# IN THE SUPREME COURT OF THE STATE OF NEVADA

DONOVINE MATHEWS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

NO. 72701



## APPELLANT'S REPLY BRIEF

(Appeal from Judgment of Conviction)

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**APPELLANT'S REPLY BRIEF**

**ARGUMENT**

## I. THE DISTRICT COURT ERRED IN EXCLUDING DR. JOHNSON'S TESTIMONY.

In describing the "facts" related to the court's decision to exclude Dr. Johnson's testimony, the State insinuates that the exclusion was appropriate because "[a]fter the time of disclosure had passed, Appellant presented a PowerPoint presentation and several videos that represented [Dr.] Johnson's opinion that CJ was accidentally burned." Respondent's Answering Brief ("RAB") at 10. However, the State fails to mention two important details: (1) Donovine *objected* to disclosing expert materials that he did not intend to use at trial, and (2) after the court overruled that objection, it granted a two-month continuance, rendering all subsequent disclosures timely. (III:547-

48;566-71). As set forth herein, the court erred in excluding Dr. Johnson's testimony.

*a. Dr. Johnson's testimony was admissible under **NRS 50.275***

**1. Dr. Johnson was qualified.**

The State claims that Dr. Johnson "failed" the four-part "qualification requirement" set forth in **Hallmark v. Eldridge**, 124 Nev. 492 (2008). RAB at 12-14. According to the State, the only way Dr. Johnson would have been qualified to render an opinion in this case was if his formal schooling/degrees, licensure, employment experience, *and* practical experience all related to the analysis of liquid burns on children. RAB at 13-14. Yet, the State reads the qualification requirement much too narrowly.

The proper inquiry was not whether Dr. Johnson was a qualified "burn expert" or "medical doctor", but whether he was qualified as a *biomechanical engineer* to perform and discuss his accident reconstruction experiments. See, e.g., **Higgs v. State**, 126 Nev. 1, 19 (2010) (toxicology expert qualified where he had a science degree, worked for the FBI's toxicology department, and had experience performing succinylcholine testing). As set forth in Donovine's Opening Brief, Dr. Johnson was amply qualified to testify as a biomechanical engineer regarding the burn patterns he reconstructed. AOB at 20, 30-31.

### 2. Dr. Johnson's testimony satisfied the "assistance requirement".

The State incorrectly claims that Dr. Johnson's testimony failed the "assistance requirement". RAB at 15-23. To satisfy the "assistance" requirement, an expert's opinion must be both "relevant and the product of a reliable methodology." **Hallmark**, 124 Nev. at 500. Here, Dr. Johnson was able to recreate the burn patterns found on CJ's hands, demonstrating that the burns could have been caused by a mug of hot water spilling from left to right over the backs of his hands. (II:357;IV:936-37). This would have assisted jurors by allowing them to consider an alternative, accidental cause of an injury that the State claimed was intentional. Without question, Dr. Johnson's opinion was relevant. See, e.g. **NRS 48.015**.

In his Opening Brief, Donovine explained in great detail why Dr. Johnson's testimony was the product of a reliable methodology. AOB at 22-24. Yet, citing **Rish v. Simao**, 368 P.3d 1203 (Nev. 2016), the State claims that Dr. Johnson's testimony was unreliable because "[t]his court has held that biomechanics *is not* a recognized field of expertise in Nevada." RAB at 15 (emphasis added). The State's claim is inaccurate at best and misleading at worst.

**Rish** was simply summarizing the now ten-year-old **Hallmark** decision, where this Court observed that the appellee failed to "offer any

*evidence* that biomechanics was within a recognized field of expertise." **Hallmark**, 124 Nev. at 502 (emphasis added). Nothing in **Hallmark** *precludes* a district court from finding, based on the evidence presented, that biomechanics is within a recognized field of expertise. See **Rish**, 368 P.3d at 1208 ("**Hallmark** stands for the well-established proposition that expert testimony, biomechanical or otherwise, must have a sufficient foundation before it may be admitted into evidence."). In this case, Donovine presented evidence that biomechanics is within a recognized field of expertise and the district court agreed, telling the parties, "I know what biomechanical experts are. I know what they can testify to." (II:365;377-78;IV:909).

Next, the State argues that Dr. Johnson's methods were neither "tested" nor "testable" because his experiments involved three different children who "lay their hands flat on a table while a mechanism tipped the cup to spill water on their hands." RAB at 17. The State asserts that Dr. Johnson's experiments were unreliable because the children did not move the cup *themselves* during the experiments. RAB at 17.

Yet, Dr. Johnson did not need to prove that a child could knock over a cup of hot water by bringing his hand down on the top edge of the cup and then onto the countertop. That is a matter of common knowledge that did not require expert testimony. See **Burnside v. State**, 352 P.3d 627, 636 (Nev.

2015) (expert testimony not required for "information within the common knowledge of or capable of perception by the average layperson").

