism, Mr. Cornell, that you've shown to Ms. Noble. And I just do that anyway. Thank you.

Go ahead, Ms. Noble.

MS. NOBLE: Thank you, Your Honor.

CROSS-EXAMINATION

BY MS. NOBLE:

Q Mr. Edwards, in preparing for trial did you review the discovery that you received from the State?

A Yes.

Q Did that include transcripts of witness statements taken by the sheriff's office of the people that were at the party?

A Yes. There were a lot of them. I recall that.

Q Did you review them all?

A Um-hum. Yes.

Q With that in mind, I'm going to work backwards a little bit here. With regard to Z[redacted] C[redacted], I believe it is, Mr. Cornell asked you what if there were certain testimony out there; right? Do you recall that?

A Yeah, he asked me if this was inconsistent or

consistent with our theory.

Q What if I represented to you that most of or almost all of what Mr. Cornell represented to you was not documented anywhere until 2015, in other words, not contained in the sheriff's office interview and that the witness admitted that on the stand here today?

A What about that?

Q Right. Would there be another way for you to know that they were going to add more in a few years?

A No, I wouldn't know that.

Q And how does it look when you have a witness who talks to law enforcement and then at some later date makes up or -- sorry. Strike that -- has a very different story to tell, lots of details are added? Does that tend to look good to a jury in your experience?

A No. It happens, but it doesn't -- it's a source of cross-examination for sure.

Q Had anything in Mr. C[redacted]'s interview with the sheriff's office struck you as particularly helpful to you, would you have subpoenaed him as a witness?

A If there was something particularly necessary about that person, yeah. Yes.

Q Because you did not subpoena him; correct?

A I did not.

Q Is it safe to assume that you evaluated his statement and didn't see anything in there that was particularly helpful?

A That's right.

Q With regard to Ms. -- I'm going to try to say this name right -- C[redacted], same question. What if you were to learn that the details Mr. Cornell attributed to Ms. C[redacted] were not documented anywhere until 2015? Would that be something you should have known in 2012?

A No.

Q And you would have reviewed her interview with the sheriff's office as well; correct?

A I did.

Q Had there been anything particularly helpful would you have called her as a witness?

A Yes.

Q And last, Mr. S[redacted] L[redacted], the testimony presented was that it sounded like two rocks being hit together as Mr. Cornell just told you. Was there other testimony at trial that when Schneuringer and Jefferson were attacking the victim, it was a brutal beating?

A Oh, absolutely.

Q Multiple witnesses in fact?

A Multiple witnesses.

Q I'm going to move to the issue of the medical testimony in this case. In the Nevada Supreme Court's Order of Affirmance they recite a particular factual scenario, do they not?

A They do.

Q And that was a factual scenario that was set forth by the State at trial; correct?

A Yes. The approach that the Nevada Supreme Court took was in their recitation of facts they looked at the facts most favorable to the State that were adduced at trial.

Q Now, some representations were made to you about possible expert opinion that might have been, quote, out there. If that expert opinion were premised upon the assumption that Mr. Hyde was only jabbed once or twice by Mr. Kelsey, that would be one way you could present it to the expert, but that would not have been the only facts or scenario presented to the expert; correct?

That was a horrible question.

MR. CORNELL: Yeah, I'm not sure I understood it.

THE COURT: I think we're four for four that no one understands your question, even you, Ms. Noble, so I'll let you rephrase the question.

MS. NOBLE: I'm going to work on it, Your Honor. I apologize.

BY MS. NOBLE:

Q Do you think it would have made a difference if you had an expert testify that if Mr. Kelsey only hit Mr. Hyde once or twice he couldn't have caused the damage or might not have caused the damage that was later seen?

A Yeah, sure, that might have helped.

Q Now, how much --

A I didn't have anybody to say that, but --

Q How much do you think it would have helped, though, when the jury obviously rejected that factual scenario?

MR. CORNELL: Well, I'm going to object. That calls for speculation, and I don't think he can properly answer. We don't know what the jury would have done.

THE COURT: Ms. Noble.

MS. NOBLE: Well, he's been asked to speculate throughout Mr. Cornell's examination with regard to

wouldn't this have helped, wouldn't that have helped. My question is: Do you think that would have helped?

THE COURT: But there was no objection interposed, and Mr. Cornell has interposed an objection. I will sustain the objection because it's totally speculative what the jury may have done with that information.

I think that Mr. Edwards is allowed to testify whether or not he thinks that it would be of benefit, but he can't -- but the benefit is to him presenting the evidence, not what the jury's conclusion would be. That would be an attempt to crawl into the minds of the 12 jurors, and I don't think he's able to do that.

MS. NOBLE: Yes, Your Honor.

THE COURT: But I think he has testified and it's fair testimony that, yeah, if I would have known that, I would have put it on or it may have been helpful, but not that it specifically would have helped.

BY MS. NOBLE:

Q How would you describe your relationship with Mr. Kelsey?

A Oh, very good. We got along great the whole time. He was under a lot of stress, but we had open conversation and communication. I got to know a lot about him independent of the evidence in the case and

the trial itself. Kind of a learning experience for him, you know, so I got him prepared. You know, we were both very disappointed in the outcome.

Q Had Mr. Kelsey identified to you certain witnesses whose testimony would help him, would you have interviewed those witnesses or followed up on that information?

A Yeah. We went through the witnesses and talked about the people that were out there and what the trial would look like and who was saying what before trial. And I was interested in his relationship with particular people there, you know, Mr. Graves obviously. You know, he gave me his insight about who these people were and what happened in his opinion that night. So, yeah, I don't feel like I said no to him about "We shouldn't do that, Zach."

Q So if the supplemental -- I'm sorry -- the original petition alleges that Mr. Kelsey was essentially forced to testify because you refused to call witnesses that would help him, would that be accurate?

A No.

MR. CORNELL: I'm going to object. I'll let the petition speak for itself, but I don't know that I said

that.

THE COURT: She's saying the original petition, not the --

MR. CORNELL: Oh, the original petition. I withdraw my objection. Okay.

THE COURT: And the answer to that question was --

THE WITNESS: Was "No," Your Honor.

THE COURT: No, that would not be accurate?

THE WITNESS: No, that would not be accurate.

THE COURT: Next question.

BY MS. NOBLE:

Q With respect to the waiver of closing argument, when did you first make that decision?

A It was after Ms. Halstead's opening close. We took a break, a lunch break, somewhat extended break, and the idea was floated by Mr. Ohlson. We had all had the same kind of opinion, well, that we shared with each other during that break and that was a decision that we made.

Q What was the opinion of her close that you're talking about?

A Well, it wasn't the most vigorous closing argument I had ever seen in a prosecution, put it that way.

Q Had you ever seen Karl Hall do a closing argument?

A Yes.

Q Would you characterize that as, perhaps, more vigorous?

A Yes.

Q So was the decision to waive that close predicated in part on a desire to keep Mr. Hall from addressing the jury about the evidence in the case?

A Absolutely. Mr. Hall knew it too.

Q With respect to Mr. Ohlson's comment about Dr. Clark being brilliant, you stated that you did not object because that's, quote, his style?

A Yeah. He's flattering -- I don't know -- engaging, old school type. You know, I think he talked about how long they had been around this process and how many times they've, you know, been on -- in this relationship.

Q During direct examination Dr. Clark's qualifications were discussed; correct?

A Yes.

Q And her experience in terms of how many -- her experience with respect to the field of forensic pathology, that was discussed?

A Yeah, she set forth her qualifications.

Q Would it be safe to say that the jury probably didn't think that she was an unintelligent person?

MR. CORNELL: Well, objection. Again, same problem.

THE COURT: Sustained.

MR. CORNELL: We don't know what the jury thought.

THE COURT: That would be speculation. Sustained.

BY MS. NOBLE:

Q Okay. Did you feel that comment prejudiced your client?

A No.

Q Was Mr. Ohlson acting as an agent of the government or part of the State at that time?

A No.

Q So he wasn't vouching in terms of trying to put the power of the government behind the witness?

A No. It was a compliment. It was a polite ending to his examination.

Q What about him getting somewhat argumentative with Mr. Kelsey about "Did you know that Straight Edge used to be associated with neo-Nazi?"

A Yeah, that surprised me a little bit, but I believe Mr. Kelsey handled himself fine.

Q And so you made a strategic decision not to object?

A Yeah. It went by very quickly, and I thought Mr. Kelsey held his own. You know, I don't think they believed that he was a Nazi.

Q If you did object and asked for a limiting instruction, could there be some risk associated with that in terms of the jury's impression?

A Sure. It would be -- it would call more attention to it, emphasize it a little more, bring it up again.

Q With respect to -- you did not proffer a self-defense instruction; correct?

A I did not.

Q And your testimony earlier on direct was that the facts solicited at trial didn't seem to support it in your opinion?

A That's right.

Q Had you proffered it do you think it would have been given?

MR. CORNELL: Well, objection. That's speculation.

THE WITNESS: I know the law on it, but --

THE COURT: Hold on a second.

What's your response to the speculation?

MS. NOBLE: Well, what's being challenged is his trial strategy, so I have to ask him why he did or did not do certain things. I'm not asking about the jury's conclusion. Certain strategies are more successful with judges than others. Certain motions are worth making; certain are not. I mean, there is some judgment call involved in this.

THE COURT: Mr. Cornell.

MR. CORNELL: I don't disagree with any of that, but the specific question has to do with would Judge Elliott have given the instruction if he proffered it. Only Judge Elliott can say, and he's not here as a witness, understandably so. It's speculation.

THE COURT: The Court will overrule the objection for the following reason. It is a tactical decision that is made by Mr. Edwards. A defendant is entitled to a jury instruction on his theory of the case no matter how implausible assuming that there is some evidence that supports that instruction, but that doesn't mean that counsel needs to offer the instruction every time.

So it is an issue that has been raised in the petition for writ of habeas corpus, and I believe that Mr. Edwards has the right to respond to why he did not

choose to give that instruction.

Whether or not Judge Elliott would actually give the instruction is not relevant to me, because I agree, I don't know, but there has to be some explanation for why he chose not to do it.

Go ahead. So you can answer that portion of the question, why you chose not to do that.

THE WITNESS: I didn't think this was a self-defense case. I thought this was a simple battery by Mr. Kelsey. That was what I thought about this case, not a self-defense.

BY MS. NOBLE:

Q With respect to Dr. Omalu and Dr. Clark, you were asked why you did not seek to -- let me rephrase. Why didn't you seek to exclude their testimony on the basis that they didn't use the phrase "to a reasonable medical probability"?

A Exclude their testimony?

Q Yes.

A Prohibit the State from calling them as witnesses?

Q That is a claim in the petition, supplemental petition.

A I don't think I could do that.

Q Are you aware of any criminal case in Nevada that requires that?

A Perhaps I'm misunderstanding you. Are you saying keeping the State's witnesses from testifying, the experts?

Q Yes, because their testimony did not include that characterization, "to a reasonable degree of medical probability."

A I'm not aware that that's a requirement for their being able to testify, at least in a criminal case maybe.

Q You've answered my question. Thank you.

A Okay.

Q With respect to severance, what basis -- did you identify any basis to move to sever this case in the middle of the trial after Ohlson's statement?

A No. I didn't figure that was so antagonistic that it would warrant separate trials.

Q Was it your analysis that if you had made such a motion, it was likely to be successful?

A You know, I didn't really consider doing it, so I don't know what would have happened.

Q With respect to the references to Straight Edge and Twisted Minds, do you recall in a pretrial hearing

Judge Elliott heard argument from counsel about that?

A I don't think it was necessarily about Straight Edge so much.

Q Just the Twisted Minds?

A Twisted Minds. I remember it was either Mr. Molezzo or Mr. Ohlson saying, "There's no gang enhancement here. Why are you bringing this up?" And they -- whatever the record said. I think Judge Elliott ruled upon it, but it didn't have much to do with Mr. Kelsey as I recall.

Q Did you raise an issue pertaining to that in the original Fast Track Statement?

A If I could look and refresh my recollection.

Q Certainly. I believe it is Exhibit O. I don't know if you have the exhibits up there, Mr. Edwards.

A I do. I do. That would have been the third claim.

Q So you did raise that issue?

A Yes. I had researched the -- as well as talked to Mr. Kelsey about the nature of Straight Edge. My recollection is at that time there was a debate going on in the police department gang unit about whether they should be classified as a gang, so to speak, within the meaning of the law or some other kind of

affiliation.

Q But you argued that the court's call as to the res gestae analysis for references to TM or Straight Edge was incorrect?

A Well, that's in the appeal, yeah. Of course I did.

Q So are you sure that that wasn't addressed pretrial?

A I think it was. And I think the conclusion of the supreme court was that that was not a meritorious issue.

Q With respect to Mr. Kelsey's decision to testify, did he want to testify?

A Yes. I mean, he wasn't -- we spent a lot of time discussing that prior to trial. And then as the trial went on, you know, things would happen. I would say, "I'm going to ask you about this," you know. "Well, during your testimony you will be addressed about this issue or that issue."

And, yeah, he wanted to testify. I certainly didn't coerce him into getting on the stand.

Q Did he ever indicate to you that he felt that he had to testify because you had not called witnesses he wished to be called?

A No.

MS. NOBLE: The Court's indulgence.

BY MS. NOBLE:

Q Do you recall during the State's case Michael Opperman testifying that at that party Kelsey had brass knuckles, was telling people he had just gotten some brass knuckles?

A Somebody testified to that.

Q During the State's case?

A Yeah, somewhere along the line somebody testified about that.

Q Prior to Mr. Ohlson bringing up the subject of brass knuckles?

A I think it was part of -- it had been -- in my opinion I had diminished the, you know, probative value of whoever that was about that issue.

Q On cross-examination?

A Yeah. And Mr. Kelsey had, you know, flat out said that wasn't true. So I knew to look for that when it came up.

Q Mr. Edwards, I have no further questions for you at this time.

MS. NOBLE: I would pass the witness, Your Honor.

THE COURT: Redirect based on the

cross-examination, Mr. Cornell.

MR. CORNELL: Yes. Thank you.

REDIRECT EXAMINATION

BY MR. CORNELL:

Q In determining what witnesses to call or not call, basically you have to have an investigator go out and talk to them and the investigator has to report back to your feeling about the witness, whether the witness has problems or whether the witness is straight up; right?

A I don't necessarily feel that way.

Q Well, what's the role of an investigator in your practice then?

A Sometimes that very thing, but if I read the report, I watch the statement, I look at them -- you know, give a statement to the police with audio, you know, sometimes it's not very useful at all to send an investigator, especially with 43 juveniles in high school.

MR. CORNELL: The Court's indulgence.

BY MR. CORNELL:

Q But this case is one that deals with eyewitnesses. I mean, the State is going to present what it presents through witnesses as far as setting

the scene for the forensic pathologist; correct?

A They presented eyewitnesses, yes.

Q If there are eyewitnesses out there who at least are nearby the fight between Kelsey and Hyde, you would like to at least be able to shed some light on what that's all about. Don't you think it would be a good idea at least to send an investigator out to interview them to see specifically what it is they have to say, whether it's going to be helpful or not?

A Sometimes and sometimes not.

Q Okay. When would it be helpful?

A If it was pertaining to a critical issue that I couldn't find any kind of, you know, truth to in the other statements, corroborating evidence, things like that.

Q Okay. Well, when -- let me get at it this way. When was the decision made to put Mr. Kelsey on the stand?

A Not until -- I mean, effectively not until he got on the stand.

Q So middle of the trial?

A Yeah. And we discussed it long before, but, you know, depending on how the trial went, we were --

Q If there are witnesses out there that can give

some strength to his testimony, make his testimony appear more credible to a jury, don't you want to bring in those witnesses for that reason?

A Could be.

Q But you don't know whether there are witnesses out there that can do that until you interview them; is that correct?

A Well, if I know what they have to say already --

Q If you don't know what they have to say already, because you haven't interviewed them, then you can't bring them?

A Well, why wouldn't I know what they had to say if I read what they had to say?

Q Did you know in this case that in the cases of Z[redacted] C[redacted] and T[redacted] C[redacted] that they had additional information that they hadn't given to the deputy sheriff who interviewed them initially?

A Obviously not.

Q Okay. And you can't know that unless you send an investigator out to interview them prior to trial; correct?

A And I might not even know it then.

Q Now, let's talk about the waiver of the closing

argument. In the trials you've tried before, both murder and non-murder, had you ever waived closing argument?

A Never before.

Q This is a first?

A This is a first.

Q And --

A It might be the last.

Q Okay. And the waiver of the closing argument is something that Mr. Ohlson suggested. He brought the subject up; you didn't.

A He did.

Q Had Mr. Ohlson said nothing about that, you would have gone forward with your closing argument?

A I was prepared to do so.

Q Okay. And Mr. Hall cross-examined Mr. Ohlson's witnesses in a pretty tough style, wouldn't you agree?

A Yeah.

Q Okay. And if you give a closing argument, Mr. Ohlson will have to give a closing argument, and at that point we can anticipate that Karl Hall is going to come back and have some pretty harsh things to say about Mr. Ohlson's witnesses, would you agree?

A I don't know if Mr. Ohlson would have had to

give a closing argument, but Mr. Hall would have had the opportunity for sure.

Q Okay. And if that scenario happens, that doesn't help Mr. Ohlson at all; correct?

A I don't know.

Q Okay. Can you see where Mr. Ohlson had a good strategy reason for his client to waive argument?

A I can see that.

Q Okay. Can you see where Mr. Molezzo would have had a good strategy reason to join in that?

A Um-hum. Yes. And me as well.

Q But your client was in a different position than Schneuringer and Jefferson; correct?

A A little bit different.

Q Okay. I'm a little unclear, and maybe it was from the tenor of Ms. Noble's question, but in the supplemental petition I'm not suggesting that there should have been a limiting instruction on the neo-Nazi information. Can you think of a limiting instruction on that that would have been given?

A No. Did I say I should have requested a limiting instruction?

Q No. I mean, there was apparently the allegation that I claimed that you should have, and I

didn't claim that. I guess I'm asking you, what limiting instruction after Mr. Ohlson does that do you think maybe you could have given?

A I don't know. It could be stricken.

Q Yeah, I was going to say, wouldn't that be the procedure, you just do a motion to strike it?

A Or the judge instructs the jury to disregard it.

Q Right. Okay. Disregard it completely, not consider it only for a particular purpose; correct?

A Correct.

Q All right. You said that you weren't aware of any -- you didn't file a motion in limine to limit expert testimony on what is possible because you didn't know of any authority that might support that; correct?

A To keep Dr. Omalu and Dr --

Q -- Clark from testifying that possibly Mr. Kelsey's blows could have caused the fatality of Mr. Hyde.

A No, I didn't file that motion.

Q Okay. Were you -- and you were asked if you were aware of any authority that could have supported such a motion. Were you aware of Frutiger versus State from 1995?

A You know, I have been aware of Frutiger, but, I mean, if you're going to hold me to certain lines in it --

Q Well, do you remember in Frutiger's case that was where Dr. Ritzland talked about the cause of death possibly could have been natural causes, possibly could have been a criminal agency, and the Nevada Supreme Court reversed on sufficiency of the evidence. Do you remember that?

A That sounds familiar.

THE COURT: Wasn't Frutiger the case where --

THE WITNESS: The guy in the closet.

THE COURT: -- the victim was in the closet or in a car or something like that?

MR. CORNELL: Yeah. It was a three-to-two opinion.

BY MR. CORNELL:

Q And are you familiar with Higgs in the criminal realm but also the Hallmark v. Eldridge case in terms of gatekeeper duties of the trial judge in keeping out certain kinds of expert testimony?

A The stuff based on speculation you mean?

Q Right.

A I'm familiar with the concept, yeah.

Q Okay. So you were familiar with the concepts

that could have lent itself to a motion in limine; is that correct?

A Well, that's not the way I viewed Dr. Omalu's testimony in particular. I mean, he said every blow was a contributing factor to the demise of Jared Hyde. And he wouldn't shake from that opinion.

Q Okay. But he also said that a punch to the face could cause a subconcussion; correct?

A Okay.

Q And apparently Dr. Clark is not willing to go along with that. Did you know that?

MS. NOBLE: Misstates her testimony. Objection.

THE COURT: Sustained.

Don't respond to that question.

It's not that she won't go along with it. She just said she does not use that terminology.

MR. CORNELL: All right. She does not use that terminology. Thank you.

BY MR. CORNELL:

Q Were you aware of Dr. Omalu's testimony in that regard?

A About what?

Q About a punch to the face could actually cause a subconcussion only.

A That might have come out in his testimony.

Q In fact, it came out through your cross-examination, didn't it?

A Okay.

Q And if it's a subconcussion only, wouldn't it strike you that a subconcussion by itself wouldn't likely lead to the death of the person receiving the --

MS. NOBLE: Objection; calls for a medical conclusion.

THE COURT: It's beyond the witness's expertise unless you can lay some additional foundation.

