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PATRICK E. McDONALD, ESQ.
Nevada Bar No. 3526
STEVEN B. WOLFSON, CHTD.
601 S. Seventh Street
Las Vegas, Nevada 89101
Tel: (702) 385-7227
Fax: (702) 385-5351
Attorney for Petitioner

DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

MICHAEL ALAN LEE,
#1699107,

Defendant.

Case No: C277650
Dept No: XXIII

Date of Hearing: January 30, 2012
Time of Hearing: 11:00 a.m.

REPLY TO STATE'S RETURN TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Petitioner, MICHAEL ALAN LEE, by and through his attorney, PATRICK E. McDONALD, ESQ., of the law office of STEVEN B. WOLFSON, CHTD., and submits the following Points and Authorities in Support of his Reply to State's Return to Petition for a Writ of Habeas Corpus.

This Reply is made and based upon all the papers and pleadings on file herein, the attached Points and Authorities in support hereof, and any oral argument of counsel to be heard at the time of the hearing on this matter.

DATED this 29 day of December, 2011.

STEVEN B. WOLFSON, CHTD.

By: *Patrick E. McDonald*

PATRICK E. McDONALD, ESQ.
Nevada Bar No. 3526
601 South Seventh Street
Las Vegas, Nevada 89101
Attorney for Petitioner

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I.

3 FACTS

4 The State argues that the instant Petition should be denied as the facts set forth are
5 misleading. This argument is without merit. The State further argues that "in the critical areas of
6 this case, the selective factual presentation in the writ paints an inaccurate picture of the facts
7 presented." In the instant Petition, testimony was accurately cited directly from the Transcript of
8 Proceedings as to what the witnesses said "verbatim" at the Preliminary Hearing. The testimony was
9 not "edited" in any way as alleged by the State. However, the State is correct in its assertion that the
10 testimony presented does support Petitioner's argument.

11 The State mistakenly argues that Petitioner concedes that Brodie Aschenbrenner was
12 murdered. This is simply not the case. This case is surrounded by uncertainties. The most specific
13 being the cause of death of Brodie Aschenbrenner. Although the State continues to argue that these
14 offenses were committed, if any such alleged abuse occurred to Brodie, it was not by Petitioner,
15 despite the State's allegations of the facts being "uncontroverted." Based upon all of the testimony
16 presented at the Preliminary Hearing, it is erroneous to allege that Petitioner concedes in any way,
17 that Brodie Aschenbrenner was murdered.

18 The most critical testimony provided at the Preliminary Hearing was given by Dr. Lisa Gavin
19 who performed the autopsy on Brodie. Dr. Gavin's testimony was that her diagnosis of the condition
20 of Brodie Aschenbrenner during her autopsy was that he had acute peritonitis due to duodenal
21 transection due to blunt force injury of the abdomen. (PHT at Page 46). She further testified as
22 follows (PHT at Page 47):

23 BY MR. STANTON:

24 Q. Now, what was the transection of an organ that you observed in
25 the abdominal vault?

26 A. The duodenum extends from the stomach and goes out through
27 several loops of your small bowel and eventually go into your colon
28 and then fecal matter, if you will, extends from there. The duodenum
comes directly after the stomach and it's a tube essentially, and the
tube was transected, in other words essentially cut in half, and

1 therefore all the contents that were coming from the stomach would
2 just empty up into the abdominal cavity.

3 Q. Let me ask you in separate forms. Would the dissection of the
4 duodenum be an instantaneously incapacitating injury to a
5 two-year-old child?

6 A. There would be immediate pain, but the contents going out into
7 the abdomen eventually generate this inflammatory response which
8 in turn the acute peritonitis and eventually cause the death. So it could
9 be minutes to hours rather than instantaneous.

10 Q. What would be the symptoms generally speaking when a child of
11 Brodie's age that one would be able to observe after the transection
12 of the duodenum?

13 A. Abdominal pain, possibly vomiting as well as fever eventually.

14 Q. When you say "pain", a child obviously would be manifesting in
15 some sort of crying or fussiness?

16 A. I could imagine.

17 Q. What about the appetite?

18 A. Usually it's limited. Decreased.

19 Dr. Gavin clearly stated that there would be immediate pain, but the contents going out into
20 the abdomen "eventually" generate this inflammatory response which in turn causes the acute
21 peritonitis and "eventually" causes the death. She described symptoms which Brodie was in fact
22 experiencing prior to his death as testified to by Arica Foster. (PHT at Page 114). Arica testified that
23 she had told the detectives that Brodie had been experiencing some flu-like symptoms a couple
24 weeks prior to his demise. She also stated that she was concerned about these symptoms but does
25 not remember if she took him to the pediatrician.

26 Arica also testified that during their trip to the Shark Reef, Circus Circus and the other stores
27 until the time they arrived at home that Brodie had been tired and cranky. (PHT at Page 123 - 126).
28 She indicated that he was cranky from being tired, however, testified that once they arrived home
she started to clean and Brodie helped her, despite his fussy demeanor.

Dr. Gavin testified that she noted in her report items consistent with transection of the
duodenum in Brodie's abdominal cavity. She testified that the presence of the fluid, the kind of
brown fluid that was present in the abdominal cavity, is an indicator of the transection and of course

1 the development of peritonitis suggests that in some way the bowels have been disrupted. (PHT at
2 Page 48). Dr. Gavin stated that the location of the duodenal where this was torn is essentially just
3 anterior to the spinal cord and although the bowel is loose within the abdomen, there's a point
4 anatomically and developmentally where it stays somewhat attached to the center. There's essentially
5 a point where the bowel is attached at that point and if enough force occurs, it presses that bowel up
6 against that area and actually can cause it to tear, to lacerate essentially.

7 A portion of Dr. Gavin's testimony follows:

8 BY MR. STANTON:

9 Q. Now, what type of other incidents do you as a pathologist
10 encounter transections of duodenum in children or adults for that
11 matter?

12 A. A motor vehicle accident, any blunt force injury to the abdomen.

13 Q. And you're talking about severe enough blunt force trauma that
14 someone actually dies during that automobile accident?

15 A. Correct.

16 Dr. Gavin clearly testified upon direct examination that if enough force occurs, it presses that
17 bowel up against that area and actually can cause it to tear. She clearly testified that there would be
18 immediate pain, but the contents going out into the abdomen "eventually" generate this inflammatory
19 response which in turn causes the acute peritonitis and "eventually" causes the death. She stated
20 there would be flu like symptoms and *could* imagine there may be some fussiness. Dr. Gavin clearly
21 testified that this type of blunt force trauma can be consistent with that of an automobile accident.

22 Upon cross examination, Dr. Gavin testified that it's hard to tell the direction the blunt force
23 trauma came from. It's less likely that it came from directly from the back. It's more likely it came
24 from the front or the sides. (PHT at Page 60). She testified that she didn't see any evidence of
25 injury to the skin in the abdominal area and that it takes a tremendous amount of force to cause the
26 damage that she saw, force so significant it is close to being consistent with an automobile accident.
27 (PHT at Page 61). Dr. Gavin also testified that she noticed contusions that were in various stages
28 of healing but that it's difficult to date a contusion specifically. A portion of Dr. Gavin's testimony
follows:

1 BY MR. McDONALD:

2 Q. Could a contusion last for a week?

3 A. They would be in usually a different shade, a different color if
4 they've been there for a week's time.

5 Q. Well, you said usually.

6 A. Yes.

7 Q. You had no prior history with this individual, correct?

8 A. Correct.

9 Q. You don't know how long it took for his body to process a
10 contusion so to speak?

11 A. Correct.

12 Q. So could some of those contusions on his body had been there
13 longer than a week?

14 A. Possibly.

15 Dr. Gavin also testified as to the subscalpular contusions which were found in the skull area,
16 under the hairline which can be found any where over the skull or under the skin. (PHT at Page 63).
17 She testified that after looking at those histologically these injuries are **probably** about 24 hours
18 before his demise. (PHT at Page 64). Dr. Gavin stated that this is determined by looking at the
19 cells under the microscope for the presence of red blood cells, the presence of macrophages, and
20 those cells, whether or not the red blood cells are starting to clot and break down, whether or not the
21 macrophages are present and have any iron present in them, those help you indicate timing. Because
22 we know the sequence of events that it takes for different types of cells in the body to come out to
23 try to heal injury that's occurred. (PHT at Page 64).

24 Dr. Gavin was asked if that timeline was standard for every person, to which she replied "It's
25 what's been documented in all of our textbooks. So it's a standard approach. The timing of those
26 different ones has been argued." She was further asked "So there isn't a total agreement then on the
27 timing?" Dr. Gavin's reply was "There's a standard text in terms of when those particular cells come
28 out." Dr. Gavin stated that she sent the entire brain to a neurological pathologist to Dr. Bennett

.....

1 Omalu who is located in California but that she wasn't present when he did any testing on it. (PHT
2 at Page 65).

3 Based upon Dr. Gavin's testimony, the time of the injury is based upon what's been
4 documented in textbooks, and is **probably** 24 hours old. This is not an absolute degree of certainty
5 as to the timeline of when these injuries occurred. It is a "textbook" standard, and not an
6 individualized diagnosis.

7 Dr. Gavin was next questioned about what the detectives had told her while she was
8 performing the autopsy of Brodie. (PHT at Page 71). A portion of Dr. Gavin's testimony follows:

9 BY MR. McDONALD:

10 Q. All right. Did the detective tell you or did the captain tell you that
11 the child had been in a motor vehicle accident within three weeks of
his demise?

12 A. Yes. I don't remember if it was the detective that told me or I
13 found that out through my investigator, but I was aware that the child
had been in an accident.

14 Q. Did you review any of the reports from the accident?

15 A. Yes.

16 Q. What did you review?

17 A. I believe it was an incident report and also the pediatrician visit.

18 Q. You reviewed the incident report?

19 A. I believe so.

20 Q. Do you recall anything about the incident report?

21 A. I remember that he was in a car seat but that's what I remember.

22 Q. Do you recall that the mother represented that the car seat was
23 broken as a result of the accident?

24 A. Yes, I recall as you're saying that.

25 Q. The pediatrician, you reviewed pediatrician reports?

26 A. Correct. The records that were sent to me by the pediatrician.

27 Q. Do you know if you were sent all the records?

28 A. I don't know. We request all them, we subpoena that information
and I assume that they sent them.

1 Dr. Gavin was asked if the detectives had advised her that Brodie had pulled down the curtain
2 and the rod had struck him in the back, to which she replied that she had. (PHT at Page 73). She
3 testified that she had never seen the rod or the curtains, in order to determine if the curtain rod caused
4 the parallel lines she had seen on Brodie's back. In her earlier testimony when asked which direction
5 the blunt force trauma came from she stated "It's more likely it came from the front or the sides."

6 Dr. Gavin testified that the motor vehicle accident could have caused a partial tear to the
7 duodenum. (PHT at Page 74). Her testimony follows:

8 BY MR. McDONALD:

9 Q. Could the motor vehicle accident have caused a partial tear to the
10 duodenum?

11 A. A motor vehicle accident can cause that. But the timing is off in
12 this particular case.

13 Q. It can cause it to partially tear, not transect fully?

14 A. It can cause a partial tear but there would be symptoms at that
15 time.

16 Q. Could it be symptoms like an upset stomach?

17 A. They can have an upset stomach.

18 Q. It would be like flu-like symptoms?

19 A. It's possible.

20 Q. And then as the partial tear -- the way I understand it is that matter
21 instead of processing out it's coming from the stomach into the
22 abdominal cavity?

23 A. Yes. It doesn't even go into -- he wouldn't necessarily have normal
24 bowel movements. He would be vomiting, he wouldn't want to eat.

25 Q. Depending on the extent of the --

26 A. Well, it's the peritonitis that develops regardless about the size of
27 the transection. People can get it from diverticula and they can
28 develop peritonitis and it can be very painful with abdominal
distension. It happens very quickly. It doesn't necessarily matter the
size of the hole. It's the fact that the contents themselves are going
into the abdominal cavity and it's the response --

A. It doesn't matter the size of the hole, it's the fact of the abdominal
contents going into the cavity and that's causing the peritonitis and
it's that reaction that ends up making the person sick.

1 Q. Well, wouldn't the size of the hole regulate the amount of matter
2 that is emptying into the abdominal cavity?

3 A. The amount that gets into the abdominal cavity isn't relevant either
4 because it's the reaction to something that's not supposed to be there
5 that causes the problem that causes the peritonitis that causes the
6 death.

7 Q. So it's not uncommon for someone to have peritonitis for in
8 excess - of two weeks before expiring?

9 A. They can have it for -- that's correct, but they're usually sick, a
10 fever, abdominal pain, not eating, could be vomiting, may not have
11 normal bowel movements.

12 Q. And those are some of the symptoms that a person may have,
13 correct?

14 A. That's correct.

15 Q. They wouldn't necessarily have to have all those symptoms?

16 A. Usually they have a majority of them.

17 Q. And that comes from just your education from the text books?

18 A. Education. I have seen that when I was in medical school. I have
19 seen people with peritonitis present. I've seen children with
20 peritonitis present. I've seen adults die from peritonitis as well as
21 children.

22 Q. You don't necessarily have to have as you mentioned a transection
23 of the duodenum to incur peritonitis?

24 A. That's correct.

25 Q. It can happen from problems with your pancreas?

26 A. That's correct.

27 Q. How about your gall bladder?

28 A. Correct. It can do that with the gall bladder as well.

Based upon this testimony, it could take a matter of time, in excess of two weeks, for death to occur. Dr. Gavin further testified that a person my experience localized pain symptoms for a fracture of the ribs depending on the extent. (PHT at Page 77). Brodie's fractured rib was found to be non-displaced, a displaced fracture would carry more severe symptoms. Dr. Gavin further testified that she did not recall being advised that four to five days prior to his demise, Brodie was riding on a battery operated quad, went off the curb and allegedly hit his face. (PHT at Page 77).

1 When asked if this is something she would put in her report if someone had told her, she stated "I
2 usually leave some of that material to the investigative reports. Occasionally I'll take pieces of that
3 and put it into the summary, but it may or may not. I don't know whether I would have chose to put
4 it in or not."

5 Finally, in the conclusion of cross examination, Dr. Gavin was asked whether or not she felt
6 that there was an indication that Brodie bruised a lot or bruised easily. Dr. Gavin stated yes. (PHT
7 at Page 79). A portion of her testimony follows:

8 BY MR. McDONALD:

9 Q. You reviewed the pediatrician's reports or files?

10 A. What I was given.

11 Q. What you subpoenaed, correct?

12 A. What was given to me by subpoena.

13 Q. And that there was an indication that this child bruised a lot or
14 bruised easily?

15 A. Yes.

16 Q. Did that cause you any concern?

17 A. He did what I feel to be the proper evaluation, he looked at the
18 platelet levels and he looked at some clotting in formation to see
19 whether or not there was any kind of abnormality. It's what I know to
20 be a preliminary investigation of that issue and all of that seemed to
21 be within normal limits.

22 Q. But there's other testing that can be done, correct?

23 A. There are some other tests that could have been done.

24 Q. But this was just preliminary testing?

25 A. My impression. I'm not a clinician, but that's my impression.

26 Q. Of the 800 or so autopsies that you've done how many involve the
27 transection of the duodenum?

28 A. I have only seen a couple cases and I've only done this case.

Q. This is the first one you did yourself?

A. Myself.

....

1 The State's argument that Dr. Gavin was able to testify, from a medical degree of certainty
2 that the primary cause of Brodie's death (acute peritonitis) occurred within ("minutes to hours") from
3 his death. Thus, the State's argument that "the timing of the fatal injuries was clearly testified to and
4 was not imprecise," is without merit. There are uncertainties which exist in this case. There is
5 testimony based upon "textbook" standards, rather the individualized facts presented in this case.

6 The State questions the relevance as to Arica's testimony regarding the car accident which
7 occurred and may have been the source of Brodie's injuries. Arica testified that she and Brodie had
8 been in an accident on May 26th. (PHT at Page 111). She stated that she was hit from behind and
9 it had caused Brodie's car seat to break on the left hand side and it had broken off the Styrofoam.
10 Arica testified that there was quite a bit of damage to the back of her car. (PHT at Page 112). If you
11 recall once again, Dr. Gavin testified that the blunt force trauma came from the front or the sides,
12 Brodie's car seat was broken on the left hand side.

13 When Arica was asked if Brodie received medical attention, she testified as follows (PHT
14 at Page 113):

15 BY MR. MCDONALD:

16 Q. Did you sustain any injuries in the automobile accident?

17 A. I jerked my neck.

18 Q. What about your head?

19 A. It was fine.

20 Q. Did you lose consciousness when your head hit the side window?

21 A. No.

22 Q. And Brodie never complained of any injuries on May 26th, the day
23 of the automobile accident?

24 A. No.

25 Q. And when you took him to the doctor on May 27th did the doctor
do any x-rays?

26 A. No.

27 Q. Doctor just examined him in the room when you were present?

28 A. Yes.

1 Q. About how long was the doctor in the room with you and Brodie?

2 A. Ten or fifteen minutes.

3 It is difficult to believe that Brodie was only physically examined for approximately ten to
4 fifteen minutes and no x-rays were taken after he was involved in an automobile accident which had
5 the force to literally break his car seat. As Dr. Gavin previously testified, it is not always
6 instantaneous and that a tear in the duodenum can partially tear and for someone to experience

7 peritonitis for in excess of two weeks before expiring. A simple physical examination after an
8 automobile accident of that magnitude was less than sufficient. There are uncertainties in the case
9 at bar.

10 The State further argues that Petitioner's contentions that if actual abuse occurred to Brodie
11 which resulted in his death, they were not as a result of any actions of Petitioner, are without merit.
12 The State argues that it is "uncontroverted" that Petitioner was also alone with Brodie on numerous
13 occasions prior to his death. It should be noted that if any abuse did occur, the timing of events is
14 more compelling that it was Arica Foster who was alone with Brodie during this critical timing of
15 events. The following portion of Arica's testimony would negate the inference of either "slight or
16 marginal" evidence that probable cause exists to believe that it was Petitioner who committed these
17 acts against Brodie. (PHT at Page 128):

18 BY MR. McDONALD:

19 Q. When you cleaned Brodie up what was he wearing?

20 A. His underwear and I took his shirt off.

21 Q. So you removed his shirt. Did you see any injuries when you
22 removed his shirt?

23 A. No.

24 Q. No injuries at all?

25 A. I didn't notice anything. I was half asleep and it was still kind of
26 dark in the house.

27 Q. Well, you took him in the bathroom to clean him up, didn't you?

28 A. Yes.

Q. You turned the light on in the bathroom?

1 A. Yeah.
2 Q. So it wasn't dark in the bathroom, correct?
3 A. Correct.
4 Q. You didn't have any problems seeing Brodie at that time, did you?
5 A. No, I didn't notice anything.
6 Q. You took him out to the couch and did you arrange the couch in
any special way?

7 A. I just put a towel down.
8

9 By her own testimony, she did not observe any injuries to Brodie at that time. It was
10 following this incident that she and Petitioner went to bed together and the following morning
11 Petitioner, on his way to work, placed Brodie next to Arica on the bed before he left. Arica testified
12 that she awoke around 8:50 am., noticed that Brodie was at the edge of her bed and rubbed his back.
13 She felt that he was cold and non responsive, and that's when she called 911.

14 By her own testimony, Arica admitted that she did not observe any injuries to Brodie when
15 she put him to bed that evening. She further testified that she and Petitioner went to bed **together**.
16 The State argues that "Incredibly, the Petition fails to mention that when Brodie is suffering signs
17 of his fatal beating, vomiting, he was "found" by the petitioner alone, and further, when taking care
18 of Brodie (Petitioner played no role in caring for Brodie when he was vomiting) the relevant
19 testimony was: Q. What did Brodie tell you about how he was feeling? A. He told me that his head
20 hurt." The State conveniently does not mention the fact that Arica testified, under oath, that she did
21 not see any injuries to Brodie at that time. She took him into a lighted bathroom to clean him up,
22 and observed **no** injuries.

23 The State further relies on Arica's testimony, referring to it as "uncontroverted" testimony
24 of what occurred at the Mandalay Bay Shark Reef visit. The State argues that this portion of Arica's
25 testimony is quite "compelling." Specifically, the State argues that Arica went into her hair salon
26 to get some money back since she had previously overpaid for some services. (PHT at Page 96).
27 Based upon Arica's testimony, the State argues that what actually occurred follows:

28 Q. When you went into the hair salon how long were you in there?

1 A. Five minutes.

2 Q. When you went in what was Brodie doing?

3 A. Sleeping.

4 Q. When you came out what was he doing?

5 A. Screaming.

6 When questioned by the State, Arica made it appear that Brodie was grumpy during their trip

7 to the Shark Reef, among other places, on Monday, due to some fault of Petitioner, However, when
8 cross-examined, Arica testified as follows (PHT at Page 124):

9 BY MR. MCDONALD:

10 Q. When you went to Circus Circus had that been planned prior to
11 going to the Shark Reef?

12 A. No.

13 Q. So once you were done at the Shark Reef you and Mike discussed
14 going to Circus Circus?

15 A. Yes.

16 Q. And Brodie was in his stroller at Circus Circus, wasn't he?

17 A. Yes.

18 Q. He wasn't walking?

19 A. No.

20 Q. When Brodie was at Circus Circus did he tell you he was tired?

21 A. Yes.

22 Q. Would Brodie get cranky when he was tired?

23 A. Yes.

24 Q. So he was cranky at Circus Circus?

25 A. Yes.

26 Q. So after that you went to Fantastic Sam's?

27 A. Yes.

28 Q. And then to the bank?

A. Yes.

1 Q. Was that a drive-thru?
2 A. Mike went in.
3 Q. And you and Brodie stayed in the car?
4 A. Yes.
5 Q. So it took 30 or 40 minutes to get from Circus Circus to Fantastic
6 Sam's to the bank and then to Best Buy?
7 A. Somewhere around there, yes.
8 Q. And was Brodie still telling you that he wanted to go night night?
9 A. He had fell asleep between Circus Circus and Fantastic Sam's.
10 Q. But he woke up when you got out of the car at Fantastic Sam's,
11 correct?
12 A. Yes.
13 Q. Did he stay awake to the bank and to Best Buy?
14 A. Yes.
15 Q. Was he cranky?
16 A. A little bit.
17 The State left out the relevant portion of Arica's testimony as to the actual events of what
18 took place at the hair salon. Arica testified as follows (PHT at Page 96):
19 Q. When you left the Mandalay Bay, McDonald's area you said you
20 went to a hair salon?
21 A. Correct.
22 Q. Did you drive there?
23 A. Mike drove. I was the passenger.
24 Q. Where was Brodie?
25 A. In the back seat in his car seat.
26 Q. Is that behind you or behind the defendant?
27 A. In the center.
28 Q. Can you reach Brodie as he was seated from either the driver's
side or the passenger side without getting out of the car?
A. Yes. From both.

1 Q. When you went into the hair salon how long were you in there?

2 A. Five minutes.

3 Q. When you went in what was Brodie doing?

4 A. Sleeping.

5 Q. When you came out what was he doing?

6 A. Screaming.

7 Q. Did you ask the defendant what happened?

8 A. He just said yes. He said he woke up.

9 Q. Brodie did?

10 A. Yes.

11 Q. When did he tell you Brodie woke up in relationship to when you
12 went into the hair salon?

13 A. When I shut the car door.

14 Clearly, as Arica's testified, Brodie was cranky following the Mandalay Bay trip. He had
15 fallen asleep and if in fact Brodie had been woken up as a result of Arica shutting the car door, as
16 most cranky children, he would most likely be screaming and fussy.

17 The State argues that another "compelling" fact omitted from the instant Petition is the
18 behavior exhibited by Brodie towards the Petitioner during the last day of his life. The State argues
19 that on several occasions Brodie did not want to be near the Petitioner. The only testimony
20 supporting that allegation, is that of Arica Foster, which does not constitute being "uncontroverted
21 facts" as the State describes them to be. Given Mr. Stanton's statement during closing arguments,
22 Arica's testimony should be considered anything but "uncontroverted facts."

23 As previously argued by Petitioner, at the Preliminary Hearing, even the State argues that it
24 is questionable as to who actually committed these crimes against Brodie that caused his death. Mr.
25 Stanton's statement during his closing argument follows in part (PHT at Page 141):

26 BY MR. STANTON:

27 This child died at the hands of another human being and critically
28 that it's non-accidental trauma. So one of three things took place. The
defendant murdered this child, the mother murdered this child or they

1 both did. Now, what we have in this case is the mother of this child
2 and the care and concern that you saw of what and how she cared for
3 this child under oath. With that testimony, Judge, I would submit that
4 there's only one of three options that exist based upon this evidentiary
presentation and that the defendant committed the charge that's set
forth in the criminal complaint and ask that you bind him over.

5 Based upon that statement alone, it is unclear how the State can refer to Arica Foster's
6 testimony of events as "uncontroverted facts," regardless of whether or not her testimony was
7 presented under oath.

8 The "uncontroverted facts," as reiterated by Mr. Stanton's own statement in his closing
9 argument, are that the evidence against Petitioner does not establish probable cause to support a
10 reasonable inference that it was Petitioner who committed these offenses, if any had been committed.
11 Mr. Stanton explicitly states: "there are three options that exist based upon the testimony and
12 arguments presented at the Preliminary Hearing." That statement alone "one of three options,"
13 reflects that even the State realizes that there was no finding of probable cause at the Preliminary
14 Hearing to support the criminal charges based on "slight or even marginal evidence" to bind
15 Petitioner over on these charges. For the Court to find that the State's argument "that since we
16 cannot with certainty say who did this, then it must be Petitioner who is to blame," establishes
17 probable cause either "slight or marginal," to bind Petitioner over on these charges, is simply
18 reversible error.

19 Moreover, this case is full of uncertainties, uncertainties as to the actual cause of death of
20 Brodie Aschenbrenner.

21 The State argues that the petition quotes a lengthy passage of Arica's testimony, yet stops just
22 short of the next portion of Arica's testimony that is extremely relevant and directly contradicts the
23 entirety of the Petitioner's argument. (PHT at Page 135). The State alleges that the omitted
24 testimony on cross-examination was that when she was asked if Brodie ever told her that Mike had
25 hit him, she replied "He told me one time the bump hurt head. He used to call Mike bump." She was
26 asked if Brodie told her what happened to which she replied no. Arica testified that this occurred
27 a couple weeks before Brodie passed away. She testified that she asked Mike about it, she was
28 concerned at first, but her concern was alleviated by Mike telling her that they were wrestling and

1 he hit his head. She testified that Mike and Brodie played. They would play wrestling in the
2 apartment.

3 In her earlier testimony however, Arica testified that if Brodie was asked how he received
4 a cut, would he be able to tell you. (PHT at Page 132). Her testimony follows in part:

5 BY MR. MCDONALD:

6 Q. Brodie was about two and a half years old, correct?

7 A. Yes.

8 Q. Was he speaking at two and a half?

9 A. A little bit. Not like tons, but enough.

10 Q. If you were to ask him something was he able to answer. you?

11 A. Depends on what it was.

12 Q. Well, if you asked him how did you get that cut, would he be able
13 to tell you?

14 A. No.

15 Q. Did he ever tell you that Spanky the dog had knocked him down?

16 A. He said Spanky did it.

17 Q. Spanky did it?

18 A. Uh-huh.

19 Q. And that would have been in response to your question as to what
20 had happened?

21 A. Uh-huh.

22 This testimony seems to contradict itself, first she stated no he could not tell me how he got
23 a cut, then conflicted her own testimony by stating Brodie had told her that Spanky had knocked him
24 down. Arica's testimony is very conflicting or very confusing, at best. In no way should it be
25 considered "uncontroverted fact."

26 The State argues that Petitioner had motive due to his frustration over potty training and that
27 there was substantial evidence that Petitioner was frustrated with Brodie not being potty trained fast
28 enough. The State argues that further, Brodie had an episode where he wet himself at McDonald's
during the last day of his life. (PHT at Page 94). They further allege that in reading the petition, it

1 is as if none of these events ever happened. However, keep in mind that this argument is based upon
2 the "uncontroverted facts" provided by Arica Foster.

3 The State argues that the Petitioner's argument that Arica testified that Brodie was very
4 clumsy and although she had previously been advised to take Brodie to a neurologist, she neglected
5 to do so, is somehow inaccurate. (PHT at Page 134). The State argues that the complete testimony
6 sheds a completely different and more accurate explanation to these events. When Arica was asked

7 "Did you ever take Brodie to a pediatric neurologist," she replied "No. My pediatrician said not to
8 worry about it." She was then asked "So you discussed it with the pediatrician," to which she replied
9 "Yes."

10 It should be noted that there was no evidence provided at the Preliminary Hearing that this
11 conversation with the pediatrician ever took place. Moreover, if in fact it did, why didn't the State
12 submit the relevant medical records into evidence at the Preliminary Hearing? This would once
13 again be due to the State's argument that this Honorable Court should rely on Arica Foster's
14 testimony as "uncontroverted facts."

15 The State argues that the testimony of Meridee Moshier does not indicate that Brodie was
16 a clumsy child and was constantly getting bruises. However, in the Preliminary Hearing Transcript
17 from pages 16 through Page 20, she describes him as a "wild child," "he had a habit of hitting his
18 head on her countertops," "his legs were always bruised" and she called him "Bamm-Bamm"
19 because he was so wild.

20 The State alleges that the critical aspect of Ms. Moshier's testimony is completely absent
21 from the petition. That testimony being that she was the last adult person, outside of Petitioner and
22 Arica, to care for Brodie before he died. On Sunday evening, she bathed and applied lotion to
23 Brodie's naked body. (PHT at Page 11). Ms. Moshier testified that she observed him from head to
24 toe and adamantly denied that she had never seen anything like the nature, severity and most of the
25 injuries depicted in those photographs.

26 The State argues that the portion of the Petition of the testimony by Ms. Moshier is simply
27 a gross mischaracterization of the record. However, it was taken directly from the Transcript of
28 Proceedings, as to what Ms. Moshier testified to. Petitioner agrees that Ms. Moshier testified that

1 Brodie was delivered to Arica and Petitioner, with a few minor bruises and he was otherwise in
2 excellent health and full of vigor. Petitioner does not view this as a mischaracterization of the record.
3 Especially given that Arica testified that on the night prior to Brodie's death, she did not observe any
4 injuries on Brodie either.

5 The State argues that there is no evidence to suggest that Arica inflicted any of numerous
6 and fatal injuries to her own child and highlights a portion of Arica's testimony wherein the State

7 asks "My final question to you Miss Foster, is did you in any way harm Brodie from Sunday evening
8 to when you just rubbed his back on the next morning [when Brodie was found dead]?" Arica
9 replied "No, sir."

10 Again based upon the State's own closing argument wherein Mr. Stanton states "So one of
11 three things took place. The defendant murdered this child, the mother murdered this child or they
12 both did," there was absolutely no evidence sufficient to establish probable cause, either "slight or
13 marginal" that Petitioner committed any of the acts alleged by the State. Moreover, it certainly does
14 not place much weight on the State's argument that when Arica was questioned as to whether or not
15 she harmed Brodie and she testified, under oath, that she did not, and yet it was not mentioned at all
16 in the petition. As clearly documented, given that even the State has pointed out the fact that there
17 is a question as to which one of three things took place, Arica's testimony is questionable at best.