Moreover, Dr. Johnson's efforts to recreate the burn patterns found on CJ's hands are no less reliable than the recreations conducted by the State's own "burn expert" Peltier. (VI:1303-07). Peltier did not have children attempt to recreate their own injuries in order to determine if they were accidental or intentional. Rather, Peltier would examine a photograph of a burn injury and see if he could recreate the pattern found in the photograph. (VI:1272-73). In liquid burn cases, Peltier would pour water with blue dye on a subject to see if the resulting spill patterns matched the burn patterns on a victim's hands. (VI:1274;1290-91). Minus the blue dye, that is precisely what Dr. Johnson did in this case when he attempted to recreate the patterns found on CJ's hands using the surrogate children. (VI:1303-04).

Importantly, none of Peltier's efforts to recreate burn patterns involved children spilling liquids on themselves as the State contends was necessary in this case:

> Q. You weren't doing experiments in a laboratory where you had a control, for example, this is an accidental burn, you would inflict something accidentally and then you would have a control where you would intentionally inflict it and then compare the results?
>
> A. What we did was we tried to recreate the injury in the photograph and then we called you or somebody back and said

here's what we found out, it's totally accidental, we're not sure, they could be strong enough to do it, there's no way or 100 percent non-accidental.

So we create what we see, meaning me –

Q. Sure.

A. -- I -- I don't get volunteers. I recreate what I see, I try to recreate exactly what I see in the photograph.

Q. Once I can do that or not do that, then I call back the person that's asking me to help.

(VI:1274). By challenging Dr. Johnson's recreations because they "all required someone or something else to move the cup to cause it to tip over" (RAB at 17), the State is holding Dr. Johnson to a higher standard than the one employed by its own burn expert.

The State also contends that Dr. Johnson's testimony was unreliable because it was not subject to peer review. RAB at 17. Yet, **Hallmark** recognized that this and other factors "may be accorded varying weights, and may not apply equally in every case." 124 Nev. at 502. Here, Dr. Johnson's opinions did not need to be peer reviewed because they were based on experiments that he developed for purposes of this case. (II:379-384).

Next, the State argues that Dr. Johnson's "methods were not generally accepted in the scientific community" because he did not attend Peltier's

blue dye class, and because he did not show that he used Peltier's exact same method of recreating burn patterns. RAB at 18. Here, again, the State frames the issue much too narrowly. In **Hallmark**, this Court faulted the appellee for failing to "offer any evidence showing that these *types of opinions* were generally accepted in the scientific community." 124 Nev. at 502 (emphasis added). Peltier's testimony established -- without question -- that opinions formed as a result of burn recreations are generally accepted in the scientific community. (V:1229-33).[1] Dr. Johnson was not required to employ the exact same burn recreation techniques used by Peltier to satisfy this factor. Unlike Peltier, Dr. Johnson utilized rigorous scientific controls in his experiments. Compare (VI:1274) with (II:380-81;VI:1304). To the extent Dr. Johnson's techniques were superior to the State's so-called "burn expert", that is not a valid basis to exclude his testimony.[2]

Next, the State claims that Dr. Johnson's testimony was unreliable because it was "based upon assumptions, conjecture, and generalization" where Donovine did not actually see the accident happen. RAB at 19-20.

[1] Donovine never claimed that Peltier "is the only burn expert in the world." Compare RAB at 18 with AOB at 24, fn. 11. Rather, Donovine pointed out that Peltier is the only burn expert who does what he does – *i.e.*, recreating burn patterns from pictures. As the preeminent authority on burn pattern recreation, Peltier established that experts may properly testify based on what they learn by recreating burn patterns.

[2] In any event, the **Hallmark** court made it clear that this particular factor is "not always determinative". 124 Nev. at 501.

Yet, Dr. Johnson's opinions were based on the exact same underlying information[3] that was available to Cetl and Peltier! (IV:945-47). No one testified that they saw Donovine slowly pour scalding hot water on the backs of CJ's hands. (IV:948-49,954;V:1222). Yet, Cetl and Peltier were permitted to opine that Donovine likely did just that. (V:1183-84,1223,1269-70). If the underlying information was sufficient to permit Cetl and Peltier to opine about what "could have" happened, than that same information was sufficient to permit Dr. Johnson's recreation experiments in this case. (IV:959). It does not matter whether Donovine witnessed the accident or could "testify and say the child had his hands on the counter, the child tipped the – the mug." RAB at 20 (citing 4 AA 948). This was not "critical factual information" that was "imperative for a sound and reliable accident reconstruction." Cf. RAB at 20.