BY MR. CORNELL:

Q Well, I mean, did you consider asking Dr. Omalu that question?

A I considered asking Dr. Omalu what I asked him. And I didn't get the answer I wanted, and I could not shake him from that opinion.

Q And wouldn't consulting with an expert, perhaps, enable you to better cross-examine Dr. Omalu and ask more focused questions to get the information you really want out of him?

A Perhaps. I didn't feel like I was undermanned. I just -- that was his opinion, and he was sticking to it.

Q I don't have any other questions. Thank you.

THE COURT: Recross based on the redirect.

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

THE COURT: Thank you for being here today, Mr. Edwards. You're free to go.

THE WITNESS: Thank you, Your Honor.

THE COURT: One moment.

Not you. You're free to go.

MR. CORNELL: Your Honor, actually I am going to --

THE COURT: Hold on one second.

MR. CORNELL: I'm sorry.

THE COURT: Counsel, rather than calling another witness today, we'll take our recess for the afternoon. It's about 20 minutes after 4:00. And so we will reconvene tomorrow. The Court does have its calendar in the morning that begins at 8:30, so I would anticipate being ready to go about 10:30 in the morning.

MR. CORNELL: Very well.

THE COURT: Tomorrow it might be a little bit later than that, but we'll get going as quickly as possible after the court's calendar.

MR. CORNELL: Your Honor, may I ask for tomorrow -- I mean, we'll finish the evidentiary portion for sure.

You had -- I thought you had indicated that you wanted to see the transcript of these proceedings before deciding. Maybe I misunderstood.

THE COURT: No, I just said that I guarantee you that I will read Mr. Ohlson's transcript from the deposition, which I did while we were on recess waiting for Mr. Edwards to be here. So I've read that. I have copies of the transcripts on my computer.

MR. CORNELL: From the trial.

THE COURT: From the trial. So I've got the entire trial transcript. And the reason I referenced that was if there was ever an opportunity or a necessity, I should say, for counsel to direct me to something in the transcript, I would be able to immediately pull it up.

MR. CORNELL: Okay.

THE COURT: It's not sitting here on the bench. I don't want you to think I don't have access to it as we sit here. All I have to do is click something on my computer and I've got the whole transcript right there. You could direct me to whatever line and page you wanted me to look at.

MR. CORNELL: Okay. Point being you want us to argue tomorrow after the evidence is done?

THE COURT: If we get to that point, that would be great.

MR. CORNELL: I think we will.

THE COURT: Excellent. If not, we can come back and reschedule it for some additional time in the near future. I know that my calendar on Friday is completely booked up. So I've got my calendar in the morning and then I've got you guys set for the rest of the day tomorrow. So assuming we get it finished, then we will go to argument. And by "it" I mean the testimony.

What I will not do is bifurcate the arguments. I think that would be unfair to you, Mr. Cornell, if I had you argue first and then we take a break and then Ms. Noble gets to go and prepare a more extensive argument in response to what you're doing immediately after the close of evidence.

So if I don't think we can do the closing arguments all at once, then we reschedule it for some later time. But if I think we can get them all done, then we will do so.

MS. NOBLE: Yes, Your Honor.

THE COURT: Court's in recess.

(The proceedings were adjourned at 4:20 p.m.)

STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

I, LORI URMSTON, Certified Court Reporter, in and for the State of Nevada, do hereby certify:

That the foregoing proceedings were taken by me at the time and place therein set forth; that the proceedings were recorded stenographically by me and thereafter transcribed via computer under my supervision; that the foregoing is a full, true and correct transcription of the proceedings to the best of my knowledge, skill and ability.

I further certify that I am not a relative nor an employee of any attorney or any of the parties, nor am I financially or otherwise interested in this action.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing statements are true and correct.

DATED: At Reno, Nevada, this 31st day of January, 2016.

LORI URMSTON, CCR #51

LORI URMSTON, CCR #51

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Case Title:	STATE VS. ZACH KELSEY (D10)
Document(s) Submitted:	Points and Authorities
Filed By:	Jennifer Patricia Noble

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#7747
P. O. Box 11130
Reno, Nevada 89520-0027
(775) 328-3200
Attorney for Respondent

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE

* * *

ZACHARY KELSEY,

Petitioner,

v. Case No. CR12-0326B

THE STATE OF NEVADA, Dept. No. 10

Respondent.

_____/

STATE'S POST-HEARING POINTS AND AUTHORITIES REGARDING CUMULATIVE ERROR

Pursuant to *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), a finding of ineffective assistance of counsel must be supported by both deficient performance and actual prejudice. The second part of a *Strickland* analysis—the question of prejudice—has been approached differently by various courts. No decision of the United States Supreme Court indicates that the doctrine of cumulative error may be properly applied to satisfy the prejudice requirement for claims of ineffective assistance of counsel. *Accord Moore v. Parker*, 425 F.3d 250, 256 (6th Cir. 2005); *Lorraine v. Coyle*, 291 F.3d 416, 447 (6th Cir. 2002); *Baze v. Parker*, 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

judicial confidence in a conviction. While many federal circuits recognize claims of prejudice based on cumulative error, the Fourth, Sixth, Eighth, and Eleventh Circuits do not allow errors not individually unconstitutional to be added together to create a constitutional violation. *See Ballard v. McNeil*, 785 F. Supp. 2d 1299, 1336 n. 22 (N.D. Fla. 2011); *Wainwright v. Lockhart*, 80 F. 3d 1226 (8th Cir. 1996); *Fisher v. Angelone*, 163 F.3d 835, 852-3 (4th Cir. 1998). *See also* Ruth A. Moyer, To Err is Human; To Cumulate, Judicious: The Need for U.S. Supreme Court Guidance On Whether Federal Habeas Courts Reviewing State Convictions May Cumulatively Assess *Strickland* Errors, DRAKE L. REV., Winter 2013, at 453-474.

Other circuits are muddy on the issue, demonstrating ambiguity and inconsistency in their willingness or unwillingness to apply the cumulative doctrine in a *Strickland* analysis. *Id.* The Ninth Circuit is no exception. In *Harris v. Ramseyer*, 74 F. 3d 1432 (9th Cir. 1995), the Ninth Circuit considered whether the cumulative impact of multiple deficiencies prejudiced the defense, and aggregated 11 deficiencies to satisfy the prejudice requirement. The *Harris* court noted, however, that "[w]e have found prejudice resulting from cumulative errors only once in the post-*Strickland* era." *Harris*, 64 F. 3d at 1438 (*citing Mak v. Blodgett*, 970 F. 2d 614 (9th Cir 1992). Less than ten years later, the same court declined to add errors not individually unconstitutional together to support reversal. In *Mancuso v. State*, 292 F.3d 939 (9th Cir. 2002), the court explained:

> Cumulative error applies where, "although no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant." *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir.1996). Because there is no single constitutional error in this case, there is nothing to accumulate to a level of a constitutional violation.

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)).

///

For its part, the Nevada Supreme Court appears to disfavor cumulating instances of deficient representation to create prejudice. In *McConnell v. State*, 125 Nev. 243, 259, 212 P.3d 307 (2009), the court was "not convinced that this [cumulative error] is the correct standard" as applied to a *Strickland* prejudice analysis. Though it acknowledged a split of authority among courts as to this issue, the *McConnell* court also cited an 8th circuit opinion holding that "[e]ach claim of a constitutional deprivation asserted in a petition for federal habeas corpus must stand on its own, or, as here, fall on its own." *McConnell*, 125 Nev. 243, fn. 17 (*internal citation omitted*). [1]

In some earlier Nevada decisions, the court has considered assertions of cumulative error in the context of a post-conviction petition. But the analysis in those decisions still treats each claim of ineffectiveness individually. *See Doyle v. State*, 116 Nev. 148, 995 P.2d 465 (2000)(where petitioner sought habeas relief based on cumulative error theory, individually evaluating each claim for prejudice, and denying relief); *Evans v. State*, 117 Nev. 609, 848; 28 P.3d 498 (2001)(where petitioner sought relief based upon cumulative error, analyzing each claim individually for both deficient performance and actual prejudice.)

Even courts applying the cumulative error doctrine in a habeas context do so inconsistently and rarely. With regard to the deficiency prong of the *Strickland* test, "judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for

---

[1] In his "Post-trial Brief," Petitioner cites to two recent unpublished Nevada Supreme Court Decisions, *State v. Elmazoub*, 2015 WL 9464444 (December 18, 2015) and *Chappell v. State*, 2015 WL 3849122 (June 18, 2015). The State notes that while ADKT 504 repealed Nevada Supreme Court Rule 123 forbidding any citation to unpublished authorities, the change only applies to those cases decided after January 1, 2016. Second Judicial District Court Rule 10 (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*."

a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984). In the absence of a showing that counsel's performance was tantamount to no legal representation at all, *see United States v. Cronic,* 466 U.S. 648, 654-55 (1984), finding that counsel's performance was repeatedly and cumulatively deficient is not a substitute for the prejudice portion of the *Strickland* test. Adding otherwise harmless errors together in order to support a prejudice finding only increases the risk that a court will use hindsight and subjective standards of reasonableness to overturn a conviction. This Court should not apply the cumulative error doctrine by adding errors of non-constitutional dimension together to purportedly satisfy the prejudice requirement.

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED: January 29, 2016.

CHRISTOPHER J. HICKS
District Attorney

By /s/ JENNIFER P. NOBLE
JENNIFER P. NOBLE
Appellate Deputy

CERTIFICATE OF SERVICE

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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Case Title:	STATE VS. ZACH KELSEY (D10)
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SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

THE HONORABLE ELLIOTT A. SATTLER, DISTRICT JUDGE

--oOo--

ZACH KELSEY,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. CR12-0326B

Dept. No. 10

TRANSCRIPT OF PROCEEDINGS
EVIDENTIARY HEARING

Volume 2 of 2
Pages 253-362

Thursday, January 14, 2016
Reno, Nevada

APPEARANCES:

For the Plaintiff — JENNIFER P. NOBLE, ESQ.
Deputy District Attorney
1 South Sierra Street, 4th Floor
Reno, Nevada 89501

For the Defendant — RICHARD F. CORNELL, ESQ.
Attorney at Law
150 Ridge Street
Reno, Nevada 89501

I N D E X

-oOo-

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

have always been very professional, and so no apology is necessary. It's just one of my pet peeves, if we have judicial pet peeves, is, I just can't stand it when people talk over the top of each other. So that was the only point I was trying to make, and I appreciate the apology, but it was unnecessary.

MR. CORNELL: Thank you, Your Honor.

THE COURT: And if you are not feeling well -- I don't know what "not feeling well means" -- but if you need to leave the courtroom in a hurry, please feel free to do so.

MR. CORNELL: I will let you know.

THE COURT: Okay.

MR. CORNELL: I don't think that will happen, but if it does, I'll let you know.

THE COURT: All right.

MR. CORNELL: All right. I'll call Mr. Kelsey.

THE COURT: Okay. Mr. Kelsey, if you could please stand and raise your right hand to be sworn as a witness.

ZACH KELSEY,

being first duly sworn by the clerk

was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CORNELL:

Q. Please state your name for the record once you are

ready to go.

A. Zach Kelsey.

Q. Okay. And are you the petitioner in this case?

A. Yes, sir.

MR. CORNELL: Your Honor, I am going to have just two limited areas of inquiry for Mr. Kelsey.

BY MR. CORNELL:

Q. Number one, in your meetings and conferences with Mr. Edwards, at what point in time was the decision made for you to testify?

A. If not the morning of my testimony, it would have been the day before, after Mr. Ohlson called his witnesses.

Q. Okay. And what was the reason for you taking the stand?

A. To rebuttal what those witnesses said. There was no chance to prep for that. As he said, he found out about it the day -- the first day of trial.

Q. Before you heard Mr. Ohlson's opening statement and the testimony of those witnesses, did you know that those witnesses were out there to testify to what they testified to?

A. No.

Q. All right. Second limited area of inquiry.

In your pretrial meetings with Mr. Edwards, did you bring up the subject of interviewing Ms. C[redacted] and/or

Mr. C[redacted]?

A. Yes. On numerous occasions I told Mr. Edwards that I wanted to speak with an investigator so we could flesh out who -- who he should go talk to.

Q. Why did you want the investigator to talk to those particular issues -- to those particular witnesses? I'm sorry.

A. Because those were witnesses that I knew were in the area during my altercation with Mr. Hyde.

Q. Okay. Having now heard their testimonies yesterday, would you have wanted Mr. Edwards to present those testimonies at trial?

A. Absolutely.

Q. And why do you say "absolutely"?

A. Because what they had to say corroborated my defense.

Q. Okay. Meaning -- meaning what, exactly?

A. That my altercation with Jared Hyde was very brief and it was a mutual combat situation.

Q. Okay.

MR. CORNELL: All right. I have no further questions.

THE COURT: Cross-examination, Ms. Noble?

MS. NOBLE: Your Honor, I believe that Mr. Edwards covered these areas in his testimony yesterday. I have no questions for Mr. Kelsey.

THE COURT: Mr. Kelsey, thank you for your testimony

today. You may step down.

MS. NOBLE: Your Honor, in an abundance of caution, I did have Mr. Edwards outside in case I needed to call him in rebuttal today. May I let him go?

THE COURT: You can let him go if you don't want to recall him. I don't know if anything that Mr. Kelsey just testified to would cause you to recall him. That's --

MS. NOBLE: It would not, Your Honor.

THE COURT: Okay. Then he's free to go.

DEPUTY SHERIFF: I can let him know.

MS. NOBLE: Thank you.

MR. CORNELL: With that testimony, Your Honor, the petitioner would rest.

THE COURT: Okay. Thank you, Mr. Cornell.

Ms. Noble, do you have any witnesses that you would like to call?

MS. NOBLE: No, Your Honor.

THE COURT: Okay. Well, as was predicted late yesterday afternoon, we'll move right into argument.

Counsel, in speaking with my staff after the hearing yesterday, I think I pieced together, possibly, why it is you think that I was going to need a transcript, or the nature of the transcript comment.

I did mention during my comments in response to an

objection that was made by Ms. Noble, if I remember correctly, about the phrasing of certain questions by Mr. Cornell in his description of hypothetical situations, and the hypotheticals were about the testimony that Mr. C[redacted], Ms. C[redacted] and Mr. L[redacted] (phonetic), I believe was his name--

MR. CORNELL: L[redacted].

THE COURT: -- L[redacted] not even close -- had provided. And my comment was, is that I can go back and look at the transcript and compare what they actually said to the testimony -- or, excuse me, to the way that Mr. Cornell phrased the question.

I won't be waiting for a transcript of these proceedings. However, if I need one, I can certainly order one. I think it would have been more accurate for me to say I can review my notes and I can judge the way that the question was phrased by Mr. Cornell and make a determination based on that. But it's not -- there's no transcript needed. Let's put it that way.

MR. CORNELL: Sure. That's fine.

THE COURT: Go ahead, Mr. Cornell. I have your petition here with me, I've got all of the exhibits, and so you may proceed with argument.

MR. CORNELL: Thank you, Your Honor.

If it please the Court, I try to be extremely thorough

in my supplemental petitions in the hopes that it will cut down the necessity of saying too much at this point. But in this case, there is more to be said, and particularly so since the trial judge happened to be the Honorable Steven Elliott.

There are some -- and I'm very, very well aware of the Strickland standard. And let me start with that. There -- in a case like this where you are doing an expanded record, presenting witnesses who were never presented at trial, the issue, in a sense, becomes one of prejudice, the prejudicial prong in Strickland. As we all know, if the petitioner doesn't carry its burden on prejudice, he loses. He's got to carry his burden on both prongs, both below the standard and prejudice.

And there are some cases out there, quite frankly, where -- where a habeas petitioner is never going to be able to establish prejudice. There are some cases out there where the defendant went to trial so plainly guilty as charged that you can establish that the trial lawyer didn't do this or didn't do that, or did something that was -- he shouldn't have done or she shouldn't have done, and at the end of the day you can even say the lawyer fell below the standard of reasonably effective counsel, but the petitioner wasn't prejudiced because a reasonable jury, hearing things differently, the way the habeas petitioner now says it ought to have been heard, wouldn't have come to any other conclusion but guilty as charged.

THE COURT: Arguably the defense attorney sleeps through the trial, and the defendant is so clearly guilty, it wouldn't have mattered anyway.

MR. CORNELL: You can have that -- you can have that happen. I've seen published opinions where, in fact, that's been the result.

And I would suggest to you, Your Honor, that this is not that case. When you have Mr. Edwards telling you, "I thought it was" -- "I was very disappointed in the jury verdict," you know something isn't quite right. When you have Mr. Qualls stating his frustration --

THE COURT: Well, hold on a second, Mr. Cornell. I ask a lot of questions, and so I want to interrupt you right there.

Why does Mr. Edwards' disappointment in the jury verdict demonstrate to me that something isn't quite right?

MR. CORNELL: It -- it -- no. It sets the -- all right. I'll get to my argument in a slightly different way.

There is enough in this record to suggest that if a reasonable jury hears the rest of the story as we presented it, there is a reasonable likelihood -- certainly a reasonable possibility -- that that jury comes to a different result.

And if I may expound from there?

THE COURT: Okay.

MR. CORNELL: Okay. It has been suggested by the State that I've misstated what the actual evidence was and what my client actually did. So let's clear that up.

Looking at the testimony of Aubree Hawkinson, which is at page 1425 of your transcript, she is asked:

"All right. And did you see-- while that was going on did you notice where Jared Hyde was?"

Talking about the fracas near the bonfire. Her answer is:

"No, not until they came around the tree and Ricky Bobby got into the middle of it. And then Jacob and him got into like a very short fight, it was Jacob pretty much hit Bobby, he was out. And then out of the corner of my eye Zach grabbed Jared by the shirt and kneed him in the face and hit him a couple of times.

"Question: Zach --

"Answer: Zach Kelsey, I think that's his last name, yeah.

"Question: All right. You saw that?

"Answer: Yeah."

So that witness is talking about two hits and a knee to the face.

Brandon Naastad testified at trial. His testimony, as appears at pages 1178, -79, and -88. At -79 and seven -- at

page 1179, he's identifying Zach Kelsey as the one that he sees. Mr. Hall doing the examination:

"All right. So you said you saw they were kind of struggling, pulling the shirts off and then Jared was hit a couple, three times?

"Answer: Yes.

"Mr. Edwards: Objection; leading.

"By Mr. Hall: Was that your testimony that you just told us?

"Answer: Yes, he was hit a few times after his shirt got pulled off.

"Question: All right. And then what happened after that?

"Answer: He got hit a few times and then they broke that up. I don't know who broke it up. It was somebody that broke it up. And then Jared went to a car that was down here just to get away from everyone and everything. And then that was it for the Jared thing until later on."

So then we have Brandon Molder's testimony. And this appears at page 1409. And this is in Mr. Edwards' cross-examination:

"Mr. Molder, when you saw Jared Hyde wrestling on the ground, did you see who he was wrestling with?

"Answer: No.

"Question: Okay. So you don't know what that was about?

"Answer: No.

"Question: Can you tell us how long it went on?

"Answer: I just saw them for a couple seconds when I looked over there, because there was so much stuff going on. I just remember seeing him wrestling somebody over there."

So we don't know exactly how many blows were thrown, where on Mr. Hyde's body Mr. Kelsey's knee went, which is understandable because you're talking about a bonfire with very limited ambient lighting, a fracas near that. We don't know whether it was two punches, as Ms. Hawkinson and yesterday Ms. C[redacted] said. We don't know if it was more than two, possibly three, as Mr. Molder indicated it might have been. We don't know whether the knee happens while they're wrestling on the ground or whether they're standing up. I said Mr. Molder when I meant Mr. Naastad. Per Mr. Molder, maybe it happened while they were wrestling on the ground. But I don't know that any of that matters.

What we do know, what can't be controverted, is that at the end of this fracas that lasts 20 seconds, maybe, they both get up, they both walk away. They're broken up, they get up, whatever. They both walk away. Mr. Hyde walks 50 feet up the hill towards the Dodge Durango. And from the perspective

of the witnesses who see it, there's nothing wrong with him at that point.

And it begs the question, even if you can somehow link those punches to the death of Mr. Hyde, even if you can do that, how from there do we determine that those punches or that knee or acts are inherently dangerous to life? I know that that's what Mr. Qualls's frustration about this case ultimately was, and I share that. How can that be? The best we can say at this point is it is not a strong case for second degree murder, because this case has that question begging at it.

The only thing that we can say from this record on how a jury could have gotten there from hearing the evidence, and how the Nevada Supreme Court could have upheld it, was the testimonies of Drs. Clark and Omalu that every blow contributes. And the notion that somehow Mr. Kelsey and Mr. Schnueringer and, slash, Mr. Jefferson are somehow associated, that somehow they're acting in concert in this case.