18 What is of more importance to note, is again, even the Court was not convinced that there
19 was "slight or even marginal" evidence to hold Petitioner to answer to these charges in District
20 Court. The Honorable David S. Gibson, Jr., noted in his decision:

21 "I have some problems with the case, with the amount of knowledge
22 that I've been given here this afternoon. I believe that the burden is
23 slight or marginal. This is a tragedy. The testimony is uncontroverted
24 that the death was a homicide at the hands of another. The question
25 of who did it is a big question. At this point in time with all of the
26 testimony, and we haven't heard from the defendant, which at this
27 point in time I don't think you can un-ring a bell, but with the
28 testimony of the friend questioning the bruising, with the testimony
that we have I believe that the burden has been met. I think by the
slightest and slimmest of margins and there's a lot of stuff here that
I don't know and of course I'm not the one who is able to ask the
questions. I believe that slight or marginal evidence has been shown
that murder and child abuse with substantial bodily harm has been
met and we'll hold the defendant to answer to the charges in the
Eighth Judicial District Court."

1 Clearly, the burden of presenting evidence which establishes probable cause by either "slight
2 or marginal" evidence, that Petitioner committed the offenses alleged by the State, has not been met.

3 **II.**

4 **ARGUMENT**

5 **A. THERE WAS INSUFFICIENT EVIDENCE PRODUCED AT PRELIMINARY**
6 **HEARING**

7 To withstand a Writ of Habeas Corpus, the Court must find that the State presented sufficient
8 legal evidence at the preliminary hearing or at the grand jury proceedings to show (1) probable cause
9 that a crime was committed and (2) probable cause to believe that the defendant charged committed
10 that crime. Frutiger v. State, 111 Nev. 1385, 907 P.2d 158 (1995); see also Lamb v. Holsten, 85
11 Nev. 566, 459 P.2d 771 (1969); NRS 172.155. "The purpose of the preliminary proceedings is to
12 weed out groundless or unsupported charges of grave offenses and to relieve the accused of the
13 degradation and the expense of a criminal trial." State v. VonBrincken, 476 P. 2d 733 (Nev. 1970).

14 Before a person may be held for trial, the grand jury must determine that there is probable
15 cause to believe (1) an offense (otherwise known as the corpus delicti) has been committed; and (2)
16 the defendant has committed it. N.R.S. 172.155. Frutiger v. State, 111 Nev. 1385, 907 P.2d 158
17 (1995). On appeal, Frutiger first argues that there was insufficient evidence before the grand jury
18 to prove the corpus delicti.

19 In Frutiger, Defendant sought review of the decision of the Second Judicial District Court,
20 Washoe County (Nevada), which convicted him of one count of first degree murder pursuant to a
21 jury verdict. The defendant was convicted of first degree murder for the death of a woman that he
22 shared a motel room with, who was found partially decomposed in defendant's motel room after he
23 left the motel. When defendant was arrested, defendant had some items owned by the victim on his
24 person. A pathologist testified that he could not determine the cause of death and that the victim's
25 very high blood alcohol level or heart or liver failure may have caused her death. Based on that
26 evidence the grand jury indicted defendant. At trial, the pathologist reiterated that the victim's cause
27 of death may have been heart or liver failure, and that the victim did not appear to be strangled.
28 Another pathologist testified that victim's death was most likely due to the syndrome of chronic and

1 acute alcoholism. A jury convicted defendant of first degree murder. On appeal, the court reversed
2 and vacated the conviction. The court held that, based on the pathologists' testimony there was
3 insufficient evidence to show that the victim's death was caused by the criminal agency of another,
4 the jury could not have even reached the issue of whether there was sufficient evidence to link
5 defendant with her death.

6 Defendant's conviction of first degree murder was reversed and vacated.

7 Although the State need not eliminate all non-criminal inferences, there must be sufficient
8 proof of the hypothesis of death by a criminal agency. In the case of Frutiger, before the grand jury,
9 the State clearly did not present sufficient proof of a hypothesis of death by a criminal agency
10 because the State did not even assert what the hypothesis might be. The State did not submit a
11 possible cause of death to the grand jury. The complaint simply asserted Frutiger was charged with
12 murder by "means currently undetermined."

13 The court in Frutiger found that "the proper standard is whether, after viewing the evidence
14 in the light most favorable to the prosecution, any rational trier of fact could have concluded beyond
15 a reasonable doubt that Poulter's death was caused by a criminal agency." See Koza v. State, 100
16 Nev. 245, 250, 681 P.2d 44, 47 (1984) (citing Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d
17 560, 99 S. Ct. 2781 (1979)).

18 However, the Frutiger court noted: "The law applicable to sustainable indictments is that the
19 State must present only sufficient evidence to create a reasonable inference that the accused
20 committed the charged offense. Such evidence may be of a quality that is only slight or marginal."
21 State v. Boueri, 99 Nev. 790, 672 P.2d 33 (1983).

22 By the State's own admission, the question of who committed these alleged acts, if any were
23 committed, is insufficient evidence to create a reasonable inference that the accused committed the
24 charged offense. Such evidence may be of a quality that is only slight or marginal, however, in the
25 case at bar, the evidence is neither "slight or marginal."

26 On appeal from a denial of pre-trial habeas the sole function of this court is to determine
27 whether all of the evidence received at the preliminary hearing, or by the grand jury, establishes
28 probable cause to believe that an offense has been committed and that the accused committed it.

1 State v. von Brincken, 86 Nev. 769, 476 P.2d 733 (1970); Lamb v. Holsten, 85 Nev. 566, 459 P.2d
2 771 (1969). To enable us to accomplish that function it is necessary that the transcript of the
3 proceedings before the magistrate or the grand jury be made a part of the record. Shelby v. District
4 Court, 82 Nev. 204, 414 P.2d 942 (1966). Further review of the record is not required, as probable
5 cause or the lack of it will be disclosed by the transcript.

6 The transcript in the instant matter, clearly reflects that not only the State, but the Judge as
7 well, expresses that there is insufficient evidence to create a reasonable inference that the accused
8 committed the charged offense. The quality of such evidence is neither slight or marginal.

9 At a preliminary examination or in proceedings before a grand jury, the issue of guilt or
10 innocence of the accused is not involved. Marcum v. Sheriff, 85 Nev. 175, 451 P.2d 845 (1969). The
11 evidence need not be sufficient to support a conviction. Maskaly v. State, 85 Nev. 111, 450 P.2d 790
12 (1969). Nor must the State produce the quantum of proof required to establish the guilt of the
13 accused beyond a reasonable doubt. Robertson v. Sheriff, 85 Nev. 681, 462 P.2d 528 (1969). To
14 commit an accused for trial, the State is not required to negate all inferences which might explain
15 his conduct, but only to present enough evidence to support a reasonable inference that the accused
16 committed the offense. Johnson v. State, 82 Nev. 338, 418 P.2d 495 (1966); Beasley v. Lamb, 79
17 Nev. 78, 378 P.2d 524 (1963).

18 In the case at bar, given the fact that both the State and the Judge voice their concerns over
19 who committed unlawful acts, if any were committed, cannot be considered evidence which
20 establishes probable cause, either "slight or marginal." Further, based upon the testimony of Dr.
21 Gavin, the acts alleged by the State may not have been the cause of death to Brodie Aschenbrenner.

22 The State argues that "It is unnecessary to analyze murder by means of child abuse in terms
23 of deliberation and premeditation because the soundest view is simply that a murder perpetrated by
24 an enumerated means is first-degree murder by force of statute, without legal concern with or factual
25 inquiry to willfulness, deliberation, and premeditation, citing Collman v. State, 116 Nev. 687, 714,
26 7 P.2d 426, 443 (2000).

27 In Collman v. State, a jury instruction was given that "There are certain kinds of murder
28 which carry with them conclusive evidence of malice aforethought. One of these classes of murder

1 is murder committed by means of child abuse. Therefore, a killing which is committed by child
2 abuse is deemed to be murder of the first degree, whether the killing was intentional or
3 unintentional." (Emphasis added.)

4 This jury instruction for murder by means of child abuse was not challenged on appeal, but
5 after reviewing the record, the court ordered the parties to provide supplemental briefs addressing
6 whether this instruction correctly provided that child abuse constituted conclusive evidence of
7 malice when murder is charged pursuant to NRS 200.030(1)(a).

8 In Nevada, consistent with the common law, murder "is the unlawful killing of a human
9 being, with malice aforethought, either express or implied." NRS 200.010; see Wayne R. LaFave
10 & Austin W. Scott, Jr., Criminal Law § 7.1, at 605-06 (2d ed. 1986); Model Penal Code and
11 Commentaries § 210.2 cmt. 1 at 13-15 (Official Draft and Revised Comments 1980). Today, the
12 phrase "malice aforethought" does not even approximate its literal meaning. Hence it is preferable
13 not to rely upon that misleading expression for an understanding of murder but rather to consider the
14 various types of murder (typed according to the mental element) which the common law came to
15 recognize and which exist today in most jurisdictions: (1) intent-to-kill murder; (2)
16 intent-to-do-serious-bodily-injury murder; (3) depraved-heart murder; and (4) felony murder.

17 Nevada expressly recognizes three of these malicious states of mind in its statutes and case
18 law. NRS 200.020 defines express malice as the "deliberate intention unlawfully to take away"
19 another's life and implied malice as "an abandoned and malignant heart." These forms of malice are,
20 respectively, the mental elements for intent-to-kill murder and depraved-heart murder. Nevada
21 statutes and this court have apparently never employed the phrase "depraved heart," but that phrase
22 and "abandoned and malignant heart" both refer to the same "essential concept . . . one of extreme
23 recklessness regarding homicidal risk." Model Penal Code § 210.2 cmt. 1 at 15; see also Thedford
24 v. Sheriff, 86 Nev. 741, 744, 476 P.2d 25, 27 (1970) (malice as applied to murder includes "general
25 malignant recklessness of others' lives and safety or disregard of social duty"). NRS 200.030(1)(b)
26 defines felony murder, in which "the felonious intent involved in the underlying felony may be
27 transferred to supply the malice necessary to characterize the death a murder." Ford v. State, 99 Nev.

28

1 209, 215, 660 P.2d 992, 995 (1983). The jury instruction in Collman was patterned after the
2 felony-murder instruction approved of in Ford. See id. at 214, 660 P.2d at 995.

3 Nevada defines by statute three kinds of first-degree murder.

4 Murder of the first degree is murder which is:

5 (a) Perpetrated by means of poison, lying in wait, torture or child abuse, or by any
6 other kind of willful, deliberate and premeditated killing;

7 (b) Committed in the perpetration or attempted perpetration of sexual assault,
8 kidnaping, arson, robbery, burglary, invasion of the home, sexual abuse of a child or
9 sexual molestation of a child under the age of 14 years; or

10 (c) Committed to avoid or prevent the lawful arrest of any person by a peace officer
11 or to effect the escape of any person from legal custody. NRS 200.030(1).

12 The issue presented in the Collman case is: for first-degree murder under subsection (1)(a)
13 of NRS 200.030, can malice be established simply by proving that the killing was done by an
14 enumerated means? The State answers this question affirmatively, offering three or four arguments
15 in support of its position. The Court concluded that none had merit.

16 Malice versus willfulness, deliberation, and premeditation

17 First, the State asserted that: (1) the means enumerated in NRS 200.030(1)(a) constitute
18 willfulness, deliberation, and premeditation as a matter of law, and (2) willfulness, deliberation, and
19 premeditation subsume malice aforethought as a matter of law. Thus, the State contends, the child
20 abuse in this case established willfulness, deliberation, and premeditation which in turn established
21 malice. The court rejected both prongs of the state's argument.

22 The means enumerated in subsection (1)(a) do not necessarily constitute willfulness,
23 deliberation, and premeditation, though there is authority for construing the statute in this manner.
24 See Graham v. State, 116 Nev. , 992 P.2d 255 (2000). The original enumerated means are poison,
25 lying in wait, and torture, whereas child abuse was added to subsection (1)(a) only recently.
26 Although the three traditional enumerated means are normally consistent with deliberate,
27 premeditated action, cf. LaFave & Scott, Criminal Law § 7.1, at 605, child abuse can be and often
28 is a rash, impulsive crime. It is unnecessary to analyze murder by means of child abuse in terms of
deliberation and premeditation because the soundest view is simply that a murder perpetrated by an
enumerated means is first-degree murder by force of statute, without legal concern with or factual

1 inquiry into willfulness, deliberation, and premeditation. See Graham, 116 Nev. at , 992 P.2d at
2 257-58; State v. Johnson, 317 N.C. 193, 344 S.E.2d 775, 781 (N.C. 1986); People v. Thomas, 41
3 Cal. 2d 470, 261 P.2d 1, 3 (Cal. 1953).

4 Though Nevada's code now appears to be in the minority, for many years statutes commonly
5 deemed poison, lying in wait, and torture to be predicates of first-degree murder. See LaFave &
6 Scott, Criminal Law § 7.1(a), at 605, and § 7.7©, at 646; Model Penal Code § 210.2 cmt. 2 at 16.

7 By contrast, child abuse was added to NRS 200.030(1)(a) just ten years ago. See 1989 Nev. Stat.,
8 ch. 408, § 1, at 865.

9 The most recent legislative session resulted in the removal of child abuse from subsection
10 (1)(a) and its placement in (1)(b), the felony murder subsection. See 1999 Nev. Stat., ch. 319, § 3,
11 at 1335.

12 The second prong of the state's argument contains a more pronounced flaw because malice
13 is not subsumed by willfulness, deliberation, and premeditation. This court has so stated, but without
14 much explanation. See, e.g., Hern v. State, 97 Nev. 529, 532, 635 P.2d 278, 280 (1981). But the
15 proposition can be easily illustrated. For example, it is possible for a police sniper to act willfully,
16 deliberately, and premeditatedly but without malice in fatally shooting a man who has taken hostages
17 and threatens their lives. The legal defense of defense of self or others justifies a homicide and
18 negates the element of malice. "Even a deliberate killing, if done in actual self-defense, is justifiable;
19 the intent is not unlawfully to take the life of another." Kelso v. State, 95 Nev. 37, 42, 588 P.2d
20 1035, 1039 (1979); see also State v. Vaughan, 22 Nev. 285, 299-302, 39 P. 733, 735-36 (1895).

21 Malice versus specific intent to kill

22 As a second argument, the State repeatedly invokes and cites authority for the proposition
23 that specific intent to kill is not a necessary element of murder. This proposition, however, does not
24 address this court's concern with the proposed jury instruction number. The instruction stated that
25 "murder committed by means of child abuse" is a kind of murder which carries with it "conclusive
26 evidence of malice aforethought." (Emphasis added.) Specific intent to kill is not synonymous with
27 malice. The fact that not every murder requires a specific intent to kill does not relieve the State of
28 the burden to prove some kind of malice to establish murder.

1 As the West Virginia Supreme Court of Appeals explained, "the language 'murder by poison,
2 lying in wait, imprisonment, starving' does not require that premeditation or a specific intent to kill
3 has to be shown, but to elevate the homicide to first-degree murder, a killing with malice must be
4 proved and one of the four enumerated acts must be established." State v. Harper, 179 W. Va. 24,
5 365 S.E.2d 69, 72 (W. Va. 1987); see also People v. Benjamin, 52 Cal. App. 3d 63, 124 Cal. Rptr.
6 799, 813 (Ct. App. 1975).

7 First-degree murder by an enumerated means versus first-degree felony murder

8 The State analogizes murder under NRS 200.030(1)(a) to felony murder under subsection
9 (1)(b). In the latter case, by law the malice required for murder is supplied by the intent to commit
10 an enumerated felony. Likewise, the State argues, the requisite malice arises as a matter of law from
11 the use of an enumerated means under subsection (1)(a). However, this and other courts have never
12 followed the view urged by the State (the court discussed exceptional cases treating murder by
13 torture below).

14 The California Supreme Court explained this matter clearly in People v. Mattison, 4 Cal. 3d
15 177, 481 P.2d 193, 196, 93 Cal. Rptr. 185 (Cal. 1971). Thus if a killing is murder within the meaning
16 of sections 187 [defining murder as an unlawful killing with malice aforethought] and 188 [defining
17 express and implied malice], and is by one of the means enumerated in section 189 [i.e., poison,
18 lying in wait, or torture], the use of such means makes the killing first degree murder as a matter of
19 law. It must be emphasized, however, that a killing by one of the means enumerated in the statute
20 is not murder of the first degree unless it is first established that it is murder. If the killing was not
21 murder, it cannot be first degree murder, and a killing cannot become murder in the absence of
22 malice aforethought. Without a showing of malice, it is immaterial that the killing was perpetrated
23 by one of the means enumerated in the statute.

24 It is true that murder may be committed without express malice, i.e., without a specific intent
25 to take human life. To be so committed, however, unless the felony-murder rule is applicable, "the
26 defendant must intend to commit acts that are likely to cause death and that show a conscious
27 disregard for human life." [Thomas, 261 P.2d at 7 (Traynor, J., concurring).] . . .

28

1 The above rules apply to all murders, other than felony murders, regardless of whether they
2 are committed by one of the means enumerated in section 189.

3 See also Harper, 365 S.E.2d at 72 (quoted above); Benjamin, 124 Cal. Rptr. at 813 (cited
4 above); cf. State v. Johnson, 821 P.2d 1150, 1156-57 (Utah 1991) (first-degree murder first requires
5 proof of what would otherwise be second-degree murder and then proof of an enumerated
6 aggravating factor, e.g., administering poison).

7 This Collman court's case law was in accord with Mattison. That malice is required to find
8 murder by an enumerated means was implicit to this court's reasoning in Pinana v. State, 76 Nev.
9 274, 286, 352 P.2d 824, 831 (1960). In that case, the court upheld the giving of a jury instruction
10 which stated: "All murder which is perpetrated by means of lying in wait is murder of the first
11 degree." Id.

12 In Collman, Appellant contends that the instruction was defective because the court failed
13 to explain that murder must first be established before the question of lying in wait can arise. In the
14 other instructions given the court defined murder and stated that to find appellant guilty thereof all
15 of the elements must have been proven beyond a reasonable doubt. This instruction was proper to
16 aid the jury in determining the degree of the offense in the event they found the appellant guilty of
17 murder.

18 The state's position is not only contrary to the law regarding murder by enumerated means,
19 but seeks to expand the doctrine of felony murder when the weight of authority calls for restricting
20 it. Many commentators criticize the felony-murder doctrine, and the trend has been to limit its
21 applicability, not extend it. See Model Penal Code § 210.2 cmt. 6 at 29-42; LaFave & Scott,
22 Criminal Law § 7.5, at 622-23, 632, 640-41.

23 Furthermore, first-degree murder by an enumerated means fundamentally differs from felony
24 murder. Although child abuse, as discussed below, is a special case, the means originally enumerated
25 in subsection (1)(a)--use of poison, lying in wait, and torture--do not denote crimes. Thus, it cannot
26 be presumed that they necessarily carry a felonious intent which can supply the malice necessary to
27 characterize a killing as a murder. For example, friends and family who spring a surprise birthday
28 party on a middle-aged man as he steps into his home may be "lying in wait," but they are not liable

1 for murder if he collapses and dies from a heart attack because they did not act with malice. As
2 noted, lying in wait is defined as watching, waiting, and concealment from the person killed with the
3 intention of killing or inflicting bodily injury upon that person. See Moser, 91 Nev. at 812 & n.3,
4 544 P.2d at 426 & n.3. In effect, this definition places the requisite malice within the element of
5 lying in wait.

6 Murder by torture warrants further discussion because the State has cited authority for the
7 proposition that the malice required for murder can be transferred from the commission of torture.
8 This is the only authority that supports the state's position, and it provides support only if it can be
9 extended to apply to murder by other enumerated means. However, it appears that no court has taken
10 this approach with poison, lying in wait, or any other enumerated means. More important, we
11 conclude that the approach is not sound even in regard to torture.

12 The Supreme Court of North Carolina reasoned that murder by torture "is analogous to felony
13 murder in that malice may be implied by the very act of torturing the victim. Torture is a dangerous
14 activity of such reckless disregard for human life that, like felony murder, malice is implied by the
15 law." State v. Crawford, 329 N.C. 466, 406 S.E.2d 579, 587-88 (N.C. 1991). The California
16 Supreme Court also held: "When a killing is perpetrated by means of torture, the means used is
17 conclusive evidence of malice and premeditation, and the crime is murder of the first degree." People
18 v. Turville, 51 Cal. 2d 620, 335 P.2d 678, 685 (Cal. 1959), overruled on other grounds by People v.
19 Morse, 60 Cal. 2d 631, 388 P.2d 33, 44, 36 Cal. Rptr. 201 (Cal. 1964).

20 Although as a practical matter malice may almost always be factually present when there is
21 a killing by torture, the decisions in Crawford and Turville err in abandoning the established analysis
22 of first-degree murder by enumerated means and concluding that, given torture, malice must be
23 present as a matter of law. Such an approach introduces laxness and inconsistency into the
24 application of a statute which defines first-degree murder by enumerated means in a uniform, reliable
25 way. This lax approach is not sound because it is conceivable that torture, like other enumerated
26 means, can be done without legal malice.

27 Actually, although Turville has not been expressly overruled on this point, the California
28 Supreme Court has since reiterated that to prove murder by torture, "it must be established that the

1 defendant intended to 'cause cruel suffering on the part of the object of the attack, either for the
2 purpose of revenge, extortion, persuasion, or to satisfy some other untoward propensity.'" Mattison,
3 481 P.2d at 197 (quoting People v. Tubby, 34 Cal. 2d 72, 207 P.2d 51, 54 (Cal. 1949)). The required
4 "untoward propensity" goes to the element of malice. The California Supreme Court has also
5 explained that murder by torture is first-degree murder not because of the amount of pain inflicted
6 but because of "the state of mind of the torturer--the cold-blooded intent to inflict pain for personal
7 gain or satisfaction." People v. Steger, 16 Cal. 3d 539, 546 P.2d 665, 669, 128 Cal. Rptr. 161 (Cal.
8 1976). Therefore, the court has held that first-degree murder by torture is "murder committed with
9 a wilful, deliberate, and premeditated intent to inflict extreme and prolonged pain." *Id.*; see also
10 People v. Wiley, 18 Cal. 3d 162, 554 P.2d 881, 887, 133 Cal. Rptr. 135 (Cal. 1976). Further, in cases
11 of murder by torture in California, the current standard jury instructions require the jury to find both
12 malice aforethought and that "the perpetrator committed the murder with a willful, deliberate, and
13 premeditated intent to inflict extreme and prolonged pain upon a living human being for the purpose
14 of revenge, extortion, persuasion or for any sadistic purpose." California Jury Instructions; Criminal
15 8.24 and accompanying use note (6th ed. 1996). Thus, despite the unqualified statement made in
16 Turville, malicious intent must be independently proved to establish murder by torture in California.

17 As already discussed, child abuse was added only recently to the means enumerated in NRS
18 200.030(1)(a) and is somewhat anomalous, but the State has not argued nor would we agree that this
19 is a basis to treat it differently from the other enumerated means. To maintain coherency and rigor
20 in the application of the statute, first-degree murder by child abuse can and must be proven in the
21 same manner as the other three enumerated means. To reiterate, poison, lying in wait, and torture are
22 not separate statutory offenses, but all are consistent with deliberate, premeditated action. Child
23 abuse, on the other hand, can denote a crime, but does not appear to do so in NRS 200.030(1)(a)
24 because the statute provides its own definition of child abuse in subsection (6)(a) rather than
25 referencing the independent offenses involving abuse or neglect of children proscribed in NRS
26 200.508. Child abuse more clearly diverges from the other three enumerated means in that it does
27 not strongly correlate with deliberate, premeditated action since it can be and often is committed in
28 a rash, impulsive manner. Therefore, it is critical that jurors expressly find malice aforethought

1 before convicting a child abuser of first-degree murder under subsection (1)(a). Otherwise, a single
2 rash, impulsive act by an otherwise decent parent leading to a child's death--an act which was
3 abusive to the child but lacked legal malice--would constitute first-degree murder.

4 Thus, unlike felony murder pursuant to NRS 200.030(1)(b), to establish that a killing is
5 murder under subsection (1)(a), the State must prove that the killer acted with malice aforethought,
6 i.e., with the deliberate intention unlawfully to take life or with an abandoned and malignant heart.

7 See NRS 200.020. Proof of an enumerated means then establishes that the murder is of the first
8 degree.

9 The jury instruction in the Collman case improperly relieved the State of this requirement.
10 For Collman's actions to constitute murder, the jury had to find that he acted with malice
11 aforethought. This malice could not be presumed simply from his commission of child abuse
12 pursuant to NRS 200.030(6)(a), i.e., physical injury of a nonaccidental nature to a child.

13 As in the instant matter, for Petitioner's acts to constitute murder by means of child abuse,
14 the state must prove by even slight or marginal that there is evidence substantiating that all of the
15 elements of the alleged offense were committed. The State has not met that burden by either slight
16 or marginal evidence.

17 CORPUS DELICTI DOCTRINE

18 The State concedes that the Corpus Delicti doctrine has relevant applications under two
19 circumstances: (1) when the sole basis of a criminal prosecution is based upon the defendant's
20 confession to police; and (2) in a criminal case when an issue exists as to whether a person died
21 (missing body cases) or, if they did die, whether the death was the result of criminal agency (See
22 Frutiger, et al).

23 However, in Frutiger, the court held that

24 "Before a person may be held for trial, the grand jury must determine that there is probable
25 cause to believe (1) an offense (otherwise known as the corpus delicti) has been committed; and (2)
26 the defendant has committed it. NRS 172.155."

27

28

1 In proving the corpus delicti, "two elements must be established (1) the fact of death; and (2)
2 the criminal agency of another responsible for that death." Azbill v. State, 84 Nev. 345, 350-51, 440
3 P.2d 1014, 1017 (1968) (citation omitted).

4 In the case at bar, neither of the elements have been established. The cause of death is
5 surrounded by uncertainty due to Brodie's prior automobile accident which could have resulted in
6 his death. Further, should the State argue that the cause of death was non-accidental, it has not
7 established the criminal agency of another responsible for that death.


8 **III.**

9 **CONCLUSION**

10 WHEREFORE, based upon the foregoing facts and argument, Petitioner prays that this
11 Honorable Court issue a Writ of Habeas Corpus.

12 DATED this 29th day of December, 2011.

13 STEVEN B. WOLFSON, CHTD.

14
15 By: 
16 PATRICK E. McDONALD, ESQ.
17 Nevada Bar No. 3526
18 601 South Seventh Street
19 Las Vegas, Nevada 89101
20 Attorney for Petitioner
21
22
23
24
25
26
27
28

1 **ROC**
2 PATRICK E. McDONALD, ESQ.
3 Nevada Bar No. 3526
4 STEVEN B. WOLFSON, CHTD.
5 601 South Seventh Street
6 Las Vegas, Nevada 89101
7 Tel: (702) 385-7227
8 Fax: (702) 385-5351
9 Attorney for Petitioner

10 **DISTRICT COURT**

11 **CLARK COUNTY, NEVADA**

12 * * * *

13 STATE OF NEVADA,
14 Plaintiff,

Case No: C277650
Dept No: XXIII

15 vs.

16 MICHAEL ALAN LEE,
17 #1699107,

Date of Hearing: January 30, 2012
Time of Hearing: 11:00 a.m.

18 Defendant.

19 **RECEIPT OF COPY**

20 **RECEIPT OF COPY of REPLY TO STATE'S RETURN TO PETITION FOR WRIT**
21 **OF HABEAS CORPUS** is hereby acknowledged this 30 day of Dec, 2011.

22 Eileen Monville
23 DISTRICT ATTORNEY

ORIGINAL

FILED

JAN 18 10 53 AM '12

Alan Stanton
CLERK OF THE COURT

OPI
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
DAVID STANTON
Chief Deputy District Attorney
Nevada Bar #003202
200 Lewis Avenue
Las Vegas, Nevada 89155-2211
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-VS-

MICHAEL ALAN LEE,
#1699107

Defendant.

CASE NO: C-11-277650-1
DEPT NO: XXIII

C-11-277650-1
OPI
Order for Production of Inmate
1748412



ORDER FOR PRODUCTION OF INMATE
MICHAEL A. LEE, BAC #81950

DATE OF HEARING: 01/30/2012
TIME OF HEARING: 11:00 A.M.

TO: DWIGHT NEVEN, Warden of the High Desert State Prison;

TO: DOUGLAS C. GILLESPIE, Sheriff of Clark County, Nevada

Upon the ex parte application of THE STATE OF NEVADA, Plaintiff, by DAVID ROGER, District Attorney, through DAVID STANTON, Chief Deputy District Attorney, and good cause appearing therefor,

IT IS HEREBY ORDERED that DWIGHT NEVEN, Warden of the High Desert State Prison shall be, and is, hereby directed to produce MICHAEL A. LEE, in Case No. C-11-277650-1, wherein THE STATE OF NEVADA is the Plaintiff, inasmuch as the said MICHAEL A. LEE is currently incarcerated in the High Desert State Prison located in Indian Springs, Nevada and his presence will be required in Las Vegas, Nevada commencing

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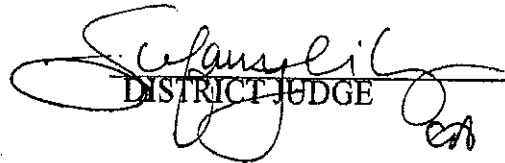
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CLERK OF THE COURT

on 01/30/2012, at the hour of 11:00 o'clock A.M. and continuing until completion of the prosecution's case against the said Defendant.

IT IS FURTHER ORDERED that DOUGLAS C. GILLESPIE, Sheriff of Clark County, Nevada, shall accept and retain custody of the said MICHAEL A. LEE in the Clark County Detention Center, Las Vegas, Nevada, pending completion of said matter in Clark County, or until the further Order of this Court; or in the alternative shall make all arrangements for the transportation of the said MICHAEL A. LEE to and from the Nevada State Prison facility which are necessary to insure the MICHAEL A. LEE's appearance in Clark County pending completion of said matter, or until further Order of this Court.


DATED this 17 day of January, 2012.


DISTRICT JUDGE

JUDGE STEFANY A. MILEY

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

BY


DAVID STANTON
Chief Deputy District Attorney
Nevada Bar #003202

sam/MVU

ORIGINAL

FILED

MAY 1 1 23 PM '12

Sharon A. L. L.
CLERK OF COURT

1 EXPT
2 PATRICK E. McDONALD, ESQ.
3 Nevada Bar No. 3526
4 STEVEN B. WOLFSON, CHTD.
5 601 S. Seventh Street
6 Las Vegas, Nevada 89101
7 Tel: (702) 385-7227
8 Fax: (702) 385-5351

DISTRICT COURT
CLARK COUNTY, NEVADA

7
8 STATE OF NEVADA,)
9)
10 Plaintiff,)
11)
12 vs.)
13)
14 MICHAEL ALAN LEE,)
15 ID#1699107,)
16 Defendant.)

Case No: C277650
Dept No: XXIII

C-11-277650-1
EXPT
Ex Parte
1841434



EX PARTE APPLICATION FOR COURT APPROVAL
OF PAYMENT OF SPECIFIC CATEGORIES
OF ANCILLARY DEFENSE COSTS

16 Defendant, MICHAEL ALAN LEE, by and through his counsel, PATRICK E.
17 McDONALD, ESQ., moves this court for an order approving certain specific
18 categories of ancillary defense costs which are necessary for an adequate defense
19 which shall be paid by the State of Nevada in a reasonable amount.

20 This Motion is made pursuant to NRS § 7.135, the Sixth and Fourteenth
21 Amendments of the United States Constitution, Article 1, Section 8 of the Nevada
22 Constitution, and the authorities cited herein.

23 This Motion is supported by the attached Memorandum of Points and
24 Authorities and the papers and pleadings on file in this case.