The State further claims that Dr. Johnson's "testing conditions were not similar to the conditions at the time of the incident." RAB at 21. Yet, the

[3]Peltier's opinion was based on the photographs of CJ's injuries, information from the arrest report and Donovine's voluntary statement. (IV:1279-80). Cetl's opinion was based on her review of photographs, medical records, and a brief consultation with CJ's treating physician. (V:1124,1178). Dr. Johnson's experiments were based on information gathered by police, including the subject counter height, the subject mug dimensions and manufacturer, the water level within the mug, the location of the mug on the counter, CJ's height and hand size, and the burn patterns on CJ's hands as depicted in photographs. (I:376-77;IV:925-28).

district court expressly found that the conditions were similar, and that finding is entitled to deference by this Court. See AOB at 23. To the extent the State suggests that Dr. Johnson's reenactments should have used the "actual victim" or the "actual mug" identified by Donovine (RAB at 21-22), that is yet another attempt to hold Dr. Johnson to a higher standard than used by Peltier in his own burn recreations. The testing conditions only needed to be "similar" to those at the time of the incident – not identical. **Hallmark**, 124 Nev. at 501-02.

The State argues that "critical" pieces of information were missing that prevented Dr. Johnson from accurately recreating the burn patterns found on CJ's hands. (RAB at 22). Yet, the State's argument misses the mark. Unlike the appellee in **Hallmark** who was using expert testimony to definitively rule out a specific cause of injury,[4] Dr. Johnson was merely trying to establish that an accident was a possible cause of injury, given all of the available information. Where the purpose of Dr. Johnson's testimony was to establish a possible alternative to the State's claim of intentional child

[4] The expert in **Hallmark** testified that "the forces involved in the collision could not have caused the herniation in Hallmark's lumbar spine" while conceding "that he formed his opinion without knowing the starting positions of the vehicles, the speeds at impact, the length of time that the vehicles were in contact during the impact, the distances traveled, or the angle at which the vehicles collided." 124 Nev. at 497 (emphasis added). Certainly, the expert needed this additional information before he could rule out the collision as a cause of the injury.

abuse, he did not need any more information than he already had, nor did he have to opine to a reasonable degree of certainty that CJ's injury was accidental as opposed to intentional. See, e.g., **Williams v. Eighth Jud. Dist. Ct.**, 127 Nev. 518, 530 (2011) ("if the defense expert's testimony is used for the purpose of cross-examining the plaintiff's expert or to otherwise contradict the plaintiff's causation theory by comparing that theory to other plausible causes, the defense expert does not need to state each additional cause to a greater-than-50-percent probability").

Finally, the State claims that Dr. Johnson's experiments "were not controlled by known standards" with a "known error rate." RAB at 20-22. Again, the State is incorrect. Donovine's pretrial offer of proof made it clear that both of these standards were satisfied. (II:379-384). Despite the State's protestations, there is nothing wrong with Dr. Johnson "trying and retrying different spills scenarios . . . to find a particular spill that fit Appellant's narrative." RAB at 22. This is precisely what Peltier would do when he tried to recreate a burn pattern. (VI:1274;1303-04). Where the State's theory was that only intentional child abuse could have caused the burns on CJ's hands, Dr. Johnson was entitled to refute this theory by using the scientific method to identify a possible accidental cause of the burns. (IV:959;VI:1303-08).

The State implies that Dr. Johnson did something improper by developing and conducting experiments "solely for use in the current case." RAB at 23. Not so. In **Hallmark**, 124 Nev. at 653, this Court faulted appellee for failing to "introduce any evidence that Dr. Bowles attempted to re-create the collision by performing an experiment." Where the **Hallmark** appellee failed to perform any experiments, the Supreme Court was unable to "address whether his opinion was the product of reliable methodology." **Id**. Under **Hallmark**, there was nothing wrong with Dr. Johnson forming an expert opinion based on the results of his burn pattern recreation experiments.

### 3. Dr. Johnson's testimony satisfied the "limited scope" requirement.

The State claims that Dr. Johnson's testimony "far exceeds" **Hallmark**'s limited scope requirement. RAB at 23-25. To make this argument, the State relies almost entirely on Dr. Johnson's PowerPoint presentation – a document that the court forced him to prepare or run the risk of having his testimony excluded at trial. See pp. 23-24 infra. The State claims the PowerPoint presentation was "replete with unqualified medical opinions." (RAB at 24). Again, not so.

One of the challenged slides simply contrasted Dr. Olsen's finding that "[CJ] did not grab cup of hot water which was above his shoulders and

spill it on himself" with the fact that "Mr. Mathews did not state that [CJ] grabbed the cup of hot water, nor did he provide a mechanism of injury". (II:325).

Another challenged slide contrasted Dr. Cetl's medical opinion that "the explanation given by Donovine would suggest additional burn marks" on CJ's body with the fact that "Mr. Mathews did not provide an explanation of how he thought [CJ] sustained his burns." (II:327).