And what we have established in this hearing is those two assumptions are not carved in stone, whatsoever. If a jury hears the additional evidence that we presented, we can't say that they are going to, nevertheless, find Mr. Kelsey guilty of second degree murder. But could they have found him guilty of involuntary manslaughter? More likely. Could they have found

him guilty of misdemeanor battery? Even more likely. That's our position. But with that setup in mind, let me go to the grounds.

And I will tell you this, I am going to be thorough. We're both thorough, but I am going to tell you, tipping my hat, the grounds that I really think the Court needs to concentrate above all are Ground 1(b) and Ground 3. One(b) is the one that charges counsel being ineffective for not having a forensic pathologist to testify, and Ground 3 is the one that charges counsel is ineffective for waiving closing argument. I think -- I don't want to diminish everything else I've written by any means, but I think those are the grounds that really jump out in this case.

Now, Ground 1(a), which is counsel should have challenged the admissibility of this "possibility evidence" of Dr. Clark and Dr. Omalu at all. The State asks, "Where is that from?" And in the petition my argument was: Well, wait a minute. If -- if we say -- I mean, not "we." If the Nevada Supreme Court says that in a medical malpractice case when an expert witness comes in and testifies to cause of death, it has to be to a reasonable degree of medical probability, why is there a higher standard in a medical malpractice case than there is in a criminal case when the criminal case has the highest burden of proof, guilt beyond a reasonable doubt, and,

I would submit, the most severe consequence, which is potential life imprisonment. Why? Why is that?

The Court hasn't addressed that. What the Court has said is interesting, in the West case, in the Berkey West case from 2003. There are some cases where the State doesn't have to bring in an expert at all. You know, the facts of cause of death just from the surrounding circumstances are there.

There are other cases, like the Middleton case, where it may be ripe with possibilities, but we can look at the surrounding circumstances and say the cause of death had to have been what the defendant did.

But we also, as I indicated yesterday, have the Frutiger case. And the cite for Frutiger, by the way, is 111 Nev. 1385, 907 P.2nd 158, where Dr. Ritzlin is talking about the possible -- possible methods of death in that case, and the Court makes pretty clear in reversing and vacating the judgment that possibility isn't enough.

And in this case -- oh. And we also have Hallmark vs. Eldridge, where the Nevada Supreme Court -- that one -- cite is 124 Nev. 492, 189 P.3rd 646, a 2008 -- where the Supreme Court holds that a biomechanical expert should not have been allowed to testify in a negligent action involving an automobile accident because there was no demonstration that his testimony was based on a reliable methodology and, therefore, his

testimony didn't assist the jury in understanding the source of injury the motorist sustained when a truck driver backed a company truck into the driver's side of the motorist's vehicle, and it was reversible error to allow that in.

Now, I'll grant the State's point in a way. You know, what specific manner do we have that would allow an expert -- excuse me -- allow a District Court on a motion in limine to keep that expert's out -- testimony out beyond all that, beyond the burden of proof.

And it kind of came out yesterday, quite frankly. I had talked to Dr. Clark about second impact syndrome, and that's the medical syndrome where the brain swells rapidly when there's a first hit, and then a short period of time after that there's a second hit.

She wasn't testifying at trial about second impact syndrome per se, but what she was testifying about, I would submit, is something very similar to that. And when I confronted her, just by reading the Wikipedia article on second impact syndrome and the fact that due to poor documentation of the injury, some professionals think it's overdiagnosed and some doubt the validity of the diagnosis altogether, her answer is, "Well, I haven't studied second impact syndrome."

But she's testifying to something that if it isn't second impact syndrome, it's awfully, awfully close. I -- and

my question is: How can you take the stand and testify to something that is equal to or very closely related to a phenomenon you haven't studied?

It seems to me that if it comes out in a motion in limine, and that's how the testimony goes, a district judge well exercises his discretion, saying, "You're talking about possibility on a theory that you haven't studied. The jury doesn't hear that. As the gatekeeper, I keep that out."

I would certainly hope the Nevada Supreme Court would ultimately agree with that observation, especially in a criminal case where the standard is beyond a reasonable doubt. It bothers me tremendously that doctors can come in and talk about possibilities, and somebody can be sentenced potentially to life imprisonment based on what's merely possible, as opposed to probable, but --

THE COURT: But the analysis that a criminal case, the ultimate burden of proof is higher than in civil cases and, therefore, we should somehow bring that standard over doesn't really work, in my mind, at this moment, Mr. Cornell. Because beyond a reasonable doubt isn't a standard regarding everything in a criminal case. As we know, there is a preponderance of the evidence standard to certain things. Petrocelli evidence, for example.

MR. CORNELL: Clear and convincing.

THE COURT: Right. Clear and convincing. I apologize.

MR. CORNELL: Yes.

THE COURT: I said "preponderance."

But there are all kinds of different standards that are applied in criminal cases that are much more lenient than beyond a reasonable doubt.

MR. CORNELL: Well, sure. And another example is allowing in hearsay of a co-conspirator, although that -- that creates a separate can of worms. But we have the old McDowell case that says only slight evidence of the conspiracy is allowed before we allow it in.

In any event -- and as I indicated before, you have the West case that says you don't need a forensic pathologist to testify to cause of death at all, in certain cases like that one.

THE COURT: Yeah. If I shoot you in the head and you drop dead --

MR. CORNELL: Yeah.

THE COURT: -- I don't need a pathologist to come in and say that you died from the big hole in your head.

MR. CORNELL: Right. If we find your dead body buried six feet under in the desert years after the fact -- I think sort of playing the facts of West -- we can infer death by

criminal agency just from the facts. But in this case, as I said, if you look at the testimonies of those witnesses that I just read in, plus the two that we heard yesterday, and Mr. Kelsey, how did we go from a brief skirmish to an act that inherently causes, you know, the inevitable death of life or whatever your standard of 200.070 is? In this case how do we get from that to the cause of death under the facts of our case? It has to come from the experts.

And I don't think anybody can look at this record and disagree with us. The key witnesses against Mr. Kelsey in this case, the witnesses who sunk his ship, were Dr. Clark and Dr. Omalu. If this case is tried without them, I don't see any reasonable jury finding second degree murder on this case if it's presented right.

Now, that leads into Ground 1(b), which is --

THE COURT: Hold on a second. Let's take -- let's take that last thought that you just had. So you're saying that if the State tried to prove this case without Dr. Clark and without Dr. Omalu, there is no way that there would be a conviction. I don't disagree --

MR. CORNELL: Of second degree murder.

THE COURT: I don't disagree with that at all.

MR. CORNELL: Okay.

THE COURT: But why would I have -- why would I go

with that supposition that the State somehow would come in and try and present a case of the nature of Mr. Kelsey's, Mr. Schnueringer's, and Mr. Jefferson's, and not present evidence, expert testimony, on cause of death?

Is it your argument that just they should have been kept out? There should have been a motion in limine filed, Dr. Omalu and Dr. Clark shouldn't testify and, therefore, the State would be left with nothing other than the description of the facts as they were relayed by the witnesses to the altercations that resulted in Mr. Hyde's death?

MR. CORNELL: As far as my client goes, that is my position. As far as Schnueringer and Jefferson, I don't think so. I think -- I mean, my opinion is Schnueringer and Jefferson were good for the second degree murder conviction with or without Drs. Clark and Omalu. But I -- my position is very different with my client.

But that leads to the next point. Let's suppose Mr. Edwards files his -- his gatekeeper motion and Your Honor or Judge Elliott denies it. Then what? Why -- you know going in as Mr. Kelsey's lawyer that the key witnesses are the two doctors. Why on earth would you not at least consult with a forensic pathologist and, if necessary, call that pathologist to testify to create that evidence to give the jury something to weigh, to give the jury something to say, "Hey, wait a

minute. There's another way to look at this evidence medically, and if we look at it the way the defense pathologist says, we come to a different result." Why wouldn't you do that?

Yesterday I read to Mr. Edwards when he testified John Ohlson's exact description of what Dr. Terri Haddix would have testified, the expert that he retained, and I asked him if that kind of evidence would have been available for you, would you have wanted to present it? He said, "Yes."

I then read to him the bottom-line opinion of Dr. Llewellyn -- not all of the sub-opinions, but the bottom line -- if that evidence had been available to you, would you have wanted to present it? And the answer is, "Yes." That's what he testified to.

And certainly the answer has to be yes if you are defending Mr. Kelsey. Because what that testimony does is it forces the jury to say, "Wait a minute. Let's get out of the possibility realm." You know, let's -- let's not take it at face value that if a victim suffers a number of blows, they all are the cause of death. Maybe in some other case that's true, like the one that I described to Dr. Clark when three assailants are just pummeling somebody simultaneously. That's not this case, of course. That forces the jury to weigh evidence. And if -- could a reasonable jury credit

Dr. Llewellyn or presumably Dr. Haddix or whoever else the defense may call that's consistent with them, could that happen? Absolutely it could happen.

And I will tell you something else. I was shocked when I asked Dr. Clark the question, the hypothetical question, "Suppose this scenario: Defendant one punches the victim in the cheek twice, the victim walks away, goes and eats lunch or dinner, comes out of the restaurant 25 minutes later. Assailant number two comes from behind and hits him in the head with a shovel and he dies of subarachnoid bleeding. Are you saying that number one's punches are not contributory?"

She says, "Oh, no, I'm not saying that."

I would submit it for your consideration. A reasonable jury, acting on common sense, could hear that and say, "Un-huh. No, we're going to credit Dr. Llewellyn," or Dr. Haddix if she's the one, or whoever. "We are going to look at this case through her eyes." And if they do that, what result do we have? We do not have a result of guilty of second degree murder, that's for sure, on Mr. Kelsey. We may have a verdict of involuntary manslaughter. I would say more likely they separate out the actions of Mr. Kelsey from the other two and they say, "No, misdemeanor battery," or not guilty of anything -- and we'll get to that in a second -- but certainly not second degree murder if they credit those experts.

An expert such as Dr. Llewellyn absolutely should have been called in this case. This case was a medicolegal case. Why in the world would a defense lawyer not at least consult with a forensic pathologist?

I have cited to you a number of cases in the brief, in the petition, where that happened, where the defense lawyer didn't consult with an expert, much less prepare -- present the expert, and it resulted in a finding of below the standard. And I submit to you, that's below the standard. In this case is it prejudicial? Oh, yeah. It's very prejudicial.

Let me talk about Ground 2. Here is where I take issue with Mr. Ohlson, for whom I have the highest respect and regard. His testimony in his deposition is, they weren't inconsistent defenses, that his defense is you can't tell which punch caused the death and, therefore, his client could be no more guilty than Mr. Kelsey.

If you look at his opening statement at pages 1675 through 1677. That's not what he presented to the jury. Now, I will plead guilty to overstating what he was saying a little bit. I would say not overstating so much, but rephrasing. He didn't say, "Our theory of the case is that Mr. Kelsey killed Jared Hyde, and all our guys did was hit a dead guy." He didn't say it that way.

Here's what he did say. Mr. Ohlson gives -- sort of

surprises the Court when he says, "I want to give my opening statement." And he gets up there and says:

"The reason I'm giving an opening statement now, unlike the other lawyers in the case who gave you one at the beginning of the case, is that I had the option and I reserved mine because I intended on calling some witnesses. And I intend to call three witnesses before you. And I think that those three witnesses are going to give you testimony that will answer two questions for you, who did it and how was it accomplished."

Okay. Who did it and how was it accomplished. Now, what's -- what's the tenor of those three witnesses? Who did it? Zach Kelsey. He bragged to us. He said he hit the guy with brass knuckles. He killed him. He said so after the fact. We weren't there, but that's what he said. That's the gist of Mr. Fallen's, Mr. Smith's, and Mr. Simpson's testimony.

And Mr. Ohlson goes on to say, "Now, in order to put their testimony in perspective" -- he talks about how he got out of Dr. Clark the notion that the injuries in question could have been caused by brass knuckles. Now, here was the factual problem with his defense. The closest he came to brass knuckles was Mr. Opperman, who said that Mr. Kelsey had bragged about owning a pair of brass knuckles. Is there any witness that said Mr. Kelsey was wearing brass knuckles, that he

brought them to the scene of the crime, so to speak, and that he hit him while wearing brass knuckles? Not one witness testified to that.

If Mr. Edwards knows that that's the defense going in, he has the ability to examine every one of these scene witnesses -- like I did, with Ms. C[redacted] and Mr. C[redacted] -- "Did you see Zach Kelsey wearing brass knuckles?"

They both said, "Absolutely not, no."

I submit to you from the absence of evidence that if that question is asked of the other student witnesses that the State called, even Mr. Opperman, the answer is no. The whole notion of Mr. Ohlson's theory has got a big problem right there. You know, it's supposedly Mr. Kelsey bragging about something that the scene witnesses can't confirm and -- but did Mr. Ohlson say, "We're going to show that he, Mr. Kelsey, killed poor Mr. Hyde, and my client, all my client did was hit a dead person"? Not in those precise words. Is that the import of his defense? Sure it is. Does it have a problem? It had a problem going in, before Karl Hall blistered those witnesses. But, yeah, it's a big problem.

Now, Mr. Qualls let it slip that he thought the defenses were inconsistent. I fully concur. The testimony from Mr. Ohlson and Mr. Edwards is they got together and said, "Let's not put each other on trial, because if we do, we are

going to have second prosecutors and, you know, Karl Hall is going to take great advantage of that." Oh, yeah, he would. No question about that if -- if you don't have inconsistent defenses.

But Mr. Kelsey's defense -- and Mr. Edwards admitted this -- necessarily puts the blame on Mr. Schnueringer and Mr. Jefferson. It necessarily does. My client was involved in a brief skirmish where he hit him twice, three times, whatever it was. They walked away. The guys who actually killed him were Schnueringer and Jefferson. So his defense necessarily, the proximate cause and so forth, is putting the finger on those two.

It's not clear, certainly to Mr. Kelsey, until the middle of trial that Ohlson's defense is the exact opposite: No, the guy who killed -- the guy who killed Mr. Hyde was not my guy, it was that guy. Those are -- that's about as inconsistent a defense as you get, quite frankly. Again --

THE COURT: But how does Mr. Edwards' conduct on that front fall below the standard? As I think of it, Mr. Ohlson, it sounds like from the testimony, did not inform Mr. Edwards of his intention to call these witnesses and to point the finger, as we say, at Mr. Kelsey. But it certainly could be argued he had an ethical obligation not to do that, that by revealing his trial strategy, he may be affecting his own

client to his client's, Mr. Schnueringer's detriment.

MR. CORNELL: Um-hum.

THE COURT: So Mr. Edwards -- the argument is Mr. Edwards didn't anticipate these witnesses coming in and testifying in this way and, therefore, did not cross-examine the other witnesses about brass knuckles.

But how do you know that? You know, that gets back to the standard prong of Strickland. How would Mr. Edwards have known that? Mr. Ohlson is not going to tell him what his trial strategy is.

MR. CORNELL: No. Well, I will -- here's your answer. Believe it or not, I did try 30 jury trials in my career before I became an appellate and post-conviction lawyer, so I understand the pressures that trial lawyers undergo. And believe me, I had something very similar to what happened to Mr. Ohlson happen to me on a case, that I remember vividly.

If for the first time you learn what your co-counsel is really doing in opening statement, if for the first time you realize, "Oh, my God, I've been sandbagged. Here I've been working with this guy and all of a sudden, boom, he's working against me, he's sandbagging me" -- and Mr. Edwards testified that he felt that way. Yes, trials happen, like that.

And thinking it through and saying, "Well, wait a minute," you know -- you can sit there and say, "I can

understand a lawyer being so geared into everything else he's doing that he can't think of that sort of thing." I get that.

In this case, though -- and this is why it's nice to have evidentiary hearings and -- but judge these things on the record. Mr. Edwards testified that he learned of this the first day of trial when either the DA investigator or Ms. Halstead or -- or Mr. Hall -- it probably was Halstead, I would guess, but that doesn't matter -- told him what those three witnesses were there.

THE COURT: Well, my --

MR. CORNELL: They had been investigated by the cops.

THE COURT: My recollection of the testimony, Mr. Cornell, was not that it was the first day of trial, it was when it became time for the defendant's case in chief that Ms. Halstead relayed that information to Mr. Edwards. So he was caught off guard. But it was during the trial. It wasn't like -- and not only during the trial, but contemporaneous with the events occurring. So I'm not quite sure, logistically, how it worked. But Ms. Halstead kind of leans over euphemistically to Mr. Edwards and goes, "Hey, by the way, these three guys are about to testify, and this is what's about to happen."

MR. CORNELL: Well, your recollection is going to control. My recollection is his testimony is it happened on the first day of trial. And that makes sense to me for this

reason. Mr. Ohlson waited until Friday before trial to reveal the names of his three witnesses.

I can well imagine the three witnesses come up out of the blue. Ms. Halstead or Mr. Hall look at it and say, "Who are these people? They're not people the sheriffs ever interviewed." They get the DA investigator right on it. "Go interview these guys. Find out what they have to say." And knowing how things go, I can well picture that that's what happens.

And it's on the first day that Ms. Halstead, let's say, tells Mr. Edwards, "By the way, here's what John Ohlson's witnesses have to say." And it seems to me, if he learns of that early on, it's a different story. At that point he's got time to think about it. At that time he's got the ability to say, "Whoa. We've got inconsistent defenses here. That isn't what this trial is supposed to be about." And at that point somewhere in the trial, he's got the ability to say, "Judge, we've got to have a severance."

THE COURT: Well --

MR. CORNELL: It might not happen that day, but it certainly -- and the ability -- you know, I'm sure you know this. A motion to sever is something that you have to bring up throughout the proceedings when prejudice appears.

I don't lay blame on Mr. Edwards, at least for not

filing a motion prior to trial. He would have lost at that point. There was nothing in his discovery to make it appear to him that Mr. Ohlson's defense is going to be inconsistent.

THE COURT: Mr. Cornell, I just want you to know I did go back, as you were talking, and look at any notes for Mr. Edwards, and you're correct. I was mistaken in my recollection. I now will, more than likely, go back and review a transcript of this hearing to make sure that I can clarify those issues. But my notes do reflect that Mr. Edwards testified that he found out that Mr. Ohlson was going to be calling three witnesses to say that the defendant had brass knuckles on the first day of trial, so --

MR. CORNELL: Okay.

THE COURT: I don't want you to think I'm laboring under some false assumption. I went back and checked my own notes, and you're right.

MR. CORNELL: Okay. Fair enough. Thank you very much.

My position would be, wait a minute. The duty to seek a severance, if prejudice appears, falls on counsel and on the trial judge throughout the whole proceeding, not just prior to trial. We often see it, where a motion like that happens and the judge denies it and it's without prejudice.

It has to be without prejudice in light of Kentucky

vs. Stincer, the U.S. Supreme Court case that puts the duty on the prosecution, the defense, and also, really, the judge to make sure that we're not having a joint trial with inherent prejudice to -- to either or both -- really, to both. I mean, when the case gets to the point where the defense lawyers are acting as second prosecutors, that's your classic case of inconsistent defenses. And I submit on this record that's what happened. Now, that's all I want to say about Ground 2.

Ground 3 is the one that I really want to focus on, and that's waiving closing argument. I went overboard in the petition to give you a memorandum of law when waiving closing argument would be appropriate and when it's not. And I would submit that what this hearing has shown in this case, as far as Mr. Edwards goes, it was not.

And interestingly -- and I'm sure you've caught this, again -- when I asked the question to Mr. Edwards, "Have you ever waived closing argument in any other trial before?" His answer was "No. And I would never do it again."

THE COURT: I think his answer was, "I don't think I would ever do it again."

MR. CORNELL: All right. "I don't think I would ever do that again." You may well be right.

But what is that? He shouldn't have done it in this case. Look at Mr. Ohlson's testimony on that from his

deposition, pages 24 and 25. I asked him:

"You were appointed to represent Mr. Schnueringer. You could have been appointed to represent Mr. Kelsey or Mr. Jefferson. Knowing the case as you knew it, if you had been appointed to represent Mr. Kelsey, would you have waived closing argument?"

And his answer was -- the short answer is no. And it has to be no. Why? Because of what Mr. Edwards testified to. Mr. Kelsey is the one of these three who enjoys proximate causation as a defense. And to Mr. Edwards' credit, he keys in on that as early as six months prior to trial, does his research, gets his jury instructions together, and gets Judge Elliott to give it. Proximate cause doesn't apply to Mr. Jefferson or Mr. Schnueringer, because they're the last ones who hit Mr. Hyde before he died.

He also candidly admitted that the misdemeanor battery instruction, which he sought and which Judge Elliott granted, really doesn't apply to Mr. Schnueringer or Mr. Jefferson.

He also, I believe, candidly admitted that his client, Mr. Kelsey, is one that, if the jury thinks about it, has a case for involuntary manslaughter, assuming you believe the testimony of the forensic pathologists.