25 DATED this 17th day of January, 2012.

26 STEVEN B. WOLFSON, CHTD.

27 By: *Patrick E. McDonald*
PATRICK E. McDONALD, ESQ.
State Bar No. 3526
601 South Seventh Street
Las Vegas, NV 89101
Attorney for Defendant

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MAY - 1 2012
CLERK OF THE COURT

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **A. BACKGROUND INFORMATION**

3 On November 18, 2011, the State of Nevada filed an Information against the
4 Defendant charging him with: 1 count - Murder (Felony) and 1 count - Child Abuse
5 Neglect with Substantial Bodily Harm (Felony).

6 The Defendant has been incarcerated on these charges since October 27, 2011.

7 On November 8, 2012, the Defendant proceeded with his preliminary hearing wherein
8 he was bound over to the District Court to answer to these charges. Currently the
9 Defendant's jury trial is scheduled to start on July 23, 2012.

10 Although his family has pooled together the funds to have retained counsel to
11 represent him, they cannot incur the additional costs of an investigator. They have
12 depleted any and all funds available to them at this time and given the light of the facts
13 of the case, it is obvious that an investigator is necessary for adequate defense of the
14 Defendant.

15 **B. THE STATE IS OBLIGATED TO PAY REASONABLE DEFENSE COSTS**

16 Recently, in the case of Widdis v. Second Judicial Dist. Court of State, 114
17 Nev. 1224, 968 P.2d 1165 (1998), the Nevada Supreme Court explained the State's
18 obligated to pay costs incurred in the representation of an indigent when attorneys'
19 fees are paid by a third party:

20 Widdis argues that even though he had been privately retained by
21 Lewis' family, Lewis was indigent and, thus, the State was legally
22 obligated to pay for reasonable defense services such as Dr.
23 Mahaffey's fee. We agree that the State has a duty to provide
24 reasonable and necessary defense services at public expense to
25 indigent criminal defendants who have nonetheless retained private
26 counsel. However, in the instant case, we conclude that our
27 extraordinary relief would be premature due to a lack of specific
28 findings with respect to Lewis' indigency status and whether Dr.
Mahaffey's evaluation was reasonably necessary for Lewis' defense.

The Iowa Supreme Court faced a similar situation in English v.
Missildine, 311 N.W.2d 292 (Iowa 1981). In English, a defendant's
mother retained private defense counsel for her son, but could not
afford to pay for expert witness fees or deposition expenses.
Consequently, the defendant applied for these services at county
expense; however, the trial court denied the defendant's application.
Id. at 293. On appeal, the Iowa Supreme Court issued a writ of
certiorari compelling the county to pay the requested expenses. Id. at

1 294. The court noted that although an Iowa statute similar to NRS
2 7.135 authorized the public payment of defense services for
3 court-appointed attorneys, this statute did not apply because the
4 defendant's mother had retained private counsel. Id. at 293.
5 Irrespective of the absence of any express statutory authorization, the
6 court concluded that the Sixth Amendment right to effective assistance
7 of counsel provided authority for the payment requested by the
8 defendant. Id. at 294. According to the court, the determinative
9 question was the defendant's indigency. Once indigency was
10 established, the court concluded that the "defendant [was]
11 constitutionally entitled to those defense services for which he
12 demonstrate[d] a need." Id. (quoting People v. Worthy, 109
13 Cal.App.3d 514, 167 Cal.Rptr. 402, 406 (1980)).

14 We conclude the English court's analytical framework is sound.
15 Accordingly, we hold that a criminal defendant who has retained private
16 counsel is nonetheless entitled to reasonable defense services at
17 public expense based on the defendant's showing of indigency and
18 need for the services. Although the use of public funds in this manner
19 may appear to be a misuse of such funds, we feel that a contrary rule
20 would have a greater negative impact on scarce public resources by
21 creating disincentives for defendants to seek private representation at
22 their own expense. Such representation, at least, defrays the most
23 costly aspect of defending a person charged with criminal misconduct;
24 costs that otherwise would be born by public funds. Additionally, a
25 contrary rule disallowing the use of public funds would undoubtedly
26 create disincentives to the defense bar from taking those cases in
27 which defense counsel would possibly have to absorb the cost of
28 defense services. Further, we are confident that a sufficient safeguard
against the misuse of public funds is created by placing the burden
squarely on the defendant to demonstrate both indigency and
reasonable need for the services in question.

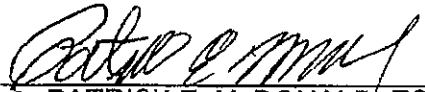
18 CONCLUSION

19 The Defendant respectfully submits that his indigency is established by his
20 attached affidavit and that the costs set forth in the affidavit of counsel are
21 reasonably incurred in this matter.

22 DATED this 17th day of January, 2012.

23 Respectfully submitted,

24 STEVEN B. WOLFSON, CHTD.

25 By: 
26 PATRICK E. McDONALD, ESQ.
27 State Bar No. 3526
28 601 South Seventh Street
Las Vegas, NV 89101
Attorney for Defendant

AFFIDAVIT OF PATRICK E. McDONALD

STATE OF NEVADA }
COUNTY OF CLARK } ss:

PATRICK E. McDONALD, testifies as follows:

I am a lawyer duly authorized to practice law in the State of Nevada. I represent Defendant, MICHAEL ALAN LEE, in this action. I am competent to testify and have personal knowledge of the facts stated in this affidavit.

1. The Court has scheduled the trial in this matter for July 23, 2012.

2. Affiant believes that the Defendant is indigent and does not have money to pay for his defense costs.

3. That defense requires the assistance of a private investigator, and estimates that the cost of the investigator will not exceed \$5,000.00 and the investigator is as follows:

TOM DILLARD
Professional Investigator's Inc.
123 N. 9th Street
Las Vegas, Nevada 89101
(702) 702-383-4005

4. Specifically, the defense requires the State to pay costs associated with Defending the Defendant against the alleged charges.

5. Affiant believes that the Defendant is unable to pay the necessary expenses associated with this defense.

FURTHER, affiant sayeth naught.


PATRICK E. McDONALD

SUBSCRIBED AND SWORN to before me
this 17th day of January, 2012.


NOTARY PUBLIC in and for said
County and State



AFFIDAVIT OF MICHAEL ALAN LEE

STATE OF NEVADA

COUNTY OF CLARK

} ss.

I, MICHAEL ALAN LEE, having first been duly sworn, depose and state that:

1. I am the Defendant in the instant matter.

2. I currently am being detained at the Clark County Detention Center and have been incarcerated here since October 26, 2011.

3. That I have no funds available to me and I am unable to afford the costs necessary to defend myself against these allegations.

4. That my family has paid for my attorney's fees and they are unable to pay for these necessary expenses associated with my defense nor can they continue to assist me in this matter as they have depleted all funds available to them.

5. The above statements are made by Affiant under the penalty of perjury of the laws of the State of Nevada pursuant to N.R.S. 15.010 and Affiant hereby certifies that same are true and correct to the best of his knowledge.

FURTHER, affiant sayeth naught.


MICHAEL ALAN LEE

ORD

PATRICK E. McDONALD, ESQ.
Nevada Bar No. 3526
STEVEN B. WOLFSON, CHTD.
601 S. Seventh Street
Las Vegas, Nevada 89101
Tel: (702) 385-7227
Fax: (702) 385-5351

FILED

May 1 1 24 PM '12

John D. Schinner
CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

Case No: C277650
Dept No: XXIII

vs.

MICHAEL ALAN LEE,
ID#1699107,

Defendant.

C-11-277650-1
EXPR
Ex Parte Order
1841431



**EX PARTE ORDER DECLARING THE DEFENDANT INDIGENT
FOR PURPOSES OF AUTHORIZING PAYMENT OF SPECIFIC
CATEGORIES OF ANCILLARY DEFENSE COSTS**

This Court, upon application of the Defendant pursuant to Widdis v. Second Judicial Dist. Court of State, 114 Nev. 1224, 968 P.2d 1165 (1998), and upon finding that the Defendant is indigent, finds it necessary to approve payment of specific defense costs associated with the Defendant's defense:

IT IS HEREBY ORDERED that the Defendant is declared indigent and that the State shall pay for the costs necessary for the Defendant to defend against the allegations.

///

///

///

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CLERK OF THE COURT

1 IT IS FURTHER ORDERED that TOM DILLARD is appointed as the
2 Investigator.

3 IT IS FURTHER ORDERED that the Clark County Manager's Office is to
4 determine the amount of the expenditure approved therefore.


5 DATED this 30 day of April, 2012.

6
7
8 Respectfully Submitted,
9 STEVEN B. WOLFSON, CHTD.


DISTRICT COURT JUDGE

Y A. MILEY

JUDGE STEFANY A. MILEY

10
11 By 
12 PATRICK E. McDONALD, ESQ.
13 Nevada Bar No. 3526
14 601 South Seventh Street
15 Las Vegas, Nevada 89101
16
17
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22
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28

MTCT

PATRICK E. McDONALD, ESQ.

Nevada Bar No. 3526

McDONALD ADRAS, LLC

601 South 7th Street

(702) 385-7227

Las Vegas, Nevada 89101

Attorneys for Defendant

FILED

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Ann L. Johnson
CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

MICHAEL ALLAN LEE,
#1699107

Defendant.

Case No.: C277650

Dept. No.: XXIII

MOTION TO CONTINUE TRIAL

Date of Hearing:

Time of Hearing:

COMES NOW, Defendant MICHAEL ALLAN LEE, by and through his attorneys, PATRICK E. McDONALD, ESQ., of the law office of McDONALD ADRAS, LLC, and hereby submits his Motion to Continue Trial. This Motion is brought pursuant to the Nevada Rules of Criminal Procedure, the following memorandum of points and authorities, all pleadings and papers filed herein, any other evidence the Court may consider when ruling upon Defendant's Motion.

Dated this 19th day of June, 2012.

C-11-277650-1

MTCT

Motion to Continue Trial

1877480



McDONALD ADRAS, LLC

By

Patrick E. McDonald
PATRICK E. McDONALD, ESQ.

Nevada Bar No. 3526

601 South 7th Street

Las Vegas, Nevada 89101

Attorneys for Defendant

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JUN 19 2012

CLERK OF THE COURT

81


MCJ

6

NOTICE OF MOTION

YOU WILL PLEASE TAKE NOTICE that Petitioner will bring the foregoing Motion on for hearing in Department XXIII of the above-entitled Court on the 2 day of July, 2012, at the hour of 9:30 a.m. or as soon thereafter as counsel can be heard.

McDONALD ADRAS, LLC

By 
PATRICK E. McDONALD, ESQ.
Nevada Bar No. 3526
601 South 7th Street
Las Vegas, Nevada 89101
Attorneys for Defendant

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF RELEVANT FACTS

Defendant was bound over to District Court on November 17, 2011, on the following charges: Count 1: Murder and Count 2: Child Abuse/Neglect with Substantial Bodily Harm. A Petition for Writ of Habeas Corpus was thereafter filed and heard on January 30, 2012. Although Defendant's Petition for Writ of Habeas Corpus was ultimately denied, Defendant has since been aggressively developing defenses in his case and denies committing the alleged offenses.

To aid in his defense, Defendant has retained two expert witnesses, a Medical Examiner, as well as a Biomechanical Engineer. Defendant is also in the process of securing a General Surgeon to testify at trial. Since Defendant has been declared indigent for purposes of costs in this matter, before being retained in this matter, each proposed expert witness must be submitted to the County for prior approval. As such, there are time delays from the time an expert witness is identified, until Defendant can actively engage his expert.

....

....

1 Developing the full theories of defense and locating experts who are qualified and
2 available to testify for trial in July 23, 2012, has taken some time. As set forth above, Defendant
3 is still attempting to locate a qualified expert in the field of General Surgery to testify at trial.

4 Additional time delays have taken place, to secure the items Defendant's experts have to
5 review, including x-ray films, autopsy slide 're-cuts', the damaged motor vehicle the alleged
6 victim was in prior to his death, and the related broken car seat.

7 Given the severity of the charges: Count 1: Murder and Count 2: Child Abuse/Neglect
8 with Substantial Bodily Harm, additional time is necessary for Defendant to prepare a meaningful
9 defense to the charges. Defendant is therefore seeking a 90 day trial continuance.
10

11 II. LEGAL AUTHORITIES

12 Local Rule of Practice for the Eighth Judicial District Court, Rule 3.20(a) provides that

- 13 (a) Unless otherwise provided by law or by these rules, all motions must be
14 served and filed not less than 15 days before the date set for trial. The
15 court will only consider late motions based upon an affidavit
16 demonstrating good cause and it may decline to consider any motion filed
in violation of this rule.

17 Trial in this matter is currently set for July 23, 2012. This motion is brought well in
18 advance of the 15 day deadline. Based upon the need for additional time to retain expert
19 witnesses, Defendant requests that trial in this matter be continue for a period of at least 90 days.
20

21

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III. CONCLUSION

Based upon the above, Defendant respectfully requests that this Court grant Defendant's Motion to Continue Trial.

Dated this 19th day of June, 2012.

Respectfully submitted,

McDONALD-ADRAS, LLC

By


PATRICK E. McDONALD, ESQ.

Nevada Bar No. 3526
601 South 7th Street
Las Vegas, Nevada 89101
Attorneys for Defendant

ATTORNEYS AT LAW

AFFIDAVIT OF ATTORNEY PATRICK E. McDONALD, ESQ.

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

PATRICK E. McDONALD, ESQ, being first duly sworn, deposes and says:

1. That I am a licensed attorney practicing law in the State of Nevada and that I represent the Defendant MICHAEL ALLAN LEE, in the above-entitled case.

2. That I have personal knowledge of the facts contained in this Affidavit and am competent to testify as to those facts.

3. That since being retained, Defendant has been incarcerated at High Desert State Prison and has been declared indigent for purposes of paying defense costs, including expert witnesses. Before an expert is retained, Defendant must wait for County approval.

4. That Defendant has retained two expert witnesses, a Medical Examiner, as well as a Biomechanical Engineer. It has taken some time to identify and retain the above experts. However, a General Surgeon third expert witness still needs to be retained, although Defendant has been actively seeking a qualified and available expert.

5. That once all of the experts have been retained, additional time will still be necessary for the experts to review all of the pertinent information, including items that Defendant is not in possession of, namely: x-ray films, autopsy slide 're-cuts', the damaged motor vehicle the alleged victim was in prior to his death, and the related broken car seat.

6. That to properly mount a defense against the charges of Murder and Child Abuse/Neglect with Substantial Bodily Harm, a trial continuance of at least 90 days is necessary.

FURTHER, your affiant sayeth not.


PATRICK E. McDONALD, ESQ.

44
1 ROC
PATRICK E. McDONALD, ESQ.
Nevada Bar No. 3526
2 McDONALD ADRAS, LLC
601 South 7th Street
3 (702) 385-7227
Las Vegas, Nevada 89101
4 Attorneys for Defendant
5
6

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John A. Robinson
CLERK OF COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,

Case No.: C277650

10 Plaintiff,

Dept. No.: XXIII

11 vs.

RECEIPT OF COPY

12 MICHAEL ALLAN LEE,
13 #1699107

14 Defendant.

15
16 Receipt of the foregoing MOTION TO CONTINUE TRIAL is hereby acknowledged
17 this 19th day of June, 2012.

18
19 By *[Signature]*
DISTRICT ATTORNEY'S OFFICE
20
21

22 C-11-277650-1
ROC
Receipt of Copy
1879132



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24 RECEIVED
25

JUN 19 2012

CLERK OF THE COURT
26
27
28


CLERK OF THE COURT

1 **SUPP**
2 **STEVEN B. WOLFSON**
3 Clark County District Attorney
4 Nevada Bar #001565
5 **JOHN GIORDANI**
6 Deputy District Attorney
7 Nevada Bar #012381
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**

9 **THE STATE OF NEVADA,**

10 Plaintiff,

11 -vs-

12 **MICHAEL ALAN LEE,**
13 **#1699107**

14 Defendant.

CASE NO: C-11-277650-1

DEPT NO: XXIII

15 **SUPPLEMENTAL NOTICE OF WITNESSES**
16 **[NRS 174.234(1)(a)]**

17 **TO: MICHAEL ALAN LEE, Defendant; and**

18 **TO: PATRICK E. MCDONALD, ESQ., Counsel of Record:**

19 **YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the STATE OF**
20 **NEVADA intends to call the following witnesses in its case in chief:**

21 **NAME**

ADDRESS

22 **PACHECO, SANDRA**

ABC Pediatrics
10950 S. Eastern Ave., Ste. 100
Henderson, NV 89052

24 **PULIDO, ANNA**

c/o CCDA'S OFFICE
200 Lewis Ave., 3rd Flr.
Las Vegas, NV 89155

26 **SIRSY, DR. HESHAM**

ABC Pediatrics
10950 S. Eastern Ave., Ste. 100
Henderson, NV 89052

28 **///**

1 ZAVALA, JOANNA

c/o CCDA'S OFFICE
200 Lewis Ave., 3rd Flr.
Las Vegas, NV 89155

3 These witnesses are in addition to those witnesses endorsed on the Information and
4 any other witness for which a separate Notice has been filed.

5 STEVEN B. WOLFSON
6 Clark County District Attorney
Nevada Bar#001565

7 BY /s/JOHN GIORDANI
8 JOHN GIORDANI
9 Deputy District Attorney
Nevada Bar #012381

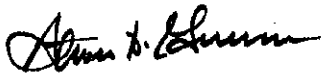
10
11 CERTIFICATE OF FACSIMILE TRANSMISSION

12 I hereby certify that service of the above and foregoing SUPPLEMENTAL NOTICE
13 OF WITNESSES, was made this 11th day of January, 2013, by facsimile transmission to:

14 PATRICK E. MCDONALD, ESQ.
15 ATTORNEY FOR DEFENDANT
16 FAX#385-5351

17 BY: /s/P. Manis
18 P. Manis
19 Employee of the District Attorney's Office
20
21
22
23
24
25
26
27

28 pm/L-2


CLERK OF THE COURT

1 **SUPP**

2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 JOHN GIORDANI
6 Deputy District Attorney
7 Nevada Bar #012381
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,)

10 Plaintiff,)

11 -vs-)

12 MICHAEL ALAN LEE,
13 #1699107)

14 Defendant.)

CASE NO: C-11-277650-1

DEPT NO: XXIII

15 SUPPLEMENTAL NOTICE OF EXPERT WITNESSES
16 [NRS 174.234(2)]

17 TO: MICHAEL ALAN LEE, Defendant; and

18 TO: PATRICK E. McDONALD, ESQ., Counsel of Record:

19 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the STATE OF
20 NEVADA intends to call the following witnesses in its case in chief:

21 1. SIRSY, DR. HESHAM

ABC Pediatrics,
10950 S. Eastern Ave., Ste. 100
Henderson, NV 89042

23 DR. HESHAM is expected to testify as an expert regarding the medical care and
24 treatment of BRODIE ASCHENBRENNER for the time period prior to Brodie's death.

25 ///

26 ///

27 ///

28 ///

1 The substance of each expert witness' testimony and a copy of all reports made by or
2 at the direction of the expert witness has been provided in discovery.

3 A copy of each expert witness' curriculum vitae, if available, is attached hereto.

4 STEVEN B. WOLFSON
5 Clark County District Attorney
6 Nevada Bar#001565

7 BY /s/JOHN GIORDANI
8 JOHN GIORDANI
9 Deputy District Attorney
10 Nevada Bar #012381

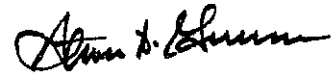
11 CERTIFICATE OF FACSIMILE TRANSMISSION

12 I hereby certify that service of the above and foregoing SUPPLEMENTAL NOTICE
13 OF EXPERT WITNESSES, was made this 11th day of January, 2013, by facsimile
14 transmission to:

15 PATRICK E. MCDONALD, ESQ.
16 ATTORNEY FOR DEFENDANT
17 FAX#385-5351

18 BY: /s/P. Manis
19 P. Manis
20 Employee of the District Attorney's Office
21
22
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28 pm/L-2


CLERK OF THE COURT

OPI
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
DAVID L. STANTON
Chief Deputy District Attorney
Nevada Bar #003202
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,
Plaintiff,

-vs-

MICHAEL ALAN LEE,
#1699107

Defendant.

CASE NO: C-11-277650-1

DEPT NO: XXIII

**ORDER FOR PRODUCTION OF INMATE
MICHAEL A. LEE, BAC #81950**

DATE OF HEARING: 03/13/2013
TIME OF HEARING: 9:30 A.M.

TO: DWIGHT W. NEVEN, Warden of the High Desert State Prison;
TO: DOUGLAS C. GILLESPIE, Sheriff of Clark County, Nevada

Upon the ex parte application of THE STATE OF NEVADA, Plaintiff, by STEVEN B. WOLFSON, Clark County District Attorney, through DAVID L. STANTON, Chief Deputy District Attorney, and good cause appearing therefor,

IT IS HEREBY ORDERED that DWIGHT W. NEVEN, Warden of the High Desert State Prison shall be, and is, hereby directed to produce MICHAEL A. LEE, in Case No. C-11-277650-1, wherein THE STATE OF NEVADA is the Plaintiff, inasmuch as the said MICHAEL A. LEE is currently incarcerated in the High Desert State Prison located in Indian Springs, Nevada and his presence will be required in Las Vegas, Nevada commencing

1 on 03/13/2013, at the hour of 9:30 o'clock A.M. and continuing until completion of the
2 prosecution's case against the said Defendant.

3 IT IS FURTHER ORDERED that DOUGLAS C. GILLESPIE, Sheriff of Clark
4 County, Nevada, shall accept and retain custody of the said MICHAEL A. LEE in the Clark
5 County Detention Center, Las Vegas, Nevada, pending completion of said matter in Clark
6 County, or until the further Order of this Court; or in the alternative shall make all
7 arrangements for the transportation of the said MICHAEL A. LEE to and from the Nevada
8 State Prison facility which are necessary to insure the MICHAEL A. LEE's appearance in
9 Clark County pending completion of said matter, or until further Order of this Court.

10 DATED this 7 day of March, 2013.

11
12 
13 DISTRICT JUDGE
14 JUDGE STEFANY A. MILEY

14 STEVEN B. WOLFSON
15 Clark County District Attorney
16 Nevada Bar #001565

16 
17 BY
18 DAVID L. STANTON
19 Chief Deputy District Attorney
20 Nevada Bar #003202

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MOT

NADIA von MAGDENKO, ESQ.

Nevada Bar No. 7945

von MAGDENKO & ASSOCIATES, PLLC

624 South 9th Street

Las Vegas, Nevada 89101

Electronic Mail: Nadia@vplavegaslaw.com

Telephone: 702.385.1600/Facsimile: 702.385.1611

In association with

GREGORY D. KNAPP, ESQ.

Nevada Bar No. 6381

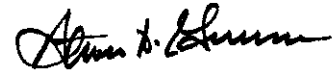
601 South 7th Street

Las Vegas, NV 89101

Telephone: 702.380.4199

Attorneys for Defendant Michael Allan Lee

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CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

MICHAEL ALLAN LEE,

#1699107

Defendant.

Case No.: C277650

Dept. No.: XXIII

MOTION IN LIMINE TO EXCLUDE
PRIOR BAD ACTS OF DEFENDANT

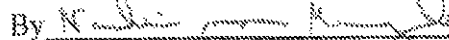
Date of Hearing:

Time of Hearing:

COMES NOW, Defendant MICHAEL ALLAN LEE, by and through his attorneys, NADIA von MAGDENKO, ESQ. of the law firm of von MAGDENKO & ASSOCIATES, PLLC and GREGORY D. KNAPP, ESQ. of the KNAPP LAW FIRM, and hereby submits his Motion in Limine to Exclude Prior Bad Acts of Defendant. This Motion is brought pursuant to the Nevada Rules of Criminal Procedure, the following memorandum of points and authorities, all pleadings and papers filed herein, any other evidence the Court may consider when ruling upon Defendant's Motion.

Dated this 17th day of October, 2013.

von MAGDENKO & ASSOCIATES, PLLC

By 
NADIA von MAGDENKO, ESQ.
Nevada Bar No. 7945
Attorneys for Michael Allan Lee

NOTICE OF MOTION

YOU WILL PLEASE TAKE NOTICE that Petitioner will bring the foregoing Motion on for hearing in Department XXIII of the above-entitled Court on the 28 day of OCTOBER, 2013, at the hour of 9:30 A.m. or as soon thereafter as counsel can be heard.

VON MAGDENKO & ASSOCIATES, PLLC

By Nadia von Magdenko
NADIA VON MAGDENKO, ESQ.
 Nevada Bar No. 7945
Attorneys for Michael Allan Lee

MEMORANDUM OF POINTS AND AUTHORITIES**I. STATEMENT OF RELEVANT FACTS**

Defendant Michael Lee was bound over to District Court on November 17, 2011, on the following charges: Count 1: Murder and Count 2: Child Abuse/Neglect with Substantial Bodily Harm. Michael Lee is currently set to stand for trial for the above charges on January 13, 2014.

II. LEGAL AUTHORITIES

A. QUESTION PRESENTED: DOES DEFENDANT'S PRIOR BAD ACT(S) FALL WITHIN ANY OF THE STATUTORY EXCEPTIONS?

ANSWER: NO.

The provision specifically governing the admissibility of evidence of "prior bad acts" is codified in NRS, Rule 48.045(2) and provides:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

1 It has been held that the principle embodied in this provision applies to *mere questioning*
2 regarding "prior bad acts." *Longoria v. State*, 99 Nev. 754, 670 P.2d 939 (1983). "Great latitude
3 would be allowed attorneys in cross-examining witnesses, but their questions *should not contain*
4 *insinuations that the defendant is guilty of some other crime.*" *Id.* at 755.

5 In the case at bar, the Defendant is charged with the above-listed crimes. Defendant's
6 prior arrests and convictions do not fall within the purview of any of the recognized statutory
7 exceptions. Therefore, they are not admissible as "prior bad acts."

8 **B. QUESTION PRESENTED: ARE PRIOR CONVICTIONS INADMISSABLE?**

9 **ANSWER: YES.**

10
11 Michael Lee's prior convictions are dissimilar in nature and are they irrelevant to the
12 charges in the instant matter. In 2002, Michael Lee was only 17 years old. Michael Lee fell in
13 with bad influences and was on drugs. In a two month period, in early 2002, Michael Lee was
14 involved in a series of armed robberies. Shortly after he was brought in for questioning in 2002,
15 Michael Lee immediately cooperated with the police. Michael Lee admitted his involvement in
16 the robberies. Ultimately in 2004, Michael Lee was convicted of his crimes.

17 Michael Lee served his prison time and was released on parole. Michael Lee committed
18 that crime when he was 17 years old. As such, Michael Lee committed the armed robberies as a
19 teenager. While on parole, Michael Lee had been a model citizen. Michael Lee had been
20 working full time and committing no crimes whatsoever. Of course, Michael Lee strongly
21 professes his innocence in the case at bar. Michael Lee should be tried on the facts and
22 allegations of the present case, not on his prior armed robberies. A mistake in his youth should
23 not cost Michael Lee the rest of his life. Defendant's prior convictions, have no relevance to the
24 case at bar.

25 In *Anderson v. State of Nevada*, 92 Nev. 21, 544 P.2d 1200 (1976), during trial, the judge
26 excused the jury to entertain appellant's motion to suppress prior felony convictions in the event
27 appellant decided to testify. Prior felony convictions may be used to impeach a defendant who
28 takes the stand. NRS 50.095; *Edwards v. State*, 90 Nev. 255, 524 P.2d 328 (1974). However,

1 prior felony convictions should not be admitted if their "probative value is substantially
2 outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the
3 jury." NRS 48.035(1). The determination of whether to admit or exclude such evidence rests in
4 the sound discretion of the trial court and will not be disturbed unless manifestly wrong. *Brown*
5 *v. State*, 81 Nev. 397, 404 P.2d 428 (1965).

6 Beyond the contemplation of our legislature, Michael Lee urges the use of prior felony
7 convictions for impeachment should further be limited to only those felonies specifically
8 determined relevant to the truthfulness or veracity of the witness. *See People v. Beagle*, 492 P.2d
9 1 (Cal. 1972); *Gordon v. United States*, 383 F.2d 936 (D.C. Cir. 1967); *Luck v. United States*,
10 348 F.2d 763 (D.C. Cir. 1965). NRS 50.095 imposes no such requirement, nor have any of the
11 prior decisions of this court. However, our legislation contemplates a balancing process to
12 determine whether the evidentiary usefulness of the proposed impeachment by prior felony
13 convictions, is substantially outweighed by the danger of unfair prejudice, NRS 48.035(1), or by
14 considerations of undue delay and cumulativeness. NRS 48.035(2). While the nature of the
15 underlying offense by which impeachment is sought may affect the trial court's determination as
16 to the relevance, and hence admissibility of the impeachment, that determination will be reversed
17 only upon a clear showing of abuse." *Jones v. State*, 93 Nev. 287, 564 P.2d 605 (1977).

18 Evidence offered at trial must satisfy two preliminary requirements. First, the evidence
19 must be *relevant* to the issue at hand and second, the proposed evidence must be *more probative*
20 *than prejudicial*. N.R.S. 48.015 defines relevance as evidence having a tendency "to make the
21 existence of any fact that is of consequence. . . more or less probable than it would be without
22 the evidence." Relevant evidence would also include any evidence that could be used to
23 impeach the Defendant. *Weakland v. State*, 96 Nev. 699 (1980).

24 Once proposed evidence is determined to be "relevant" the second requirement is that
25 this same evidence is "not" more prejudicial than probative. Nevada Revised Statute 48.035
26 dictates that "the use of "otherwise" relevant evidence is precluded if its probative value is
27 substantially outweighed by the danger of unfair prejudice. . ."

28 Michael Lee's prior convictions cannot be offered at trial, as they do not satisfy the two
preliminary requirements. The first requirement is that they must be relevant to the issue at
hand and second, the proposed evidence must be more probative than prejudicial. The prior bad

1 act was a series of armed robberies, committed when Michael Lee was only 17 years old. In the
2 present case, the allegations are child abuse and murder. Armed robberies committed a decade
3 ago have no relevance to a murder and child abuse charge. Given the severe nature of the
4 allegations presently pending against Michael Lee, his past crimes are more prejudicial than
5 probative. In fact, there is no probative value to having Michael Lee's prior bad acts coming into
6 evidence, aside from the jury convicting Michael Lee simply because they think he is a bad man.

7 The following is also a three-part analysis to be used by courts in determining whether
8 evidence of a prior conviction should be admitted: (1) the other crime is of a *similar character* to
9 the offense on which the defendant is being tried; (2) the other crime is not *too remote in time*
10 from the offense charged; and (3) the probative value of the other crime is not substantially
11 outweighed by the danger of *unfair prejudice*. *Warren v. State*, 121 Nev. 886, 124 P.3d 522
(2005).

12 Further, according to the three-part analysis in determining whether evidence of a prior
13 conviction should be excluded, Michael Lee's prior convictions should not be admissible. His
14 prior crimes are not of a similar character to the offense on which he is being tried, they are too
15 remote in time from the offense charged; and the probative value of the prior crimes are
16 substantially outweighed by the danger of unfair prejudice.

17 Evidence of other crimes, wrongs, or acts is inadmissible to "prove the character of a
18 person in order to show that he acted in conformity therewith." NRS 48.045(2). Prior bad act
19 evidence may be admitted to show "motive, opportunity, intent, preparation, plan, knowledge,
20 identity, or absence of mistake or accident." *Rosky v. State*, 111 P.3d 690, 697 (Nev. 2005)
21 (citing *Richmond v. State*, 118 Nev. 924, 932, 59 P.3d 1249 (2002)).