Had he been permitted to testify, Dr. Johnson would have identified these flaws in the doctors' initial factual assumptions and offered a different causal mechanism to explain the burn patterns on CJ's skin. See (II:357-59). Dr. Johnson was not challenging either doctor's medical diagnosis or treatment recommendations. He simply presented the alternate possibility that an accidental spill could have caused CJ's burns.

To the extent the State challenges Dr. Johnson's PowerPoint because it references "clean demarcation lines . . . typically associated with immersion burns" (RAB at 24), this observation came directly from a 2001 U.S. Department of Justice publication entitled, "Burn Injuries in Child Abuse", along with two other published journal sources. Compare (II:322) with (II:334). Certainly, Dr. Johnson was entitled to rely on published literature in forming his opinions.

Despite the State's claim, Dr. Johnson did not "tr[y] to offer a medical opinion in contradiction with respected pediatric doctors, Dr. Olson and Dr. Cetl." C.f. RAB at 24. Rather, Dr. Johnson primarily disagreed with Peltier's non-medical conclusion that the injury pattern reflected water running from wrist to fingertips. (IV:917-18). Donovine's Opening Brief demonstrated that he was amply qualified to render such an opinion. AOB at 29-31.

Contrary to the State's claim, it is not an "undisputed fact that [Dr.] Johnson has no formal medical training." Compare RAB at 23 with AOB at 29-30. The State selectively cites only *part* of Dr. Johnson's testimony to make it appear as though he was "not specifically instructed in the area of anatomy and skin layers." RAB at 23 (citing 4 AA 921). In fact, Dr. Johnson testified that he was trained in this area prior to attending Emory University for his doctorate degree:

> Q. Did you learn about skin and the layers of skin during that education?
> A. I would say actually doing our, the laboratory work we had at Emory University. We were not specifically instructed in the area of anatomy and skin layers. **We had that training prior in my anatomy pathophysiology courses at Georgia Tech.** So not specifically at that time. . .

(IV:921)(emphasis added).[5]

[5] Without citing the record, the State falsely claims that Dr. Johnson's "experience in determining the cause or mechanism of any burn is nonexistent." RAB at 29. In fact, Dr. Johnson testified that in the course of

In any event, even if this Court ruled that portions of Dr. Johnson's PowerPoint fell outside the scope of his expertise, Dr. Johnson's fundamental opinions were sufficiently limited: as a biomechanics expert with personal knowledge of the burn patterns he recreated in this case, Dr. Johnson's opinion that CJ could have burned himself by reaching over the countertop and tipping the mug onto his hands was certainly within the scope of his specialized knowledge. (II:384-85). It was error to exclude this key opinion from the trial.

*b. The district court abused its discretion by excluding Dr. Johnson from trial.*

In his Opening Brief, Donovine demonstrated how the district court applied a double standard to exclude Dr. Johnson's testimony while permitting the State's experts to give the very testimony that it deemed impermissible when offered by Dr. Johnson. See AOB at 25-29. The court's double standard involved two explicit rulings: (1) that Dr. Johnson's opinion that CJ "could have" had an accident lacked foundation *because no one saw*

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his employment, he has worked on three or four liquid burn cases. (IV:923). Donovine encourages this Court to review the entirety of Dr. Johnson's testimony at (IV:915-941) rather than rely on misstatements contained in the State's brief. The record shows that the district court erred in finding Dr. Johnson incompetent to testify about burn patterns. Compare AOB at 29-31 with RAB at 28-30.

*the accident*;[6] and (2) that Dr. Johnson's testimony was inadmissible "because we don't bring experts in here to tell a jury what could have happened".[7]

The State does not dispute that the district court made these two explicit rulings. Cf. RAB at 25-28. The State does not dispute that its own experts were allowed to testify about things that "could have" happened without having a percipient witness independently verify their opinions. Cf. RAB at 25-28. Instead, the State seems to be arguing that the court's contradictory rulings were justified because *their* experts had superior qualifications and, therefore, did not need as much "foundation" for their testimony. See RAB at 25-28.

Regardless of whether an expert is "qualified in an area of 'scientific, technical or other specialized knowledge'", the party seeking to admit that expert's testimony must always lay a foundation for the opinions being offered. See **Hallmark**, 124 Nev. at 498-504 (although expert was qualified, his testimony lacked foundation). A court's finding on the first **Hallmark** factor has nothing to do with the amount of factual "foundation" that is required to satisfy the second two **Hallmark** factors. If the facts, as they existed, were sufficient "foundation" for Cetl's and Peltier's opinions,

[6] (IV:946,948,953,965).
[7] (IV:938,940-41,953-54,964).

then those same facts were a sufficient foundation for Dr. Johnson's recreation experiments and his testimony about those experiments. To put it another way, if the State's experts could testify that Donovine intentionally burned CJ's hands without a percipient witness first saying that they "saw" him do it, then Dr. Johnson could testify that CJ accidentally burned his hands without a percipient witness first saying that they "saw" the accident.