Do the other two guys have a case for involuntary manslaughter? When you have a witness like Jordon Beck, who

testifies that Schnueringer hit him so hard it sounded like a crack of a baseball bat, and when you have two guys kicking the guy who goes down in the head and chanting out stuff and saying, "I slept that guy" -- not an exact quote -- no, that doesn't sound like an involuntary manslaughter case. That sounds like acts that really are designed, in their nature, to take human life, even if there's no specific intent to do so. Those two guys don't have an involuntary manslaughter case.

This man does, assuming that we credit the testimonies of Drs. Clark and Omalu. But you've got to argue it. If you don't argue it, if everybody waives it, what does that look like to the jury? It looks like they're all in the same boat. And in this case, the proof of the pudding is in the eating. The jury is out what, three hours and they come back guilty of second degree on all of them.

Now, Mr. Edwards testified that it was a strategy to waive closing argument. Sure. What -- what Strickland questions though is, is it a reasonable strategy?

Mr. Edwards's testimony is, "Well, yeah, because Mr. Hall could have come back and argued for first degree murder."

First off, he was getting Byford mixed up. Premeditation and deliberation are different -- are different elements of first degree murder. Also specific intent to kill.

The question I had for him is, what evidence in this record would -- would lead a reasonable jury to believe that Mr. Kelsey had a specific intent to kill Mr. Hyde, and he had deliberated and decided to go to the dark side in carrying out the intent to kill. There is no evidence. There is none. Mr. Hall could not have credibly argued that. And with respect to Mr. Hall -- who is one of the toughest advocates I've ever had to deal with -- I just can't imagine that he would. But I particularly can't imagine that he would because of what Ms. Halstead's argument was.

THE COURT: Well, let's just take that for a second. The State charged all three defendants with open murder.

MR. CORNELL: Right.

THE COURT: And so your argument is, is that in essence Mr. Hall could not go in and with a straight face argue first degree murder, which is one of the four homicides that are contemplated by open murder. So you think that he would just go in and say, you know, "We charged open murder, but we really acknowledge, regarding at least Mr. Kelsey, we've got no evidence of that. Just disregard open murder. Let's talk about second and then voluntary and involuntary."

MR. CORNELL: I believe that and I'll tell you why. Number one, Mr. Hall is not the kind to try and create a silk purse out of a sow's ear. But besides that, even if he were,

look at what Ms. Halstead argued in her opening argument. She said, and I'm quoting from pages 2042:

"This was more than a tragedy; this was a murder. And as I close, I again submit to you that this was second degree murder, because while there was malice aforethought, there wasn't the admixture of premeditation and deliberation. But they engaged in malicious conduct that was naturally intending to take the life of Jared."

So Ms. Halstead right there, and towards the end of her closing remarks, is telling the jury, "We're not going for first degree on this case against any of them, any of the three defendants, we're going for second." It would really look bad for Mr. Hall to get up there in rebuttal and say, "Forget about what my colleague and office mate Ms. Halstead said. This is a first degree murder."

I just -- especially to Mr. Kelsey -- I just can't see Mr. Hall going there. The State had set the boundary right there. First is off the table. What we're talking about at the -- at the high end is second.

Now, that gets me to Ground 4. And Ground 4 is the failure to seek a self-defense instruction. And maybe the problem there, quite frankly, as Mr. Kelsey testified, without his testimony there's no self-defense at all. The decision to put him on the stand doesn't happen until Mr. Ohlson's

witnesses testify, and Mr. Kelsey in his mind realizes, "I've got to testify because these three guys, they're not" -- you know, "they're not telling the truth," I mean in his mind.

And oftentimes we prepare jury instructions beforehand and we don't prepare them -- we don't think about them once the trial starts.

But in this case, that happens. And what was Mr. Kelsey's testimony in that regard? You will see it at pages 1794 through 1802. But in particular, at 1796, 1797, 1798, 1799, that's where the essence of this happens. He testifies as follows:

"I'm standing and I'm watching Jake, and while I'm watching Jake fight with Taylor, someone punches almost directly in front of me. I saw two hands go by my face. I turned and looked and it was Bobby and when I turned and looked to my right there were three kids rushing in.

"Question: Do you remember who those three kids were?

"Answer: It was three or four actually and I'm not a hundred percent sure.

"Question: Was one of them Jared Hyde?

"Answer: Yes. Or who I understand to be Jared Hyde."

We skip over to 1797. Mr. Edwards continues:

"What did you do next?

"Answer: These kids started running in and I jumped

between them and Jake and swung at the first two. I told them, 'Stay back. Get the fuck back.' The first two backed off, the first one -- or the third one came closer and I hit him and he backed off and that's when I got in my fight with Jared Hyde.

"Question: All right. Let's talk about that.

"Did Jared Hyde say anything to you?

"Answer: He said, 'If you are going to swing on me I'm going to knock you out,' and that's when he came forward the second time.

"Question: He came forward to you?

"Answer: Yes, sir.

"Question: And you had your back to Jake?

"Answer: Yes, sir.

"Question: Who was engaged with Taylor and --

"Answer: And Ricky and whoever else was rushing in as far as I knew.

"Question: All right. How do you engage Jared Hyde.

"Answer: Jared came forward with his fists balled up. I punched him twice. He ended up grabbing my shirt. When he grabbed my shirt I tried to kick him off me. That didn't work. I actually ended up losing my balance and I was falling over. I tried it a second time and the same thing happened. So I ended up just leaning back and putting my weight into putting him off of me and when I did that he pulled my shirt over my

head."

And, I mean, that's the essence of it, but --

THE COURT: But even by then Mr. Kelsey's own testimony, he would not be entitled to a self-defense instruction because the initial aggressor is not allowed to seek self-defense.

MR. CORNELL: But on that testimony, Hyde is the initial --

THE COURT: You would agree with that basic premise, that the initial aggressor cannot seek self-defense?

MR. CORNELL: From Culverson v. State, absolutely.

THE COURT: Right.

MR. CORNELL: Yeah. But on his version, Hyde is the one who says -- Hyde is the one who doubles up his fists at him and he's the one who says, "If you're going to swing at me, I am going to knock you out," and he comes forward.

THE COURT: Right. But let's think about that quote. And that's what stood out in my mind, Mr. Cornell. "If you're going to swing at me." So by Mr. Kelsey's admission, he goes into the fray first, and he is taking the first swings. And then Mr. Hyde, taking the argument from Mr. Kelsey's perspective -- and we have to acknowledge that it's not what everybody else says, but it's what Mr. Kelsey says -- Mr. Kelsey is saying -- or Mr. Kelsey says that Mr. Hyde tells

him, "If you are going to swing at me" -- so he's already swung at him -- "then I'm going to come at you too." And then at that point, arguably, Mr. Kelsey is saying there is this affray or mutual combat that takes place.

MR. CORNELL: Mr. Hyde -- you know, I see your point. And part of the problem is exactly what is said when. Self-defense in this case? Weak. Okay? I'll give you that. Under the standard, even if it's weak, if he's entitled to the instruction, the Court has a duty to give it. And I'm --

THE COURT: I agree.

MR. CORNELL: And I'm thinking of Rosas v. State, 122 Nev. 1258, where they hold that the defense is entitled to a lesser included instruction even if his theory is to deny all liability.

And what self-defense would do in this case, it would get -- and this ties into Ground 3. It doesn't make Ground 3, but it ties into it. You have to have a way in your jury instructions to distinguish Mr. Kelsey from the other two, and self-defense would be another one. Because the other two simply -- there's no way they have self-defense, whatsoever.

In this case I would grant you that it's a weak theory. But based on the evidence, it would be enough at least to give the instruction and give the jury another option to think about Mr. Kelsey, as opposed to Mr. Schnueringer and

Mr. Jefferson.

Let me go on to Ground 5. And I have to say Ground 5(a) bothers me a lot. Ground 5(b) bothers me not so much. Ground 5(c), almost a throwaway. I'm not even going to argue Ground 5(c), I'll just let it -- I'm not going to dismiss it, I'll just let it stand on the petition.

But 5(a) bothers me a lot. And what bothers me is that when the case has no racial overtones to it, whatsoever, it's -- the victim is white, my client's white. It's not charged as a hate crime. There is nothing in the discovery to suggest that straight edge in North Valleys High is a Neo-Nazi organization.

When there's none of that, to bring race into a case that's not relevant to race, I find really, really bothersome. I mean, for one thing -- think about this -- we -- maybe today in 2016, the notion of somebody being a Neo-Nazi isn't quite so bothersome. But if you had anybody on that jury who is Jewish, they might be extremely bothered by that. If you knew that was going to come up and come in, you would want to talk about that in voir dire. We don't know that that happened.

But this is what Mr. Ohlson is getting at in his deposition when he said he would want to do a motion in limine to keep that out. And I'm sure it would have been stipulated to.

The notion that Mr. Ohlson brings this up in cross-examining Mr. Kelsey, and Mr. Kelsey handling himself, I suggest to you is a little bit on the questionable side. The pages 1901, 1902 reveal the testimony.

"Question: Aren't you a tough guy?

"Answer: No.

"Question: Straight edge has been around for a long time, haven't they?

"Answer: Yes, around here.

"Question: And you know a little bit about straight edge history, don't you? Nothing? You just joined?

"Answer: There's not really a joining. It's a way to lead a life.

"Question: Straight edge used to be associated with the neo-Nazis, didn't they?

"Answer: No."

Then Mr. Ohlson says: "Question: They did, son. Did you know that?"

Now, what is that? How is young Zach Kelsey supposed to respond to that? Well, "No, I didn't know that."

The older and wiser lawyer is telling him, "As a matter of fact, my friend, you belong to an organization that has ties to neo-Nazis." That's what -- that's a fair comment on what that record reveals.

And he says, "No, I didn't know that."

And Mr. Ohlson says: "Part of the culture used to be fighting; did you know that?"

"Answer: No, I didn't know that.

"Question: They used to shave their heads; did you know that?"

Mr. Kelsey, seeing where this is going, says, "Wait a minute. "I don't have a shaved head. Does that mean I'm not straight edge?"

And Mr. Ohlson says: "No, I think you are straight edge."

Well, Mr. Qualls put it right. If there is an objection and a motion for mistrial and it's sustained and the mistrial is denied, improperly though it would be, that's an issue to be raised on appeal. But without objections, you know, why -- why put in a plain error issue if it's the only plain error issue you have? It's not going to get you anywhere.

THE COURT: But isn't it a tactical decision that criminal defense attorneys, and attorneys in general, make all the time? In the heat of battle, as the case is going on and the questions and answers are coming one after the other, you need to decide whether or not to object to just about every question.

MR. CORNELL: Sure.

THE COURT: And with questions of this nature, whether or not you want to object and draw attention back to the issue again. I think Mr. Edwards has said that.

As a person who has done a couple of trials myself --

MR. CORNELL: More than a couple.

THE COURT: -- as an attorney, you know you've got to make decisions whether or not, in the blink of an eye, do I want to let that go or do I want to re-raise that issue in the jury's mind and stop everything and now start talking about something maybe that I just hope I -- it glosses over.

And I don't think Mr. Ohlson, to the best of my recollection, came back and started arguing it -- well, actually, he didn't argue anything in closing argument. But it really didn't become an issue again during the trial. It was just one of those fleeting moments that came and went. And Mr. Edwards, by his statements in the court yesterday, said he made a tactical decision really not to draw any more attention to it than he thought was necessary.

MR. CORNELL: Again --

THE COURT: How does that fall below the standard? That's the first question I have.

MR. CORNELL: Here's -- here's what I have to say to that. Is it a tactic? Sure. Is it a reasonable tactic?

That's what Strickland asks. What possible reasonable strategy could a trial lawyer have for allowing racism to inject its, quite frankly, ugly head in this case?

I quoted to you in Ground 5(a) cases from the Ninth Circuit and the D.C. Circuit where that sort of thing happened, and those courts, quite frankly, when you read the opinions, went ballistic. It's far too late in the day to allow this sort of thing to go on in our courtrooms.

We have Dawson vs. Delaware, a capital case, where the U.S. Supreme Court, where they allow, and even by stipulation, that the guy belongs to the Aryan Brotherhood. And racism had nothing to do with that case. And the U.S. Supreme Court said, "No. We're not going to allow racist philosophies to enter this courtroom if the case is not about racist philosophies."

And had Mr. Ohlson simply just said, "Wow, you know, isn't it true that these guys" -- or, "that straight edge is a Neo-Nazi philosophy?" and Mr. Kelsey said, "No, not that I've ever heard," that would have been the end of it. I'd have a hard time talking about prejudice. But then he says, "They are, son."

When you look at this case -- again, in going back to Ground 2 -- what was Mr. Ohlson doing? He was becoming a second prosecutor. But he was doing it by injecting race into the equation. And even he admitted, if he had been

representing Mr. Kelsey, he would have made a motion in limine to keep it out. It has no business being in this courtroom at all. When there's no race hate crime alleged it just has no business being here at all. That's my strongly-held position.

THE COURT: I'm not quite sure how we would have crafted a motion in limine to keep it out.

MR. CORNELL: Pretrial.

THE COURT: No, I understand what a motion in limine is, Mr. Cornell --

MR. CORNELL: Okay.

THE COURT: -- but I wasn't finished with my thought.

MR. CORNELL: Sorry.

THE COURT: My thought was, is that it appears, at least to me having familiarity with the case, that Mr. Ohlson is just saying this during the trial. So there is no way that the hypothetical Mr. Ohlson representing Mr. Kelsey would have filed a motion in limine to keep it out, because he wouldn't know about it. There's -- you know, there's -- unless you want to come in and say he should have filed a motion in limine to exclude all references to racism or to racist ideologies associated with -- with straight edge. That assumes that he would have done some investigation, and also assumes that maybe someone out there has suggested that they were neo-Nazis, but that's not true and so we're not allowed to say that.

MR. CORNELL: Well, that's the interesting part of this case. The only -- or this issue. The only person in that courtroom who had any knowledge about any of this was Mr. Ohlson. And my question to him at his deposition was, "If had you been appointed to represent Mr. Kelsey, would you have objected to that testimony?" And I believe his answer was, "More than that. I would have filed a motion in limine prior to trial to keep it out."

And I suspect strongly that if he had done that, the position of Ms. Halstead and Mr. Hall would have been something along the line of, "Well, of course we keep it out. We're not going there. No problem."

But the one who went there was Mr. Ohlson. And how do you explain that, except Mr. Ohlson being a second prosecutor, which is exactly what Ground 2 is grounded on.

Now, the statement about -- to Dr. Clark, "You remain brilliant as usual," is that going to carry the day by itself? No. But it is vouching. And Dr. Clark is a necessary witness for his defense, which is, "You can't necessarily tag what my client did to the death of Jared Hyde. It's possible." I mean, that's a necessary part of his defense. So, I mean --

THE COURT: I can tell you I tend to agree with you and with your analysis that that's not your strongest argument. I've had the pleasure of trying a number of cases against

Mr. Ohlson, and presiding over a couple of trials where he's been the trial attorney. And I really look at that comment from Mr. Ohlson more as rhetorical flourish than vouching for Dr. Clark's credibility or vouching for her authority as an expert in any area. Because if he were doing that, when you think about it, he is actually doing it against his client as well. Dr. Clark's testimony isn't just against Mr. Kelsey. Dr. Clark's testimony is damaging to all three defendants, including Mr. Schnueringer. So it really strikes me that's just more Mr. Ohlson being Mr. Ohlson, and not trying to somehow inform the jury that Dr. Clark's testimony is more believable or should be given more weight because he says that she's brilliant.

MR. CORNELL: Yeah. Of course, then that goes back to Ground 1(c). By itself, not particularly prejudicial. Why? Because there's no forensic pathologist to rebut Dr. Clark on that record. If there is and co-counsel volunteers that, then we might have more to talk about. On this record, I'm not disagreeing with what you're saying.

Let me talk to Ground -- and I'll skip -- I am going revise (c) to the brief. Because I even say in there that Ms. Halstead's statement about Mr. Kelsey not going to the funeral, by itself doesn't carry the day. It's part of an accumulation of problems. That's my position on that. And it

still is. But I've said all that I can say about it in Ground 5(c).

Ground 6, though, let's go back to what I started on in talking about prejudice. From this brief skirmish that happens, whether it's two punches or three punches, whether -- whether it's a knee to the upper shoulder or a knee to the head, whether it happens in a wrestling match or standing up, you can't -- you just can't say from those facts alone that those facts are the kind of facts that -- that naturally tend to destroy the life of another. Not -- not when the victim walks away 50 feet and appears to be fine.

And going back to my point. What -- how then can the jury and the Nevada Supreme Court decide the evidence is there to support otherwise? And in this case, as I said before, the only way they can credibly do it is to think that the three individuals are in association with one another to where, really, they're acting in concert. That's the only way that I can see them doing that.

The problem that we have is the evidence was really pretty strong at trial of these things. Straight edge is not Twisted Minds. It's not. They're two completely different ideas. Straight edge is not a gang. It's not a club. It's a philosophy on how to live your life. No smoking, no drinking, no drugs, no premarital sex. And in North Valleys High that's

what it means.

THE COURT: There's also a musical component to it.

MR. CORNELL: Well, yeah. It's something that came out of punk. And some -- some jurors may know that.

But as far as the trial testimony goes, it's pretty clear that that's what we're talking about. Not even a gang. The fact that -- on this record, the fact that Mr. Graves and Mr. Kelsey ascribe to straight edge is not a problem at all. Twisted Minds is another problem.

The testimony that Twisted Minds is something indigenous, if you will, to North Valleys High -- they were thought of as a tagging crew, but after this case they're thought of as a gang, at least by the Sheriff. I believe that came out. And what they're about -- you know, "Catch a fade. Catch a fade." Almost like the movie "Fight Club," you know, "Knock him out to where he doesn't come back."

And what caused Schnueringer to do this? And it comes out from -- even from the trial testimony, but clearly from Mr. L[redacted], who didn't testify, is that when Hyde supposedly questions the validity of his own words of TM, you know -- "You question the validity of TM?" -- and then, boom, the punch that's loud enough to sound like the crack of a baseball bat or two rocks pounding together.

So I have no problem with Judge Elliott's ruling that

all of the Twisted Mind and straight edge stuff come in, and even in the Nevada Supreme Court it's res gestae. Agreed.

But what should have been done in this case was a limiting instruction. And the limiting instruction -- it probably wouldn't have meant too much to Schnueringer or Jefferson, but it means a lot to Kelsey -- if it says, "The evidence of Twisted Minds is relevant only to show motive of the persons belonging to the Twisted Minds, and this applies only to defendants Schnueringer and Jefferson, and not Kelsey" -- because there is no evidence, even in this record at trial, that Mr. Kelsey was ever a member of Twisted Minds. That came through good and strong, and loudly and clear on the witnesses I presented yesterday, Mr. C[redacted] and Ms. C[redacted] But even at trial that comes through.

If that -- if that limiting instruction is given -- and quite frankly I don't see the objection to it. I don't -- and it was indicated in the pretrial hearing on it that a limiting instruction would be proffered, only one never was. If that limiting instruction is given that tells the jury this man, Mr. Kelsey, is not associated with Twisted Minds, only apply the evidence on Twisted Minds as the motive for Schnueringer and Jefferson to do what they did, that limiting instruction goes contra to the notion that these guys acted in concert.

And, frankly, as I look at this record, I say, "How do we have an upheld verdict on my client committing a second degree murder?" And that's the only answer that I can come up with. You know, that how -- how the jury could decide there's a cause -- that he's involved in the cause of death of Mr. Hyde, but reject involuntary manslaughter. Absent closing argument, of course.

So that is one of the deficiencies. Is it going to carry the day by itself in this case? No. But it's a cumulative deficiency. And it is a deficiency because it was out there at trial. Everybody dropped the ball. It was presented.

And, of course, whenever you know have uncharged misconduct, including gang evidence from a number of cases, you have a limiting instruction that is given, and none was given here. And a limiting instruction that not only limited the issue to motive, but limited it to those two defendants, would have been extremely helpful to Mr. Kelsey under these circumstances. Those are my comments on Ground 6.

Ground 7. Ground 7 is sort of interesting because in a way it cuts through to other grounds that we've alleged. Ground 7 is the one that Mr. Kelsey never -- or, excuse me, Mr. Edwards never really engaged the services of an investigator. He filed a motion to get one appointed and never

used him for anything.

And in this case what you have with Mr. C[redacted] and Ms. C[redacted], are two witnesses who gave statements, who were there, who were very close to where the fight happened between Mr. Kelsey and Mr. Hyde -- or the skirmish, if you will -- and at least should -- could shed some light on what was going on there.

Now, here -- and Mr. Edwards made the tactical decision not to have his investigator do anything, which in a murder case that's a pretty dicey decision, I would think. But there could be a universe of facts that would say, "Well, even so, that's not below the standard," I suppose.

But in this case your problem is this. The decision to have Mr. -- to have Mr. Kelsey take the stand isn't made until the middle of trial, and it is made because of the testimony of Mr. Ohlson's witnesses. Okay? Which, if we have a motion to sever, we've got a completely different universe. Right? A motion to sever is granted. Because in a separate trial the jury doesn't hear, in adjudicating Mr. Kelsey's case, from the testimony of those three witnesses.