22 There is a presumption of inadmissibility to all prior bad act evidence. *Rosky*, 111 P.3d
23 at 697. To overcome this presumption, the prosecutor must request a hearing and establish,
24 outside the presence of a jury, that (1) the prior bad act is relevant to the crime charged; (2) the
25 prior act is proven by clear and convincing evidence; and (3) the probative value of the evidence
26 is not outweighed by the danger of unfair prejudice. *Id.* (citing *Tinch v. State*, 113 Nev. 1170,
1176, 946 P.2d 1061 (1997)); *Tabish v. State*, 119 Nev. 293, 72 P.3d, 584, 593 (2003).

27

28

1 Although relevance may exist, and the evidence may be provable under the clear and
2 convincing evidence standard, if the admission of the evidence risks an improper spillover effect,
3 then the evidence cannot be deemed admissible. *Tabish*, 119 Nev. 293, 72 P.3d at 594
4 *Braunstein v. State*, 118 Nev. 68, 73, 40 P.3d 413 (2002); *Walker v. State*, 116 Nev. 442, 445,
5 997 P.3d 803 (2000). "Prior bad act evidence forces the accused to defend himself against vague
6 and unsubstantiated charges and may result in a conviction because the jury believes the
defendant to be a bad person." *Braunstein*, 118 Nev. at 73; see also *Walker*, 116 Nev. at 445.

7 Exceptions exist to allow the admission of other bad acts. NRS 48.045(2). Bad act
8 evidence may be admitted to show the defendant's knowledge of a material fact of the charged
9 crime. *Cirillo v. State*, 96 Nev. 489, 492, 611 P.2d 1093 (1980). Admission of other bad acts
10 may be admitted if the act is shown to be so closely related to the crime at issue that an ordinary
11 witness cannot describe the crime at issue without referring to the other bad act. *Cirillo*, 96 Nev.
12 at 493.

13 Additionally, evidence of other bad acts may be admitted if there is an issue about the
14 identification of the perpetrator and the bad act evidence establishes a signature crime so as to
15 establish the identity of the accused. *Rosky*, 111 P.3d at 698.

16 In *Cirillo*, the defendant was accused of murdering a man who had last been seen in a
17 park with the defendant. *Cirillo*, 96 Nev. at 491. At trial, evidence was admitted over objections
18 that the defendant was in the same park offering to sell marijuana. *Id.* at 491. When people
19 declined to purchase such, the defendant forced them out of the park and threatened to harm
20 them if they came back. *Id.* Evidence was also admitted that the victim routinely went to the
21 park to buy marijuana and that a small amount of marijuana was discovered in the defendant's
22 house. *Id.* at 491-492. The district court allowed such evidence to be admitted on the "grounds
23 that the evidence showed a 'plan or absence of mistake,' and further that the state was 'entitled
to present a full and accurate account of the circumstances of the crime.'" *Id.* at 492.

24 On review, the *Cirillo* Court held that it was an error to allow the admission of any of the
25 bad act evidence. *Id.* at 490. Admission of previous instances of drug possession to show a
26 defendant's knowledge about the controlled nature of a substance is only admissible when such
27 knowledge is an element of the offense charged. *Id.* at 492. In *Cirillo*'s case, knowledge that the
28 marijuana was a controlled substance was not at issue and irrelevant to the murder charge. *Id.*

The *Cirillo* Court also held that the witnesses were able to describe what happened in relation to the murder charges without discussing the drug issues. *Id.* at 493. This rendered the lower court's decision of a need to tell the complete story as grounds for admitting the other bad act evidence as erroneous. *Id.* Lastly, admission of bad act evidence that did not show any plan to commit the charged crime was held as improper. *Id.*

In the instant case, Defendant's prior bad acts are hugely dissimilar in nature to those at issue in the case at bar. As such, as held in *Cirillo* and *Dougherty*, such evidence is inadmissible. In *Williams v. State*, 95 Nev. 830, 603 P.2d 694, (1979), the court admitted into evidence prior bad acts, due in part by the fact of the closeness in time and similarity.

The remarkable similarity of the Modus operandi in the testimony regarding the other crimes, and their relative proximity in time to the charged offense establish the probative value of such evidence. *Id.* at 834, P.2d at 697.

It stands to reason if the court held that both requirements were needed, that is similarity and closeness in time, then if one requirement is missing, the probative value is not met, and the evidence can not be introduced. Further, in *McMichael v. State*, 94 Nev. 184, 577 P.2d 398 (1978), the Court allowed evidence under a narrow exception to the general rule. However, the offenses charged were similar, occurred with the same victim and in close proximity of time.

Because of the dangers of creating assumptions of guilt in the minds of the triers of fact, the risks attendant to compelling the accused to meet collateral charges and possible confusion of the issues, this exception mandates proof of similar offenses which are near in time to the principal offense and which do not apply to mere criminal propensities in general but rather to specific sexual proclivities. The evidence should be received with extreme caution, and if its relevancy is not clear, the evidence should be excluded. (Emphasis added) (Citations omitted). Whenever a confrontation occurs between prejudice likely to follow admission of such evidence, the trial court must, as was done in the instant case, weigh the probative value of the proffered evidence against the bias or prejudice likely to result.

Id. at 190, P.2d 401, 402. Again, in the case of *Willett v. State*, 94 Nev. 620, 584 P.2d 684 (1978), the court focused on the fact that the crimes were similar and occurred in close proximity in time. Michael Lee's prior convictions do not satisfy the preliminary requirements to be

1 admissible. They are not relevant to the issue at hand and the probative value of the evidence is
2 not outweighed by the danger of unfair prejudice.

3 With these conditions in mind, Michael Lee moves this Honorable Court to preclude the
4 State from utilizing this potential evidence.

5 **C. QUESTION PRESENTED: ARE THE BAD ACTS HIGHLY PREJUDICIAL**
6 **AND AS SUCH, SHOULD BE EXCLUDED?**

7 **ANSWER: YES.**

8
9 While it is clear that prior bad acts can be admitted as evidence, it is necessary for the
10 court to weigh the probative value against the prejudicial effect. The Court has the discretion to
11 exclude the evidence if it is highly prejudicial. N.R.S. 48.035 states as follows:

12 1. Although relevant, evidence is not admissible if its probative value is
13 substantially outweighed by the danger of unfair prejudice, of confusion of the
14 issues or of misleading the jury.

15 2. Although relevant, evidence may be excluded if its probative value is
16 substantially outweighed by considerations of undue delay, waste of time or
17 needless presentation of cumulative evidence.

18 3. Evidence of another act or crime which is so closely related to an act in
19 controversy or a crime charged that an ordinary witness cannot describe the act in
20 controversy or the crime charged without referring to the other act or crime shall
21 not be excluded, but at the request of an interested party, a cautionary instruction
22 shall be given explaining the reason for its admission.

23 There must be a balance between the probative value and the prejudicial effect of these
24 bad acts, otherwise reversible error could occur. In *State v. Nystedt*, 79 Nev. 24, 377 P.2d 929
25 (1963), the court found that the prejudicial nature outweighed the probative value, and
26 disallowed the highly prejudicial evidence, with acts other than with the victim in that case, to
27 come before the jury.

28 As stated in *Nester*, 75 Nev. 41, 54, 334 P.2d 524, 531: "Even where relevancy
under an exception to the general rule may be found, fair trial demands that the
evidence not be admitted in cases where, by virtue of its prejudicial nature, it is
more likely to distract from the essential issue than to bear upon it. *Id.* at 27."

1 Further, in *Daly supra*, the Court allowed in highly prejudicial evidence for other
2 reasons, but discussed that even if the evidence is relevant and falls within one of the exceptions,
3 if the prejudicial effect outweighs the probative value, the evidence should not be admitted.

4 Even where the evidence is relevant and tends to establish motive, intent, plan,
5 identity, absence of mistake or accident, or some other relevant fact within the
6 list of exceptions in N.R.S. 48.045(2), it may not be admitted if its prejudicial
7 effect outweighs its probative value. (Citations omitted). The decision to admit
8 or exclude evidence of separate and independent offenses rests within the sound
9 discretion of the trial court. . . (Citations omitted). *Id.* at 567, P.2d at 801.

10 Clearly, these prior bad acts are prejudicial and inflammatory against the Defendant and
11 for the reasons stated above, should be excluded.

12 **D. THERE IS NO SPECIFIC NEED TO ADMIT THE PRIOR BAD ACTS**

13 Evidence which has to do with the character of the Defendant cannot be allowed. Bad
14 act evidence is not automatically admissible simply because the proponent has articulated a not-
15 for character purpose to which the evidence could not be put. This was discussed in *Taylor v.*
16 *State*, 109 Nev. 849, 853, 858 P.2d 843 (1993).

17 The state contends that the evidence was relevant to prove intent, absence of
18 mistake, absence of accident, and appellant's common scheme or plan. The
19 general rule is that evidence of prior acts is inadmissible to prove character or
20 actions in conformity therewith. The state has not explained how any of the
21 exceptions contained in N.R.S. 48.045(2) specifically relate to the facts of this
22 case. A mere recitation of the statute is not sufficient justification for the
23 admission of prior acts.

24 Further, in *Cipriano v. State*, 111 Nev. 534, 894 P.2d 347 (1995), the court found that
25 evidence of prior bad acts are not admissible to prove that the Defendant acted in a similar
26 manner.

27 Evidence of a defendant's other crimes, wrongs, or bad acts is not admissible
28 to prove that the accused acted in a similar manner for purposes of the charge at
issue. *Beck v. State*, 105 Nev. 910, 784 P.2d 983 (1989). The justification for this
rule is that evidence of prior uncharged wrongs may improperly influence the jury
and result in a conviction because the jury believes the accused is predisposed to
crime or is a bad person. *Crawford v. State*, 107 Nev. 345, 348, 811 P.2d 67, 69
(1991). . . Moreover, evidence of other bad acts is only admissible where three
requirements are met: (1) the incident is relevant to the crime charged; (2) the act

1 is proven by clear and convincing evidence; and (3) the evidence is more
2 probative than prejudicial. *Berner v. State*, 104 Nev. 695, 697, 765 P.2d 1144,
1146 (1988). *Id.* at 541, P.2d at 352.

3 In *United States v. Le Compte*, 99 F.3d 274 (8th Cir. 1996), the court reversed a
4 conviction for abusive sexual conduct with a minor, holding it was error to admit evidence of the
5 defendant's prior acts of sex abuse with minors. The trial court admitted the bad acts as
6 evidence of "plan", but the court noted that the "victims were different, and the events were far
7 apart in time." Absent more distinct relevance, "the bad act evidence was relevant to 'plan' only
8 insofar as it tends to prove propensity to commit crimes which Rule 404(b) prohibits."

9 Under Rule 404(b), testimony concerning other bad acts is admissible "if it is
10 relevant to a material issue, established by a preponderance of the evidence, more
11 probative than prejudicial, and similar in kind and close in time." *United States v.*
12 *Baker*, 82 F.3d 273, 276 (8th Cir.1996). Such evidence is not admissible "solely
13 to prove the defendant's criminal disposition." *United States v. Shoffner*, 71 F.3d
1429, 1432 (8th Cir.1995). . . .

15 In general, at least in this circuit, "prior sex offenses committed upon the
16 victim of the charged offense" are usually admissible, but "[w]e are far more
17 hesitant to affirm the admission of evidence of prior sexual acts or crimes
18 committed against persons other than the victim of the charged offense." *United*
19 *States v. Yellow*, 18 F.3d 1438, 1440 & n. 2 (8th Cir.1994). This case falls within
20 the latter category, so the government's burden to establish that T.T.'s testimony
21 was relevant under Rule 404(b), and more probative than prejudicial under Rule
22 403, is greater than if C.D., who accused him of the charged offense, was the
23 victim of prior sexual abuse. *Id.* at 277.

24 The prosecution should be prevented from presenting this information in front of the jury,
25 so as to inflame their emotions against the Defendant and convict him regardless of the evidence
26 in their case-in-chief.

27 In this case, the Rule 404(b) evidence was not part of the charged offense and did
28 not tend to prove a "common scheme or plan." The victims were different, and
the events were far apart in time. Absent more specific linkage, such evidence is
relevant to "plan" or "preparation" only insofar as it tends to prove a propensity to
commit crimes, which Rule 404(b) prohibits. (Emphasis added). See
Government of the Virgin Islands v. Pinney, 967 F.2d 912, 916 (3rd Cir.1992),
Id. at 277.

1 It is clear that evidence or testimony of prior bad acts would only be used to show the
2 character of the Defendant, and "is of only slight probative value and may be extremely
3 prejudicial. It tends to distract the trier of fact from the main question of what really happened on
4 the particular occasion. It subtly permits the trier of fact to reward the good man and to punish
5 the bad man." *Federal Criminal Code and Rules*, 1995 Ed. West Publishing, at 230.

6 In the instant matter, upon hearing of the prior bad acts, the jury will influence their
7 determination of guilt or innocence based upon Defendant's prior actions, rather than focus on the
8 issues at hand.

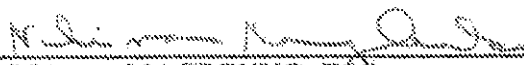
9 III. CONCLUSION

10 Based upon the above, Defendant respectfully requests that this Court issue an Order
11 prohibiting the prosecutor from making any mention of "prior bad acts".

12 Dated this 17th day of October, 2013.

13 Respectfully submitted,

14 von MAGDENKO & ASSOCIATES, PLLC

15
16 By 
17 NADIA von MAGDENKO, ESQ.
18 Nevada Bar No. 7945
19 Attorneys for Michael Allan Lee
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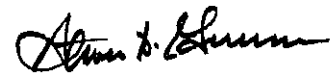
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of October, 2013, I caused to be deposited in the United States mail a true and correct copy of the foregoing **MOTION IN LIMINE TO EXCLUDE PRIOR BAD ACTS OF DEFENDANT** in a sealed envelope, first class postage fully prepaid, addressed to the following persons or via email where indicated:

David Stanton, Esq.
Email: david.stanton@cedany.gov and
rdmations@cedany.gov
Prosecutor

/s/ Manuel Montelongo
An employee of von Magdenko &
Associates, PLLC

ATTORNEYS AT LAW


CLERK OF THE COURT

NOTM
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
DAVID L STANTON
Chief Deputy District Attorney
Nevada Bar #003202
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,

Plaintiff,

-vs-

**MICHAEL ALAN LEE,
#1699107**

Defendant.

CASE NO: C-11-277650-1

DEPT NO: XXIII

NOTICE OF MOTION AND MOTION FOR PROPER AND CORRECT SERVICE

DATE OF HEARING: 11/13/13

TIME OF HEARING: 9:30 A.M.

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through DAVID L STANTON, Chief Deputy District Attorney, and files this Notice of Motion and Motion for Proper and Correct Service.

This Motion is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will bring the foregoing motion on for setting before the above entitled Court, in Department XXIII thereof, on Wednesday, the 13th day of November, 2013, at the hour of 9:30 o'clock A.M., or as soon thereafter as counsel may be heard.

DATED this 30th day of October, 2013.

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

BY

DAVID L STANTON
Chief Deputy District Attorney
Nevada Bar #003202

STATEMENT OF FACTS

Recently defense counsel filed a Motion in Limine on or about October 17, 2013. The "Certificate of Service" listed on page 12 of that Motion (attached as Exhibit A) shows that neither email addresses listed are the correct email address for the undersigned counsel or the Clark County District Attorney's Office.

The listed email addresses for the Defendant's Motion were:

- david.stanton@ccdandv.gov and
- Pdmotions@ccdandv.gov

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1 Neither of these addresses is correct. All Clark County District Attorney emails
2 addresses end with: .com NOT .gov. Further the "Pd motions" address has nothing to do
3 with the District Attorney's office whatsoever.

4 The correct email address for lead counsel is:

5 - david.stanton@clarkcountyda.com

6 DATED this 30th day of October, 2013.

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

10 BY 

11 DAVID L. STANTON
12 Chief Deputy District Attorney
13 Nevada Bar #003202

14 CERTIFICATE OF FACSIMILE TRANSMISSION AND/OR ELECTRONIC MAIL

15 I hereby certify that service of Notice of Motion and Motion for Proper and Correct
16 Service was made this 30th day of October, 2013, by facsimile transmission and/or e-mail to:

17
18 NADIA VON MAGDENKO, ESQ.

19 E-MAIL: NADIA@VPLASVEGASLAW.COM

20 GREGORY D. KNAPP, ESQ.

21 FAX #385-1611

22
23
24 BY: 

25 J. Robertson
26 Employee of the District Attorney's Office

27
28 11FH1653X/jr/MVU

EXHIBIT “A”

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of October, 2013, I caused to be deposited in the United States mail a true and correct copy of the foregoing **MOTION IN LIMINE TO EXCLUDE PRIOR BAD ACTS OF DEFENDANT** in a sealed envelope, first class postage fully prepaid, addressed to the following persons or via email where indicated:

David Stanton, Esq.
Email: david.stanton@cedanv.gov; and
Edmotions@cedanv.gov
Prosecutor

/s/ Manuel Montelongo
An employee of von Magdenko &
Associates, PLLC

ATTORNEYS AT LAW

NOTC

NADIA von MAGDENKO, ESQ.

Nevada Bar No. 7945

von MAGDENKO & ASSOCIATES, PLLC

624 South 9th Street

Las Vegas, Nevada 89101

Electronic Mail: Nadia@vplasvegaslaw.com

Telephone: 702.385.1600/Facsimile: 702.385.1611

In association with

GREGORY D. KNAPP, ESQ.

Nevada Bar No. 6381

601 South 7th Street

Las Vegas, NV 89101

Telephone: 702.380.4199

Attorneys for Defendant Michael Allan Lee

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

MICHAEL ALLAN LEE,
#1699107

Defendant.

Case No.: C277650

Dept. No.: XXIII

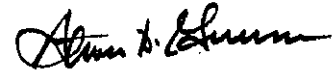
**DEFENDANT MICHAEL ALLAN LEE'S
WITNESS DISCLOSURE**

COMES NOW, Defendant MICHAEL ALLAN LEE, by and through his attorneys,
NADIA von MAGDENKO, ESQ. of the law firm of von MAGDENKO & ASSOCIATES,
PLLC and GREGORY D. KNAPP, ESQ. of the KNAPP LAW FIRM, and hereby lists the
following witnesses he intends to call at the time of trial:

A. Jonathan L. Arden, M.D.
Arden Forensics
1390 Chain Bridge Rd., #105
McLean, VA 22101
Telephone: 703.749.0227

Dr. Arden is expected to testify as to his findings and conclusions related to his forensic
pathology analysis of the death of Brodie Aschenbrenner.

A copy of Dr. Arden's curriculum vitae, schedule of fees, and report have been
previously provided, as Bates Nos. LEE0001-0024.


CLERK OF THE COURT

1 B. Steven A. Rundell, Ph.D., P.E.
2 Armstrong Forensic Engineers
3 5 Research Dr., Suite B
4 Ann Arbor, MI 48103
5 Telephone: 813.948.8010

6 Dr. Rundell is expected to testify as to his findings and conclusions related to forensic
7 biomechanical engineering analysis related to the death of Brodie Aschenbrenner.

8 A copy of Dr. Rundell's curriculum vitae, schedule of fees, and report have been
9 previously provided, as Bates Nos. LEE0025-0049.

10 C. Devesh Tiwary, M.D., FACS
11 Tiwary Surgical
12 1682 Canopy Oaks Blvd.
13 Palm Harbor, FL 33761
14 Telephone: 727.346.6489

15 Dr. Tiwary is expected to testify as to his findings and conclusions related to his forensic
16 trauma analysis of the death of Brodie Aschenbrenner.

17 A copy of Dr. Tiwary's curriculum vitae, schedule of fees, and report have been
18 previously provided, as Bates Nos. LEE0050-0055.

19 D. Shannon Krynzel
20 145 1st St.
21 Las Vegas, NV 89015
22 Telephone: 702.472.3863

23 Ms. Krynzel is expected to testify as to her eye witness observations and conversations
24 with Michael Lee in the hours prior Brodie Aschenbrenner's death.

25 E. Jennifer Lee
26 11970 White Lilly St.
27 Las Vegas, NV 89183
28 Telephone: 702.810.2852

Ms. Lee is expected to testify as to eye witness observations of Brodie Aschenbrenner, as
well as her conversations with Michael Lee and Arica Foster prior Brodie Aschenbrenner's
death.

1 F. Jackie Lemke
2 194 Gilliflower Dr.
3 Las Vegas, NV 89183
4 Telephone: 702.569.7748

5 Ms. Lemke is expected to testify as to her conversations with Arica Foster and Michael
6 Lee, and her eye witness observations of Brodie Aschenbrenner, prior Brodie Aschenbrenner's
7 death.

8 G. Danny Fico
9 194 Gilliflower Ave.
10 Las Vegas, NV 89183
11 Telephone: 702.250.3405

12 Mr. Fico is expected to testify as to his conversations with Arica Foster and Michael Lee,
13 and his eye witness observations of Brodie Aschenbrenner, prior Brodie Aschenbrenner's death.

14 H. Brad Moshier
15 Address and telephone number presently unknown.

16 Mr. Moshier is expected to testify as his conversations with Arica Foster and his eye
17 witness observations of Brodie Aschenbrenner, prior Brodie Aschenbrenner's death.

18 I. Merridee Moshier
19 Address and telephone number presently unknown.

20 Ms. Moshier is expected to testify as her conversations with Arica Foster and her eye
21 witness observations of Brodie Aschenbrenner, prior Brodie Aschenbrenner's death.

22 J. Amanda Butler
23 Address and telephone number presently unknown.

24 Ms. Butler is expected to testify as her conversations with Arica Foster and her eye
25 witness observations of Brodie Aschenbrenner, prior Brodie Aschenbrenner's death.

26 K. Alaine Opie
27 Address and telephone number presently unknown.

28 Ms. Opie is expected to testify as her conversations with Arica Foster and her eye
witness observations of Brodie Aschenbrenner, prior Brodie Aschenbrenner's death.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of December, 2013, I caused to be deposited in the United States mail a true and correct copy of the foregoing **DEFENDANT MICHAEL ALLAN LEE'S WITNESS DISCLSORE** in a sealed envelope, first class postage fully prepaid, addressed to the following persons *or via email* where indicated:

David Stanton, Esq.
Email: david.stanton@ccdancv.com;
david.stanton@clarkcountyda.com;
Prosecutor

/s/ Nadia von Magdenko, Esq.

ATTORNEYS AT LAW

DISC

NADIA von MAGDENKO, ESQ.

Nevada Bar No. 7945

von MAGDENKO & ASSOCIATES, PLLC

624 South 9th Street

Las Vegas, Nevada 89101

Electronic Mail: Nadia@vplasvegaslaw.com

Telephone: 702.385.1600/Facsimile: 702.385.1611

In association with

GREGORY D. KNAPP, ESQ.

Nevada Bar No. 6381

601 South 7th Street

Las Vegas, NV 89101

Telephone: 702.380.4199

Attorneys for Defendant Michael Allan Lee

**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,

Plaintiff,

vs.

MICHAEL ALLAN LEE,
#1699107

Defendant.

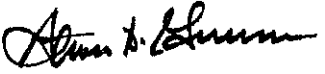
Case No.: C277650

Dept. No.: XXIII

**DEFENDANT MICHAEL ALLAN LEE'S
DISCLSOURE OF DOCUMENTS**

COMES NOW, Defendant MICHAEL ALLAN LEE, by and through his attorneys,
NADIA von MAGDENKO, ESQ. of the law firm of von MAGDENKO & ASSOCIATES,
PLLC and GREGORY D. KNAPP, ESQ. of the KNAPP LAW FIRM , and herby lists the
following witnesses he intends to call at the time of trial:

1. A copy of Dr. Arden's curriculum vitae, schedule of fees, and report have been previously provided, as Bates Nos. LEE0001-0024.
2. A copy of Dr. Rundell's curriculum vitae, schedule of fees, and report have been previously provided, as Bates Nos. LEE0025-0049.
3. A copy of Dr. Tiwary's curriculum vitae, schedule of fees, and report have been previously provided, as Bates Nos. LEE0050-0055.
4. Photographs, Bates Nos. LEE0056-LEE0074.


CLERK OF THE COURT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of December, 2013, I caused to be deposited in the United States mail a true and correct copy of the foregoing **DEFENDANT MICHAEL ALLAN LEE'S DISCLSOURE OF DOCUMENTS** in a sealed envelope, first class postage fully prepaid, addressed to the following persons *or via email* where indicated:

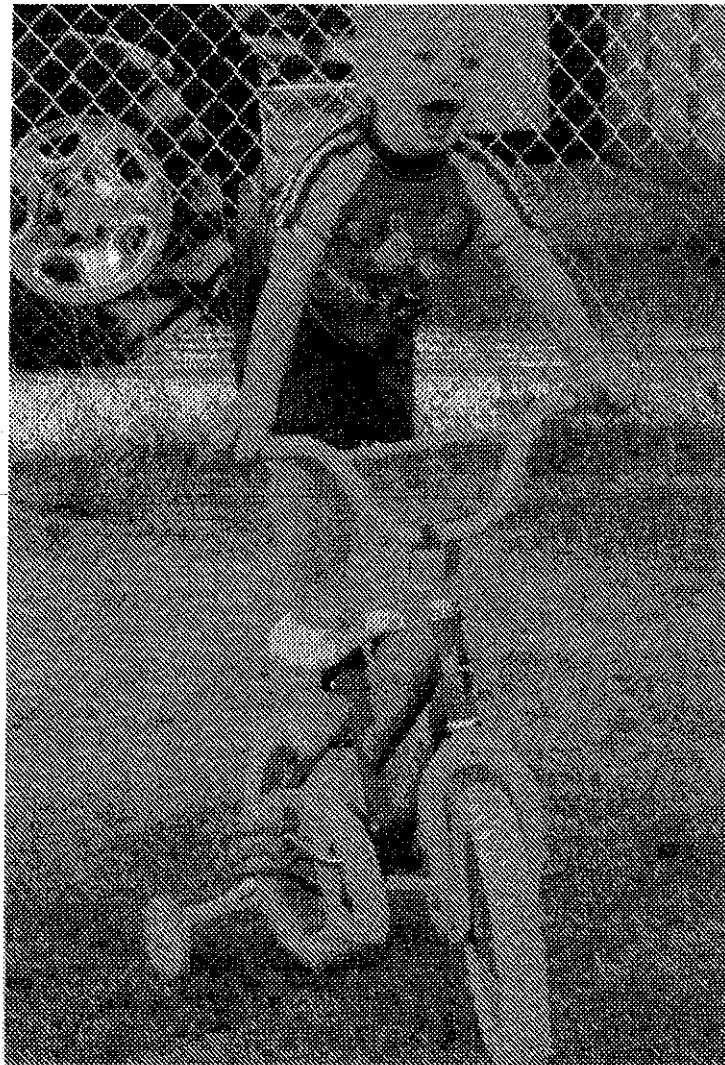
David Stanton, Esq.
Email: david.stanton@ccdancv.com;
david.stanton@clarkcountydacv.com;
Prosecutor

/s/ Nadia von Magdenko, Esq.