Although the State challenges Donovine's reliance on **Richmond Med. Ctr. For Women v. Herring**, 527 F.3d 128, 167 (4th Cir. 2008), reversed on reh'g en banc, 570 F.3d 165 (4th Cir. 2009), the State cannot credibly argue that a court is free to exercise its discretion in a discriminatory manner. C.f. RAB at 28. Certainly, a court abuses its discretion when it applies a double standard to the parties appearing before it. See, e.g., **Chikar v. Chikar**, 573 N.E.2d 1160, 1162 (Ohio App. 1989) ("the trial court's adoption of the referee's findings regarding appellee's need and appellant's ability to pay constituted an abuse of discretion because they were based upon a double standard"); **Calvin v. Jewish Hospital**, 746 S.W.2d 602, 605 (Mo. App. E.D., 1988) ("inconsistent rulings upon the late disclosure of expert witnesses was an arbitrary abuse of discretion").

Moreover, when the court excluded Dr. Johnson's testimony because "we don't bring experts in here to tell a jury what could have happened"

(IV:940-41), this was not a foundational ruling, but a general ruling on admissibility that should have applied equally to both parties. If experts are not supposed to tell a jury what "could have happened", then Peltier should not have been allowed to testify that Donovine could have held CJ's hands under a faucet to cause the burns. See AOB at 26.

But this was clearly not a legitimate basis to exclude expert testimony. The whole point of expert testimony, particularly from the defense perspective, is to tell a jury what could have happened! See, e.g., **Williams**, 127 Nev. at 530 ("defense experts may offer opinions concerning causation that either contradict the plaintiff's expert or furnish reasonable alternative causes to that offered by plaintiff"). The district court was wrong when it concluded otherwise.

At the end of the day, if there was insufficient factual foundation for Dr. Johnson to testify that it "could have" been an accident, then there was insufficient factual foundation for the State's experts to exclude an accidental cause based on the exact same underlying information! See **Hallmark**, 124 Nev. at 504 (doctor should not have been permitted to testify that "the forces involved in [a] collision could not have caused the intervertebral disc herniation in Hallmark's lumbar spine" where he did not

know the vehicles' starting positions, their speeds at impact, the length of impact, or the angle of the collision).

*c. The district court's error was not harmless.*

The State argues that Donovine's constitutional right to present a defense was not violated when the district court prevented him from refuting the State's experts because "Appellant did not present a qualified expert." RAB at 30. Yet, the State's argument ignores the foundational problems with its own experts' testimony. See AOB at 26-27. Even if this Court agreed that Dr. Johnson's testimony lacked foundation, it should still reverse Donovine's conviction because the court refused to hold the State's experts to the same exacting standard that it applied to Dr. Johnson.

After permitting the State's experts to give unfounded testimony that Donovine's accident theory wasn't even possible,[8] the court was no longer free to refuse Donovine's repeated and reasonable requests to refute that

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[8] The State denies that Peltier testified there was no possible way Donovine could have accidentally burned the backs of his hands. RAB at 26-27. Yet, the record reflects the following exchange between Peltier and the State:

> Q. Did you form an opinion in this case if the injuries to [CJ] **in any way could possibly have been self-inflicted by [CJ] himself**?
> A. I did.
> Q. **And what is your opinion, sir?**
> **A. It did not.** The – the liquid was not in his hands. It wasn't tipped over by him. It was done by someone else.

(V:1301) (emphasis added).

testimony.(V:1189-95;VI:1303-09). Without Dr. Johnson's testimony, Donovine had no meaningful defense to the State's case. See, e.g., **Marvelle v. State**, 114 Nev. 921, 931 (1998) ("Marvelle was denied a fair trial because he was denied the opportunity to oppose the State's case by means of his own expert testimony"), abrogated on other grounds by **Koerschner v. State**, 116 Nev. 1111 (2000).

Although the State claims that Donovine's right to present a defense was preserved because "the district court explained to counsel they could test their theory of the case through cross-examination" (RAB at 30), the district court later prevented Donovine from asking the State's experts about his theory of the case. AOB at 43-49. The district court ultimately prevented Donovine from even arguing his theory of the case in closing because there was supposedly no "evidence" to support it. AOB at 57-58.

The court's arbitrary rulings denied Donovine "a meaningful opportunity to present a complete defense", violating his Sixth and Fourteenth Amendment rights. See **Holmes v. South Carolina**, 457 U.S. 319, 324-25 (2006); **Williams v. State**, 110 Nev. 1182, 1185 (1994); **Crane v. Kentucky**, 476 U.S. 683, 690 (1986). A new trial is required.

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## II. RECIPROCAL DISCOVERY

*a. The district court's pretrial discovery rulings.*

In responding to Donovine's argument about the court's disparate discovery rulings, the State takes substantial liberties with the record to imply that defense counsel deliberately hid information from both the State and the court at calendar call, which was not the case.