If Ground 2 is defeated, we're going to have a trial involving, in Mr. Kelsey's case, involving those three witnesses. Now it becomes important to back up what his testimony is.

Are Ms. T[redacted] C[redacted] and Mr. Z[redacted] C[redacted] perfectly congruent with Mr. Kelsey's version? No, but that's -- not perfectly congruent, but that, on the other hand, could be explained by the lighting conditions. Clearly with -- in a dark evening with ambient light from a bonfire being the only light, no witness is going to be able to say with precision what exactly happened. But if you have Mr. C[redacted] testifying that he saw Mr. Hyde swing a punch at Mr. Kelsey, whether or not he connected, it gives some credibility to Mr. Kelsey's version of the events.

THE COURT: But what we have from the testimony of both Ms. C[redacted] and Mr. C[redacted] and Mr. Edwards is, both Mr. C[redacted] and Ms. C[redacted] acknowledging that they did not provide the information that is beneficial to your client to law enforcement.

And Ms. Noble cross-examined them on that fact. "You didn't, in essence, say this to the police." So we know that they didn't tell anyone that until they told your investigator, Mr. Olson, I believe is his name.

MR. CORNELL: Right.

THE COURT: And then we've got Mr. Edwards. And Mr. Edwards says, "I had dozens of statements." I'm paraphrasing. But I think he said he had over 40 statements of kids in the high school who were at this fight, and he didn't

have his investigator go out and talk to all of them. I think it's fair to say he didn't have his investigator talk to any of them.

MR. CORNELL: Any of them.

THE COURT: But that he reviewed them. And in reviewing the statements that they gave to law enforcement, there was nothing there that led him to believe that they were necessary or would provide information that was beneficial to Mr. Kelsey.

The argument you're seeming to make is, is that Mr. Edwards should have reviewed all the statements -- as he's acknowledged that he did -- and then have Mr. Peele go out and interview all of these people to see if they're going to change their statements or they have anything else to add. And that by failing to do that, he failed to discover Mr. C[redacted] and Ms. C[redacted] and therefore didn't present their testimony.

MR. CORNELL: Right. In other words, we -- we have to assume, particularly with Ms. C[redacted] having been interviewed by the DA's office and then being released from her subpoena, that had Mr. Peele gone out and talked to those two witnesses --

THE COURT: But that's contemporaneous with trial.

MR. CORNELL: Right. Had he done that then -- then they would have told Mr. Peele, in that case, the same thing

that they told Mr. Olson.

And remember, I asked them both, "Were you specifically asked, did you see Hyde swing at Kelsey?" "No, I wasn't specifically asked that."

In the case --

THE COURT: But, you know, I guess -- I mean, I know you want to move on to something else, Mr. Cornell, but I think this is your last ground, anyway, so we can talk about it for another moment, and then we are going to take a break for lunch.

But to me it's a sliding scale, to a certain extent, about what is reasonable. Because that's what we are looking at in the Strickland analysis prong dealing with, you know, was it -- did it fall below the standard?

So if you've got a murder that happens and there are only two witnesses, it's clearly prudent to have your investigator go talk to those two people. If you have a murder that happens at a football stadium, you don't have to interview all 60,000 people who may have been present. And then there's a sliding scale in between.

And so what we've got is Mr. Edwards saying: I reviewed everything, and I've got 40 people, and in reviewing them all, I didn't have anyone go out and speak to Mr. C[redacted] and Ms. C[redacted] because I just -- in reviewing their

statements, there is nothing there that is different or unique that is ogling to help my client. So I'm not -- I don't quite know still how that means that he fell below the standard.

MR. CORNELL: Because those are two witnesses who were there. They saw --

THE COURT: But all 40 kids were there, sir.

MR. CORNELL: Well, no, but not where they were. They were right --

THE COURT: Are you saying the proximity to the fight itself?

MR. CORNELL: Exactly.

THE COURT: Okay.

MR. CORNELL: Exactly. I mean, I can -- I can give them a pass on Mr. L[redacted] because Mr. L[redacted] really saw the end of the fight. And his testimony is somewhat consistent with Jordon B. and Tyler DePriest and those witnesses. Okay?

But if we're going to talk about this man being a second degree murderer based on what happened in the -- in the skirmish, let's get a clear version of the skirmish. And two witnesses who are right there proximately are Z[redacted] C[redacted] and T[redacted] C[redacted]

That's why, I would submit to you, Mr. Kelsey is telling Mr. Edwards, "Go out and interview those two people."

Does he know that they are going to be exculpatory?

THE COURT: Well, I do have to take into consideration, too, and weigh the credibility, of course, of Mr. Kelsey. But Mr. Kelsey testified today that he specifically identified Mr. C[redacted] and Ms. C[redacted] as people to interview.

MR. CORNELL: Right.

THE COURT: So it wasn't that Mr. Kelsey said, "Go interview everybody and see if they are going to change their stories." It is Mr. Kelsey representing to the Court, "I told Mr. Edwards, 'Go talk to these two people. They would have'" --

MR. CORNELL: Right.

THE COURT: -- "'would back my story up,'" so to speak.

MR. CORNELL: And, you know, playing devil's advocate with myself, if we don't have a trial with Mr. Ohlson's witnesses, I could see a strategy of saying, "Well, look. There's no way they can come back with murder based on all of the scene witnesses that the State presents." I mean, that's debatable, but, I mean, at least I can see a strategy that way.

But when Mr. Ohlson injects in this notion that Mr. Kelsey killed Hyde with wearing brass knuckles at the scene, then we've got to have more than just Mr. Kelsey coming

in and saying what happened. We've got to have some corroborating evidence. And what you heard from Ms. C[redacted] and Mr. C[redacted] are these things.

I mean, again, can we say -- can we nail down, was it two punches or three? No. Can we nail down whether the knee hit Mr. Hyde's chest, shoulder, or head? No. Can we say that it happened while Mr. Hyde was standing up? No. Can we say Mr. Hyde was -- was the one who doubled up his fists and said, "If you punch me, I'm going to knock you out"? Not from those witnesses. They're not close enough to hear what's being said.

But what they do add to it is, A, no brass knuckles; B, this man has nothing to do with Twisted Minds. He doesn't hang with Schnueringer. They know him. They know Mr. Kelsey. They know who he hangs with and who he doesn't hang with. No acting in concert with Mr. Schnueringer.

C, more importantly, a brief skirmish, where neither Mr. Hyde nor Mr. Kelsey get the better of each other. They're both flailing away, and after 20 seconds or so the fight is over and they both walk on their separate ways.

We may assume that Mr. Kelsey, by himself, didn't carry the day with the jury. If those witnesses are in their to corroborate at least those points, at least those points, does a reasonable jury reach a different verdict? I think there is a reasonable probability that they would.

And to not interview witnesses who are really close to the skirmish, who can at least give the version of what they saw happen, to me falls below the standard in a murder case.

And the only free pass that I think he gets, in tying this back into Ground 2, is if Mr. Ohlson doesn't present those three witnesses. When he does it, he's got to have more than just Mr. Kelsey to explain what really happened.

So when we take the universe of all of this, do we have a reliable result based on what we've presented today, in addition to what was presented to the jury? I would submit the answer is no. I submit that this man being convicted of second degree murder is more than "no," it's an injustice. That's my position.

How do we correct it? Unfortunately -- you know, unfortunately in habeas work we end up, you know, pointing the finger at the defense lawyers, and, you know, that's what we're required to do. And it's unfortunate in a way, but it's what it is. But in this case --

THE COURT: Mr. Hatlestad once said -- and we all know and I think respect Gary Hatlestad --

MR. CORNELL: Oh, yes.

THE COURT: -- one time Mr. Hatlestad told me that post-conviction attorneys judge in the cool of the evening what men do in the heat of the day. And I always thought that that

was somewhat profound as a trial attorney. Go ahead.

But it's the nature of the business that you're in, Mr. Cornell. And I don't say that disparagingly towards you at all. It's just, that's what post-conviction work is about is looking back at how trial counsel performed and where their deficiencies were in the heat of the battle, or in preparation for the battle.

MR. CORNELL: But the decision to hire or not hire a forensic pathologist, I mean, that's not done in the heat of the battle, that's done months and months before. And what is undisputed is Mr. Edwards knew that. He should have done that. If he has the information from Dr. Haddix, supposedly, or Dr. Llewellyn, he presents it. If that evidence is presented, does a reasonable jury come to a different conclusion? Yes, there's a reasonable probability of that. And that one we can't lay on the heat of the battle and stuff happens. That was a decision made well before trial.

Likewise, we do a motion for an investigator. We don't do the -- give the investigator anything to do. That's a decision that's made well prior to the trial.

The testimonies of Ms. C[redacted] and Mr. C[redacted] are consistent with the general point of this skirmish of Mr. Kelsey. We know from the verdict that the jury rejects Mr. Kelsey's testimony. Would a reasonable jury have rejected

it if they heard from those witnesses? I would submit the answer is no. But that's not a decision done in the heat of battle. That's a decision done prior to trial. Let's have an investigator, but not have him do anything? Is that reasonable?

And, yes, some of what I'm talking about does happen in the heat of the battle. But if you've been going at this trial with the notion that all three lawyers are not going to point fingers at one another -- although, as I said many times before, Mr. Kelsey's defense assumes pointing fingers at the other two -- and suddenly you learn on day one of the trial that your co-counsel is going to present a defense that will point the finger at your client -- I realize that stuff like neo-Nazis comes out of the blue. But that one, if he learns it on the first day of trial, I would submit to you he's got to do something about that.

And waiving closing argument when your client has numerous defenses. It's a strategy. How in the world it can be a reasonable strategy, I can't fathom. In my brief I point out to you when it can and when it can't, and this is a situation that doesn't square up with when it can. It simply cannot be. I thank you very much for your careful attention.

THE COURT: Thank you, Mr. Cornell.

Court will be in recess until 1:30.

(Lunch recess taken.)

THE COURT: We'll go back on the record in CR12-0326B, Zachary Kelsey, the petitioner, versus the State of Nevada, the respondent. Mr. Kelsey is present in court in custody with his attorney, Mr. Cornell. Ms. Noble is here on behalf of the State. And when we took our break for lunch Mr. Cornell had concluded his argument.

And so, Ms. Noble, on behalf of the State.

MS. NOBLE: Thank you, Your Honor.

Your Honor, over the break I arrived at the somewhat humbling conclusion that I would love to argue at that podium, but I can't see over it very well. So I will be arguing from here.

THE COURT: Wherever works for you, Ms. Noble.

MS. NOBLE: Thank you.

I know this Court is well aware of Strickland versus Washington, but at the outset I would just like to remind Your Honor that in evaluating the reasonableness of what Mr. Edwards did or didn't do, we're to avoid the distorting effects of hindsight, under Strickland. And I would submit to you that most of Mr. Cornell's argument utilized that hindsight.

Starting with the issues raised about expert testimony. And perhaps as a precursor to that I should mention that it wasn't that Mr. Cornell entirely misrepresented the

facts with respect to what occurred in this case, it's just that he only presented those facts that Mr. Kelsey testified to. There was plenty of evidence at this trial that supported the verdict in this case.

And this record, while not particularly voluminous, is eight volumes. And so I would direct Your Honor's attention to Volumes 3 and 4, the testimony of Michael Opperman.

Mr. Opperman talks about how he knew Zach Kelsey, and that he was talking to him the night of the party. That's around pages 774-777. And before all this happens Zach Kelsey is bragging to him about a new pair of brass knuckles that he's gotten, but he didn't ever show them to him.

In fact, no witness at trial ever testified that they saw Mr. Kelsey use brass knuckles when he hit Mr. Hyde. So I will just get that out of the way right now.

But Mr. Opperman testifies that he sees Kelsey pushing Mr. Hyde, and Mr. Hyde has his arms up, like he doesn't want to fight. He sees him be -- sees Mr. Hyde be punched twice in the head, and as he's going down he sees Mr. Kelsey knee the victim in the head twice, as well.

He sees Mr. Hyde get up off the ground with blood running down from his nose or mouth. And as Mr. Hyde is trying to walk away from this fight, he hears Zach Kelsey calling him, calling Mr. Hyde, a pussy and a bitch, and screaming, and other

people were trying to pull him back because he wants to continue to pursue his assault on the victim in this case.

Those are the facts that the Nevada Supreme Court relied upon, it appears, when it issued its order of affirmance in this case. And it's the State's position that those facts were what the Supreme Court based its opinion, in terms of the adequacy of the evidence, and that those facts are now the law of the case.

Now, there are questions, of course -- and I'll get to that -- of whether or not any of these witnesses could have changed those facts at trial in any meaningful way that would have made a difference. With that, I would like to go to the experts' testimony.

At the trial the jury heard from Dr. Omalu and Dr. Clark. Both of them testified that Mr. Hyde had extensive bleeding over virtually all brain surfaces. They testified that a single blow could have caused this to start, additional blows would have exacerbated that tear. They explained it's not atypical when a person suffers that type of injury to get up, walk away, be conversant, and die minutes later. That's exactly what happened in this case. Critically, each of them, Dr. Omalu and Dr. Clark, testified that each of the blows contributed to Jared Hyde's death.

Now, with respect to Mr. Edwards' decision not to

consult an independent forensic pathologist, of course we first have to look at, was that an objectively unreasonable decision? Mr. Edwards testified that he had discussions with Mr. Ohlson, that Mr. Ohlson indicated he had consulted a forensic pathologist, and that what that person had to say wouldn't help any of their clients.

Now, the first question is, was it objectively unreasonable under Strickland for him to rely in part on that? That's a question for Your Honor. I would submit that it wasn't. Would some attorneys not make that decision? Of course.

But the standard is not whether or not somebody is trusting. The standard isn't whether or not somebody maybe should have made a better decision. It's whether it was objectively unreasonable under the circumstances known to Mr. Edwards at that time.

THE COURT: Well, let's talk about that, Ms. Noble.

MS. NOBLE: Yes, Your Honor.

THE COURT: Because as Mr. Cornell points out, and I think Mr. Edwards pointed out, and maybe Mr. Qualls as well, you know, there are arguments that are stronger and weaker. And I don't intend on tipping my hand what arguments I think are stronger or weaker based on the questions. But I am interested in more analysis of that prong. Because, as we

know, the cause of Mr. Hyde's death, why he died, based on the facts and circumstances of this case, is of grave importance.

And you're saying to me that it's not unreasonable -- not objectively unreasonable for Mr. Edwards to consult with counsel for a co-defendant who has no ethical obligation towards Mr. Edwards or towards Mr. Tanker -- or Mr. Kelsey. And the sum and substance, it would seem, of Mr. Edwards' investigation as to why Mr. Hyde died was, he asked Mr. Ohlson if Mr. Ohlson had an expert. Mr. Ohlson said, "I talked to one, and it wouldn't help us." And Mr. Edwards -- or Mr. Edwards said, "Okay." That's it.

I mean, that's -- from what I've heard so far, from what I've heard from the testimony of Mr. Edwards, that's the totality of the investigation that he did regarding the medical or forensic cause of Mr. Hyde's death. And you are just saying, "Well that's not unreasonable."

If Mr. Hyde had been shot in the head, as I said earlier, as an example, Mr. Hyde is shot in the head and, you know, Mr. Ohlson employed an expert to say, "Well, could he have lived? Could he have survived that injury?" And Mr. Ohlson told Mr. Edwards, "Nah. I talked to the expert and the expert said, 'No, it was just fatal.'" Well, that's just kind of, almost, common sense. You wouldn't think, "I need to do maybe a little bit more on behalf of my client."

But in this case we've just got Mr. Edwards, who asks co-counsel a question, and co-counsel says, "No. I talked with somebody and it wouldn't be helpful," and that's it. That's all he did. I don't know that you can just gloss over the fact that that is not unreasonable. How is that reasonable?

MS. NOBLE: Well --

THE COURT: And I know it's a two-prong analysis and you can fail prong number one and the State -- or, excuse me -- I can deny the petition if I find that the outcome would not have been any different had he not acted in that objectively unreasonable fashion. But, you know, that's an important prong and that's an important issue in this case.

As I suggested before, you know, I think the failure to object when Mr. Ohlson referred to Dr. Clark as "brilliant as always," I don't think that's either objectively unreasonable or had any effect on the outcome of the case. I'll tell everybody that right now.

But that's an important issue. He didn't do anything to investigate how this man is responsible, in some way, for the death of Mr. Hyde. Not only did he not employ an expert -- and it's not just you get an expert, but experts assist you in preparing your cross-examination and understanding the forensic testimony, in better understanding how and why Mr. Hyde died.

Unfortunately, I've read many more autopsy protocols

than I choose to recall, and have attended numerous autopsies myself. And, you know, I don't understand everything. I don't understand the medical terminology.

Mr. Edwards is certainly a smart man, and certainly an able and competent counsel. But this is kind of detailed medical testimony. And so far all I know is, he didn't do anything to investigate it.

MS. NOBLE: I would agree with Your Honor.

And I don't know if I got this out during direct examination or cross, or whatever it was, because Mr. Cornell was kind enough to let me exceed the scope of his direct -- and I will also concede right now that this first prong with regard to this issue is the weakest point in my argument here today.

It appeared to me from his testimony -- and also, perhaps, from the fact that Mr. Molezzo didn't retain anybody either -- that they thought that nobody was really going to contradict the opinions of Dr. Clark and Dr. Omalu. ' Okay?

THE COURT: But you don't know that, Ms. Noble, until you try. And we've all had the experience as attorneys in private practice or in practice for the State where you at least call an expert. You pick up the phone and call somebody and say, "Can you look at these facts?" And they say, "Hey, those are great for you," or, "No, I can't help you." And then maybe you pick up the phone and call somebody else.

The first call is objectively reasonable. Maybe to say that he had to call like 15 people until he found the lowest-level person who would say anything for a fee. If he didn't do that, that's one thing. But here he -- again, I come back to kind of the same point. Mr. Edwards didn't do anything. So --

MS. NOBLE: Well --

THE COURT: He just relied on co-counsel.

MS. NOBLE: Given the Court's comments, I think I am going to move to that second prong now, if that's all right.

THE COURT: Okay. Yeah.

MS. NOBLE: I think I was talking about how at trial each of the blows contributed to Jared Hyde's death. That was the testimony from Drs. Clark and Omalu. But moving to that second prong of prejudice, which is, as Your Honor just recognized, very important, we have the testimony of Dr. Llewellyn, who testified here in court that her -- two percent of her practice is forensic pathology. She's not a neuropathologist like Dr. Omalu, who, I believe it was admitted at trial, has like a 46-page curriculum vitae specifically in these areas and whose trial testimony indicated that he had examined over 10,000 brains.

THE COURT: I am going to guess Dr. Llewellyn has not had a movie made about her recently. One-hour win, but -- I

mean, Dr. Omalu is well-known. And as I've said, I've spoken to him in the past in a professional capacity, so I know who he is. He's somebody well-known in the community.

MS. NOBLE: Yes. And at the outset, I'll be frank, I thought that Dr. Llewellyn and I were going to have a lot more trouble getting to where I wanted to go. Based on her initial opinion, her opinion letter that I cross-examined her about, she had offered some opinions that were different from Drs. Clark and Omalu.

But as I was able to get from her during cross-examination, that was based on certain assumptions. Okay? One of those assumptions was that Mr. Hyde was not knocked down, and that he was, quote, jabbed twice.

And she told me initially, "A hit is a hit." But she did, as the Court recalls her testimony, later back down from that position when I asked her, "How important is it in forming your opinion in this case to know the nature and number of blows administered by Kelsey?"

She admitted that jabs to the cheek could cause a torquing or rotational injury that would cause sudden acceleration or deceleration of the head on the neck. That agrees with Dr. Clark and Dr. Omalu.

She agrees with Dr. Clark and Dr. Omalu that she cannot pinpoint exactly what blood vessels in Mr. Hyde's brain

tore. In fact, I got the exhibit of the brain out, not to be dramatic, but I wanted her to take a look at it because it really underscores the horrible condition that this poor gentleman's brain was in and the extensive bleeding. And she admitted that she couldn't parse out what blow caused which part of that damage.

She agreed with both the State's experts at trial that in addition to subarachnoid hemorrhaging at the base of the brain there was other brain trauma. She admitted that she could not link that trauma to any specific blow. That also agrees with the State's experts.

She admitted that jabbing can cause concussions and blood vessels in the brain to begin to bleed.

She admitted that a knee to the head could cause damage to those arteries in the back of the neck that feed into the brain.

And Dr. Clark testified, of course, at trial. And the Court can, of course, review that when making its decision about the probable efficacy of Dr. Llewellyn had she testified at trial.

But in response to Dr. Llewellyn's testimony, Dr. Clark said a single impact can cause bleeding in the brain, that Mr. Hyde's brain showed cumulative injury. And Dr. Llewellyn did not dispute that. And that the attack from

Mr. Kelsey could have exacerbated a tear at the plexus at the back of the neck. That was made worse by the brutal attack of the other two defendants.