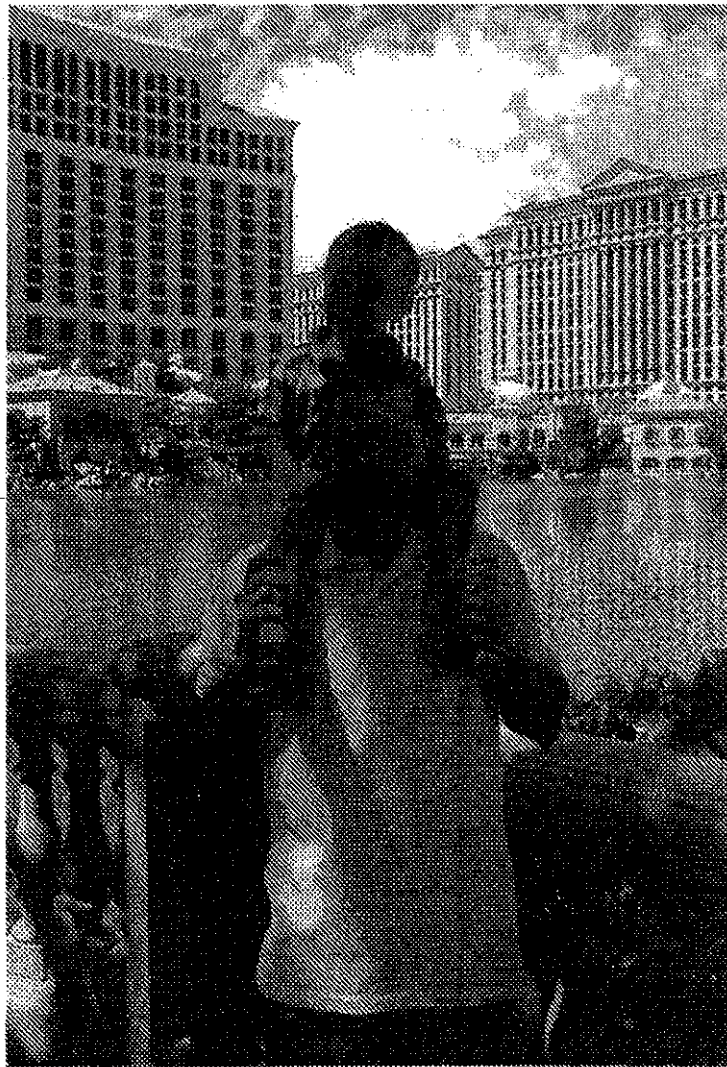
ATTORNEYS AT LAW



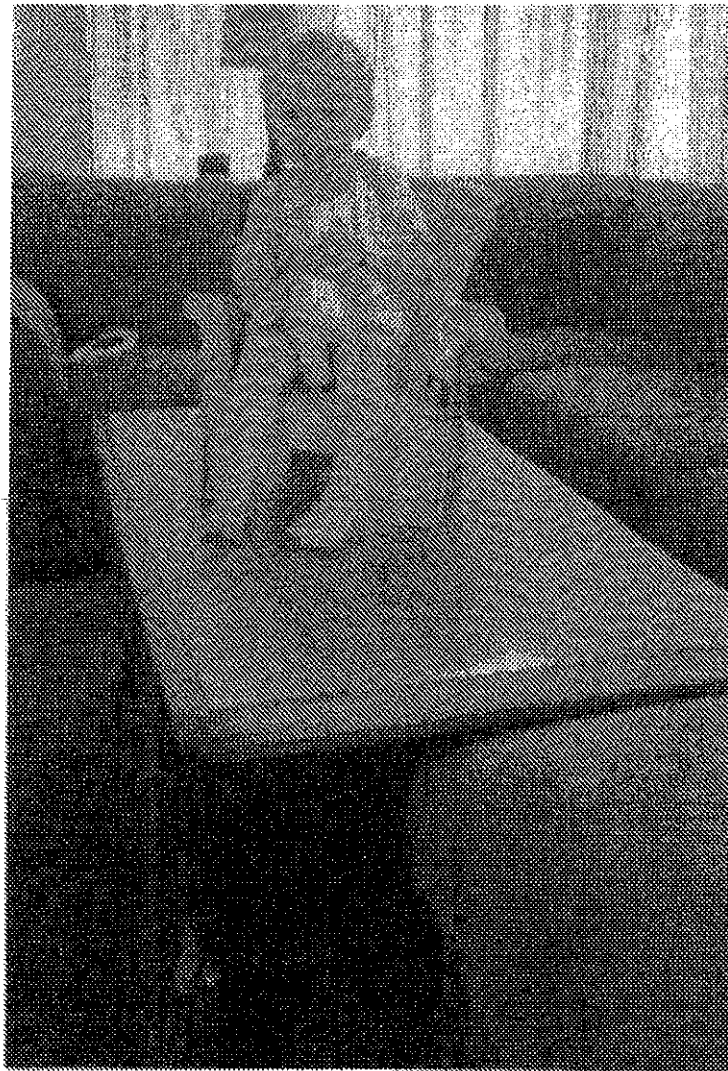
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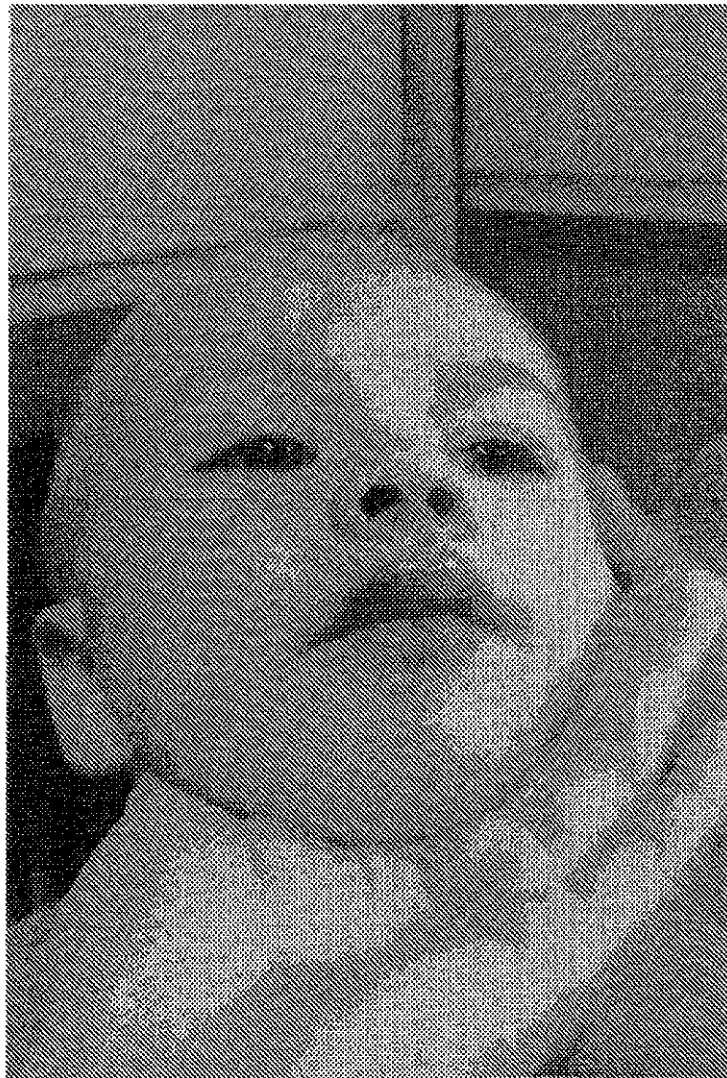
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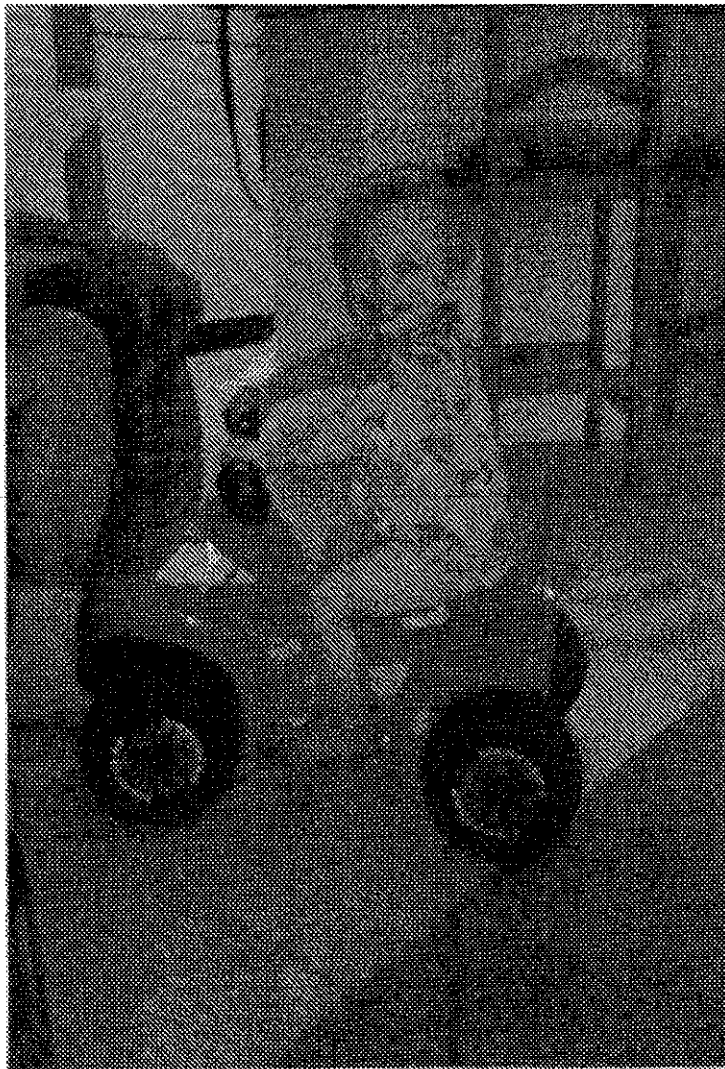
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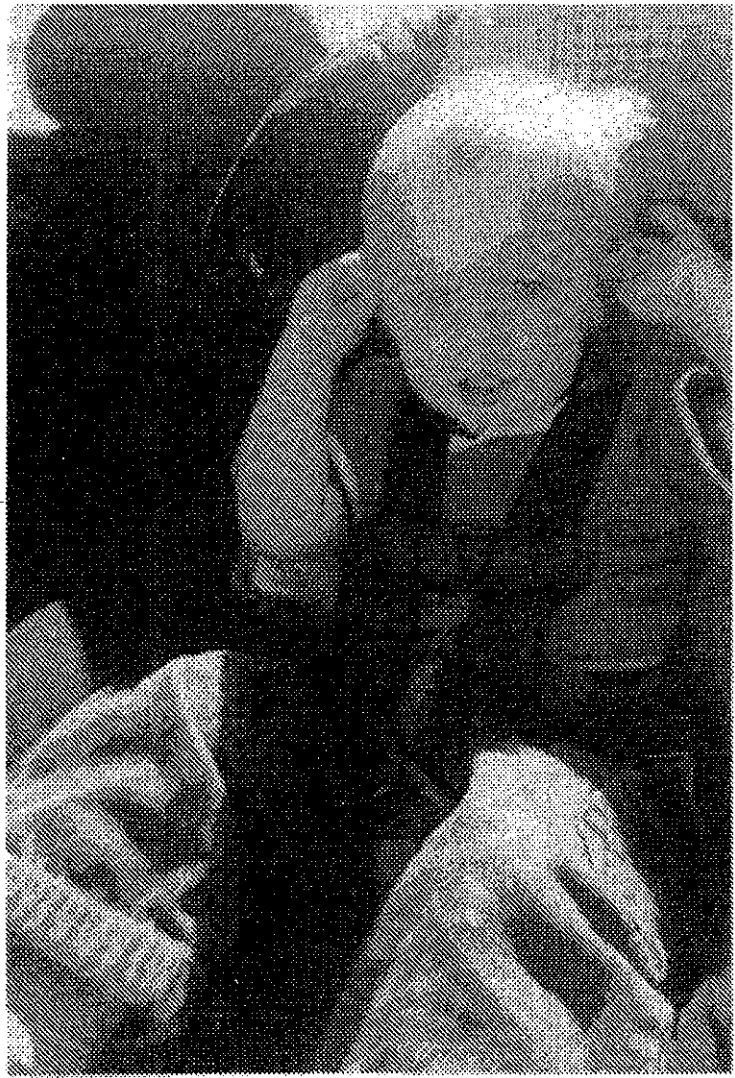
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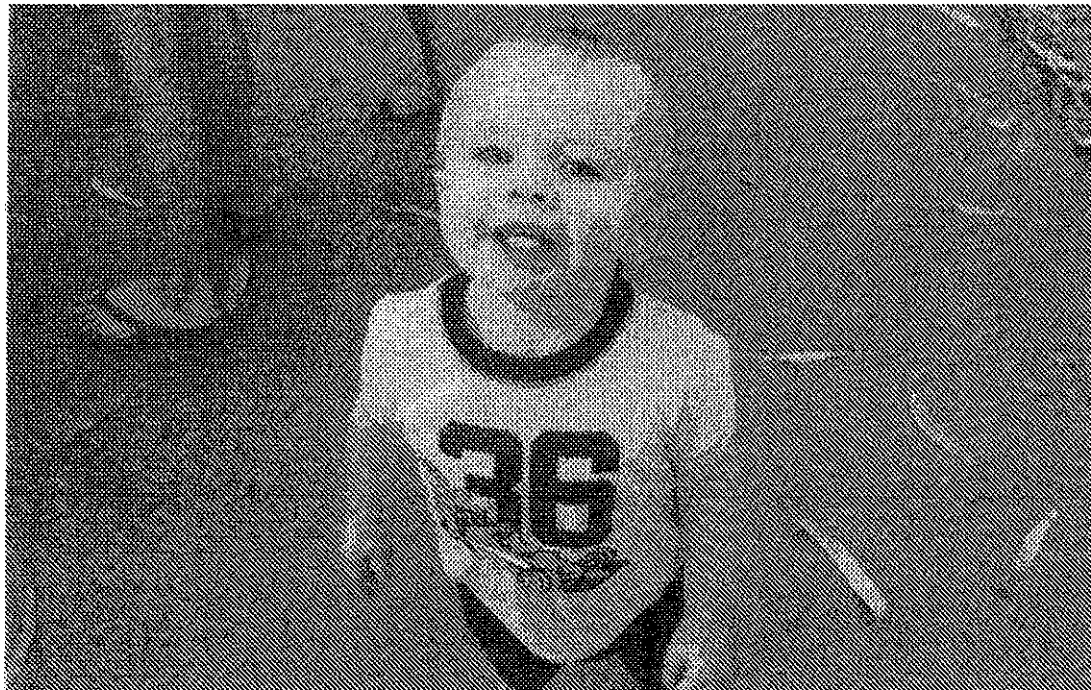
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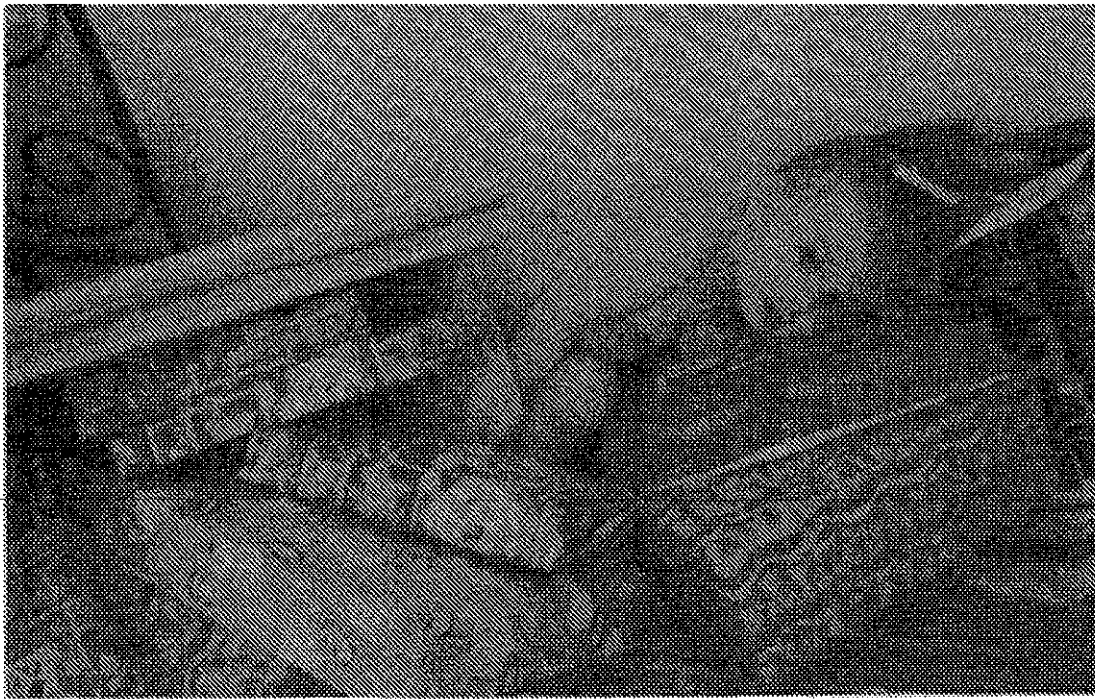
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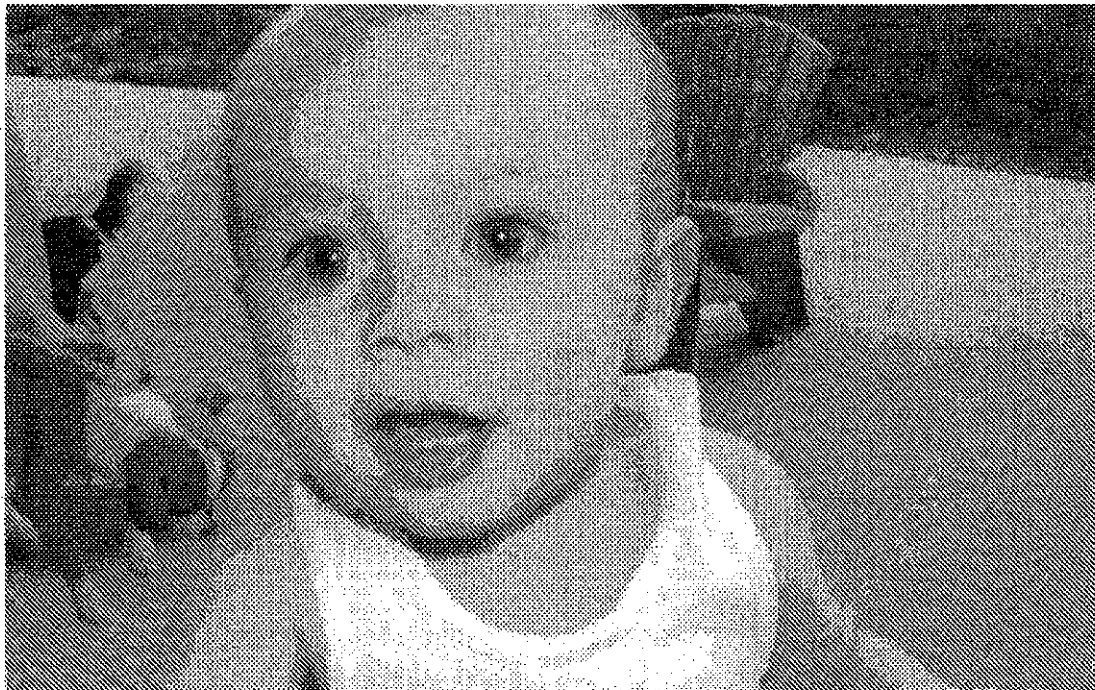
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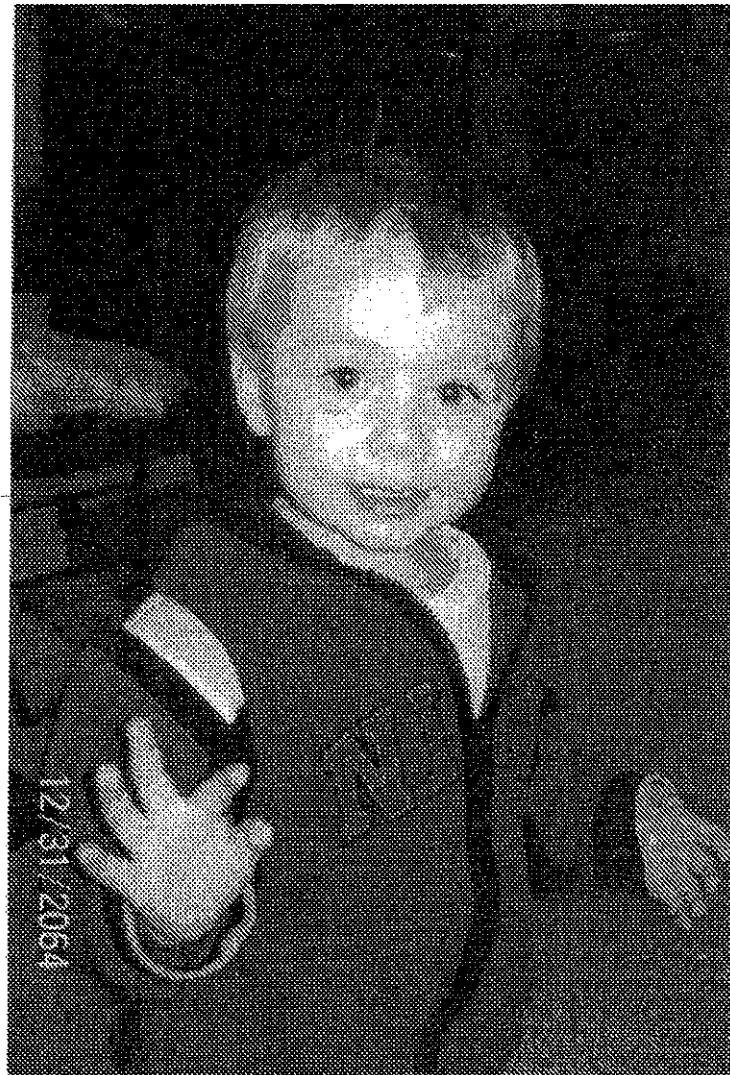
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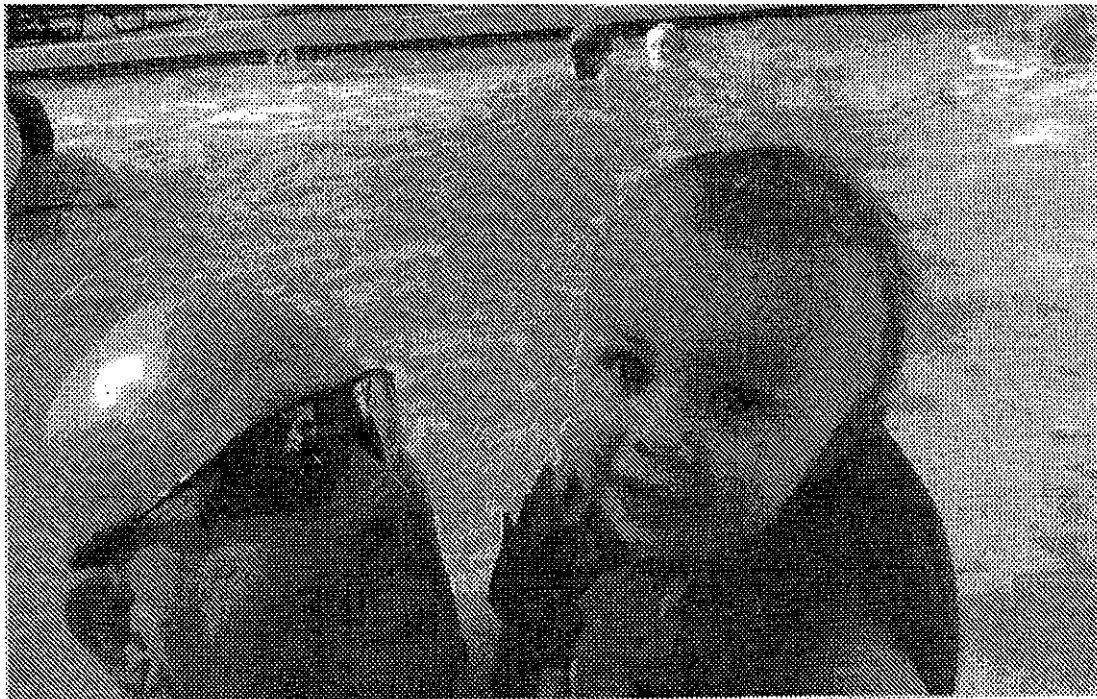
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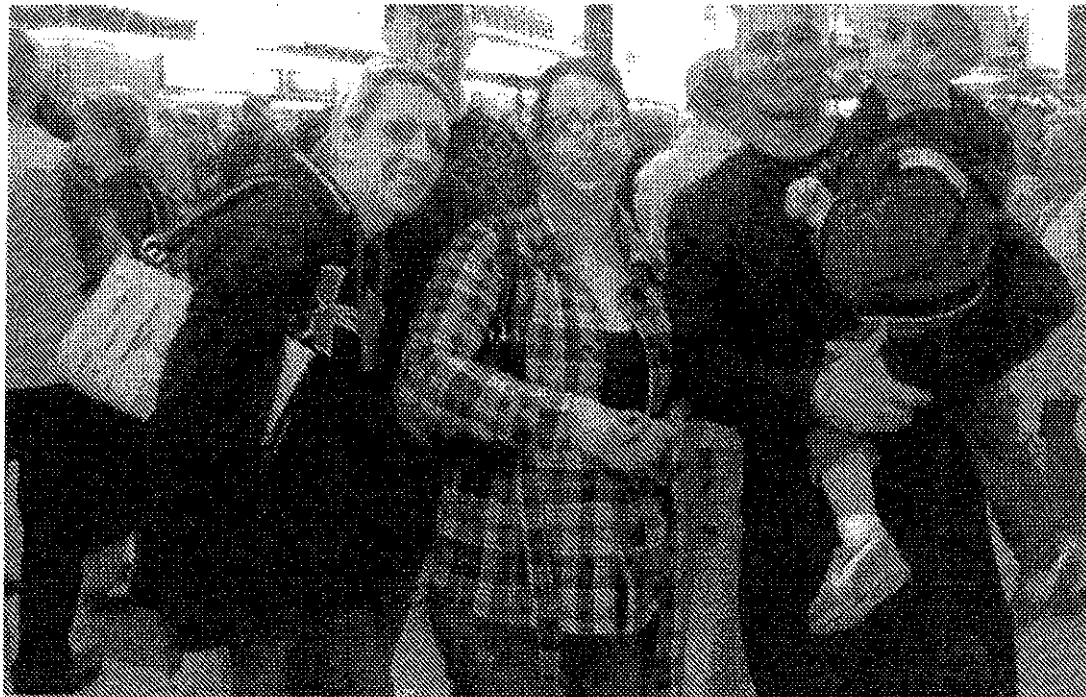
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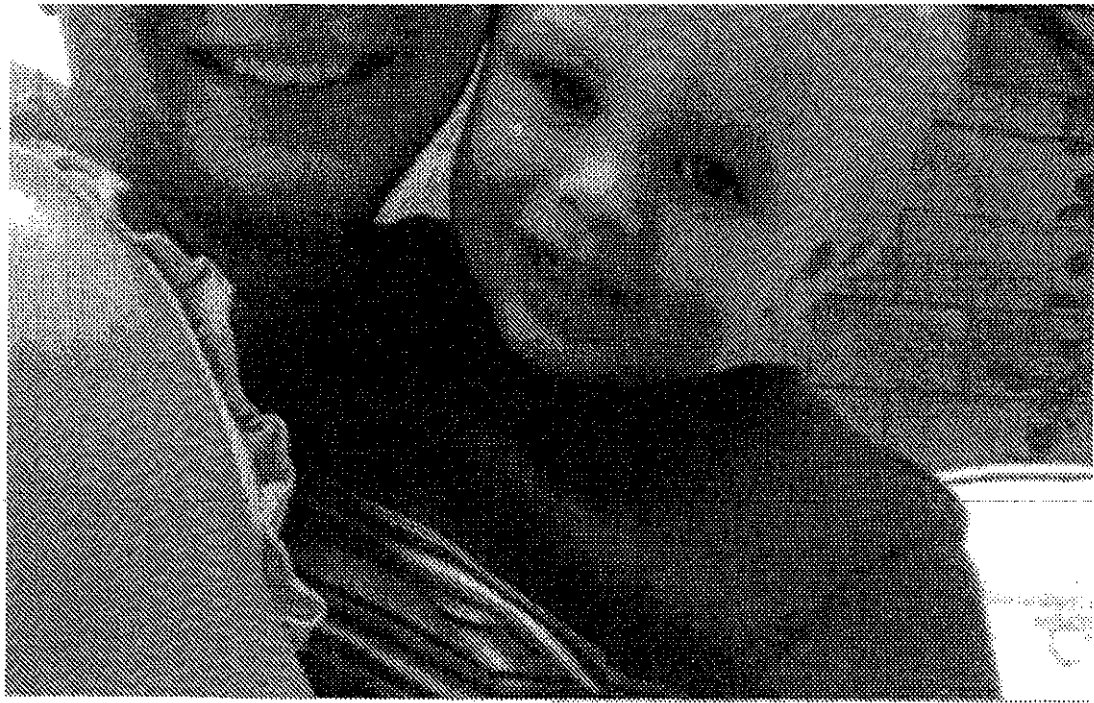
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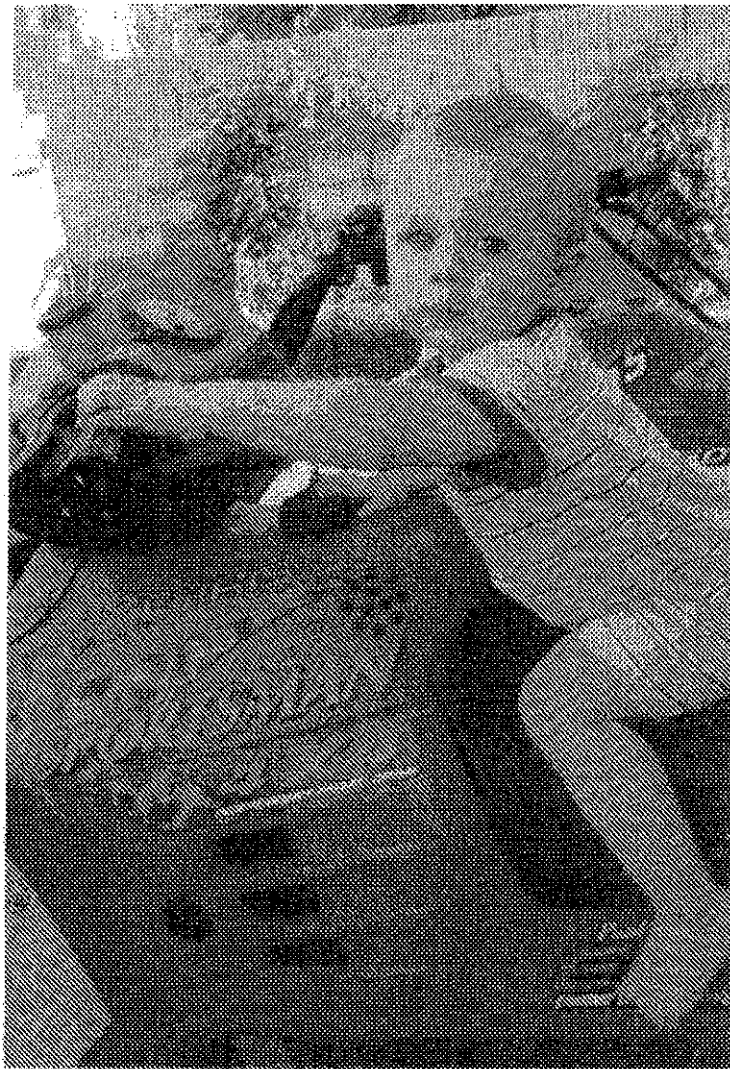
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CLERK OF THE COURT

1 **MLIM**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 DAVID L. STANTON
6 Chief Deputy District Attorney
7 Nevada Bar #003202
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

7
8 DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,

10 Plaintiff,

11 -vs-

CASE NO: C-11-277650-1

12 MICHAEL ALAN LEE,
13 #1699107

DEPT NO: XXIII

14 Defendant.

15 NOTICE OF MOTION AND MOTION IN LIMINE RE: DEFENDANT'S
16 EXPERT (RUNDELL) AND TO FOUNDATIONAL ASPECTS
OF THE DEFENSE EXPERTS' OPINION

17 DATE OF HEARING: JANUARY 13, 2014

18 TIME OF HEARING: ~~1:00 PM~~ 9:30 AM

19 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
20 District Attorney, through DAVID L. STANTON, Chief Deputy District Attorney, and files
21 this Notice Of Motion And Motion In Limine Re: Defendant's Expert (Rundell) And To
22 Foundational Aspects Of The Defense Experts' Opinion.

23 This Motion is made and based upon all the papers and pleadings on file herein, the
24 attached points and authorities in support hereof, and oral argument at the time of hearing, if
25 deemed necessary by this Honorable Court.

26 **NOTICE OF HEARING**

27 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned
28 will bring the foregoing motion on for setting before the above entitled Court, in Department

XXIII thereof, on Monday, the 13th day of January, 2014, at the hour of ~~1:00 o'clock PM~~, or as soon thereafter as counsel may be heard.

DATED this 2nd day of January, 2014.

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

BY


DAVID L. STANTON
Chief Deputy District Attorney
Nevada Bar #003202

Defense counsel has filed a notice of three (3) experts to include, Steven Rundell a “biomechanical engineer.” The State seeks this Court to order limitations on the scope of Rundell’s testimony to be confined to his area of expertise and to exclude any portion outside of his expertise contained in his August 12, 2013 or presented at the time of his testimony. Additionally, the State seeks an order from this Court that limits the testimony of these experts to their opinions and not to the underlying factual information unless directly relevant or otherwise already admitted at trial.

I. RUNDELL

The State has received and reviewed the report apparently authored by Rundell filed by defense counsel in this matter. The report is nineteen (19) pages in length. (See attached Exhibit 1). A significant portion of Rundell’s opinion goes outside the area of expertise that he is presented as an expert – biomechanical engineer.

For example (but certainly not an exhaustive listing) Rundell opines that duodenal ruptures are the subject of a “wide range of blunt impact magnitude” and this trauma has “delayed onset of symptoms.” This testimony is properly the subject matter of a qualified expert such as a forensic pathologist not a biomechanical engineer. The CV of Rundell fails to indicate any basis of how he can render an opinion of anything within this realm of expertise. Rundell concedes as much in his report on the latter wherein he state states, several times, that he reviewed literature on the matter. Merely reviewing other documents does not make the

1 content of those documents a proper subject matter for an expert to testify about. The amount
2 of force used to cause duodenal trauma is one that is observed and reviewed by pathologists
3 at autopsy of the decedents. Further, the diagnosis of the symptoms is properly the subject
4 matter of a qualified medical professional – a physician. Rundell has no expertise in either of
5 these two areas. Therefore, the State asks that this Court order that Rundell be limited to
6 opinions contained in his report that fall within his area of expertise only.

7 Finally, there are numerous “articles” referenced in Rundell’s report. Contrary to the
8 defense expert (Arden), none of the articles relied upon by Rundell have been produced to the
9 State. These numerous reports have not been produced to the State. Rundell’s report was
10 written on or before August 12, 2013. Yet to date, and more importantly outside Nevada’s
11 expert Witness notification, none of the reports deemed to be critical to Rundell have been
12 produced to the State.