At calendar call, on October 18, 2016, the State informed the court of the contents of Donovine's expert disclosures and requested that Donovine produce both an expert "report" and any "notes" that Dr. Johnson had prepared. (III:530-31).

Defense counsel responded that she was unaware of whether Dr. Johnson had prepared any notes, but objected to producing his notes if the State was not also going to be required to produce its experts' notes. (III:530-31).[9]

When the court questioned defense counsel about whether Dr. Johnson had written down any mathematical calculations, defense counsel stated she did not know, but that she did not object to the State contacting Dr. Johnson directly. (III:530).

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[9] As Donovine pointed out in his Opening Brief, the district court had previously denied Donovine's request to obtain the State's experts' notes, while ordering the defense to disclose its expert's notes. AOB at 36.

Citing this very same portion of the record, the State claims that "[w]hen the court questioned Appellant about the photos from the email, Appellant represented to the court *that there were photos merely taken by its expert and not expressly cut and pulled from an accident reconstruction.*" (RAB at 34-35, citing 3 AA 530-31) (emphasis added). Yet, the court never questioned defense counsel about the photos at calendar call and defense counsel never "represented to the court" that there were no videos. (III:527-36).[10]

Defense counsel did inform the court that they had asked Dr. Johnson not to prepare a report because they did not have the budget for it. (III:533-34). Defense counsel also informed the court that they had "turned over everything that we've been provided" by Dr. Johnson. (III:534).

When the State contacted Dr. Johnson by phone, they learned he was preparing a PowerPoint presentation. (III:540-41). Unfortunately, this was also news to the defense. At the October 21, 2016 hearing on the State's motion to continue the trial, defense counsel explained that she did not know Dr. Johnson had been working on a PowerPoint because she had "never seen an expert testify on direct examination with a PowerPoint." (III:555).

[10] Had defense counsel wanted to "hide" the existence of the reconstruction videos from the State, she would not have invited the State to call Dr. Johnson and speak to him directly!

Defense counsel never asked Dr. Johnson to prepare the PowerPoint and did not know if she would even use it at trial. (III:556-57).

At the end of the hearing, the State demanded that the court order Dr. Johnson to complete the PowerPoint presentation. (III:564). The court agreed, telling defense counsel "he has a report . . . [y]ou're just calling it something else. So turn it over. Comply with the statute." (III:565-66).

*b. Expert disclosures were not a two-way street.*

As the Supreme Court recognized in **Wardius v. Oregon**,

> It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the state.

412 U.S. 470, 472 (1970). Even the State concedes that "where discovery statutes exist, they must create a reciprocal right between the accused and the state." RAB at 31.

Given this undisputed authority, the State fails to explain how the district court could properly deny Donovine's motion to compel the State's expert's notes while,[11] at the same time, granting the State's motion to

[11] Compare (I:158) (Donovine's discovery request no. 9) with (I:236 and III:511-12) (denying request for notes and reports) and (V:1213) (ruling that the State's expert's notes "don't have to be turned over").

compel the same notes from Donovine's expert.[12] The court's discovery order should have placed the same obligation on the State as it did on the defense. The district court abused its discretion when it denied Donovine discovery to which he was entitled under the law. See **Means v. State**, 120 Nev. 1001, 1007-08 (2004).

Likewise, the State offers no explanation why Dr. Johnson should have been required to complete an unfinished *and unrequested* PowerPoint presentation when the State's experts did not have to prepare their own expert reports. The court's order violated Donovine's Fifth Amendment rights by requiring him to both create and then disclose evidence that he never intended to introduce at trial. **Binegar v. Eighth Jud. District Ct.**, 112 Nev. 544 (1996) (forcing defendant "to disclose information that he never intended to disclose at trial, some of which could be self-incriminating . . . would violate a defendant's constitutional guaranties against self-incrimination"). The court's order also violated **Wardius**, 412 U.S. at 475-76, by requiring Donovine to produce and prepare an expert report when the

[12] Compare (I:197, lines 1-5) (State's discovery request) with (II:467) (granting State's request) and (III:568) ("You're not permitted to have your expert do all these things: take notes, do calculations, create videos, and then say, it's not a report, so we're not going to turn it over... if you want your expert to testify, comply with the rules").

State's experts were not required to do the same, despite Donovine's previous motion to compel the production of such reports.[13]

In this case, the State used the contents of Donovine's PowerPoint as the basis for its motion to exclude Dr. Johnson's testimony, while hiding their own experts' opinions from the defense until trial. (I:239-II:360). Had the State's experts been required to submit reports of their anticipated testimony, Donovine could have prepared his own written motion to exclude their testimony because he would have had a road map of all of the unfounded opinions they intended to offer at trial. Donovine was disadvantaged by the court's refusal to treat discovery as a "two-way street". Reversal is required.[14]

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[13] Compare (I:158) (Donovine's discovery request no. 9) with (I:236 and III:511-12) (denying request for notes and reports).