And incidentally, at trial Dr. Omalu was specifically given the factual scenario that after this defendant or this petitioner hit Mr. Kelsey, Hyde got up, said, "I got rocked," and walked away. Given that factual scenario, he testified that in addition to the subarachnoid hemorrhaging, Mr. Hyde suffered a massive concussion that would have resulted in cellular injury to the brain, and each and every one of those impacts would have made that worse. That's at pages 1552 to 1556 of Dr. Omalu's testimony.

In fact, I really can't see any part of Dr. Llewellyn's testimony that differed in any substantial way, when push came to shove, when cross-examination was done, with Dr. Omalu and Dr. Clark's testimony. As soon as she was given the factual scenario that has now been accepted by the Nevada Supreme Court, as supported by the evidence, she agreed with their position. There was no prejudice to this defendant for failure to call Dr. Llewellyn or any other forensic pathologist that's been identified.

And with respect to Mr. Ohlson's summary in his deposition about what his expert may or may not have said, I did object to that. But I would say, all it talked about was

subarachnoid hemorrhaging, which we all know happened.

THE COURT: I think you would have to admit that what was important to Mr. Ohlson, in the analysis of his expert's report, would be significantly different than what would be important to Mr. Kelsey. I mean, not significantly. But given the scenario that everyone agrees occurred, an initial confrontation with Mr. Kelsey and Mr. Hyde, a break of some brief duration, and then a subsequent and more prolonged attack by Mr. Schnueringer and Jefferson against Mr. Hyde, where Mr. Hyde never gets up, so to speak. I am guessing Mr. Ohlson is looking for different things than Mr. Kelsey would be looking for.

So I'm not sure what -- I don't even know how valuable Dr. Haddix's report would be in the case. I just don't know.

MS. NOBLE: And I think that question really goes to the reasonableness of Mr. Edwards' decision and not to the prejudice question, which I think is the stronger argument for the State here. Because what we have is a doctor -- who is a pathologist, who I am sure is a great doctor, but two percent of her practice is in this -- her testimony would go against that of the Washoe County Medical Examiner, Dr. Clark, and all of her credentials, which are admitted as exhibits at trial and her curriculum vitae -- and I know the Court is well aware -- against the testimony of Dr. Omalu, whose credentials were also

fleshed out during trial.

And actually I'm wrong when I say the word "against," because she really doesn't disagree with anything they have to say.

THE COURT: Well, I think that her testimony, Ms. Noble, was, is that had she known that it was two punches to the head and knees to the head, rather than jabs, it would increase the probability. At least that's what my note said. So it's not that she completely came around and said, "No, now that I know those things, Dr. Clark and Dr. Omalu are accurate."

The note that I made to myself was along the lines of, if the victim was knocked down, it would increase the probability that he was injured as a result of the attack. Also, if he went to his knees as a result of being kneed in the head.

So it's not that she completely supported them, it's just -- I think it's reasonable to infer from Dr. Llewellyn's testimony that she, number one, didn't know those facts, and number two, she would not be as adamant, having known those, as she was initially.

The other difficulty for me is, in analyzing the issue of Mr. Ohlson and his expert and how it plays into this situation is, I don't know what Dr. Haddix said. We don't know

what Dr. Haddix was presented with as facts.

It was clear in Mr. Ohlson's deposition that he specifically requested Dr. Haddix not write a report for him. So we don't know what he told her. Dr. Haddix -- I think it's Terri Haddix, if I remember correctly.

MR. CORNELL: Yes, Your Honor.

THE COURT: We have no idea what Mr. Ohlson told Dr. Haddix. We don't know what the fact scenario was or if he even said anything about Mr. Kelsey.

And so I'm not quite sure, as I sit here, who that cuts in favor of, but -- you know, Mr. Cornell has argued that had, you know, Mr. Edwards called Dr. Haddix, or had that information, would it have helped or would he have used it? We don't even know what the information was. It's just a mystery.

MS. NOBLE: I don't think for the purposes of analyzing the prejudice in this case we need to know the answer to that question.

THE COURT: Okay.

MS. NOBLE: I would -- I know this Court is very thorough and reads the record, but I would in considering this case request that you take a look and compare side by side the testimony of Dr. Llewellyn with those of Dr. Omalu and Dr. Clark. I went down a laundry list of things they agreed about. Those were virtually all of the things that were drawn

out on direct and cross-examination from those two doctors at trial, from the State's expert -- experts. So in every way that counts, when she was given that factual scenario, she did not disagree.

This is an area that is, I think, confusing for lay people, including myself, and so I think it's really important, and I know Your Honor will pay close attention to all of those types of facts that were listed at trial. In other words, there was torquing and rotational injury, or there could have been, from Mr. Kelsey; that it could have caused sudden acceleration and deceleration; that you could not pinpoint where the bleeds began or where --

THE COURT: Hold on a second, Ms. Noble.

MS. NOBLE: Yes, Your Honor.

THE COURT: Mr. Kelsey, you've been doing this the entire hearing. And by "the hearing" I mean yesterday and today. It's important that you are able to communicate with your attorney, Mr. Cornell, but it's also important that you not disrupt the proceedings in this case. And so Ms. Noble is trying to talk. And if you're loud, which you are even when you whisper, it makes it very difficult for me to focus on her.

You actually at times were trying to get Mr. Cornell's attention while he was trying to make his argument, which is distracting me from him. So I would request that you use the

piece of paper in front of you, and you use the pencil that you have, and if you need to write something to Mr. Cornell, you do so and you don't disrupt the proceedings anymore.

THE DEFENDANT: Yes, Your Honor.

THE COURT: Go ahead, Ms. Noble.

MS. NOBLE: Thank you.

At trial Dr. Clark didn't say, "These blows from Mr. Kelsey absolutely caused this damage." She just answered questions, just like the ones that we asked today or yesterday of Dr. Llewellyn. And the same with Dr. Omalu. But everybody agrees, you can't parse it out.

And so what we start to get into is almost a sufficiency of the evidence type of argument. There is no material way, when you compare those testimonies, that they actually vary. And so I would urge the Court to review those. I had to read them many times. Your Honor is smarter than I am, I am sure, but --

THE COURT: I don't know about that. I'm not sure about that, but --

MS. NOBLE: But there's nothing particularly certain, other than each of these would have -- each of these blows would have contributed to what finally happened in this case.

So we've got a pathologist, two percent of her practice -- I've said this three times, I think -- presented

with very selective facts, certainly not those facts that have been accepted, and she pretty much still agrees with the State's experts. That's what we have, Your Honor. That's not sufficient to undermine the Court's confidence.

And remember that the standard is that it has to undermine it such that confidence in the verdict is rattled to the extent that a new trial has to happen. It's not just that maybe, could have some juror been swayed at some point.

There was no prejudice to this defendant, and nobody has demonstrated that a forensic pathologist would have said anything materially different than Drs. Clark and Omalu.

And furthermore, I would suggest that Dr. Llewellyn's testimony, with all due respect, given her credentials and the difference between her credentials and Dr. Omalu's, would have been far less persuasive.

I would also like to observe that the jury in this case was instructed properly. Instructions 34 and 35 talked about proximate cause, superseding cause, how they could arrive at a decision where Mr. Kelsey would not be held responsible for the murder of this young man. So they took the information that these doctors testified to, which was not fundamentally different from Dr. Llewellyn's testimony, and they arrived at their verdict.

Another aspect of the expert series of claims is

Mr. Cornell's assertion that Scott Edwards should have made some sort of motion to exclude Dr. Omalu and Dr. Clark's testimony based on the fact that they needed to testify that their opinions were true to a reasonable degree of medical certainty. Okay.

That is based -- the only case cited in support of that is a medical malpractice case. It's a civil case in Nevada. It's not the law in Nevada. So how can Mr. Edwards be objectively unreasonable for failing to make some sort of motion with regard to that? I would submit to you that that fails quite plainly the first prong of Strickland, and certainly such a motion would have been unlikely to be successful so prejudice also did not resolve. But you don't even need to get to the prejudice question.

Also -- I know I'm bouncing back and forth -- but on cross-examination, Mr. Cornell said that he impeached Dr. Clark with some -- some information about other types of injuries or head injuries. That was from Wikipedia. I don't think that was compelling. And Your Honor can certainly make that determination.

THE COURT: Well, it certainly --

MS. NOBLE: She did testify --

THE COURT: It certainly appeared that she didn't know exactly what Mr. Cornell was talking about when he referenced

it, but then when she -- when Mr. Cornell read the Wikipedia entry, it was my impression that she understood what he was talking about. It wasn't something beyond her comprehension, it was just that she hadn't heard it referred to in that way, or it was exactly explained in that way.

And it was also interesting to note that once she heard the entire quote she was so familiar with the facts and circumstances that they were discussing, she knew that that information was outdated and that there had been additional --

MS. NOBLE: That's exactly the next comment I was about to make.

THE COURT: -- additional studies.

So with all due to respect to Mr. Cornell, I'm not quite sure that Wikipedia is the Gray's Anatomy type of learned treatise that I would go to, to explain something in the medical field.

Go ahead, Ms. Noble.

MS. NOBLE: I want to discuss the -- the really failure-to-investigate types of claims with regard to a few witnesses, Ms. C[redacted] Mr. C[redacted] and Mr. L[redacted] -- I'm trying to pronounce that correctly.

Now, we have Mr. Edwards testifying that he reviewed the interviews of all the kids at the party that talked to the police. He -- there were 40-plus kids, and he reviewed many of

those interviews, and had he seen anything that would have helped his client he would have followed up on it.

Now, Mr. Cornell's position appears to be, that is objectively unreasonable -- not just something that you might do differently, I might do differently, Mr. Cornell might do differently, but objectively unreasonable under Strickland -- to not reinterview all of those witnesses.

I don't -- I don't find that that's a particularly good argument. I'll leave that to Your Honor, of course, but I don't believe it's very common to reinterview that many witnesses.

Now, that argument becomes different if this Court believes Mr. Kelsey's testimony that he specifically identified those witnesses. So that's a judgment for this Court to make in terms of the credibility of those two witnesses. Because Mr. Edwards testified, "Had he specifically identified anybody to me, I would have followed up on it."

I would also suggest that that testimony was less than credible, because Mr. C[redacted] and Ms. C[redacted] both told me that they didn't know why they didn't tell the police that, except that they weren't asked that precise question.

Well, they had interviews. They were recorded. They wanted to know what happened that led up to the death of this boy, this young man. Why didn't they add it until three years

later?

With regard to Mr., I think, L[redacted], the two rocks hitting together, I think Your Honor already commented. I think this is cumulative at best. There is ample testimony during trial -- I'm not focusing on it right now, because we're concerned with Mr. Kelsey -- that the attack by Mr. Jefferson and Mr. Schnueringer was brutal. A number of witnesses testified to that. So that would have been cumulative at best. There's no prejudice there.

With respect to the self-defense-instruction argument, Your Honor, there weren't facts that supported self-defense. This is a strategic decision made by counsel. He said he didn't think the facts were there. In looking at the case here in court, the facts still aren't there. But that strategic decision is virtually unchallengeable, absent extraordinary circumstances. And certainly we've heard no such extraordinary circumstances with regard to a self-defense argument during the course of this hearing.

THE COURT: Well, its interesting. As I pointed out to Mr. Cornell, the initial aggressor is not entitled to a self-defense instruction. So you don't get to pick a fight and then claim you acted in self-defense. And as I've heard the basic analysis of the case, the argument is, is that Mr. Kelsey is guilty of a battery.

Now, Mr. Cornell, I think you've said "guilty at most of a battery, or possibly involuntary manslaughter."

But if we enter the analysis by saying, "My client is guilty of battery," then by definition we're acknowledging that he's not acting in self-defense. If you commit the crime of battery, you're not acting in self-defense. You're committing a misdemeanor. So the self-defense argument and the lack of the self-defense instruction really would carry no weight.

The interesting thing about that -- and it gets to, I believe it's Ground 3, the waiving of the closing argument. We don't know exactly what that would be. If Mr. -- theoretically, if Mr. Edwards' closer in his argument is, "Find my client guilty of battery, that's what he did," then obviously we're not talking about a self-defense instruction. But we simply don't know what that ultimate thought process was because there was no closing argument. It would have been helpful to me.

MS. NOBLE: Yes, Your Honor.

So moving on to the waiver of the closing argument -- excuse me -- that was a tactical decision. And it wasn't a tactical decision just made by Mr. Edwards. It was apparently made by John Ohlson and by Rich Molezzo. I'm not saying that that per se means it was reasonable, but those are circumstances that this Court can take notice of.

It's a tactical decision. It's entitled to an incredible amount of deference in terms of reviewing whether or not it was objectively unreasonable. "Virtually unchallengeable" is the language of Doleman vs. State.

Mr. Edwards testified, "We heard Patricia Halstead's closing argument, first close, and there was a break. And right then we all decided it wasn't particularly strong. It was not what we feared Mr. Hall would deliver if he had the opportunity."

And I don't recollect his testimony as being completely predicated upon the first-degree-murder worry. I asked him, I believe, on cross-examination, "Mr. Hall could have come back and hammered home the State's case, essentially, all the things that supported some degree of culpability with respect to Mr. Kelsey."

And I believe he answered in the affirmative that that was one of his concerns, that he had seen Mr. Hall in action.

THE COURT: We've all seen Mr. Hall in action.

MS. NOBLE: That's true, Your Honor.

THE COURT: And that's not a negative comment about Mr. Hall. He's an excellent trial attorney, and was a very successful trial attorney for the 25 years, I think, he was in the Washoe County DA's office.

But this is another one of those issues that kind of

is a little bit higher up on my concern meter than some of the other ones. I understand that tactical decisions are virtually unassailable. But this would be getting about as -- if it's not, this is about as close as it gets.

We're talking about an open murder charge with multiple jury instructions. Many of them, it can be argued, apply to different defendants in different ways. We're talking about legal concepts and medical testimony and expert testimony that is, as you've acknowledged, foreign to most people, to the average person who comes in and sits as a juror.

And while I acknowledge Mr. Hall's ability as a litigator, I just -- I'm struggling with the fact that that concern about Karl Hall's persuasiveness outweighs the fact that I would like to discuss my client's case with the 12 people who are going to be deciding his ultimate fate.

And I would also note that in my mind the nature of the offense is very telling. We're not talking about a grand larceny charge or possession of a stolen motor vehicle or, you know, a -- I'm just trying to think -- like a PCS charge where we've got co-defendants and there are drugs found in the room and it's not quite sure whose are whose, and the State doesn't do a particularly persuasive job in their opening -- in their initial closing argument, and so the defense just says, "We'll just leave it at that."

This is a case, as I said, with numerous legal and factual issues that seems to cry out for a -- at least some conversation with the jury. And as Mr. Edwards acknowledged, I think he said it would probably be the last time that he waived a closing argument. And I think that Mr. Ohlson made a similar comment in his deposition. I don't have -- I have the deposition here, but -- he was asked that question either by you or by Mr. Cornell.

MS. NOBLE: By Mr. Cornell.

THE COURT: And he made kind of a similar comment, if I remember correctly. I read it yesterday, but --

MS. NOBLE: And, Your Honor, I remember that comment. And I would like to point out that during that deposition -- and if you would like me to be quiet while you are trying to find it --

THE COURT: No, no. I can listen and look at the same time.

MS. NOBLE: Okay. During that deposition I tried to make clear, "Mr. Cornell, you're not offering Mr. Ohlson as a standard-of-care witness in this case with respect to Strickland, are you?"

And he said, "Oh, no. That's not what we're doing."

But even if he were, if you look elsewhere in that deposition, towards the end Mr. Ohlson talks about what a great

job he thinks Scott Edwards did, and that he was competently representing his client.

THE COURT: That's true. He does say that. He makes an observation at the end.

MS. NOBLE: In hearing the Court's concerns, what concerns me is that the standard that might be applied is not a constitutional adequacy type of standard that Strickland contemplates. In other words, attorneys' skills vary. Their approaches to cases vary. And that's why that standard is so deferential.

And also, we need to remember that none of us were in that courtroom that day. They didn't feel it was a very good closing argument at all. They felt like it wasn't very effective and they waived it. Now, we can look at the transcript of what Ms. Halstead has to say -- she's a fine attorney, I'm not trying to disparage her in any way -- but we don't know how she delivered it, if the jury was paying attention. We don't know any of those things.

And there is a reason why we are to avoid hindsight, Your Honor, and this is precisely why. It is not per se ineffective to waive a closing argument. Now, certainly it might not be something that Your Honor would do as a defense attorney, or myself. It would depend on the circumstances. But it's not constitutionally unreasonable.

THE COURT: Per se.

MS. NOBLE: Per se.

THE COURT: There are some cases that have ben cited in the petition where waiving a closing argument is found to be not unreasonable, and there are citations where it is found to be unreasonable. I haven't read them all. But I promise you, Mr. Cornell, that I will.

Are any of them murder cases? I mean, do we have any cases where somebody waives a closing argument in a murder trial?

MS. NOBLE: Your Honor, I don't know the answer to your question.

MR. CORNELL: To be honest with you, I don't remember, either. The cases say what they say.

THE COURT: I'll know before I write the orders.

Go ahead.

MS. NOBLE: With respect to Mr. Ohlson's comments, Your Honor already touched upon the "Dr. Clark, you're so brilliant issue." I don't think that's of concern to the Court. That's what I'm hearing.

In terms of the straight edge, "Oh, son, you know they used to be associated with the Nazis" type of argumentative questioning, Mr. Edwards testified, number one, "I felt my client handled it very well"; number two, "I didn't want to

call more attention to it"; and, number three, "Instruction 11 told the jury, 'Statements of the attorneys are not evidence,' and jurors are presumed to follow instructions."

So even if this Court finds that Mr. Edwards was somehow not reasonable within the Strickland case law for not objecting to those comments, there's no reason to believe that the jury in this case disregarded their instructions. And that was the statement of Mr. Ohlson, it was not a statement of a witness in this case. And the cases cited by Mr. Cornell, I believe, pertain to witnesses.

With respect to a limiting instruction on the Twisted Minds business. There was no testimony at trial, no suggestion at trial -- I've read these volumes four times, now -- that Mr. Kelsey was a member of Twisted Minds. It's not there. So to suggest that somehow there was some sort of ineffective assistance of counsel with respect to that, is unsupported entirely. There is no reason that that jury would have thought that he was part of that particular group, gang, whatever you want to call it. And the Nevada Supreme Court already deemed that that discussion was part of the res gestae, and that's the law of this case.

Moving to the original petition, because I don't want to leave anything out before I sit down. Mr. Edwards flatly denied that he ever declined to present a witness that

Mr. Kelsey identified to him. Mr. Kelsey said something different happened. It's Your Honor's job to, of course, decide which is more credible. And, number two, even if Your Honor believes Mr. Kelsey, whether or not that would have made any difference.

To prove prejudice in this case Mr. Kelsey has the burden of demonstrating a reasonable probability that but for his counsel's errors, the outcome of the trial would have been different. He has not met that burden, Your Honor, and I would urge the Court to avoid using hindsight in analyzing the decisions that Mr. Edwards made in this case.

THE COURT: Ms. Noble, what about the concept of cumulative error in this case, in that, you know, maybe each individual issue that we discuss is not, in and of itself, significant enough to cause the Court to overturn the conviction and order a new trial, but the totality of the issues that are presented rise to the level that the Court should be concerned about the integrity of the jury's verdict?

MS. NOBLE: I have not --

THE COURT: I'm not saying I'm coming to that conclusion. I'm just saying that it's an issue that -- that certainly should be considered and addressed, is whether or not, based on everything that happened in this case, should I be worried about the fact that Mr. Kelsey was convicted of

second degree murder?

MS. NOBLE: No. Cumulative error is a concept that's typically applied by the Nevada Supreme Court when they're talking about errors during trial, and it needs to be raised there.

With respect to the ineffective assistance of counsel claims here, I have yet to see a post conviction case -- and admittedly, I've only been doing this particular area for four years -- where reversal occurs because of cumulative error. That doesn't mean one doesn't exist. I'm not going to represent to the Court that it doesn't. And I will actually research this when I get back and, of course, provide Your Honor with any authorities that would be relevant.

But in this case it seems what the Court is most concerned about is the waiver of that closing argument and the failure to consult an independent forensic pathologist. Now, I'm confident when the Court reviews the testimony of Dr. Clark and Dr. Omalu at trial, and reviews the testimony of Dr. Clark and Dr. Llewellyn, those concerns are going to be assuaged.

With respect to waiver of the closing argument, I understand Your Honor's point. However, I think the Strickland standard is very different than the standard that we might hold ourselves to, and I would urge the Court to avoid applying a heightened standard.