13 **II. FACTS SUPPORTING THE DEFENSE EXPERTS OPINIONS**

14 The State asks this Court to order that the testimony of any defense expert be limited
15 to their respective opinions and that the underlying facts be limited to those that are/have been
16 admitted to the jury. Further, that the source of these facts be redacted from their trial
17 testimony. Simply put, an expert witness is permitted to discuss the underlying facts that give
18 rise to their respective opinion. However, there is not an evidentiary basis to permit the expert
19 witness to testify as to the source of that information.

20 That testimony (through an expert witness) is hearsay and not subject to any exception.
21 Second, that testimony would be irrelevant to the testimony itself. Finally, it improperly
22 invades the province of the jury to be the determiners of the facts in this case.

23 DATED this 2nd day of January, 2014.

24 STEVEN B. WOLFSON
25 Clark County District Attorney
26 Nevada Bar #001565

27 BY

28 
DAVID L. STANTON
Chief Deputy District Attorney
Nevada Bar #003202

CERTIFICATE OF SERVICE

I certify that on the 2nd day of January, 2014, I e-mailed a copy of the foregoing

to:

NADIA VON MAGDENKO, Esq.
Nadia@vplasvegaslaw.com

GREGORY D. KNAPP, Esq.
gregknapp@lawyerx.pro

BY



R. JOHNSON
Secretary for the District Attorney's Office

DLS/rj/M-1

EXHIBIT 1

Curriculum Vitae

Steven A. Rundell, Ph.D., P.E.



Professional Profile

Dr. Rundell is a Professional Engineer and consultant specializing in biomechanics and mechanical engineering. His major practice areas include the forensic investigation of traumatic injury, and computational analysis of orthopedic and spinal implants. He holds a B.S. and M.S. in Mechanical Engineering from Michigan State University and a Ph.D. in Biomedical Engineering from Drexel University.

Dr. Rundell's research has resulted in the publication of numerous peer-reviewed journal articles and abstracts. He has presented scientific findings at both medical and engineering conferences. Most recently, Dr. Rundell has worked with the Food and Drug Administration to investigate failure modes of spinal implants in order to develop more robust pre-clinical test standards.

Dr. Rundell uses his understanding of mechanical engineering and injury biomechanics to perform forensic investigations of accidents. Recent investigations include evaluating the effect of seatbelt use during a large off-road dump truck rollover, determining the likelihood of spinal injury during a rear-end motor vehicle collision, investigating the cause of a shoulder injury during a slip and fall on a construction site, and determining the forces and motions imparted to a pedestrian during contact with a vehicle.

Licensure

Professional Engineer, State of Michigan, # 6201057108
Professional Engineer, State of Texas, # 110462
Professional Engineer, State of Illinois, # 062064089
Professional Engineer, State of Florida, # 73726

Contact Information

Direct: (248) 579-0101
Cell: (248) 979-7092
s.rundell@armstrongforensic.com

Detroit Office

1042 North Millford Road
Suite 208
Milford, MI 48381
Phone: (248) 529-3735
Fax: (248) 529-6185

Education

Drexel University
Philadelphia, Pennsylvania
Ph.D. in Biomedical Engineering

Michigan State University
East Lansing, Michigan
Master of Science in Mechanical Engineering

Michigan State University
East Lansing, Michigan
Bachelor of Science in Mechanical Engineering



(866) 448-8010 Toll Free
www.armstrongforensic.com Web

TAMPA
CHICAGO
AUSTIN
O'FALLON

Professional Honors

Paper Competition Winner, ASTM International Annual Meeting, 2010
Paper Competition Finalist, ASME Summer Bio Engineering Conference, 2010
Michigan State University Companion Animal Fund Grant, 2004
TRW Foundation Grant Recipient, 2003
Design News Magazine Award Recipient, 2003
Graduate Fellowship, 2003

Professional Affiliations

Society of Automotive Engineers (SAE), Member
American Society of Biomechanics (ASB), Member

Journal Reviewer

Clinical Orthopaedics and Related Research
Journal of Medical Devices
Spine

Work Experience

Armstrong Forensic Engineers, Inc.
Senior Consultant: 2011-Present

Exponent
Managing Engineer: 2010-2011
Senior Engineer: 2007-2010
Engineer: 2005-2007

Michigan State University
Orthopaedic Biomechanics Labs
Graduate Research and Teaching Assistant
2001-2005



Presentations and Published Abstracts

Rundell SA, Day JS, Isaza J, Siskey R, MacDonald D, Kurtz SM.

Determining the biomechanical environment of lumbar mobile total disc replacements using case-specific finite element modeling related to retrieved implants. FDA Workshop on Computer Methods for Medical Devices, 2011

Siskey, S.D., Siskey, R.L., Kurtz, S.M., Rundell, S.A. Sensitivity of cervical total disc replacement articulation to device lordosis and disc height distraction. FDA Workshop on Computer Methods for Medical Devices, 2011

Auerbach JD, Hanulewicz P, Rundell SA. Novel, semi-rigid lumbar spinal stabilization lowers pedicle screw pull-out risk in an osteoporotic spine when compared with titanium and PEEK rods. ePoster, 18th International Meeting on Advanced Spine Techniques (IMAST), 2011.

Auerbach JD, Parry J, Rundell SA. Dynamic cervical stabilization: A novel, motion-preserving alternative to fusion and articulating total disc replacement. ePoster, 18th International Meeting on Advanced Spine Techniques (IMAST), 2011.

Auerbach JD, Rundell SA. Dynamic cervical stabilization: A novel, motion-preserving alternative to fusion and articulating total disc replacement. Poster Presentation, 11th Annual Meeting of the Spinal Arthroplasty Society, 2011.

Auerbach JD, Hanulewicz P, Rundell SA. Semi-rigid lumbar spinal stabilization lowers screwbone interface force and cancellous bone strain when compared with PEEK and titanium rod systems in a healthy and osteoporotic spine. Poster Presentation, 11th Annual Meeting of the Spinal Arthroplasty Society, 2011.

Auerbach JD, Parry J, Rundell SA. No profile cervical interbody cage with lag screw fixation increases graft loading and reduces bone resorption signal when compared with static and dynamic cervical plating. Podium Presentation, 11th Annual Meeting of the Spinal Arthroplasty Society, 2011.

Rundell SA, Day JS, Isaza J, Siskey R, MacDonald D, Kurtz SM. Derivation of clinically relevant boundary conditions suitable for evaluation of chronic impingement of lumbar total disc replacement: Application to standard development. Podium Presentation, ASTM International Meeting 2010, San Antonio, TX. (Paper competition winner).

Siskey SD, Cordaro NM, Siskey RL, Rundell SA. Characterization of adjacent level loading in the cervical spine for fusion and motion preserving alternatives. Eur Spine J 2010; 19(Suppl 3):S233-364.

Rundell SA, Isaza J, Day JS, Guillory S, Newberry WN, Kurtz SM. The importance of posterior muscle strength and facet contact in preventing lumbar disc herniation during forward bending. Proceedings, ASME 2010 Summer Bioengineering Conference (SBC2010), Naples FL, June 16-19, 2010.

Rundell SA, Isaza J, Guillory S, Day JS, Kurtz SM. Posterior muscle activation in the lumbar spine engages facet contact and reduces shear forces in the intervertebral disc during simulated standing. Poster Presentation, 56th Annual Meeting of the Orthopaedic Research Society, 2010.

Rundell SA, Isaza J, Guillory S, Day JS, Kurtz SM. The role of facet contact in reducing intervertebral shear during simulated standing. Oral Poster Presentation, 10th Annual Meeting of the Spinal Arthroplasty Society, 2010.

Rundell SA, Siskey R, Isaza J, Kurtz SM. Disc height distraction increases range of motion and impingement risk in fixed and mobile bearing total disc replacements. Oral Poster Presentation, 10th Annual Meeting of the Spinal Arthroplasty Society, 2010.

Rundell SA, Guerin HL, Yim J. The Development of a model for use in evaluating degenerative disc disease. Poster Presentation, 10th Annual Meeting of the Spinal Arthroplasty Society, 2010.

Angibaud LD, Steffens J, Rundell SA, Hayes A, Weisenburger JN, Häider H. Effects of tibial insert slope on polyethylene wear and stress. 54th Annual Meeting of the Orthopaedic Research Society, 2008.

Rundell SA, Guerin HL, Auerbach JD, Kurtz SM. Nucleus pulposus replacement material stiffness properties affect vertebral body strains and remodeling response. Podium Presentation, 8th Annual Meeting of the Spine Arthroplasty Society, 2008.

Rundell SA, Auerbach JD, Balderston RA, Kurtz SM. Evaluation of the influence of TDR positioning on subsidence and facet arthrosis. Podium Presentation, 8th Annual Meeting of the Spine Arthroplasty Society, 2008.

Yim J, Bowman B, Paganelli J, Rundell S, Jahng T, Watson R. A finite element analysis to predict peak bending and shear stresses on the Nflex dynamic stabilization device and comparison to empirically derived fatigue data. Poster Presentation, 8th Annual Meeting of the Spine Arthroplasty Society, 2008.

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FEE SCHEDULE

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FORENSIC ENGINEERS

BIOMECHANICAL ENGINEERING REPORT

Regarding:

Nevada v. Michael Allan Lee
Our File Number: 23-2763

Prepared for:

Nadia von Magdenko, Esquire
von Magdenko & Associates, PLLC
624 S. Ninth Street
Las Vegas, NV 89101

Prepared by:

Steven A. Rundell, Ph.D., P.E.
Armstrong Forensic Engineers, Inc.

1042 Milford Road, Suite 208
Milford, MI 48381

August 12, 2013

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Armstrong Forensic Engineers, Inc.
Nevada v. Michael Alan Lee
Armstrong File No. 23-3079
August 12, 2013

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Information Reviewed

You retained Armstrong Forensic Engineers (Armstrong) to conduct a forensic biomechanical analysis pertaining to the above captioned matter that involved the death of Brodie Aschenbrenner on June 15, 2011. This report serves as a summary of the technical consulting services provided to date. In general, I anticipate offering opinions related to the area of injury biomechanics.

The following items have been received, considered, and reviewed:

- Affidavit for Warrant
- Autopsy Report of Brodie Aschenbrenner, dated June 16, 2011
- State of Nevada Traffic Accident Report from May 26, 2011
- Report of Johathan L. Arden, MD and associated materials
- Record from ABC Pediatrics associated with Brodie Aschenbrenner
- 23 Color Photos of Brodie Aschenbrenner
- Statements
 - Alaine Opie
 - Amanda Butler
 - Arica Foster
 - Brad Moshier
 - Danny Fico
 - Merridee Moshier
- September 9, 2011 Henderson Police Department Letter
- Transcript from Preliminary Hearing



Affidavit for Warrant

- **Basic Information**

- June 15, 2011 – 8:51 am a 911 call occurred from mother (Arica Foster) of decedent, (Brodie Aschenbrenner DoB 12/30/2008).
- Ms. Arica Foster administered CPR to decedent.

- **Injuries**

- "She (Arica Foster) also said that the victim has dome bruising about the face, but that all the family members that were outside the apartment were saying that the victim was very active and rambunctious. That he was constantly falling and running into things."
- "Affiant observed pinpoint bruising to the chest and upper arm areas of the victim and various bruising to the victim's face and extremities."
- "Specifically, to the forehead, left and right cheeks and chin area."
- "On the victim's back were several severe bruises that were consistent with child abuse. In the lower left back of the victim was an injury consistent with him being violently hit with an object that had left a pattern consistent with two parallel lines, about 20 millimeters apart."
- "In the middle of the lower back, were what appeared to be fingernail indentations that had significant bruising surrounding it."
- "At the upper right shoulder was a bruising pattern that was unidentifiable."
- "Arica mentioned some scraps (sic) on the victim's back and said that the victim had pulled the curtains down, in his room."
- Autopsy Report
 - Acute peritonitis due to duodenal transection due to blunt force injury of abdomen
 - Acute mild traumatic brain injury due to blunt force injury of head

- **Prior Accidents**

- "Michael said that there is a wall, just outside the victim's bedroom door that the victim constantly runs into it. He said that the victim always has bruises."
- "She said that she thought the victim was bruising too easily."
- "Arica said that she knew that the victim fell and would run into furniture quite a bit and was a very rambunctious kid for his age."
- "Arica said that he has always been clumsy and that he runs into things a lot."
- "Arica mentioned some scraps (sic) on the victim's back and said that the victim had pulled the curtains down, in his room. She said that she found him mixed up in the curtains and that the victim had told her about an 'owie' to his back. She said that she looked at it and it looked like a scrap (sic). She said that it happened two days ago."
- "She said that the victim is always running into things at her parent's house."

- On June 13th, "Brodie was driving his 4 wheel electric car and tried to jump a curb. She said that when he struck the curb, it sent him forward and he struck his face on the car."
- "Arica said that Brodie always had a bump on his forehead from falling or running into things."
- Involved in a car accident three weeks prior.

Autopsy

An autopsy of Brodie Aschenbrenner was performed on June 16, 2011. The pathologic diagnosis was laid out in an enumerated format. The documented external and internal injuries are depicted as diagrams in Figure 1 and Figure 2, respectively. The report indicated that Brodie was involved in a motor vehicle accident on May 26, 2011. He was treated by a pediatrician and reported to have no injuries.

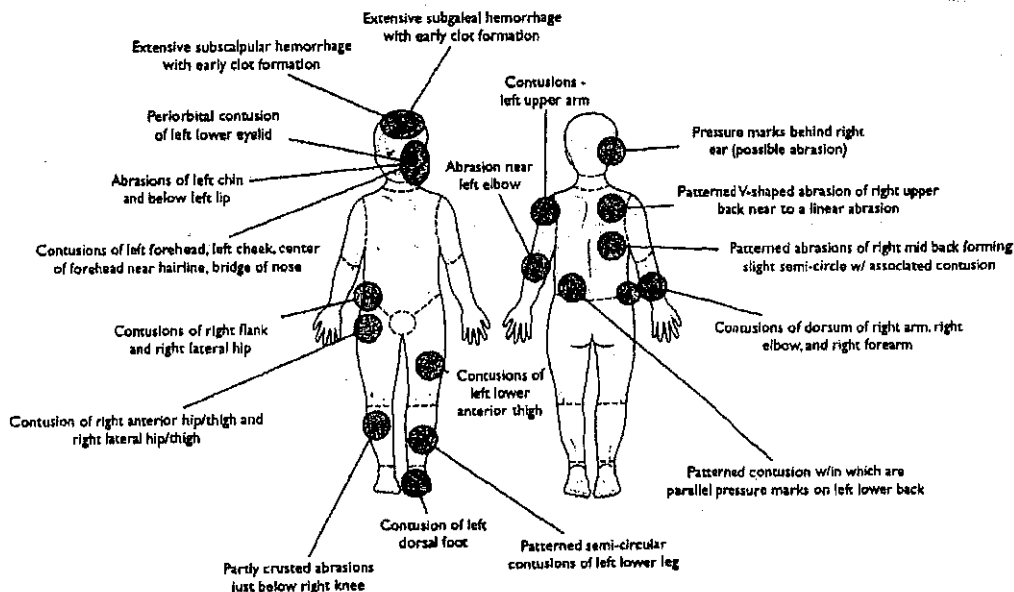


Figure 1. Diagram depicting the external injuries documented in the Autopsy Report of June 16, 2011

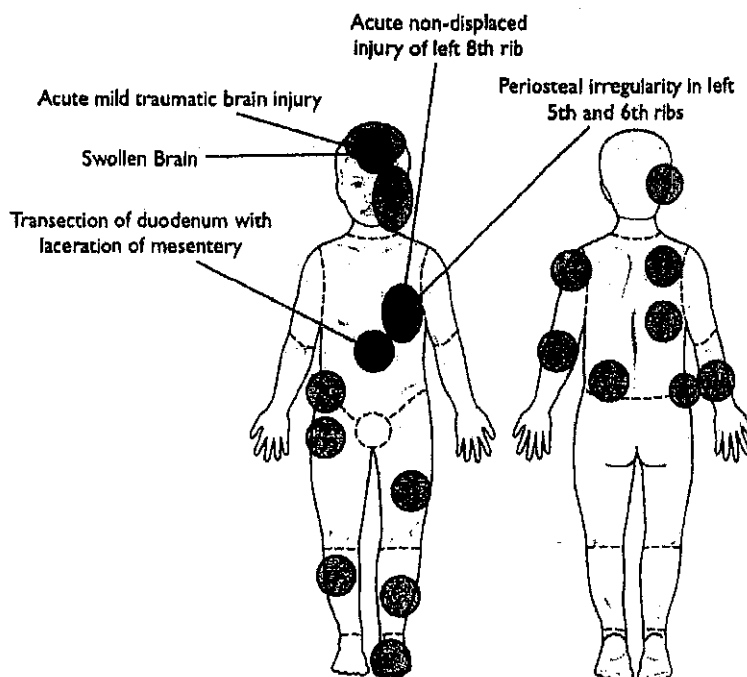


Figure 2. Diagram depicting the location of external injuries and specific internal injuries documented in the Autopsy Report of June 16, 2011.

The fatal injury was determined to be the transection of the duodenum. The report indicated that the mesentery and mesenteric vessels were lacerated near the ligament of Treitz.

Statements

Ms. Alaine Opie

Brodie was her nephew. She often babysat Brodie, and saw Brodie on the Sunday prior to his death. He had a bruise on his right cheek and looked "a little dark under his eyes." Her mother told her that the bruising came from pinkeye. On Sunday night, she gave Brodie a bath. She did not notice any scratches on Brodie's back. It was not unusual for Brodie to bruise. She stated, "He's all over the place all the time." Brodie's relationship with Mr. Lee was normal. She never felt uncomfortable leaving Brodie with Mr. Lee.

Ms. Amanda Butler

She began watching Brodie on Thursdays thru Sundays for her sister about a month prior to the statement. Her parents helped out on the weekends. In a text message, her sister

told her that Brodie had strange bruises. When she asked her sister about the bruises, she was told that Mike's sister had been baby-sitting Brodie and Mike's sister's child was aggressive. This child threw things, hit, bit and punched.

When she began watching Brodie, around May 14th, she noticed a bruise inside his right ear. They assumed that Mike's nephew had caused this bruise. The bruises began to go away after she started watching Brodie. Brodie did run into the cupboard one time and get a bruise on his forehead. Most of the bruises Brodie had were explainable. He was always jumping off of furniture.

Two or three weeks ago, she noticed that Brodie had a bruise on his cheek that was black and blue. It started to heal and it started to get worse again. Brodie told her that the dog did it. On Thursday, she also noticed that Brodie had a couple bruises around his collarbone, a scratch on his lower back and a reddish mark on his buttock.

Brodie also started to throw tantrums when Mike came to pick him up. She had a feeling that Brodie may have been afraid to go with Mike.

Ms. Arica Foster

Ms. Foster is Brodie's mother. She noticed that Brodie began to bruise easily after Mike's sister began to watch him. As an example, she found a bruise in Brodie's ear. She was uncomfortable and thought Mike's nephew was playing too rough with him. After Brodie stopped going to Mike's sister's house, the bruising stopped. Mike would pick up Brodie from her parents' home and he would have Brodie at night. He always put Brodie to bed.

Brodie had to get stitches after being hit in the eye at a park with a swing. Brodie always had little bruises on his forehead from walking into things. She thought the bruises may have been caused by Brodie hitting his head on his bed while sleeping. Brodie would tell her, "mom, bump head." On June 3rd, Brodie had a knot on the back of his head. The following Monday, he had a cut and bruise on his upper lip when he climbed up on a piece of jagged wood she left in his room.

Three weeks ago she was in a car accident with Brodie in the car. She was hit from behind. Brodie did not complain of any pain at the scene. She took him to the doctor's the next morning. She asked the doctor about the bruising and the doctor ran some blood work. The blood work came back fine.

On Friday June 10th, Brodie woke up with pinkeye. Brodie also fell off of his 4-wheeler and had a quarter-sized bruise on his cheek. On Saturday, she dropped Brodie off at her parent's house with his sister. On Sunday, Brodie wrapped himself up in the curtains in his room. He had two scratches on his back. His eyes were still puffy from the pinkeye and the bruise on his cheek was almost gone. She also noticed two little bruises and assumed it was from Brodie playing with her dad.

On Monday she noticed "lightening bruises" on Brodie's chest. The bruise on his cheek was almost gone. He had a mark on his lip. She does not believe Brodie had anything on his forehead. Brodie wanted nothing to do with Mike all day. When she left for work, around 3:15p, Brodie was taking a nap. When she got home, she noticed that Brodie had

a bump and a little bruise on his forehead. Mike told her that Brodie was running, fell down and hit his head. When she asked Brodie what happened, he often said the dog did it.

On Tuesday, the bump on Brodie's head looked worse, the bruise on his cheek had gotten larger and his eye was black. He had "quite a few bruises" on his face. Brodie refused to be with Mike. He did not want to eat lunch or dinner. She put him to bed earlier than normal because he did not have a nap that afternoon. When she put Brodie to bed, the bruise on his cheek was really dark, the bruise on his forehead was worse, his eye was black, and had little scratches on his back.

After they went to bed, Mike got up to go to the bathroom around 1am. Mike came in and told her that Brodie got sick in his room. She went to check on him and Brodie told her that his head hurt. She brought him into the bathroom and he was sick again. She cleaned him up and laid him down on the couch. Brodie fell asleep right away.

Mr. Brad Moshier

Mr. Moshier is Brodie's grandfather. He watched Brodie on the weekends; he always stayed over Saturday nights. Brodie had a little bruise that was fading near the center of his forehead. It was from the week before when he walked into the kitchen counter. He had a little bruise on his cheek. He had blackish discoloration under his eyes from rubbing them. His shins were bruised but it was "nothing major." The pinpoint bruising on his chest was from wrestling and tickling him.

He stated

"I mean the weekend before I had taken his quad over to his house. He had a little battery operated quad... And I kind of pushed it in the front door and I'm like, 'Brodie, come help me.' So he runs over and he climbs right up on it and he stepped on the gas pedal and shot straight through his front - through the front door, across the living room into a coffee table. And he had that thing sliding sideways from the impact, so... you never know what he's going to run into..."

Brodie threw tantrums when Mike would come pick him up. One day Brodie gave Mike a look. He thought it was strange for Brodie to look at Mike that way. He noticed bruises along Brodie's diaper line that came and went over two months.

At the viewing, he noticed that Brodie had a bruise across the top of his left ear. It was identical to once he had a month before his death. It was a weird bruise because it went straight across like a line, across the top of his ear.

Ms. Merridee Moshier

Ms. Moshier is Brodie's grandmother. She and her husband usually kept Brodie for at least one weekend night. Brodie was diagnosed with pink eye on Friday. His mother dropped him off at her home on Saturday. Brodie had a bruise on his left cheek. He fell off of his quad a week earlier. He also had a discolored bruise under his left eye from rubbing his eye due to the pinkeye.

Brodie was a "wild child." He would get up on tables and on the couch, and jump off. He also would hit his forehead on her granite countertop. The bruises from the counter were typically on the right side. He also liked to run and crash into the tub to see how wet he could get his grandfather. His lower legs and knees always had bruises. Sometimes she could see them on his lower arms. He was a normal kid.

When she gave him a bath the night before, she did not notice any injuries on his back. He had scratches on his lower legs and feet. Each eye had scars. Brodie acted like he did not want to be with Mike. She assumed it was because it was more fun at her house. She never had the idea that he was scared to go with Mike.

Mr. Danny Fico

Mr. Fico stated that Brodie did not injure himself while he was at his home on Monday night with Mike. He did not see any injuries to Brodie and Mike did not tell him about Brodie receiving any injuries.

Transcript of Preliminary Hearing

Dr. Lisa Gavin

Dr. Lisa Gavin is the medical examiner in the Clark County coroner's office (44). She performed the autopsy of Brodie Aschenbrenner (45). She concluded that Brodie experienced blunt force trauma to the abdomen, which resulted in a complete transection. Specifically, she stated, "...if enough force occurs, it presses that bowel up against that area and actually can cause it to tear, to lacerate essentially." She indicated the types of events that cause this injury are, "a motor vehicle accident, any blunt force injury to the abdomen." She testified that the amount of "energy or blunt force it would take to transect the abdomen is closer to that you'd see in a car accident than just a child falling."

She testified that there wasn't any evidence of blunt force trauma to the anterior aspect of Brodie's abdomen, and this isn't unusual for this type of duodenal injury. Specifically, "there's enough give to the skin and the elasticity of the skin on the outside and the energy is essentially transferred inward and doesn't necessarily cause contusion to the skin or subcutaneous area in the abdomen."

Ms. Merriddee Moshier

Ms. Moshier was Brodie's grandmother (7). She worked as an RN (11). Brodie usually spent at least one weekend day with Ms. Moshier and her husband while his mother was at work (7). Brodie and his mother also lived with them "for quite awhile" in the past (7). Ms. Moshier described Brodie as a "wild child" (16). She testified that he often got up on her counters and tables, and jumped off (16-17). Brodie sometimes hit his forehead on her granite countertops and his lower legs often had bruises on them because he was so wild (18-19). He had bruises on his face from time to time (20).

Ms. Moshier cared for Brodie for several hours on Sunday, June 12th (7). He arrived on Saturday night and left Sunday evening with her daughter (8). She noticed that Brodie had a "little round bruise" on his right cheek, about the size of "his little fingertip" (12, 20). He also had a chapped lower lip (12-13). After applying lotion to Brodie following a bath Sunday evening, Brodie did not react in pain when she touched any area of his body (13). He had no bruises on his arms, but may have had some on his lower legs (20). Ms. Moshier testified that she saw none of the injuries shown in Exhibits 2-4 when Brodie left her care Sunday night.

Mr. Danny Fico

Mr. Fico is a childhood friend of Mr. Lee's (22). Mr. Fico saw Brodie almost every day (26). On the morning of Monday, June 13th, Brodie came into the store with Mr. Lee and Ms. Foster (37). He noticed the bruises on Brodie (37). Brodie was acting normal (37). He invited Brodie and Mr. Lee to his home that evening to watch the Yankees game. Brodie and Mr. Lee were at his home for several hours (24-26). Brodie gave him no indication that he was injured or in pain (26-27). No accidents occurred in his presence in his home while Brodie was there (30). On Tuesday, June 14th, Brodie and Ms. Foster came back into his store (31). Brodie had the same bruises that he observed on Monday night (42). Nothing looked different to him (42). He asked Ms. Foster how Brodie got the bruise on his cheek (32). She told him that she did not know how he got the bruise (32).

He observed that Brodie had a few bruises under his chin, on his cheek and on his forehead (27). Brodie looked like he had a black eye (27). The bruise on his right cheek was "a decent size" and was yellowish-blue in color (27, 29). There were four to five bruises on Brodie's forehead (29). He did not ask Mr. Lee about the bruising (29). Prior to Monday, June 13th, he observed bruises on Brodie's face before (41). It seemed like Brodie "was constantly having bruises" (41).

Ms. Arica Foster

Ms. Foster is Brodie's mother (84). She was in a relationship with Mr. Lee (85). Brodie was diagnosed with pink eye on Friday (90, 120). Also on Friday, Brodie fell off his quad during a walk with her and hit his cheek on the concrete curb (115-116). The dog would also knock Brodie down (116). On Sunday evening when she picked up Brodie from her mother's house, Brodie was acting normal (86). Brodie had a tiny dime-sized bruise on his right cheek and his lower lip was chapped (87). He also had two tiny marks on his chest (118). She did not think Brodie had any bruising on his forehead Sunday night (118).

On Monday, she noticed that the area underneath Brodie's left eye was "a little bit black" (90). On Monday evening, when she arrived home from work, Mr. Lee told her that he and Brodie went to Mr. Fico's house (88). She did not see Brodie Monday evening when she returned home from work (88).

On Tuesday, she noticed that Brodie had two bruises on his forehead and a scratch on his back (89). The bruise on his cheek was darker (89-90). Mr. Lee told her that Brodie fell when they left Mr. Fico's house (89). Brodie was upset and mad, and he acted like he did not want to be around Mr. Lee as they spent the day together (89, 93).



Around 1:00 a.m. on Wednesday, Brodie became sick in bed (105-107). Brodie told her that his head hurt as she was cleaning him up (106). After Brodie fell asleep with her on the couch, she went to bed in her bedroom (107). When Mr. Lee went to work early the next morning, he moved Brodie into bed with her (108). She glanced at Brodie, rolled over and went back to sleep (108). When she woke up, she noticed that Brodie looked like he was about to fall off the bed (109). When she rubbed his back, he was cold (109). She got out of bed and called 911 (110).

They were in a car accident approximately two weeks prior to Brodie's death (110-111). She was hit from behind (112). There was damage to the back of her vehicle (112). Brodie's car seat came undone and the Styrofoam on the top left side broke off (112). Ms. Foster took Brodie for medical care the morning after the accident (110). She asked the doctor about "Brodie bruising too easily" and was told that some tests were run (110). Brodie also had some flu-like symptoms for a couple weeks before he died (114). He had diarrhea for about two days but did not vomit or have a fever (114-115). A month and a half before he died, Brodie tripped and fell while running (117). He hit his face on a piece of park equipment and required stitches at his eyelid (117).

Brodie had a lot of trouble with his balance (133). He was clumsy and would fall down (133-134). After having tubes placed in his ears in February of 2011, the surgeon suggested she take Brodie to a neurologist if his balance did not get better (132-133). Brodie would walk and "trip over things like his own feet" (134). Brodie once told her "the bump hurt head" and he used to call Mr. Lee "bump" (134). Mr. Lee told her that they were wrestling and Brodie hit his head (135). Brodie liked to get up on things and jump off of them (135).

Forensic Biomechanical Analysis

I was retained to perform a forensic biomechanical investigation and analysis. Medical dictionaries define biomechanics as the science concerned with the actions of forces, internal and external, on the living body. Webster's dictionary defines biomechanics as the application of the principles and techniques of mechanics to the structure, functions, and capabilities of living organisms. In simplest terms, biomechanics is the field of science that investigates injury mechanisms and potential in relation to forces and motions applied to the human body during dynamic and static loading. Conversely, the word medical is defined as relating to the science of medicine, or the treatment of illness and injuries. Medicine is defined as the science or practice of the diagnosis, treatment, and prevention of disease.

For the matter at hand, I was asked to determine the mechanism associated with Brodie Aschenbrenner's fatal injury. The biomechanical analysis performed for the subject incident was based on the materials provided (listed at the beginning of this report); fundamental laws of physics; principles of dynamics; principles of kinematics; principles of kinetics; published, peer-reviewed studies related to duodenal injury; classic biomechanical and engineering text books; studies of human tissue mechanics and tolerance to forces; and my training, education, and experience. The evaluation also involved a detailed review of the autopsy in order to extensively characterize Brodie's injuries.

According to the available information, Brodie Aschenbrenner's primary, and fatal injury was the complete transection of his duodenum. The duodenum is the anatomic structure that connects the stomach to the jejunum (part of the small intestine). It is located primarily in the retroperitoneal space anterior to the spinal column at the level of the third lumbar vertebra (L3) (Ivatury, Nassoura, Simon, & Rodriguez, 1996). From a biomechanics perspective, duodenal injury can occur during either penetrating (stabbing, gunshot) events or blunt impact. The available evidence indicates that Brodie did not sustain a penetrating injury, and therefore was exposed to a blunt impact. Duodenal tears associated with blunt impact have three possible mechanisms;

1. "Crushing" - Direct trauma to the abdomen resulting in compression of the duodenum between the point-of-contact and the spinal column.
2. "Blow Out" - Impact loading to the lower torso, which generates pressure in the duodenum that exceeds the failure tolerance of the tissue.
3. "Inertial" - Inertial loading of the duodenum that generates shearing forces between its mobile and immobile portions.