[14] The State's arguments at pages 36-40 of its Answering Brief are not responsive. Donovine did not argue on appeal that the district court erred by granting a continuance or denying a mistrial; rather, Donovine pointed to these rulings as evidence of the court's disparate treatment of the parties. See AOB at 38-39. If the court was willing to either grant a two-month continuance or exclude Dr. Johnson from testifying as a result of Donovine's "discovery violations", then the court should have offered him a similar remedy when the State turned over Peltier's handwritten notes in the middle of trial. Donovine never argued that Peltier's notes contained **Brady** evidence, so the State's argument at pages 38-40 are irrelevant. Peltier's notes were discoverable pursuant to statute.

*c. The Jail Calls.*

The State contends that it had no obligation to disclose Donovine's jail calls because they were not **Brady** material and because impeachment evidence need not be disclosed until a witness testifies. RAB at 40. Yet, Donovine had a court order that required the State to produce Donovine's jail calls pursuant to **NRS 174.235** (I:154-55,235), so the State's argument is without merit. The State was required to produce the jail calls "not less than 30 days before trial or at such reasonable later time as the court may permit." NRS 174.285. It was unreasonable for the State to turn over 88 minutes of jail calls on the Friday before trial and expect defense counsel to be prepared to deal with them without a transcript. (VI:1430-33).

## III. CROSS-EXAMINATION

When a court prohibits a criminal defendant from "engaging in otherwise appropriate cross-examination", it violates the Confrontation Clause. **Delaware v. Van Arsdall**, 475 U.S. 673, 680 (1986).

*a. Cross-Examination of Dr. Cetl.*

The State concedes that Donovine was entitled to "effective cross-examination" under the Sixth Amendment. RAB at 44. The State also concedes that Donovine was entitled to cross-examine the State's witnesses about his own theory of the case. See RAB at 30 (Donovine's right to

present a defense was preserved because "the district court explained to counsel they could test their theory of the case through cross-examination"); see also **United States v. Williams**, 455 F.2d 361, 364-65 (9th Cir. 1972) (government's cross-examination deemed appropriate where it "appears to have presented the Government's theory of the case").

In violation of these rights, the district court prohibited defense counsel from asking Cetl about his theory of the case on cross-examination and then repeatedly prevented him from challenging the foundation for Cetl's contrary opinions. See AOB at 43-45, citing (VI:1460-75).

The State fails to appreciate the court's error in telling counsel she could not "pretend like [she had] Dr. Johnson on the stand" or "get her to testify that she can create some sort of scenario in which this is [accidental]." (VI:1462). Although the State cites this portion of the transcript to argue that the court's ruling was appropriate (RAB at 45), the ruling actually demonstrates the court's error! It proves that the court would not allow Donovine to elicit his own theory of the case from a State's witness, which was improper, particularly where the court prevented Dr. Johnson from testifying in the first place.

The fact that the court permitted "not only . . . cross-examination", but "two re-cross-examinations" of Cetl doesn't change the fact that the court

prevented Donovine from testing his theory of the case with that key witness. Cf. RAB at 46. Where questions about Donovine's theory of the case were deemed "off-limits" by the court, the amount of cross-examination permitted on other matters is irrelevant.

*b. Cross-examination of Dr. Olson.*

"A district court's discretion to curtail cross-examination into a witness's possible bias is limited. Counsel must be permitted to elicit any facts which might color that witness's testimony." **Jackson v. State**, 104 Nev. 409, 412 (1988) (citing **Crew v. State**, 100 Nev. 38, 45 (1984)).

Donovine sought to cross-examine Dr. Olson about the fact that he *saw* Cetl in CJ's examination room and *overheard* Cetl telling Detective DePalma that she agreed CJ's burns were the result of child abuse. AOB at 45-48. This line of questioning was relevant because Cetl testified under oath at the preliminary hearing that she never saw CJ in person (I:55), but later changed her story at trial after Dr. Olson testified, admitting that she did see CJ but supposedly never examined him. (VI:1454-55). Donovine was entitled to ask Dr. Olson about his reasonable belief that Cetl examined CJ, because it established that Cetl may have lied under oath and demonstrated possible bias. See **Jackson**, 104 Nev. at 412.

The State did not respond to Donovine's argument that Cetl's conversation with Detective DePalma was not hearsay because it was not offered for the truth of the matter asserted. See AOB at 47-48. Although the court concluded that "Cetl didn't treat [CJ] in the ER because there would have been a medical report",[15] this does not mean that Cetl couldn't have briefly examined CJ's hands in connection with the police investigation. Cf. RAB at 46-47.