THE COURT: Well, I promise you I won't apply the "that's not the way Elliott Sattler would have done this trial" standard, because I know that that's not what I am supposed to do. It's an objective standard, but that's -- it's a tough hurdle to get over in this case. I'm not saying that the State hasn't cleared the hurdle, Ms. Noble. I'm just saying that if ever there were a case where you would wonder why you would waive a closing argument, this might be that case. And so then I've got to decide whether or not, assuming that I make that determination, that it was objectively unreasonable to do that, and I have to decide whether it would have affected the outcome of the case.

MS. NOBLE: And in considering that, I would urge the Court to consider the possibility that part of the decision that was made by those three attorneys at that time, during a break during a jury trial, was in part due to things that they observed, that we just can't know because we weren't there. And that's precisely why we avoid that hindsight.

It was a tactical decision, and it's a very -- it's actually not a hurdle for the State, Your Honor, it's a hurdle for Mr. Cornell, and it's a high one.

THE COURT: Well, but I have to avoid being an armchair quarterback. And I understand that. I have to avoid judging in the cool of the evening what men do in the heat of

the day. But I don't think I can just reflexively fall back on the fact that Mr. Molezzo and Mr. Ohlson also waived their closing arguments, so it was a group decision of three very experienced trial attorneys. Because Mr. Molezzo and Mr. Ohlson's clients were arguably -- arguably -- in a different boat than Mr. Edwards' client.

And Mr. Edwards did say he was fully prepared to do a closing argument. One would have to assume that Mr. Molezzo and Mr. Ohlson were fully prepared to do a closing argument. Because as I recall Mr. Edwards' testimony and the information that I have about the case, had any one of the three chosen not to go along with the no-closing-argument approach, then the others would have done their closing argument. It's hard to think that, theoretically, Scott Edwards and Richard Molezzo do a closing argument, and John Ohlson stands up and says, "No, thank you." But it could happen.

But it's just -- they're differently situated. The cases -- the defendants are different. And certainly Mr. Schnueringer and Mr. Jefferson's cases are more similar in factual circumstance than Mr. Kelsey's. At least Mr. Kelsey can make some theoretical different arguments in a closing argument than Mr. Schnueringer and Mr. Jefferson could.

MS. NOBLE: I would -- in response to that, if I may, I would say that I am not asking Your Honor to say, "Well, it

must have been reasonable because John Ohlson and Rich Molezzo did it." That's not my argument.

My argument is that, number one, that's one circumstance among many that Your Honor can consider when evaluating that decision. You will also have to evaluate Mr. Edwards' testimony, and that was that he did not think Ms. Halstead did a very strong closing argument and he didn't want Mr. Hall to have an opportunity to address the jury.

Now, whether you agree that was a good decision or not may be influenced, perhaps -- I know you will separate it out, but consider the fact that a seasoned murder prosecutor may evaluate that differently from somebody who it's their first trial. And Strickland does not require that anybody be a seasoned murder prosecutor or seasoned defense attorney. It requires representation that does not violate this person's constitutional rights to be represented by counsel. That's the requirement.

THE COURT: You know, it's funny. As I sit here and think about it, Ms. Noble, I think only a seasoned criminal defense attorney would have the intestinal fortitude to waive a closing argument. So, you know, it's -- I can't imagine a recently out of law school or recently employed by the public defender's office, or in private practice attorney thinking, "Hey, I've got a great idea, I'll just waive closing on this

murder case." It's -- if anything, it shows a heightened level of sophistication and experience. Because you've got attorneys who at least are able to weigh what they think of Ms. Noble -- or, excuse me, not Ms. Noble, I apologize -- Ms. Halstead's argument, they're using their experience and knowledge of Mr. Hall and the efficacy of his rhetorical style, in coming to a conclusion, based on their experience, that waiving closing argument is a good idea. I don't know if that's objectively reasonable or not.

MS. NOBLE: Well, I think when you arrive at that decision --

THE COURT: You'll know.

MS. NOBLE: That's true.

Also, it's important to make sure that the Court does not hold Scott Edwards to the reasonable Scott Edwards standard, the reasonable person who has done all these trials.

THE COURT: No. Just the objectively reasonable lawyer.

MS. NOBLE: Your Honor, that concludes my argument. Unless the Court has more questions about aspects of the petition and supplemental petition, I would suggest that it be -- be denied, rather, in its entirety.

THE COURT: Thank you, Ms. Noble.

Mr. Cornell, any rebuttal argument?

MR. CORNELL: Thank you. May I have the podium when I do this? Otherwise I'm going to be doing this through the argument, which isn't a good idea.

MS. NOBLE: It's not that bad.

MR. CORNELL: I think, Your Honor, from your questions of Ms. Noble, that my prediction held true. We're keyed into the grounds that matter in this case and the grounds that may not matter quite so much.

With respect to Ground 1(b), I'm getting the impression from Your Honor that you're not going to rule today, you want to take this under advisement. I think that's a really good idea. And I think what's a particularly good idea is to review the actual transcript of the testimony of Dr. Llewellyn. Because to suggest that Dr. Llewellyn is completely congruent with Dr. Clark in the end, is not my recollection of the testimony at all.

My recollection is that her opinion is this. It is possible, indeed, that Kelsey's blow could have been fatal or contributed to the death of the victim. But her opinion to a reasonable degree of medical probability is that the blows administered by the second group, meaning Schnueringer and Jefferson, were in fact fatal in nature and did in fact result in the death of the victim.

And the question is, if a reasonable juror hears that

could they credit it? Maybe a reasonable jury would be more impressed by the CV of Dr. Clark or the fact that Dr. Omalu has had a movie with Will Smith, of all people, portraying him, than they would by the CV of whatever doctor that gets presented for the defense at trial. But that's a jury's call. That's -- that's a jury's call, and that's a jury's call after we have that retrial, which only happens when this is granted.

Could a reasonable -- could a reasonable jury credit that testimony? The answer is, "Sure they could." And if they credited that testimony, then what? If they credit that testimony they either decide, after proper closing argument, that Mr. Kelsey is not the proximate cause of the death or that what he's guilty of is misdemeanor battery.

What else does Dr. Llewellyn testify to? There's a whole plexus of blood vessels at the base of the brain that can tear from blunt force impact. Given the facts of the case it would appear likely, to a reasonable degree of medical certainty, that the tearing of some blood vessels lead to -- cause immediate death, and that tearing occurred from the second fight involving Schnueringer and Jefferson.

And, indeed, in my cross-examination of Dr. Clark, as well as the examination at trial, she acknowledges that that is possible.

If a reasonable jury hears that and decides that they

credit that, and they decide those are the facts of this case -- that's how this man died, when the -- when the plexus of arteries leading to the brain were disrupted -- ruptured, not severed, but ruptured -- and the severing was made -- or the rupture was made worse by the kicking, if they decide that, then upon proper instruction argument, what did they decide? They decide that the proximate cause of this death of Mr. Hyde is what Schnueringer and Jefferson did, not what Kelsey did. And a reasonable juror may decide that even if the defense expert has a CV miniscule in comparison to the CV of the State's expert. But it's a jury's call. So --

And where Dr. Clark and Dr. -- I think what you will see from the transcripts, where Dr. Clark and Dr. Llewellyn differ is what blood vessels were actually disrupted or what could have caused the subarachnoid hemorrhaging, and could any of the areas of trauma on the skull be -- could all of them be attributed to what Mr. Kelsey did?

It's Dr. Llewellyn's opinion, I think, that all of the areas of trauma that she identified could have been the result of what Schnueringer and Jefferson did, but not all of them could have been the result of what Kelsey did. And I believe that's where Dr. Clark disagrees.

Now, also, we have the issue of subconcussion, which is a concept brought up by Dr. Omalu, not Dr. Clark. I believe

it was the opinion of Dr. Llewellyn that if in fact what -- what Master Hyde suffered from Mr. Kelsey was a subconcussion, which would appear reasonably possible, it's highly unlikely that a subconcussion by itself would lead to the death of Mr. Hyde.

If that's her testimony -- and I do believe it is -- and if the jury credits that testimony, again, they're going to determine the proximate cause of this death of Master Hyde was the action of Schnueringer and Jefferson, not Kelsey.

So I would urge the Court, in taking it under advisement, to actually -- let's get the transcript and see exactly what Dr. Llewellyn said, but look at it in the terms of what could a reasonable juror do.

We know this much. When I described the testimony briefly of both Dr. Haddix and Dr. Llewellyn, and discussed that with Mr. Edwards, he said, if that evidence was out there and he knew about it, he would have wanted to present it.

THE COURT: We didn't know what the testimony of Dr. Haddix would be.

MR. CORNELL: Well, no. But I mean, just from the general description of what they had to say.

And by the bye, let's be clear on the record. What Ohlson told Edwards was not, "My expert agrees with Clark and Omalu." He didn't say that. He said, "The expert I contacted

doesn't help" -- or "doesn't help us."

If I'm Mr. Edwards, "Wait a minute. What do you mean, 'Doesn't help us'?" Mr. Ohlson is a very sharp guy. He's not going to say anything to hurt his client to his counsel, but he's not going to reveal what he doesn't have to. "It doesn't help us." "Us" being who? Myself and Mr. Molezzo's client? Is that who he means by "us"?

Well, what we do know is Mr. Edwards didn't take it further in a case that centers on the legal medical cause of death, to where Mr. Edwards centers in on proximate cause as the very first thing practically he does in this case after he's reviewed the testimony. He doesn't hire the expert after he's told that Ohlson isn't going to bring his because "he doesn't help us," and in this case that centers on that question, I submit to you, is below the standard.

Now, by the bye, you asked the question -- and it so happens I have researched and written this. If you want a set of -- a separate set of Ps and As on this, tell us, and I'll be happy to provide one.

There is case law out there from the Federal Circuits, and I think even the Nevada Supreme Court, that says that when you have cumulative deficiencies, they can result in prejudice, even if one deficiency wouldn't.

Likewise, I think there's cases out there that say

when you have cumulative errors or cumulative things that counsel could have done differently, one alone might not be proof of below the standard, but a good number of them would be. And if you want Ps and As on that, I would be more than happy to give you that. Just, you know, so order it, and I'll have it done, but not tomorrow. Okay. I'm taking a day off tomorrow --

THE COURT: Good.

MR. CORNELL: -- thank you very much.

With respect to waiving the closing argument, which is a huge issue in this case, this is not a short trial. The charge is open murder, the most serious charge short of capital murder you can have in our society. I think we would all agree on that.

THE COURT: Actually, I wouldn't agree on that.

MR. CORNELL: Oh, all right. Sexual assault of a minor child. Okay. You got me there.

THE COURT: The potential penalty for sexual assault on a minor child is 35 years to life.

MR. CORNELL: Now it is, yeah. I think I would agree with you on that. Okay.

Extremely serious charge. Not the kind of case for a short trial. You cannot assume, of course, that a jury is going to look at jury instructions as complex as the proximate

cause instruction, and so forth, and figure it out without some assistance, properly, of counsel. You just can't assume that.

Nor can you assume this. We know that Karl Hall is an extremely forceful advocate. I certainly know it. I've done battle with him, believe it or not. But if we sit here and say, with closing argument waived, what if Mr. Edwards was to say, "Look, ladies and gentlemen of the jury, even if we accept Dr. Omalu and Dr. Clark's testimony, all they're saying is that all blows contribute to the death. All they're saying is that what my client did was a cause, in fact, of the death of Master Hyde. That doesn't make him a murderer. It just means that he's guilty of some degree of crime. The evidence in this case, ladies and gentlemen, from all of the witnesses, from the force of the witnesses is, what he did was commit a series of batteries that in and of itself wouldn't have taken the life of someone else, but in connection with what the other guys did, did so, per Clark and Omalu. What the evidence suggests to you, ladies and gentlemen, is those two guys are guilty of second degree murder, but this guy, Kelsey, he's guilty of involuntary manslaughter."

Had Mr. Edwards made that argument -- and we don't know that -- what he would have done, because he waived it -- what would Mr. Hall have said to that in response? We don't know. Would he have said, "Ladies and gentlemen of the jury,

you'd better believe Mr. Opperman, and you'd better disbelieve Ms. Hawkinson, and you'd better disbelieve Mr. DePriest, and you'd better disbelieve Mr. Naastad, and you'd better disbelieve Mr. Molder, and you just better do it"? Would he have said that? I don't think so. But it's purely speculative to know.

When we talk about sufficiency of the evidence, what we're talking about is, while a jury could have cherry-picked Mr. Opperman's testimony and decided to believe him and disbelieve all the others in terms of the actual nature of the fracas between Mr. Kelsey and Master Hyde, and they could have decided, "We believe Opperman and not everybody else" -- I mean, from the appellate perspective, they had the right to do that.

In reality, did the jury do that? We don't know. But if a jury were otherwise inclined to do that, that's why testimonies of witnesses, such as Ms. C[redacted] and Mr. C[redacted], really would have been important to -- to turn the tables of the factual justice in this case away from Mr. Opperman.

What I will say about that is, taking on a murder case that has medicolegal issues like this is the center point, and not even hiring a forensic pathologist has to fall below the standard. Almost as egregious as taking on a murder case that

is so fact intensive, with so many witnesses, and not hiring an investigator to do anything. In effect, not hiring an investigator at all.

Our theory is not that Mr. Edwards should have gotten Mr. Peele to go out and absolutely interview everybody on the planet. That's not it. Our theory relative to Ground 7 is to go out and interview the witnesses who were actually closest to the fracas, see what they have to say. Those witnesses, apart from the ones that testified, were Ms. C[redacted] and Mr. C[redacted].

Isn't it strange -- I mean, the case isn't going to rest or fall on this -- that the State actually interviewed Ms. C[redacted], and decided not to call her? What do we make of that? I don't know. It's just a little hickey on the record, if you will.

In any event, I would urge the Court, of course, to take it under advisement and get the transcript of these proceedings. I think -- well, the Court has indicated, I think, it's going to take -- the Court is going to take it under advisement. I think that would be a good idea.

If you want a brief on cumulative deficiencies or cumulative errors and how it can result in either below the standard or prejudice, I'm happy to do that for you next week, though. And, otherwise, I'll submit, Your Honor.

THE COURT: Thank you, Mr. Cornell.

I do think it would be helpful to have a supplemental brief from both sides regarding the cumulative error issue, because I did raise it, and so I do like to give the parties the opportunity to fully brief issues once I've raised them. I don't want to write an order that you look back on and say, "Well, if I had the chance to say something about the issue that you raised during oral argument, this is what I would have said." And so I will give the parties the opportunity to brief that issue.

And I will also give Mr. Cornell the opportunity to recuperate --

MR. CORNELL: Thank you.

THE COURT: -- from whatever ails him today and yesterday.

The supplemental briefs will be no more than five pages in length. They will not discuss the facts of this case at all, because the facts have already been fully litigated. It is simply the opportunity to address the discrete legal issue that is raised.

And that's why I think five pages is more than ample. If you don't need to use five pages, then don't. Use fewer pages if you would like to.

The supplemental brief will be due no later than the

close of business on Friday, January 29th of 2015.

MR. CORNELL: '16?

THE COURT: 2016.

MR. CORNELL: Thank you.

THE COURT: I keep messing that up. So thank you, Mr. Cornell.

And, Mr. Cornell, if you would resubmit the motion for consideration. And by "the motion" I mean the Petition For Writ of Habeas Corpus. At that point, once I have all of the briefing, the Court will take it under advisement.

Further, the Court will order the transcripts of these proceedings, yesterday and today's testimony, so I can accurately review the testimony of Dr. Llewellyn in comparison to the testimony of Dr. Omalu and Dr. Clark and come to the appropriate decision regarding that very important issue that has been identified. And it will also give me the opportunity to compare the testimony of Mr. C[redacted] and Ms. Carlson to that of the other witnesses who have testified in the trial and see if I really think that their testimony is duplicative of the testimony that was provided by those other witnesses, to include Mr. Kelsey, or it actually would have added something that would assist the jury in their determination. I think it's appropriate to have the transcripts to make those comparisons, and so I will order the transcripts.

MR. CORNELL: Your Honor, may counsel have, also, copies of the transcripts? Because I think, in reality, whoever doesn't prevail is going up on appeal, most likely, so it would probably be a good idea to have the transcripts now rather than later, if that's okay.

THE COURT: Well, as soon as the transcripts are prepared, they get filed with the court. How you receive access to those, I have absolutely no idea.

MR. CORNELL: Oh, that's true. We can get them on eFlex.

THE COURT: Yes. So it will be --

MR. CORNELL: So, okay, that's fine.

THE COURT: It will be just filed with the Court and you will have the ability to get the transcript that way.

MR. CORNELL: Okay.

THE COURT: So with that, the Court will take the matter under advisement.

Thank you, Counsel.

Court is in recess.

(Proceedings concluded.)

STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

I, MARIAN S. BROWN PAVA, Certified Court Reporter in and for the State of Nevada, do hereby certify:

That the foregoing proceedings were taken by me at the time and place therein set forth; that the proceedings were recorded stenographically by me and thereafter transcribed via computer under my supervision; that the foregoing is a full, true, and correct transcription of the proceedings to the best of my knowledge, skill, and ability.

I further certify that I am not a relative nor an employee of any attorney or any of the parties, nor am I financially or otherwise interested in this action.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing statements are true and correct.

Dated this 29th day of January 2016.

/s/ Marian S. Brown Pava

Marian S. Brown Pava, CCR #169

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

-o0o-

ZACHARY KELSEY,
Petitioner,

vs.
THE STATE OF NEVADA,
Respondent.

Case No. CR12-0326B

Dept. No. 10

DEPOSITION OF

JOHN OHLSON

August 18, 2015

Reno, Nevada

JOB NO. 261122

REPORTED BY: DEBORAH MIDDLETON GRECO, CCR #113, RDR, CRR

A P P E A R A N C E S

FOR THE PETITIONER:
Richard F. Cornell, Esq.
150 Ridge Street, 2nd Floor
Reno, NV 89501
329-1141

FOR THE RESPONDENT:
Jennifer P. Noble, Esq.
Deputy District Attorney
One South Sierra Street
Reno, NV 89520
328-3200

I N D E X

E X H I B I T S

NUMBER	DESCRIPTION	PAGE

(NO EXHIBITS MARKED FOR THESE PROCEEDINGS)

BE IT REMEMBERED that on Tuesday, August 18, 2015, at the hour of 10:23 a.m. of said day, at the law offices of SILVERMAN, DE CARIA & KATTELMAN, CHARTERED, 6140 Plumas Street, Suite 200, Reno, Nevada, before me, DEBORAH MIDDLETON GRECO, a Certified Court Reporter, personally appeared JOHN OHLSON, who was by me first duly sworn and was examined as a witness in said cause.

-o0o-

JOHN OHLSON

called as a witness, having been duly sworn,

testified as follows:

-o0o-

MR. CORNELL: All right. This is the time set for the taking of the deposition of John Ohlson in the case of Kelsey v State, CR 12-0326B.

Mr. Ohlson is present, of course, along with counsel Richard Cornell for the petitioner and Jennifer Noble for the State.

No other person is present.

Can we stipulate to these things, Counsel?

Originally we set this deposition with the hearing set for next week, August 26, 27, with the knowledge that Mr. Ohlson first was in jury trial, and then later in deposition, so he has graciously agreed to give testimony today.

The hearing has since been continued after we set

this, but the stipulation is that we go forward with the deposition today with the idea of reading it into the record if either party so desires at the evidentiary hearing when it gets reset.

MS. NOBLE: Yes, the State would stipulate to that.

MR. CORNELL: Okay. And the reason being, with Mr. Ohlson's schedule, it's eminently predictable his availability on any given date in the future is going to be questionable.

So it seems like the better way to go is this way.

Also, and it's contained in the stipulation that we signed to take the deposition, but to repeat on the record, we're in the somewhat unique situation where Mr. Ohlson really is a witness.

Although this is postconviction, he is not the lawyer accused of being ineffective. Therefore, there's been no waiver of the attorney-client privilege.

Therefore, his client, Mr. Schnueringer, would have the ability to raise the privilege.

If a question is asked that Mr. Ohlson cannot answer without, referencing what Mr. Schnueringer told him, Mr. Ohlson has the ability and the right to raise the privilege.

And if he does, this is the one situation where he cannot answer, and we can't direct him to.

So do we stipulate to that?

MS. NOBLE: Yes.

MR. CORNELL: Okay. For the record, I don't intend to ask any questions that I think would impinge on the attorney-client privilege, but if I do, of course, you will be raising the privilege.

Otherwise, this is a deposition that's being taken pursuant to the Rules of Civil Procedure, Rules 26, et cetera, et sequitur, but because we are anticipating this is a hearing deposition, if there are objections raised, we'll raise them.

We'll try to get around the objections if we can, but absent privilege type of objections, I think the only thing we can do is have Mr. Ohlson answer the questions, if he can, and if the objection is sound, the question will be stricken.

I don't know any other way to go about it.

Do you agree?

MS. NOBLE: I agree.

MR. CORNELL: All right. With all of that --

THE WITNESS: Before you go forward --

MR. CORNELL: Sure.