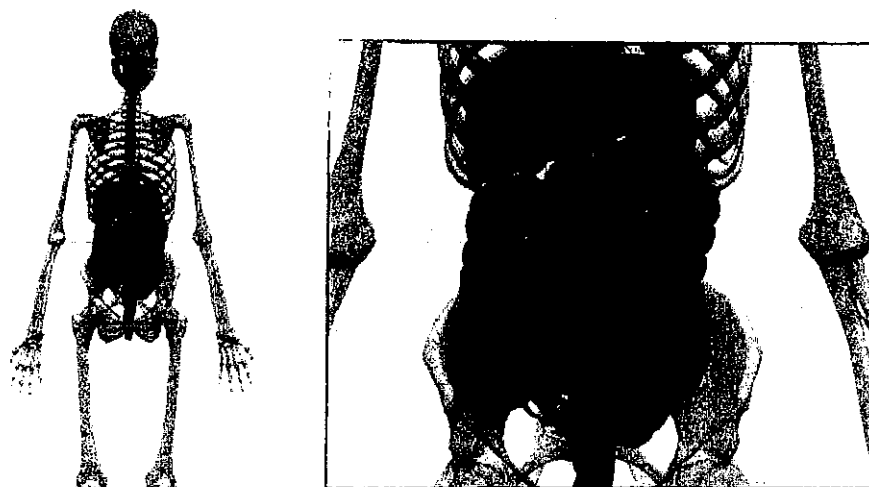


Figure 3. Anatomical diagram depicting the location of the duodenum (highlighted in blue)

According to the autopsy report, Brodie did not sustain injury to his pancreas or other abdominal cavity components. Had Brodie experienced direct contact to his upper abdomen sufficient to crush the duodenum there would have most likely been injury to the nearby structures. Specifically, the duodenum wraps around the head of the pancreas in the area anterior to the spinal column. Therefore, any force that could crush the duodenum would have most likely generated force in the pancreas as well (Cocke, Meyer, & Orleans, 1964). Further, there are no external indicators of evidence to Brodie's upper abdomen, such as a bruise or abrasion. Given the lack of external evidence or other associated internal injuries, Brodie's duodenal tear was most likely not due to a crushing mechanism.



Figure 4. Image depicting the location of the duodenum in relation to the head of the pancreas. The tail of the pancreas is highlighted in blue.

The latter two mechanisms, "blow-out" and "inertial", are the more likely mechanisms experienced by Brodie. During either of these mechanisms, the loading experienced does not have to occur directly to the abdomen. Rasaretnam et al (1974) reported four case studies of duodenal tears. Two of the patients had sustained loading to their backs (directed posterior to anterior) as a result of falls from trees (Rasaretnam & Thavendran, 1974). An "inertial" mechanism is consistent with a fall from a height in which the body's movement is suddenly halted. The mobile portions of the duodenum will continue to move, and can cause the tissue to tear at these junctions. These events will typically cause injuries associated with the fall, or other inertial type injuries. A "blow-out" mechanism can occur during relatively minor impact to the abdomen, and result in isolated injury to the duodenum.

It is noteworthy that the available testimony and statements indicates that Brodie had a history of falls and other injurious incidents. These events included:

1. Trip and fall at a park, which required stitches in May 2011 (p 117 of prelim hearing)
2. A motor vehicle accident on June 1, 2011
3. Pulled wood onto himself
4. Incident involving pulling drapes on himself
5. Multiple events involving a battery operated quad

Based on the available photographs, the quad operated by Brodie was a Fisher-Price Battery Powered Kawasaki KFX with a top speed of 5 mph (Figure 5). According to The available information, Brodie experienced an incident involving his quad days prior to his death. The Affidavit for Warrant states:

"...Brodie was driving his 4 wheel electric car and tried to jump a curb. She said that when he struck the curb, it sent him forward and he struck his face on the car (page 8)."

According to Ms. Foster's statement to the police:

"...he had a bruise on his cheek. But it was a little one, and that's from falling off his little four-wheeler... He tried to jump..." (page 83 of 128 of Incident Report)

According to Ms. Foster's testimony:

Q. And he fell off of the little quad?

A. Yes, sir.

Q. And hit his face on a car?

A. No, sir.

Q. What did he hit his face on?

A. He hit his cheek on the curb.

Q. So on the concrete?

A. Yes

While the available information is somewhat contradictory, it seems that Brodie was attempting to jump a curb with his battery-operated quad. Based on the laws of physics,

contact with the curb would have resulted in the quad coming to an immediate stop. Brodie, however, would have continued to move forward. This continued forward motion would have resulted in contact between his abdomen and the center of the quad's handlebars.

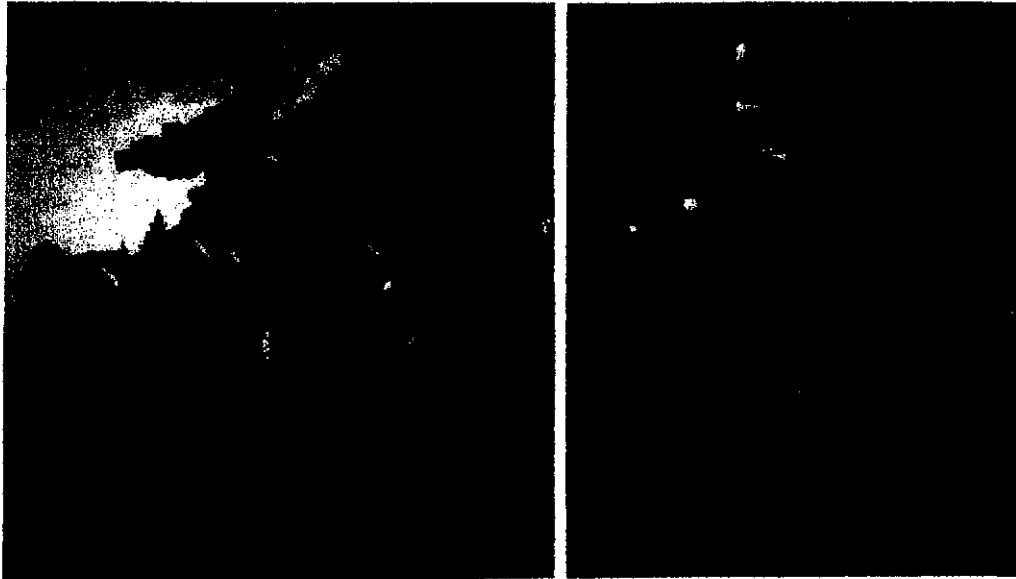


Figure 5. A marketing brochure image of the Fisher Price Kawasaki KFX (left) next to an image of Brodie Aschenbrenner aboard his quad (right).

The amount of force required to cause a duodenal rupture is highly variable. Previously reported incidents involving duodenal ruptures include a wide range of impact trauma magnitude. The events associated with duodenal trauma have specifically been referred to as "trivial" (Rasaretnam & Thavendran, 1974). While duodenal ruptures may occur during severe trauma, such as violent automobile accidents, they have also been shown to occur during relatively minor trauma to the abdominal wall. In a case study reported by Cocke et al., an 8-year-old male was diagnosed with a duodenal rupture 14 hours after having "ridden his bicycle into a pile of sand." The authors specify, "the handlebar unexpectedly twisted and jammed into his abdomen, striking him in the upper quadrant..."

Seemingly benign events can result in duodenal ruptures due to the 'blow-out' mechanism. Specifically, there are times during the normal course of an individual's life, at which the duodenum can be closed off on both sides by the pyloric sphincter on one end, and the ligament of Treitz on the other. This results in a 'closed-loop' effect. Blunt impact to the abdomen delivered at this time will generate pressure within this closed loop, which could strain the duodenal tissue beyond its tolerance. Such a blunt impact, delivered when the loop is not closed, will have the potential to generate such an injury. Therefore, duodenal tears can occur during seemingly benign events if the force is delivered when the duodenum is in a 'closed-loop' state.

Given Brodie's extensive history of traumatic events, determining the precise event that resulted in his duodenal rupture is not possible. Moreover, it has been commonly reported that the onset of symptoms is often delayed. It has been written that there are "Instances of patients with this injury for 2½, 5, 6, 14, 18, and 210 days with few symptoms..." (Fish & Johnson, 1965). It has also been shown that damage to the duodenum can increase over time after the initial insult. Essentially, a smaller injury to the duodenum can become larger over time.

Dr. Lisa Gavin has testified that the cause of Brodie's duodenum injury was a blunt impact to the abdomen. Specifically, she indicated that the duodenum tore due to the 'crushing' mechanism described previously. Further, she stated that the amount of energy required to cause this to occur would be more consistent with a car accident than with a child falling. This statement lacks sufficient detail. The energy associated with a car accident can be greater than, less than, or equal to a child falling. Motor vehicle collisions occur at all different severities, and therefore, Dr. Gavin's statement can be both true and false. Furthermore, duodenal tears in children have been shown to result during low-speed motor vehicle collisions. In a review of twenty-seven children with duodenal tears, the authors stated, "Thirteen injuries resulted from motor vehicle accidents, of these, 11 children wore passive restraining devices (6 hematomas, 5 perforations). Low-velocity impact resulted in 10 injuries..." (Shilyansky, Pearl, Kreller, Sena, & Babyn, 1997).

In recent years, the primary event associated with duodenal tears has become automobile collisions. Fish and Johnson (Fish & Johnson, 1965) wrote "Only four of Cohn's 25 cases of retroperitoneal rupture of the duodenum reviewed in 1952 were sustained in automobile accidents. In contrast, later cases from the Cleveland and Waddell's review and isolated reports during the past 2 years involve the automobile in 24 of 41 cases." Clearly, the available data related to duodenal tears indicates that it can result from both motor vehicle accidents and other forms of accidental injury. Additionally, there is documented evidence that for children, the motor vehicle collision can be of either low or high severity. The following non-penetrating events have been associated with duodenal tears:

- Being kicked by a horse
- Motorcycle accident
- Being "knocked down by a cycle"
- Being struck in the abdomen by a plank of wood in the act of sawing
- Falling from a tree (unknown height)
- Vehicle accident (severities not quantified)
- Riding bike into a pile of sand
- Assault/abuse

In assuming that Brodie's injury was caused by a high-energy 'crushing' event, Dr. Gavin fails to acknowledge the possibility that it occurred due to a 'blow-out' or 'inertial' mechanism. Duodenal tears arising from these mechanisms can occur as the result of relatively benign trauma, and may result from a fall on the back rather than direct trauma to the abdomen. Further, the 'blow-out' mechanism is more likely to result in isolated

trauma to the duodenum without external evidence of injury, as seen in the case of Brodie Aschenbrenner. Dr. Gavin indicates that the lack of external trauma to Brodie's abdomen is characteristic of a duodenal tear. She is correct that duodenal tears often occur without any evidence of external trauma to the abdomen. However, it is more likely that the reason for the lack of evidence of external trauma is due to minor trauma, rather than an impact sufficient enough to crush the duodenum up against the spinal column. She testified,

"...that's actually not unusual for this type of transection injury that you don't see because there's enough give to the skin and the elasticity of the skin on the outside that they energy is essentially transferred inward and doesn't necessarily cause contusion to the skin or subcutaneous area in the abdomen."

This statement lacks foundation or basis. The energy transferred from an impact is primarily governed by the transference of velocity and the difference in mass between the two objects. Given the lack of structure, i.e. bone, in the abdomen, the tissue is able to move out of the way during impact, and thus experience no entrapment between an impact and the bone. However, Dr. Gavin has indicated that the duodenum became entrapped between the contact and the spinal column. Therefore, the skin will also be essentially trapped and experience similar loading to the duodenum. Conversely, during a blow-out scenario, there is no entrapment between the skin and bone, and therefore a lack of external evidence of trauma is more likely.

Conclusions and Opinions

I hold the following conclusions to a reasonable degree of engineering and biomechanical certainty.

1. There is no evidence of external injury to the abdomen that can be linked with Brodie Aschenbrenner's duodenal tear.
2. Duodenal tears can occur during very severe, and relatively minor abdominal trauma.
3. The lack of external trauma and the isolated nature of Brodie's duodenal tear indicate that it most likely occurred as a result of a 'blow-out' mechanism.
4. Duodenal tears can occur during blunt impact loading to the abdomen (anterior to posterior) or to the back (posterior to anterior).
5. The available testimony and information indicates that Brodie experienced multiple traumatic events that could have resulted in blunt impact loading to his abdomen or back.
6. Given the wide range of blunt impact magnitude associated with duodenal ruptures, along with a characteristic delayed onset of symptoms reported extensively throughout the literature, it is not possible, from a biomechanics perspective, to determine precisely when and how Brodie received his duodenal rupture.

This report summarizes work performed to date and presents the findings resulting from that work. The findings presented herein are made to a reasonable degree of engineering and biomechanical certainty, and are based on my experience, education, and training. I reserve the right to supplement this report and to expand or modify opinions based on review of additional material as they become available through ongoing discovery and/or through any work or review of additional work performed by others.



Steven A. Rundell, Ph.D., P.E.
Armstrong Forensic Engineers

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MICHAEL LEE,) No. 66963
)
 Appellant,)
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 vi.)
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 THE STATE OF NEVADA,)
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 Respondent.)

Employee, Clark County Public Defender's Office

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v.

Respondent.

APPELLANT'S APPENDIX VOLUME I PAGES 001-246

Attorney for Appellant

ADAM LAXALT
Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
(702) 687-3538

Counsel for Respondent

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Case No. 66963**

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JUSTICE COURT, HENDERSON TOWNSHIP
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

-VS-

MICHAEL ALAN LEE #1699107,
Defendant.

2011 OCT 25 A 7:48

11CRH001794-0000
CASE NO: 11FH1653X
DEPT NO: 3

CRIMINAL COMPLAINT

The Defendant above named having committed the crimes of MURDER (Felony - NRS 200.010, 200.030, 200.508) and CHILD ABUSE & NEGLECT WITH SUBSTANTIAL BODILY HARM (Felony - NRS 200.508, 0.060), in the manner following, to-wit: That the said Defendant, on or between June 13, 2011 and June 15, 2011, at and within the County of Clark, State of Nevada,

COUNT 1 - MURDER

did, on or between June 14, 2011 and June 15, 2011, then and there, without authority of law and with malice aforethought, willfully and feloniously kill BRODIE ASCHENBRENNER, a minor child being approximately 2 years of age of age, by subjecting the said BRODIE ASCHENBRENNER to acts of child abuse, to-wit: by striking the said BRODIE ASCHENBRENNER in the abdominal area and/or did cause blunt force trauma to BRODIE ASCHENBRENNER'S abdominal area in an unknown manner, all of which resulted in the death of said BRODIE ASCHENBRENNER.

COUNT 2 - CHILD ABUSE & NEGLECT WITH SUBSTANTIAL BODILY HARM

did, on or between June 13, 2011 and June 14, 2011, wilfully, unlawfully, feloniously, and knowingly neglect, cause, or permit a child under the age of 18 years, to-wit: BRODIE ASCHENBRENNER, being approximately 2 years of age, to suffer unjustifiable physical pain and substantial bodily harm, by striking the said BRODIE ASCHENBRENNER in the head and/or did cause blunt force trauma to BRODIE ASCHENBRENNER'S head in an unknown manner and/or after determining that the said

FELONY
GROSS MSD.

District Court

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1 BRODIE ASCHENBRENNER had suffered head injuries, Defendant did fail to seek
2 medical care for the said BRODIE ASCHENBRENNER.

3 All of which is contrary to the form, force and effect of Statutes in such cases made
4 and provided and against the peace and dignity of the State of Nevada. Said Complainant
5 makes this declaration subject to the penalty of perjury.

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JUSTICE COURT. HENDERSON TOWNSHIP
CLARK COUNTY, NEVADA
DOCKET SHEET...CRIMINAL

CASE # 11CRH001794-0000 11FH1653X DAVID S GIBSON - DEPT # 3
 State LEE, MICHAEL ALAN 1699107 (SCOPE)

DATE, JUDGE, OFFICERS OF COURT PRESENT	PROCEEDINGS APPEARANCES - HEARING	EVENTS
October 27, 2011 D.E.MARTIN, PRO-TEM FOR D.S.GIBSON SR. P. THUNELL, DDA P. MCDONALD, ESQ. H. GARCIA, CLK L. BRENSKE, CR	<p>ALERT INFORMATION ARREST WARRANT - CRIMINAL served on: 10/25/2011 For: LEE, MICHAEL ALAN</p> <hr/> <p>SET FOR COURT APPEARANCE Event: PRELIMINARY HEARING HND Date: 11/08/2011 Time: 9:30 am Judge: GIBSON SR, DAVID S Location: DEPARTMENT 3</p> <hr/> <p>ARRAIGNMENT HEARING HELD The following event: FELONY ARRAIGNMENT HND scheduled for 10/27/2011 at 9:00 am has been resulted as follows: Result: ARRAIGNMENT HEARING HELD Judge: GIBSON SR, DAVID S Location: DEPARTMENT 3</p> <hr/> <p>INITIAL ARRAIGNMENT: Defendant PRESENT IN CUSTODY Defense Counsel ACKNOWLEDGES, WAIVED reading of the Complaint. By and through his attorney, defendant asked for date certain for hearing. INVOKED 15 day rule. Preliminary Hearing date set MOTION BY DEFENSE TO REDUCE/SET BAIL - OBJECTION BY STATE - REQUESTS DEFENSE FILE A WRITTEN MOTION. MOTION DENIED. BAIL SET: \$100,000 CASH ONLY REMAND TO METRO</p>	
October 26, 2011	<p>SET FOR COURT APPEARANCE Event: FELONY ARRAIGNMENT HND Date: 10/27/2011 Time: 9:00 am Judge: GIBSON SR, DAVID S Location: DEPARTMENT 3 Result: ARRAIGNMENT HEARING HELD</p> <hr/> <p>Complaint FILED. Upon Motion by State, Arrest Warrant ISSUED. BAIL SET. ARREST WARRANT - CRIMINAL created on: 10/26/2011 For: LEE, MICHAEL ALAN</p>	
October 25, 2011	<p>ALERT INFORMATION ARREST WARRANT - CRIMINAL issued on: 10/25/2011 For: LEE, MICHAEL ALAN Bond Amt: SET IN COURT</p>	

JUSTICE COURT. HENDERSON TOWNSHIP
CLARK COUNTY, NEVADA
DOCKET SHEET...CRIMINAL

CASE # 11CRH001794-0000 11FH1653X DAVID S GIBSON - DEPT #3
 State LEE, MICHAEL ALAN 1699107 (SCOPE)

DATE, JUDGE, OFFICERS OF COURT PRESENT	PROCEEDINGS APPEARANCES - HEARING	EVENTS
November 08, 2011 D. S. GIBSON SR, JP D. STANTON, DDA P. MCDONALD, ESQ. & N. VON MAGDENKO, ESQ. H. GARCIA, CLK L. BRENSKE, CR	PRELIMINARY HEARING DEFENDANT PRESENT IN CUSTODY STATE READY. DEFENSE READY. JOINT MOTION TO EXCLUDE WITNESSES - MOTION GRANTED STATE WITNESSES: 1. MERRIDEE MOSHIER. SWORN IN BY CLERK. DIRECT. WITNESS ID'D DEFENDANT. CROSS. WITNESS EXCUSED. 2. DANNY FICO. SWORN IN BY CLERK. DIRECT. WITNESS ID'D DEFENDANT. CROSS. WITNESS EXCUSED. 3. LISA GAVIN. SWORN IN BY CLERK. DIRECT. CROSS. REDIRECT. RECROSS. WITNESS EXCUSED. 4. ARICA FOSTER. SWORN IN BY CLERK. DIRECT. WITNESS ID'D DEFENDANT. CROSS. REDIRECT. WITNESS EXCUSED. EVIDENCE: 1. PHOTOGRAPHS - OFFERED - ADMITTED. 2-11 - PHOTOGRAPHS - OFFERED - ADMITTED. A-B - PHOTOGRAPHS - OFFERED - ADMITTED. STATE RESTS DEFENDANT ADVISED OF HIS STATUTORY RIGHT TO MAKE A SWORN OR UNSWORN STATEMENT, TO WAIVE MAKING A STATEMENT, AND/OR OF HIS RIGHT TO CALL WITNESSES - DEFENDANT WAIVES HIS RIGHT TO MAKE A STATEMENT MOTION TO DISMISS AND ARGUMENT IN FAVOR OF SAID MOTION BY DEFENSE - ARGUMENT AGAINST SAID MOTION BY STATE Thereupon Court ORDERED defendant held to answer to said charge in the Eighth Judicial District Court. BOUND OVER TO DISTRICT COURT BAIL STANDS: \$100,000 CASH ONLY RETURN TO METRO	
November 02, 2011	MEDIA REQUEST AND ORDER ALLOWING CAMERAS IN THE COURTROOM SIGNED AND FILED	
October 31, 2011	NOTIFICATION OF MEDIA REQUEST SIGNED, FILED AND FAXED TO ALL PARTIES MEDIA REQUEST AND ORDER ALLOWING CAMERAS IN THE COURTROOM FROM 8 NEWS NOW FORWARDED TO CHAMBERS.	

JUSTICE COURT, HENDERSON TOWNSHIP
CLARK COUNTY, NEVADA
DOCKET SHEET...CRIMINAL

CASE # 11CRH001794-0000 11FH1653X DAVID S GIBSON - DEPT # 3
State LEE, MICHAEL ALAN 1699107 (SCOPE)
Charge(s) MURDER BOUND OVER
CHILD ABUSE WITH SUBSTANTIAL BODILY HARM BOUND OVER

Conditions

Description	Required Amount	Bal Due	Due Dt	Notes
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LINKED CASES FOR: 11CRH001794-0000

CASE #	STATUS	EVENT DATE	EVENT DESCRIPTION
NO FUTURE EVENTS			

DATE, JUDGE, OFFICERS
OF COURT PRESENT

PROCEEDINGS
APPEARANCES - HEARING

EVENTS

November 09, 2011	SET FOR COURT APPEARANCE Event: DISTRICT COURT ARRAIGNMENT HND Date: 11/21/2011 Time: 10:30 am Location: LOWER LEVEL DISTRICT COURT DEPARTMENT 23 Result: HEARD IN DISTRICT COURT	
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TRAN

CASE NO.

C277650

IN THE JUSTICE'S COURT OF HENDERSON TOWNSHIP
COUNTY OF CLARK, STATE OF NEVADA

STATE OF NEVADA,

Plaintiff,
vs.

MICHAEL ALAN LEE,

Defendant.

CASE NO. 11FH1653X

FILED
Nov 23 11 39 AM '11
CLERK OF THE COURT

REPORTER'S TRANSCRIPT

OF

PRELIMINARY HEARING

BEFORE THE HONORABLE DAVID S. GIBSON, SR.

JUSTICE OF THE PEACE

TUESDAY, NOVEMBER 8, 2011

APPEARANCES:

For the State: DAVID STANTON, ESQ.
Deputy District Attorney

For the Defendant: PATRICK MCDONALD, ESQ.
NADIA VON MAGDENKO, ESQ.

Reported by: Lisa Brenske, CCR #186

WITNESSES

MERRIDEE MOSHIER

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DANNY FICO

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C-11-277650-1

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RECEIVED

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CLERK OF THE COURT

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HENDERSON, NEVADA, NOVEMBER 8, 2011, 12:30 P.M.

THE COURT: State of Nevada versus Michael
Allen Lee, 11FH1653X.

Are we ready to proceed?

MR. STANTON: State is, Your Honor.

MR. MCDONALD: Defense is ready, Your
Honor.

THE COURT: Do you want to invoke the
exclusionary rule?

MR. MCDONALD: Defense would invoke the
exclusionary rule, Your Honor.

MR. STANTON: State would join, Your
Honor.

In addition, Judge, for purposes of this
preliminary hearing I have served this morning the
defendant's sister and the defendant's mother with
subpoenas to attend a Grand Jury presentation directly
related to the subject matter of this preliminary
hearing in this case. I'd ask that they be excused as
well.

THE COURT: All right. Anyone who has
been served with a subpoena regarding this case or who
expects to testify or wants to testify, it doesn't mean

1 you'll get to, but if you are under the expectation of
2 being called or you are under subpoena in this case or
3 a Grand Jury case relating to it, you are excluded from
4 the courtroom and must stay outside. If you're not one
5 of those people, then you can stay inside. This is a
6 tragic case and we need to make sure that in the
7 courtroom that the decorum is maintained and I
8 appreciate everyone's cooperation.

9 I'm sorry for the delay, but we had to
10 make sure everybody got fed because it is going to take
11 us a little while this afternoon.

12 So the exclusionary rule has been invoked.

13 If you are going to be a witness and you don't leave
14 the courtroom, when you get called you'll not be
15 allowed to testify. So it's important that everybody
16 understands that.

17 Anything else anyone wants to add before
18 we get started?

19 MR. McDONALD: Not on behalf of the
20 defense.

21 MR. STANTON: No, Judge.

22 THE COURT: Call your first witness.

23 MR. STANTON: Merridee Moshier.

24 MR. McDONALD: Your Honor, I did have a
25 request, I'm sorry, for my client to be able to write

1 notes could his right hand be unhandcuffed so that --

2 THE COURT: Yes. That shouldn't be a
3 problem.

4 MR. McDONALD: Thank you, Your Honor.

5 THE CLERK: Raise your right hand.

6 Do you solemnly swear to tell the truth,
7 the whole truth and nothing but the truth, so help you
8 God?

9 THE WITNESS: Yes.

10 THE CLERK: Please speak into the
11 microphone, state your first and last name and spell
12 each for the record.

13 THE COURT: State your first and last name
14 and spell them both, please.

15 THE WITNESS: My name is Merridee Moshier,
16 M-e-r-r-i-d-e-e, Moshier, M-o-s-h-i-e-r.

17
18 MERRIDEE MOSHIER,
19 having been first duly sworn, did testify as follows:

20 DIRECT EXAMINATION

21 BY MR. STANTON:

22 Q. Miss Moshier, let me ask you a couple
23 foundational questions here today. Do you have an
24 adult daughter by the name of Arica Foster?

25 A. Yes.

1 Q. And do you live here in Las Vegas?

2 A. Yes.

3 Q. Are you aware that in June of this year
4 your daughter Arica had a son?

5 A. Yes.

6 Q. What was your grandson's name?

7 A. Brodie Aschenbrenner.

8 Q. Aschenbrenner?

9 A. Yes.

10 Q. And did you have any regular or routine
11 interaction with Brodie?

12 A. Yes.

13 Q. Could you describe that to the court.

14 A. Brodie was with myself and my husband
15 usually at least one weekend day while Arica worked.
16 They had lived with us for quite awhile so he was used
17 to staying with us and we would watch him so she'd
18 work.

19 Q. And in June of that year would it be
20 accurate to say that during the weekend, in particular
21 Sunday, June 12th, that you would have been in the
22 care of Brodie for several hours that day?

23 A. Correct.

24 Q. Can you describe when you got Brodie that
25 weekend and when Brodie left your care?

1 A. To the best of my recollection Brodie came
2 over on Saturday -- the previous Saturday and he left
3 Sunday evening with Arica.

4 Q. And who else was in your home during that
5 weekend caring or around Brodie?

6 A. My husband was there, Brad Moshier. On
7 Sunday my other daughter was there Elaine Opey and my
8 little -- other granddaughter Lilly was there.

9 Q. And you also have another daughter besides
10 the ones you've mentioned?

11 A. I have Amanda.

12 Q. And they're all adult daughters?

13 A. Correct.

14 Q. Let me ask you about Brodie during that
15 weekend. How would you describe his behavior during
16 the weekend compared to what it normally was?

17 A. Brodie was my angel and that entire
18 weekend was normal. He was getting into stuff, dancing
19 on my coffee table to the Wiggles, eating everything,
20 climbing up the fridge shelves to get yogurt, asking
21 for sippy cups. Just the normal weekend. Outside
22 playing in the pool, in the sandbox.

23 MR. STANTON: Now, Your Honor, with the
24 assistance of your Court Clerk I have previously marked
25 and shown to defense counsel State's Exhibits 1 through

1 11. May I approach the witness?
 2 THE COURT: Yes, you may.
 3 BY MR. STANTON:
 4 Q. Showing you what's been marked State's
 5 Exhibit 1 do you recognize who is depicted in this
 6 photograph?
 7 A. That's my baby Brodie.
 8 Q. Does that accurately depict generally how
 9 he looked on June of this year?
 10 A. Absolutely. He was on his bike. He was
 11 going for it.
 12 MR. STANTON: Move for State's 1 into
 13 evidence.
 14 MR. McDONALD: No opposition, Your Honor.
 15 THE COURT: It will be introduced.
 16 (State's Exhibit 1 was admitted.)
 17 BY MR. STANTON:
 18 Q. Now, ma'am, during June of the weekend in
 19 June that you were caring for Brodie did you have
 20 occasion along with your husband to give Brodie a bath
 21 on Sunday the 12th?
 22 A. Yeah, but my daughter Elaine was with me,
 23 not my husband.
 24 Q. Okay. Elaine's last name is what?
 25 A. Opey.

1 Q. What time of day on Sunday do you recall
 2 bathing Brodie?
 3 A. There was a routine so it was right after
 4 we would have fed him dinner, him and Lilly, because we
 5 always said tubby and they'd go racing up the stairs.
 6 Q. What time of day would be normal to bathe
 7 and to feed Brodie?
 8 A. We'd start dinner sometime between five
 9 and six.
 10 Q. That's p.m.?
 11 A. Correct.
 12 Q. And is that your best recollection on
 13 June 12th that's what occurred inside your home?
 14 A. Yeah. It was just normal.
 15 Q. And what was Brodie's normal routine as
 16 far as an appetite in eating? Was he a fussy eater or
 17 a pretty good eater?
 18 A. He ate everything.
 19 Q. And that was the case on Sunday, June
 20 13th?
 21 A. Correct.
 22 Q. Now, when you were bathing along with your
 23 daughter I believe you told detectives and you've told
 24 me that you kind of had a particular role with Brodie
 25 that night, that Sunday evening, due in part to your

1 back. What did you do and your daughter do regarding
 2 the bathing duties of Brodie?
 3 A. Well, I had Lilly and Brodie in the tub,
 4 they were having a bubble bath and they were sliding
 5 down the edge of the tub and just laughing, and then
 6 Elaine come up and washed their hair. I have had back
 7 surgeries, I can't lean over a bathtub.
 8 So when we were finished with the bathing
 9 then Elaine got Brodie out like always and wrapped him
 10 in a towel and put him on my bed with me because I
 11 always towed the kids off, the little guys, and then
 12 lotioned them and then put their jammies on.
 13 Q. Is that what you did on the 12th of June
 14 with Brodie?
 15 A. Yes.
 16 Q. Would it be accurate to say that you saw
 17 him naked from head to toe?
 18 A. Oh, absolutely.
 19 Q. Ma'am, before I ask you the next series of
 20 questions can you tell me what you do for a living?
 21 A. I'm an RN. I have a double masters. I
 22 manage the cath lab, specials lab, specials trauma in
 23 telemetry at UMC.
 24 Q. So you've been a registered nurse for how
 25 many years?