Donovine was also entitled to ask Dr. Olson if he was upset that Cetl had challenged his emersion burn diagnosis. (VI:1418). Initially, the State contends that there was no discrepancy between the doctors' findings because they "both concluded the burns were intentional and not accidental." RAB at 47-48. Wrong. Dr. Olsen merely found the burns "suspicious" for abuse and he believed they were "emersion" burns, meaning CJ's hands appeared to have been immersed in water. (VI:1409,1411). By contrast, Cetl did not believe the burns were "emersion" burns (VI:1478) and she deemed an accidental cause to be "as next to impossible as it comes." (V:1171).

The State contends that Dr. Olson "did not know" that Cetl had reached a different conclusion and was just upset he had been "called to testify needlessly." RAB at 47. In the next breath, the State claims that Dr.

[15] (VI:1418) (emphasis added).

Olson was merely offended that detectives had consulted with Cetl, and that his anger had nothing to do with Cetl's conflicting opinion. RAB at 47.

Yet, Dr. Olson's explanation to the court outside the presence of the jury contradicts both explanations: First, Dr. Olson testified that he asked Detective DePalma, "do you remember that you disputed my findings in this case" and reminded him "that's why you asked Dr. Cetl to come to the Emergency Room to see the kid." (VI:1389). Then, he testified that he overheard Cetl telling DePalma she "agreed" with him that these were child abuse burns. (VI:1390).

While Dr. Olson may have deemed the burns "suspicious" for child abuse such that he was required to report them, he was clearly upset that Cetl had been brought in to "dispute [his] findings" and confirm "abuse". Defense counsel should have been permitted to explore this subject matter further. The error was compounded in closing when the State argued that there was "no disagreement" between the doctors and that the diagnosis was not a "point of contention between any of the doctors." (VII:1587-88).

*c. Cross-examination of Jasmin.*

The court erred when it sustained the State's hearsay objection and prevented Jasmin from discussing CJ's communications with Officer Bethard. (V:1099). CJ's statements to Officer Bethard were not hearsay

(V:1024;VI:1330); rather, they were offered to impeach Officer Bethard and Detective DePalma, who claimed that they were unable to speak with CJ. See **Rugamas v. Eighth Jud. Dist. Ct.**, 305 P.3d 887, 893 (Nev. 2013).

The State's Answering Brief does not respond to this argument. Instead, the State claims that Donovine was able to adequately impeach the police without getting into the substance of CJ's communications. RAB at 51. However, the impeachment was not adequate because the State argued in closing that CJ "cannot tell the officers that respond to the hospital what happened." (VII:1556). Where Donovine was not allowed to elicit the substance of CJ's response, the State could not permissibly argue that he was unable to tell the officers what happened.

## IV. JURY INSTRUCTIONS

Based on **McCraney v. State**, 110 Nev. 250 (1994), Donovine was entitled to the following jury instruction:

> A person who committed an act or made the omission charged, through misfortune or accident, when it appears that there was no evil design, intentional or culpable negligence, must be found not guilty of the charge.

(VII:1686).

The State argues that Donovine was not entitled to the **McCraney** instruction because the jury was "properly instructed as to the need to have an intent to willful[ly] cause the injuries to [CJ]." RAB at 52 (citing 7 AA

1521). However, the jury was also instructed that "willfully" does not require in its meaning that the defendant held any intent to violate any law, or to injure another, or to acquire any advantage." (II:435). As a result, the **McCraney** instruction was necessary to prevent the jury from finding Donovine guilty for exposing CJ's hands to hot water without "evil design, intention or culpable negligence." **McCraney**, 110 Nev. at 254-55. Regardless of Donovine's defense theory at trial, he was entitled to the **McCraney** instruction because the evidence presented at trial could have allowed the jury to find that he burned CJ's hands by accident. **Id.**

## V. CLOSING ARGUMENT

The court repeatedly prevented Donovine from arguing his theory of the case in closing. First, the court improperly struck Donovine's argument that "[n]o motive is reasonable doubt." (VII:1569). Then, the court improperly struck Donovine's argument explaining how CJ could have accidentally burned himself by reaching across the countertop for cookies and candy, then accidentally bringing his hand down on the rim of the mug, spilling hot water onto his hands. (VII:1576-77). Finally, the court prevented him from arguing that a lack of percipient witnesses to confirm the State's theory was a basis to find reasonable doubt. (VII:1577). These rulings were erroneous and violated Donovine's constitutional rights to due process and a

fair trial, and the right to present a defense. See, e.g., **Herring v. New York**, 422 U.S. 853, 858 (1975); **Conde v. Henry**, 198 F.3d 734, 739 (9th Cir. 2000).

## VI. REMAINING ERRORS

Donovine is satisfied that his Opening Brief adequately addresses all remaining assignments of error that were not specifically mentioned in this brief and he incorporates by reference each of those arguments herein.

## CONCLUSION

Donovine respectfully requests that this Honorable Court reverse his conviction and remand for a new trial in a different department.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

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DATED this 16 day of February, 2018.

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Employee, Clark County Public
Defender's Office