THE WITNESS: -- I would like a stipulation between the two of you for my convenience.

Would the two of you stipulate that the original of this deposition be transmitted directly to me for my review and signature by the court reporter?

After which time, I will deliver the original to

whichever of you, I think Mr. Cornell this is your deposition --

MR. CORNELL: Right.

THE WITNESS: -- and then you can use it in court.

That way, I won't have to trouble the court reporter, and she won't have to trouble me to meet her at her office to review the deposition and sign.

MR. CORNELL: I so stipulate.

MS. NOBLE: Yes.

MR. CORNELL: That's pretty common civil procedure.

THE WITNESS: I appreciate that.

MR. CORNELL: So, yes, I stipulate.

EXAMINATION

BY MR. CORNELL:

Q Okay. With all of that out of the way, please state your name for the record.

A My name is John Ohlson.

Q Spell your last name, please.

A O-H-L-S-O-N.

Q And your business address, Mr. Ohlson?

A My business address is 6140 Plumas Street, Suite 200, Reno, Nevada, 89519.

Q And your occupation or profession, sir?

A I'm a lawyer.

Q And when were you admitted to practice in Nevada?

A September 1972.

Q So you have been practicing off and on for 43 years?

A Mostly on.

Q Mostly on. Okay.

At this point, is there an area of specialty that you have?

A Well, I don't think lawyers in Nevada are allowed specialties.

Q Right.

I guess --

A Area of concentration --

Q -- concentrated area of practice may be a better way to ask that.

A Concentration, I think most of my work is done in the defense of criminal accusations.

Q And as of 2012, the beginning of 2012, can you estimate how many murder cases you had handled in the defense of the accused?

A Tried to verdict or concluded?

Q Let's do both. Concluded and tried to verdict.

A That would be a tough estimate.

The first murder case that I tried to verdict was in January 1976, and thence on a regular basis after that.

Recently in some years I'll try as many as 3 or 4 murder cases to verdict in a year.

And I also settle a number of cases.

Q Sure.

Would it be accurate to say that you have tried more than 30 murder cases in your career?

A Yes.

Q Okay. And are these murder cases exclusively in Washoe County, Nevada?

A No.

Q Where else besides Washoe County have you tried murder cases?

A I have tried them in Elko County, I have tried them in Lyon County, I have tried them in Plumas County, California.

Q Are you licensed to practice in California?

A No. I tried it, that case, in conjunction with a licensed California lawyer as pro hac vice.

Q Were you appointed to represent the co-defendant, Bobby Schnueringer, in this case?

A I was.

Q And had there been an attorney for Mr. Schnueringer prior to you to your memory?

A I don't recall.

Q As you went along, did you develop a theory of defense for Mr. Schnueringer?

A I did.

Q And what was your theory?

A My theory of defense was that all three defendants

were culpable to some degree or another, and it was -- and it would be impossible to distinguish beyond a reasonable doubt which of the defendants delivered the lethal blow.

Q Now how did you go about developing that defense?

A Well, do you want the long version or the short version?

Q Well, let's go long, and then we'll break it down --

A Okay.

Q -- as we go.

A I -- it's my practice to consult the autopsy protocol as one of the first pieces of information that I look at in any homicide case.

This case, in this case, it was clear that the pathology and the testimony of expert pathologists would be critical to the State and to the defendants.

Upon reading the protocol --

MS. NOBLE: Excuse me, Mr. Ohlson.

I'm going to object to this line of questioning as not relevant.

I understand that you are going to go ahead, but the State would like to have a continuing objection.

BY MR. CORNELL:

Q That's fine.

Go ahead.

A I sent the protocol and other information to Dr. Terri

Haddix, who practices in Hayward, California, whom I had some previous acquaintance. She is a forensic pathologist.

After she consulted with me, then I firmly developed the theory of defense which I thought was the only theory of defense.

Q Let me ask you about Dr. Terri Haddix.

She's a forensic pathologist in Hayward, California, you say?

A That's right.

Q And you had utilized her services previously?

A I had.

Q Okay. How many times previously, do you know?

A I don't recall.

Q Okay. And did she give you information or opinion that was helpful to Mr. Schnueringer?

A No.

Q What was the information that she gave you?

MS. NOBLE: Objection. Hearsay. Relevance.

BY MR. CORNELL:

Q All right. Not offering this for the truth of the matter asserted. I'm offering it to establish how you came upon the direction of your theory of defense.

But go ahead.

A She identified the primary injury that was the factual cause of death of the deceased.

Q Okay. Which was what?

A That was a rupture or severing of the cranial artery, cranial artery bundle, that serves the brain with blood.

And that it was ruptured by the torquing motion of the head that resulted from a blow that the deceased received.

Q Okay. And from her description, was it your understanding, was the torquing blow delivered by your client?

A Not from her description, no.

MS. NOBLE: Objection. Hearsay. Relevance.

BY MR. CORNELL:

Q Okay.

A She didn't know who did what to whom, so she couldn't describe which defendant had delivered the fatal blow.

Q Okay. Well, the information she gave you, was it her opinion that the likely cause of death was the torquing motion that disrupted the arteries in the back of the skull, I guess?

A Yeah. In the cervical spine area.

Q Cervical spine area. That was her opinion to you?

A That was her opinion.

Q Okay. Now did she ever give you a written report in that regard, if you remember?

A You know, I don't recall. I think I may have asked her not to.

Q Okay. Prior to trial, did you share that information with co-counsel?

A No.

Q And we'll identify who co-counsel was for the record. Counsel for Mr. Jefferson was who?

A Richard Molezzo.

Q And counsel for Mr. Kelsey was whom?

A Scott Edwards.

Q All right. Did you share the information from Dr. Haddix with either Mr. Edwards or Mr. Molezzo?

A No.

Q And was there a reason why not?

A Yes.

Q And what was that?

A I felt the information, while possibly exculpatory to Mr. Edwards' client, was inculpatory to Mr. Molezzo's and more particularly to my client.

Q Okay. Do you recall whether or not either Mr. Molezzo or Mr. Edwards requested that information from you?

A I don't know if they specifically requested it.

I know that in one meeting, I volunteered to the both of them that I had consulted Terri Haddix, and that she did not have information that I deemed to be helpful, and I wasn't going to be using her.

Q Okay. Did either of them, either Mr. Molezzo or Mr. Edwards, ever indicate that they had hired their own medical expert, their own forensic pathologist?

A I don't recall that they did.

I don't recall that they indicated to me. I don't know whether they did or not.

Q Okay. All right. After consulting with Dr. Haddix, what did you do to go about developing your theory of the case?

MS. NOBLE: I'm just going to restate the State's continuing objection to the relevance of this line of testimony.

BY MR. CORNELL:

Q You may answer.

A If the first thing that I do nowadays in a homicide defense is to read the autopsy protocol, the second thing I do, particularly in either a retained or an appointed case, either one, was to engage my investigator whom I routinely used.

Q That would be whom?

A Bill Savage.

Q Okay.

A And share the file with him, to ensure that he has copies of everything in the file that he requests, and to set Mr. Savage to work, first in the general sense, and then subsequently after meeting, to the specific defense.

Q And did Mr. Savage do that in this case?

A Yes.

Q He is a pretty thorough guy, is he not?

A He is thorough, he is well trained, and he is particularly well educated and well experienced for the job.

Q Did Mr. Savage go about interviewing any witnesses that you knew the State was going to call --

A Yes.

Q -- such as Taylor Pardick?

A I think he did, yes.

Q Okay.

A As many of them that he could find, I think he did.

Q All right. And the record reflects that you called three witnesses in your case in chief.

Were those witnesses that Mr. Savage had found and interviewed to your memory?

A I'm not sure that he found them. I may have derived their names from my client.

Or Bill may have got them from my client on interviews with my client.

Q Okay.

A I also require that my investigator interview my client early on.

Q Right.

A But somehow he got the names.

Q Okay. Prior to trial, did you share Mr. Savage's reports with either Mr. Molezzo or Mr. Edwards?

A I don't think I did.

Q Okay. Would there be a reason why not?

Again, it may be fairly obvious, but, you know, I

don't know.

A In a homicide defense among co-defendants, rarely is there a joint purpose.

Q Okay.

A And what information I might give to my co-counsel might be harmful to my client.

Q Okay. Would that also go, what you just said, for a reason for not sharing Dr. Haddix' information with co-counsel?

A Dr. Haddix' information was more specifically kept by me for specific reasons.

I thought Dr. Haddix' information, had the prosecution had it, would have been devastating to the prosecution, more so than Dr. Clark, or the other fellow, the neuropathologist.

Q Now if I could ask you to expound.

Why would that have been more devastating to the prosecution than Dr. Clark or Dr. Omalu?

A For --

BY MR. CORNELL:

Q Or for.

MS. NOBLE: Objection. Calls for a conclusion about the medical opinion of an expert who is not here to testify.

BY MR. CORNELL:

Q Okay. You may answer if you can.

A Because she went further than either of the State's pathologists went.

And she described the effects of a blow that was sufficient to cause the torque to the head to rupture the cranial artery, the aftereffects of that.

Which the two State's witnesses did not specifically state in the autopsy protocol or otherwise up to that point in time.

Q Okay. Let me ask you:

In your career defending more than 30 murder cases that went to trial, have you ever handled a murder case where cause of death was at issue and not retained a medical expert?

A Yes.

Q Okay. And when did that happen?

A That was a homicide case that I think I tried about 20 years ago, in which the State's pathologist was particularly available to me before Dr. Clark became a State's coroner.

Q Is that Dr. Ritzlin?

A Yes, Dr. Ritzlin.

Q All right.

A Who had information that was particularly helpful to me, and I think probably was one of the things instrumental in the acquittal.

Q Okay. So in that case, no need to hire an expert --

A Right.

Q -- because the State's own expert wasn't going to get any better than Dr. Ritzlin for your client?

A And I want to back up.

I think that presenting my own pathologist as an expert at trial has been a rare occurrence for me.

Q Okay. But notwithstanding that, there's a distinction between presenting the witness and --

A Hiring a consultant.

Q -- hiring an consultant, right?

A Right.

Q Okay.

A Can I go further?

Q Sure. Please.

A In most cases, cause or manner of death is not in dispute.

Q Right.

A The victim died of a gunshot wound. Hit with a .45 in the heart, okay.

Q Right.

A So there's no need.

Q Right.

A And that, I think, is the common garden variety criminal homicide.

There are issues, notably -- well, there are sometimes issues about a series of blows and which blow was lethal, and then what does dead mean?

Q Right.

A If a person is dead prior to the delivery of a previous lethal blow, what is dead?

So you have those issues, and those have come up.

But those are kind of unusual issues. Mostly it's very mundane. This was one of those unusual cases.

Q Right.

To expand on what you are saying, for example, a shaken impact syndrome or shaken baby syndrome-type case, you have handled them, correct?

A I have.

Q And in those kind of cases, wouldn't you retain a medical expert, at least to consult with, because of the complexity of those kind of cases?

A At least a consultant, I think.

I tried one of those in December of 2013, and I did not put medical pathological evidence on the stand, although I did consult prior to trial.

Q Okay. In this case, did you have conversation with Mr. Molezzo and Mr. Edwards on the subject of trying not to have the defendants point fingers at each other?

A Yes.

Q Do you remember?

A Yes.

Q Okay. And what was it that you said to them and when?

Well, first off, when?

A I don't know when it was.

Q It was prior to trial?

A Of course.

Q Okay. And what was it that you said?

A The meeting was at Mr. Molezzo's office, and it was early on in the case.

And the meeting consisted of myself and Scott Edwards and Rich Molezzo and my associate, researcher Laura Arnold, who had been working on the case and various legal aspects of the case. She attended the meeting, as well.

Q Okay. And what was it that you stated to Mr. Edwards and Mr. Molezzo at that time?

A I told them that one of the pitfalls of co-defendant defenses on any charge was that sometime during the trial, one or more of the defendants would turn on the others.

And that if that happened, that generally benefited the prosecution, and everybody got convicted, and that we ought to try to find a way around that, even though we were going to represent our own clients.

Q Did you ever seek a severance in this case from Mr. Kelsey?

A No.

Q Did Mr. Edwards ever give you any indication, prior to trial or during trial, that he was going to have a theory of defense that would be inconsistent with your theory of the case?

MS. NOBLE: Objection. Calls for hearsay.

MR. CORNELL: Well, I mean from Mr. Edwards, who will be a witness in this case.

MS. NOBLE: Well, he is not a witness right now.

MR. CORNELL: I know.

MS. NOBLE: For Mr. Ohlson to say what Mr. Edwards said would be hearsay.

MR. CORNELL: I understand. And I'm going to ask him that question at the evidentiary hearing.

BY MR. CORNELL:

Q So you may answer.

A First of all, I have something that tickles my memory that Scott Edwards may have moved for a severance in this case.

Q Okay.

A I'm not sure.

Q You are not sure?

A But I don't recall. And I never had an indication -- let me think back.

I knew that Scott's defense was different from my defense.

Q What did you believe --

A I never perceived it to be inconsistent.

Q What did you believe his defense was going to be or --

A "I didn't do it. These two other guys did it. I didn't do it".

Q **Okay.**

A "I had a scuffle with the deceased, but I didn't hurt him".

Q **Okay. The record reflects that the three of you waived closing argument after Miss Halstead gave her opening closing argument.**

First off, whose idea was that?

A Mine.

Q **And when did you come up with that idea?**

A After I heard Miss Halstead's summation.

Q **Okay. And the record reflects that after Miss Halstead made her opening summation, there was a lunch break.**

A Uh-huh (affirmative).

Q **Did you meet with either counsel during that lunch break?**

A My recollection is that Scott Edwards and I had lunch together.

Q **Okay. Did you suggest waiving closing arguments to him at that time?**

A Yes.

Q **And what would -- first off, have you ever waived closing argument in a murder trial before?**

A I'm sure one or two, but I never had the guts before this time.

Q Okay. This was the first time --

A Yes.

Q -- you did that.

What was your thinking in waiving closing argument?

A Well, with all due respect to Miss Halstead, who I like and who I respect, and who I think is a good lawyer, I think that her summation was perfunctory.

My opinion at the time was that it was intentionally perfunctory in order to set us up for closing arguments to which Mr. Hall could give a blazing rebuttal argument.

And when I saw that, I was pretty convinced that that was the strategy that they had concocted, and I wanted to cut Karl Hall off from arguing.

Q Before that, Mr. Hall had cross-examined your three witnesses, correct?

A That's right.

Q And would you characterize his cross-examination of them as fairly blazing?

A I would characterize it as characteristic of Karl Hall's cross-examination.

Q Which would mean blazing?

A Tough.

Q Tough?

A Tough. Very tough.

Q Okay. And did you anticipate that if you did closing

argument, he would come back with those tough remarks, and possibly even embellish on them?

A I thought that he hurt my witnesses. And I thought that that gave him an opportunity to rub off the damage to their credibility that he had done in cross-examination onto my client.

Q Okay. Now did Mr. Edwards assent to waive closing argument in order for you to waive closing argument?

A Yes.

Q Likewise with Mr. Molezzo, did you need his assent?

A Yes.

Q Okay. Had they not waived closing argument, would you have waived closing argument?

A No.

Q And why not?

A Well, if either one of them argued, it would have defeated the purpose of waiving.

Because if either one had argued, then Karl would have had an opportunity to exercise his rebuttal in response to their argument, and we would have waived for nothing.

Q Let me ask you this question if you can answer it:

If you had been the one -- you were appointed to represent Mr. Schnueringer?

A That's right.

Q You could have been appointed to represent Mr. Kelsey

or Mr. Jefferson?

A That's right.

Q Knowing the case as you knew it, if had you been appointed to represent Mr. Kelsey, would you have waived closing argument?

MS. NOBLE: Objection. Relevance.

THE WITNESS: The short answer is no.

BY MR. CORNELL:

Q Okay. You recall that Mr. Edwards put Mr. Kelsey on the stand, and he testified?

A I do.

Q And you recall cross-examining Mr. Kelsey on the subject of the Straight Edge movement being a Neo-Nazi philosophy?

A I think I cross-examined him on that, and I think I cross-examined him also on this issue of the brass knuckles.

Q Right.

Where did you get the information that Straight Edge is a Neo-Nazi philosophy?

A Straight Edge had been around a while, and I don't recall exactly where I got it, and I think it's a combination of running into some Straight Edge defendants in the past and street knowledge.

Q Okay. Did you have any information from any source that the kids in North Valleys High who were Straight Edge were

Neo-Nazis?

A No.

Q And in this case, Kelsey was white, Schnueringer is white, the victim was white?

A Yes.

Q Correct?

I mean, did you have any information in this case that this homicide of Jared Hyde was racially motivated?

A No.

Q Okay. If you had been representing Kelsey, and the prosecutor had brought out in his cross-examination that Straight Edge was a Neo-Nazi philosophy, can you see yourself having objected to that?

A Well, I might have very well raised the issue of the subject of Straight Edge prior to trial.

Q Okay. To keep that information out?

A Yeah. I think it's kind of an obvious character issue, and I don't think that character was necessarily opened up during Kelsey's examination.

Q Okay. Let me just review.

A Might have been, but I don't think it was.

Q Okay.

MS. NOBLE: Mr. Cornell, I'm sorry to interrupt, but I just want to make a record that there was no notice of Mr. Ohlson being a proposed expert in this case.

MR. CORNELL: Okay.

THE WITNESS: Record should also reflect I have not been asked to testify as an expert, just as a percipient witness.

BY MR. CORNELL:

Q Right.

Yeah. I mean, I am not asking you whether failing to turn the case over to investigators fell below the standard of reasonably effective counsel or any question like that.

I'm just asking what you did, and what you historically have done in cases like this.

Let me just review my notes. I think I have asked you everything that I want to ask.

I believe I have. I have no further examination. I turn the floor over to Ms. Noble.

MS. NOBLE: Thank you.

EXAMINATION

BY MS. NOBLE:

Q Good morning, Mr. Ohlson.

A Hi.

Q Just had a couple of questions.

Dr. Haddix, was it, that you consulted?

A That's right.

Q And she never gave you a written opinion to your recollection?

A I don't think she did. I think I asked her not to.

Q Okay. And she never examined the decedent in this case, correct?

A The decedent? No.

Q Right.

So she didn't have an opportunity to examine Mr. Hyde, obviously?

A No.

Q And Dr. Haddix, did you ever give her a summary of the opinions of Doctors Omalu and Clark?

A I did.

MS. NOBLE: I have no further questions. Thank you.

FURTHER EXAMINATION

BY MR. CORNELL:

Q That just raises one question.

With regard to Dr. Haddix' opinion, do you recall sharing that opinion with Mr. Edwards at any time?

A I do not.

Q Okay.

A Not -- and let me add, because the answer is a little deceptive, not intentionally deceptive.

It's not that I don't recall sharing it. I'm reasonably certain I never shared it.

Q Okay.

A Because I would not have done so.

Q Prior to trial, you would not have done so?

A I might have done so after trial.

Q Thank you, sir.

That's all I have. Okay. So --

A May I add an observation --

Q Yes.

A -- before we close?

Q Certainly.

A Is that all right with the two of you?

Q It is okay with me.

A The observation I wanted to add is about my colleague, Scott Edwards.

And that is that during the trial, it was the first trial I ever had with him, and what I observed was that he did a competent job as a zealous advocate, and his work in trial --

Q During the trial itself?

A Yeah, during the trial, and I thought several times, thinking that it was admirable work.

MR. CORNELL: Okay. Thank you. I believe we are done.

(Proceedings concluded at 10:56 a.m.)

CERTIFICATE OF DEPONENT

PAGE	LINE	CHANGE	REASON

* * * * * *

I, JOHN OHLSON, deponent herein, do hereby certify and declare the within and foregoing transcription to be my deposition in said action under penalty of perjury.

That I have read, corrected and do hereby affix my signature to said deposition.

_____ _____

JOHN OHLSON, Deponent Date

NOTE: Original deposition to John Ohlson, Esq.

STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

I, DEBORAH MIDDLETON GRECO, a Certified Court Reporter in and for the State of Nevada, do hereby certify:

That on Tuesday, August 18, 2015, at the hour of 10:23 a.m. of said day, at 6140 Plumas Street, Suite 200, Reno, Nevada, personally appeared JOHN OHLSON, who was duly sworn by me to testify the truth, the whole truth and nothing but the truth, and thereupon was deposed in the matter entitled herein;

That I am not a relative, employee or independent contractor of counsel to any of the parties, or a relative, employee or independent contractor of the parties involved in the proceedings, or a person financially interested in the proceeding;

That said deposition was taken in verbatim stenotype notes by me, a Certified Court Reporter, and thereafter transcribed into typewriting as herein appears;

That the foregoing transcript, consisting of pages 1 through 31, is a full, true and correct transcription of my stenotype notes of said deposition.

DATED: At Reno, Nevada, this 18th day of August, 2015.

DEBORAH MIDDLETON GRECO
CCR #113, RDR, CRR