1 A. Twenty-seven.
 2 Q. What kind of assignments as an RN have you
 3 had in the medical field?
 4 A. I've worked as a manager, director, ICU,
 5 CCU, out-patient, in-patient, clinics, med surge, tell,
 6 pretty much all the above.
 7 Q. And obviously from your description of
 8 those duties that would indicate that you've been
 9 around children in a medical setting as well?
 10 A. Correct.
 11 Q. Can you tell this court what if any
 12 injuries you observed to Brodie's body when you were
 13 lotioning him on Sunday, June 12th.
 14 A. Brodie had a little bruise on his cheek.
 15 It had been there since Saturday when he got there. It
 16 looked like a little round bruise.
 17 Q. For the record you're pointing to your
 18 right cheek?
 19 A. I think that's correct. I don't remember
 20 what cheek now when I'm looking.
 21 Q. So there was one on the cheek?
 22 A. Uh-huh.
 23 Q. And you said it may be on the right cheek.
 24 What other injuries did you note if any on his body?
 25 A. He had like a chapped lip right here.

1 He'd suck on his lips.
 2 Q. You're pointing to your lower lip?
 3 A. Correct.
 4 Q. What other injuries if any did you note?
 5 A. I'm trying to remember. I think that was
 6 it. He had been out in the yard on and off all weekend
 7 so I don't really remember anything else right now.
 8 Q. When you were applying lotion to Brodie at
 9 any point when you were applying lotion did Brodie
 10 react as if he was in pain?
 11 A. No. He was a wiggle worm. He'd wiggle
 12 all over the bed and laugh.
 13 Q. But nothing that would indicate to you as
 14 a nurse that when you were touching an area of his body
 15 that he was in pain?
 16 A. No.
 17 MR. STANTON: May I approach again?
 18 THE COURT: You may.
 19 What day was this? I'm sorry.
 20 MR. STANTON: Sunday, June 12th.
 21 BY MR. STANTON:
 22 Q. Ma'am, I am going to show you a series of
 23 photographs, and I apologize for the nature of them,
 24 but I want you to look at Exhibit Number 2 for me and
 25 tell me if you recognize any injuries that you see that

1 you saw when you lotioned your grandson.
 2 A. No.
 3 Q. Did you see any of the injuries to the
 4 extent, location and nature that you see in Exhibit 2?
 5 A. No.
 6 THE COURT: Is that a no?
 7 THE WITNESS: No.
 8 BY MR. STANTON:
 9 Q. Let me show you Exhibit 3. Did you see
 10 any of the injuries depicted in Exhibit 3 when you were
 11 lotioning Brodie on Sunday evening? Take your time.
 12 A. No.
 13 Q. And finally let me show --
 14 A. That's my baby, you guys.
 15 Q. Let me show you Exhibit 4, the back of
 16 Brodie. Did you see any of those injuries?
 17 A. No. No.
 18 Q. Ma'am, when Brodie left your care on
 19 Sunday evening --
 20 THE COURT: Do you need a break, ma'am?
 21 THE WITNESS: Yes.
 22 THE COURT: Court will be in recess for
 23 about five minutes. Court will be at ease for five
 24 minutes.
 25 (Off the record.)

1 THE COURT: Counsel, continue.
 2 MR. STANTON: Thank you, Your Honor.
 3 BY MR. STANTON:
 4 Q. Miss Moshier, let me go back to my last
 5 question to you which is on the evening, Sunday
 6 evening, when Brodie left I believe your earlier
 7 testimony was that your daughter Arica picked Brodie
 8 up?
 9 A. Yeah, Arica came to get Brodman after
 10 work. She had gotten off work a little bit early.
 11 Q. What time do you think your daughter Arica
 12 left with Brodie, left your home?
 13 A. Not real exact. Between 6:30 and 8:00. I
 14 don't have a real exact frame in my mind.
 15 Q. And was anybody with your daughter Arica
 16 when she picked up and left with Brodie from your home?
 17 A. No.
 18 Q. Did you know that your daughter at that
 19 time period was living with someone else?
 20 A. Correct.
 21 Q. Who was that?
 22 A. Mike.
 23 Q. And do you see Mike in court today?
 24 A. Yes.
 25 Q. Could you please describe where he is in

1 the courtroom and what he's wearing?
 2 A. He's on my left at the other table with
 3 the red shirt holding the pen.
 4 MR. STANTON: May the record reflect
 5 identification of the defendant?
 6 THE COURT: It will so reflect.
 7 MR. STANTON: I will pass the witness,
 8 Your Honor.
 9 THE COURT: Counsel.
 10 MR. McDONALD: Thank you, Your Honor.
 11 CROSS-EXAMINATION
 12 BY MR. McDONALD:
 13 Q. Miss Moshier, do you recall speaking to a
 14 detective somewhere around June 23rd?
 15 A. I don't know exact days.
 16 Q. Do you recall ever speaking to a detective
 17 in reference to your grandson Brodie?
 18 A. Oh, yeah.
 19 Q. Do you recall describing Brodie as a wild
 20 child?
 21 A. Yes.
 22 Q. That he'd get up on your counters?
 23 A. Uh-huh.
 24 Q. Up on your tables?
 25 A. Uh-huh.

1 Q. Jump off?
 2 A. Yes.
 3 Q. He really didn't have any fear of getting
 4 hurt?
 5 A. I don't know if I'd say no fear.
 6 Q. You don't remember saying he had no fear?
 7 A. No, I don't remember.
 8 Q. I'm sorry?
 9 A. I don't remember that specific verbiage.
 10 Q. Now, do you recall telling the detective
 11 that it wasn't unusual for Brodie to crash himself into
 12 the tub?
 13 A. No, it wasn't.
 14 Q. And what did you mean by crash himself
 15 into the tub?
 16 A. Him and Lilly were doing it that night. I
 17 have a big round bathtub in my bathroom and it's not
 18 deep, it's just round, and they'd climb up on the edge
 19 of it and slide, boom and laugh. They used it as a
 20 slide.
 21 Q. Is there much of a ledge around the
 22 circular tub?
 23 A. For them.
 24 Q. What would you estimate the width to be?
 25 A. You know, I don't estimate width well.

1 huge growth spurt.
 2 Q. And he had a habit of hitting his forehead
 3 into the granite countertops?
 4 A. I wouldn't call it a habit.
 5 Q. Well, it happened, correct?
 6 A. It happened, yes.
 7 Q. It happened with some degree of frequency,
 8 correct?
 9 A. What's frequent?
 10 Q. Well, at least when he'd spend those
 11 weekends there it would happen?
 12 A. Not every weekend.
 13 Q. You described how his lower legs always
 14 had bruises because he was so wild?
 15 A. Yeah.
 16 Q. In fact, you called him the bruiser?
 17 A. We called him the wild child. I also
 18 called him Bamm-Bamm and I called Lilly Pebbles like
 19 the Flintstones.
 20 Q. Now, counsel for the State had shown you
 21 some photographs earlier.
 22 A. Yes.
 23 Q. And it's your testimony of what appeared
 24 to be injuries on those photographs, you never saw any
 25 of that on your grandson on Sunday evening?

1 It's not something -- I mean, there was a spot that's
 2 like this wide.
 3 Q. All right.
 4 A. And there's a spot that's like this wide.
 5 As the corners are obviously very much wider of the tub
 6 than the edge right here.
 7 Q. And he would get up and stand on the edge
 8 and then slide into the bathtub?
 9 A. No. They'd sit on their butt.
 10 Q. And slide into the tub?
 11 A. Uh-huh. And then they'd yell boom.
 12 Q. And I assume the bath water would still be
 13 in the tub while they were still doing this?
 14 A. Not all of it.
 15 Q. Some of it would be splashed on the floor?
 16 A. Pretty much. I always kept towels on the
 17 floor.
 18 Q. Do you recall telling the detective about
 19 the granite countertops in the kitchen?
 20 A. Correct.
 21 Q. And that the height of the countertop was
 22 approximately the same height as the top of Brodie's
 23 forehead or his head?
 24 A. It was just a little bit higher than his
 25 temple. Right before this happened he went through a

1 A. No.
 2 Q. So not even the mark on the cheek that you
 3 referred to?
 4 A. There was a little mark on his cheek like
 5 his little fingertip size. But whatever was in the
 6 picture, that wasn't it. Those were -- it was like a
 7 yellowing little bruise the fingertip size on his
 8 cheek.
 9 Q. And was there any bruising on his arms or
 10 his legs that Sunday night?
 11 A. Not his arms. He could have had a few,
 12 you know, just on his lower legs I wouldn't be
 13 surprised because --
 14 Q. Because it was typical for Brodie to have
 15 bruises, right?
 16 A. On his lower legs.
 17 Q. That's what I'm speaking of.
 18 A. Yeah. He's a boy.
 19 Q. And he also would have bruises on his
 20 face, wouldn't he?
 21 A. From time to time.
 22 MR. McDONALD: Court's indulgence one
 23 moment.
 24 I'll pass the witness, Your Honor.
 25 MR. STANTON: Nothing further, Your Honor.

1 THE COURT: Can we excuse this witness?
 2 MR. McDONALD: As far as the defense is
 3 concerned.
 4 MR. STANTON: Same with the State, Judge.
 5 THE COURT: Thank you, ma'am. You are
 6 excused.
 7 MR. STANTON: State would call Danny Fico.
 8 THE CLERK: Raise your right hand.
 9 Do you solemnly swear to tell the truth,
 10 the whole truth and nothing but the truth, so help you
 11 God?
 12 THE WITNESS: Yes.
 13 THE CLERK: Please speak into the
 14 microphone, state your first and last name and spell
 15 each for the record.
 16 THE WITNESS: Danny Fico, D-a-n-n-y,
 17 F-i-c-o.
 18 MR. STANTON: May I begin, Your Honor?
 19 THE COURT: You may.
 20
 21 DANNY FICO,
 22 having been first duly sworn, did testify as follows:
 23 DIRECT EXAMINATION
 24 BY MR. STANTON:
 25 Q. Do you pronounce your last name Fico?

1 A. Yes.
 2 Q. And what do you do for a living?
 3 A. I manage a convenience store.
 4 Q. Where is that? What is the name and the
 5 location of that convenience store?
 6 A. America's Mart Shell, it's off of Cactus
 7 and Spencer, 1797 East Cactus.
 8 Q. Kind of off of the St. Rose Parkway as
 9 well?
 10 A. Yes. Right there.
 11 Q. What is your precise title at this place?
 12 A. Mine?
 13 Q. Yes.
 14 A. General manager.
 15 Q. Does Mr. Lee have an employment status
 16 with that same establishment?
 17 A. Yes, he worked there.
 18 Q. What did he do?
 19 A. He was the supervisor of the car wash.
 20 Q. And there is some car wash attendant to
 21 the convenience store?
 22 A. We have a full service car wash and
 23 everything there.
 24 Q. During the course of the month of June of
 25 this year I want to ask you about a couple events. You

1 A. Yes.
 2 Q. Mr. Fico, as you testify here today, sir,
 3 how old are you?
 4 A. Twenty-seven.
 5 Q. Do you know Michael Lee?
 6 A. Yes, sir.
 7 Q. Do you see him in court today?
 8 A. Yes.
 9 Q. Can you tell me what he's wearing and
 10 where he is in the courtroom?
 11 A. Red jumpsuit.
 12 Q. Where is he in the courtroom?
 13 A. Right over there.
 14 Q. Sitting at counsel table to my right, your
 15 left?
 16 A. Yes.
 17 MR. STANTON: May the record reflect
 18 identification of the defendant?
 19 THE COURT: It may.
 20 BY MR. STANTON:
 21 Q. How do you know Mr. Lee?
 22 A. I grew up with him my whole life since the
 23 age of five.
 24 Q. And as you testify here today would you
 25 consider yourself to be good friends with Mr. Lee?

1 and I have briefly spoke prior to your testimony here
 2 today; is that correct?
 3 A. Yes.
 4 Q. And you have also been contacted by
 5 detectives on a couple of occasions in this case?
 6 A. Yes.
 7 Q. First of all, Mr. Lee, have you as you
 8 testify here today suffered any felony convictions?
 9 A. I have, yes.
 10 Q. How many and for what and when?
 11 A. Three counts of robbery with use of a
 12 deadly weapon and one count of burglary with possession
 13 of a firearm from back in -- convicted in August of
 14 2002.
 15 Q. And you've expired or flattened that time,
 16 correct?
 17 A. Yes.
 18 Q. One of your co-defendants during that case
 19 was the defendant Mr. Lee?
 20 A. Yes.
 21 Q. Now, during the course of your being his
 22 supervisor -- would that be accurate?
 23 A. Yes.
 24 Q. -- did there come a time in June,
 25 specifically Monday or Tuesday before Brodie

1 Aschenbrenner's death, that you interacted with Brodie
2 and the defendant at your home?
3 A. At my home, yes.
4 Q. What day of the week was it?
5 A. Monday.
6 Q. If I represent to you that Brodie was
7 found deceased on Wednesday the 15th of June, would
8 you take my representation it would be accurate in your
9 memory that that would have been June 13th of this
10 year?
11 A. Yes.
12 Q. During the course of --
13 THE COURT: I'm sorry, counsel, I didn't
14 understand the question. Could you do that again.
15 MR. STANTON: Certainly. If he would take
16 my representation that if Brodie was found deceased on
17 June 15th, Wednesday, that the date that he would
18 have interacted with the defendant and Brodie would
19 have been Monday the 13th of June.
20 THE COURT: Okay.
21 BY MR. STANTON:
22 Q. You'd agree with that?
23 A. Yes.
24 Q. Can you tell me where you interacted with
25 Brodie and the defendant?

1 as his behavior?
2 A. He seemed fine. He was fine.
3 Q. There was no indication to you that he had
4 been injured or was in pain?
5 A. No.
6 Q. Did you see anything that you thought or
7 observed to be injuries on Brodie?
8 A. Yeah, he had some bruising on the face.
9 Q. Where were the bruising on his face?
10 A. I remember one under the chin, the cheek,
11 I believe the area on his forehead.
12 Q. Do you remember how many bruises there
13 were?
14 A. No, I don't remember how many. There was
15 a few, though.
16 Q. Do you remember how large the bruises
17 were?
18 A. Yeah, a little bit. They were around the
19 eye, what looked like a black eye, and the cheek was a
20 decent sized bruise.
21 Q. Did you ask or inquire of either the
22 defendant or of Brodie how those injuries came about?
23 A. I asked Arica, yes, how Brodie received
24 one of the bruises. I don't recall which day it was,
25 though.

1 A. We were at my house watching the Yankee
2 game.
3 Q. What time of the evening did you first see
4 them and when did they leave your home?
5 A. Probably around fiveish. The game started
6 at four and they got there right after.
7 Q. And how long did they stay at your home?
8 A. For the remainder of the game.
9 Q. Give me a time.
10 A. Whatever time the game ended. Around
11 sevenish.
12 Q. Would I be accurate in stating they were
13 there for several hours?
14 A. Yeah.
15 Q. Had you seen Brodie prior to that time?
16 A. Yes.
17 Q. Been around him?
18 A. Just saw him briefly in the morning,
19 earlier that morning.
20 Q. But prior to that day had you been around
21 Brodie before?
22 A. Yeah. I saw him almost every day most of
23 the time, yes.
24 Q. Now, my question next is what your
25 observations of Brodie were that Monday evening as far

1 Q. I am just speaking about Monday evening
2 when you were watching the game at the defendant's
3 home. Did you inquire of the defendant about the
4 injuries on Brodie?
5 A. No. I was mostly watching the game.
6 MR. STANTON: May I approach the witness?
7 THE COURT: You may.
8 BY MR. STANTON:
9 Q. Showing you three photographs, 2, 3 and 4,
10 and ask you to look at these photographs and tell me if
11 you observed any of these injuries on Monday evening.
12 And I am going to lay out to your far left and middle
13 and to your far right. Tell me if you recognize any of
14 those injuries. Once again I'm referring to Monday
15 evening.
16 A. Under the chin, the cheek.
17 Q. You pointed in Exhibit Number 3 --
18 MR. McDONALD: May I approach, Your Honor?
19 THE COURT: You may.
20 BY MR. STANTON:
21 Q. Why don't you just wait until counsel gets
22 up here and point to the bruise that you see in Exhibit
23 Number 3 that you saw Monday evening.
24 A. I believe it was the one on the cheek
25 right there.

1 Q. The right cheek you're pointing to?
 2 A. Yes.
 3 Q. Was it the same size and color as you
 4 observed that Monday evening?
 5 A. It was yellowish. It was yellowish and
 6 blue, yeah.
 7 Q. What other injuries in those three
 8 photographs do you recall seeing?
 9 A. There was multiple. I mean, I can't
 10 recall them all, but there was some on his forehead and
 11 there was multiple. Like four or five.
 12 Q. Do you see any of those in the photographs
 13 2 and 3 that depict the front of Brodie's face?
 14 A. Just mostly right up here and this one
 15 right under the chin.
 16 Q. So you're now pointing to Exhibit Number
 17 2, you're indicating down under his lower lip?
 18 A. Yes.
 19 Q. And you're also up in his hairline?
 20 A. Yes.
 21 Q. And once again you never asked the
 22 defendant how these injuries took place?
 23 A. No.
 24 Q. You indicated that Brodie was behaving in
 25 his normal fashion?

1 friend the defendant?
 2 A. Yes.
 3 Q. Did he ever mention to you or tell you
 4 leaving your home on Monday evening that Brodie was
 5 injured in any way?
 6 A. No.
 7 Q. Never said that?
 8 A. No.
 9 Q. The next day, Tuesday the 14th of June,
 10 did you have occasion to see Brodie along with his
 11 mother Arica?
 12 A. They came in that morning, Tuesday
 13 morning.
 14 Q. Do you recall what time it was Tuesday
 15 that he came in?
 16 A. I'm not sure of the time. It was in the
 17 morning time I believe.
 18 Q. Sometime in the morning?
 19 A. I believe so, yes.
 20 Q. When did you start your shift that day?
 21 A. Five in the morning probably.
 22 Q. Do you recall seeing Brodie with his
 23 mother inside your store?
 24 A. Yes.
 25 Q. Did you notice anything or make any

1 A. Yeah. He seemed fine.
 2 Q. Was there any incident that occurred at
 3 your home where Brodie was injured?
 4 A. No. Not that I can recall, no, sir.
 5 Q. Not that you can recall?
 6 A. No, not that I saw.
 7 Q. So at no point did Brodie scream, holler,
 8 some accident, something that occurred in your presence
 9 or while you were there?
 10 A. No.
 11 Q. Were you ever advised by the defendant
 12 that anything had occurred to Brodie while they were
 13 leaving your home?
 14 A. No.
 15 Q. Did you see him later on that week at
 16 work?
 17 A. Could you say that again.
 18 Q. Did you see the defendant later on that
 19 week at work?
 20 A. Wednesday.
 21 Q. Did you also see him socially?
 22 A. Yes. I saw -- well, he came in the store
 23 Monday and Tuesday.
 24 Q. And up until even today's date you've had
 25 numerous interactions and communications with your good

1 comment to his mother about Brodie's condition?
 2 A. I don't know if it was the Monday or the
 3 Tuesday. I'm not sure.
 4 Q. What did you say if anything to his
 5 mother?
 6 A. I recall just asking how he got one of the
 7 bruises.
 8 Q. Which bruise was it that was of concern to
 9 you?
 10 A. The one on the right cheek area.
 11 Q. And did you see that on Brodie with the
 12 mom in your store again just like you had Monday?
 13 A. Yes.
 14 Q. Was Brodie wearing a hat?
 15 A. Not a hundred percent sure. I can't
 16 remember if he was or not.
 17 Q. Do you recall what if anything Arica
 18 Brodie's mother said to you in response to your
 19 question about the bruise?
 20 A. She wasn't sure.
 21 Q. She wasn't sure?
 22 A. Yeah, she didn't know.
 23 Q. How much time did you spend in the
 24 presence of Brodie at work on this day?
 25 A. Maybe a couple minutes while they were

1 walking around the store.
 2 Q. Did you see the defendant there at all?
 3 A. Yes.
 4 Q. What was he doing?
 5 A. Buying stuff.
 6 Q. Did he ever go over to the car wash area
 7 to your knowledge?
 8 A. Yeah, most likely. He usually went there.
 9 Q. And then they left your store?
 10 A. Yes.
 11 Q. Now, when did you find out in relationship
 12 to that day when Brodie had been found deceased?
 13 A. I found out after Michael had left, his
 14 sister called me and told me.
 15 Q. That would have been the next day,
 16 Wednesday?
 17 A. Yes.
 18 Q. And did the defendant continue to work at
 19 your establishment?
 20 A. Yes.
 21 Q. How long did he work after this at your
 22 place of employment?
 23 A. After it happened?
 24 Q. Yes.
 25 A. He took a couple days off. I can't be

1 A. Yes.
 2 Q. At some point during that conversation of
 3 the tape did you mention to them the bruising incident
 4 with Brodie?
 5 A. No.
 6 Q. Why not?
 7 A. I just asked again what they wanted and
 8 they came and asked for surveillance and I gave it to
 9 them.
 10 Q. Did you think that was relevant or
 11 important for the detectives to know investigating
 12 Brodie's death?
 13 A. I didn't know any type of cause of death
 14 or anything. I was out of the loop about all that. I
 15 was just waiting to hear.
 16 Q. The detectives contacted you again after
 17 getting the videotape from you. Do you remember that?
 18 A. Yes.
 19 Q. How much time had elapsed between
 20 obtaining the videotape and when they contacted you
 21 again; do you recall?
 22 A. No, sir.
 23 Q. If I represent to you that would have been
 24 on July 6th, would that be accurate?
 25 A. It could be, yes.

1 exactly sure. He came back to work a couple days
 2 later.
 3 Q. And worked up until the time of his
 4 arrest?
 5 A. Yes.
 6 Q. Now, do you recall the day of June 16th
 7 interacting with any detectives from the Henderson
 8 Police Department?
 9 A. Yes.
 10 Q. And what if anything was the interaction
 11 on the 16th about?
 12 A. Asking about -- I can't recall exactly.
 13 It was in reference of this case.
 14 Q. Do you recall them coming to your store?
 15 A. Yes.
 16 Q. And they asked if you could pull something
 17 from your surveillance system?
 18 A. Yes.
 19 Q. What was it that they asked for?
 20 A. Taped time of when they were -- when
 21 Michael and Brodie were in the store I believe.
 22 Q. And when the defendant was in your store
 23 Tuesday by himself in the evening hours, correct?
 24 A. Yes.
 25 Q. And you provided that to them?

1 Q. That would have been approximately three
 2 weeks later?
 3 A. It could have been, yes.
 4 Q. Why did the police want to talk to you?
 5 What did they tell you?
 6 A. It was in reference about the case.
 7 Q. And what did you respond to them when they
 8 asked you that?
 9 A. I had nothing to say.
 10 Q. You didn't want to talk to them?
 11 A. No, sir.
 12 Q. Is there any particular reason why you
 13 didn't want to talk to him?
 14 A. I was trying not to get involved with it.
 15 MR. STANTON: Pass the witness.
 16 THE COURT: Counsel.
 17 MR. McDONALD: Yes, Your Honor.
 18
 19 BY MR. McDONALD: CROSS-EXAMINATION
 20 Q. Do you recall what days off Michael Lee
 21 had when he was working for you back in June of 2011?
 22 A. He had Monday, Tuesday.
 23 Q. Michael Lee came into the is it called
 24 America's Mart?
 25 A. Yes.

1 Q. On the morning of Monday, June 13th,
2 correct?
3 A. Yes.
4 Q. And did you know at that time that he was
5 on his way to the Whitney Ranch community pool?
6 A. Yes.
7 Q. And he purchased some ice?
8 A. Yeah. I don't remember what he purchased.
9 He purchased some things.
10 Q. Was Brodie with him?
11 A. Yes.
12 Q. Was Arica with him?
13 A. Yes.
14 Q. Was Brodie acting normal?
15 A. Yes.
16 Q. Was he crying, was he upset?
17 A. No.
18 Q. Did you notice those bruises that morning
19 that you identified when the prosecutor had those
20 pictures in front of you?
21 A. Yes.
22 Q. Do you recall approximately what time it
23 was that the three of them came into the store Monday
24 morning?
25 A. It was sometime in the morning. It would

1 Q. So do you recall approximately when
2 Michael Lee and Brodie arrived?
3 A. Yeah. It was a little bit after five I
4 believe. Around fiveish time.
5 Q. So the game had been on awhile before they
6 got there?
7 A. About an hour, I think so.
8 Q. When Michael and Brodie arrived did Brodie
9 have the same bruises that you saw earlier that day on
10 Monday morning?
11 A. Yes.
12 Q. Did you see Brodie eat?
13 A. Yes, he ate a plate of chicken parmesian.
14 Q. And what else did you see Brodie do, if
15 anything?
16 A. I was not really watching him. He was
17 being Brodie. I think he was playing with my two
18 nephews. I was mostly focused on watching the game.
19 Q. After the game was over did you go
20 anywhere?
21 A. Yes. We left and went over to his -- I
22 left by myself and went to his sister's house and Mike
23 and Brodie met me over there.
24 Q. So you went to Jennifer's house?
25 A. Yes.

1 have been after eight. I can't be sure. Sometime in
2 the morning.
3 Q. And why would it have to be after eight?
4 A. Because I know he wasn't there before
5 8:00. Usually when he comes, when he came it was at
6 seven and I know it wasn't that early.
7 Q. You contacted Michael Lee later in the day
8 in reference to the Yankee/Indian game being on
9 television, correct?
10 A. Yes.
11 Q. Did you invite Michael and Brodie over to
12 your residence to watch the game?
13 A. Yes.
14 Q. And there were other people present at
15 your residence, correct?
16 A. Yes.
17 Q. Your father?
18 A. Yes.
19 Q. Your father resides there?
20 A. Yes.
21 Q. And how many bedrooms in the apartment?
22 A. Two.
23 Q. And Michael's sister Jennifer was there?
24 A. Michael's sister Jennifer, her fiance John
25 and her two kids.

1 Q. Did your father go over?
2 A. No.
3 Q. Do you recall approximately how long you
4 were at Jennifer's house?
5 A. Not long. It was 10, 15 minutes and then
6 we left and went down to the gas station and dropped a
7 car off to my girlfriend and Mike gave me a ride home.
8 Q. So did Mike and Brodie follow you?
9 A. Yes.
10 Q. In Michael's car?
11 A. Yes.
12 Q. He lived in the same apartment complex,
13 correct?
14 A. Yeah. Same building, yes.
15 Q. When you got back from dropping the car
16 off to your girlfriend Brodie was still with the two of
17 you?
18 A. Yes.
19 Q. And did you observe those same bruises on
20 his face at that time?
21 A. Well, I wasn't really paying attention
22 that much, but I know he had the bruises.
23 Q. How long had you known Brodie?
24 A. Just when Mike met Arica.
25 Q. Approximately how long?

1 A. November of last year, December time.
 2 Probably November.
 3 Q. Besides that Monday morning, June 13th
 4 had you ever seen bruises on Brodie's face before?
 5 A. Yes.
 6 Q. Approximately how frequently?
 7 A. It seemed like he had them a lot. He was
 8 constantly having bruises.
 9 Q. After the three of you got back to the
 10 apartment complex and got out of the car did you see
 11 Brodie or Mike at all the rest of that evening?
 12 A. Basically said good night, I went upstairs
 13 to my apartment and he went up to his.
 14 Q. What about the next day, Tuesday,
 15 June 14th, you saw Mike and Arica and Brodie again at
 16 the store.
 17 A. Yeah, they were going to Shark Reef. They
 18 went into the store before they went.
 19 Q. How did you know they were going to Shark
 20 Reef?
 21 A. Michael told me that they were.
 22 Q. Do you recall whether or not Jackie was
 23 working that morning?
 24 A. Not sure. I'm not a hundred percent sure
 25 if she was. She most likely was. She usually works

1 those mornings.
 2 Q. How about Monday morning, do you recall if
 3 Jackie was there Monday morning?
 4 A. I believe so. She was probably there both
 5 those days. She usually worked Monday, Tuesday
 6 mornings.
 7 Q. What does Jackie do at the store?
 8 A. Works in the deli.
 9 Q. So she prepares food for sandwiches for
 10 people?
 11 A. Yeah.
 12 Q. When you saw Brodie on Tuesday morning did
 13 he still have the same bruises that you saw Monday
 14 night?
 15 A. Yeah, I believe so. Nothing looked
 16 different. That I can remember.
 17 Q. And that's at that point that you asked
 18 Arica about a particular bruise?
 19 A. Well, I don't know if it was Monday or
 20 Tuesday. I can't be honest.
 21 Q. And when you asked Arica her response was
 22 she didn't know?
 23 A. She didn't seem like she really knew.
 24 MR. MCDONALD: Court's indulgence.
 25 I'll pass the witness.

1 THE COURT: Counsel?
 2 MR. STANTON: Nothing further.
 3 THE COURT: Anything else from the
 4 defense?
 5 MR. MCDONALD: No, Your Honor.
 6 THE COURT: May we excuse the witness?
 7 MR. MCDONALD: As far as the defense is
 8 concerned.
 9 MR. STANTON: State would call Dr. Lisa
 10 Gavin.
 11 THE CLERK: Raise your right hand.
 12 Do you solemnly swear to tell the truth,
 13 the whole truth and nothing but the truth, so help you
 14 God?
 15 THE WITNESS: Yes.
 16 THE CLERK: Please speak into the
 17 microphone, state your first and last name and spell
 18 each for the record.
 19 THE WITNESS: I'm Dr. Lisa Gavin, L-i-s-a,
 20 G-a-v-i-n.
 21 MR. STANTON: May I begin, Your Honor?
 22 THE COURT: You may.
 23
 24
 25

1 LISA GAVIN,
 having been first duly sworn, did testify as follows:
 2
 3 DIRECT EXAMINATION
 4 BY MR. STANTON:
 5 Q. Dr. Gavin, how are you employed?
 6 A. I am a medical examiner at the Clark
 7 County coroner's office.
 8 Q. And have you received any specialized
 9 educational training to perform those functions at the
 10 coroner's office?
 11 A. Yes, I have.
 12 Q. Could you describe briefly your
 13 educational and your medical experience.
 14 A. Certainly. I received my medical degree
 15 at the University of Connecticut School of Medicine. I
 16 went onto a pathology residency program at Hartford
 17 Hospital also in Connecticut. I did a surgical
 18 pathology fellowship at Hartford Hospital.
 19 Then I went on to do specifically a
 20 forensic pathology fellowship and that was at the
 21 University of New Mexico office of the medical
 22 investigator and afterwards I came to be employed here
 23 at the coroner's office and I've been here for
 24 approximately two years.
 25 Q. Are you board certified in forensic

1 pathology?

2 A. I am not.

3 Q. What is forensic pathology?

4 A. It's essentially the study of suspicious

5 or unexpected deaths in which the medical examiner or

6 they are sometimes called forensic pathologists will

7 determine the cause and manner of death of an

8 individual.

9 Q. And how many times have you been involved

10 in the medical procedure to determine cause and manner

11 of death, often referred to as an autopsy, either as

12 the primary physician or an assisting capacity?

13 A. I have performed approximately 800

14 autopsies either through my training or through the

15 office where I currently work in total.

16 Q. You are a licensed physician in the state

17 of Nevada?

18 A. That is correct. I am licensed to

19 practice medicine in the state of Nevada, yes.

20 Q. I'd like to direct your attention to

21 June 16, 2011. Did you have occasion to conduct an

22 autopsy of a two-year-old infant by the name of Brodie

23 Aschenbrenner?

24 A. Yes.

25 Q. If I ask you your detailed pathological

1 material underneath the microscope.

2 Q. And so from that examination you

3 determined that the injury was recent in the time of

4 when Brodie expired?

5 A. Correct.

6 Q. Now, what was the transection of an organ

7 that you observed in the abdominal vault?

8 A. The duodenum extends from the stomach and

9 goes out through several loops of your small bowel and

10 eventually go into your colon and then fecal matter, if

11 you will, extends from there. The duodenum comes

12 directly after the stomach and it's a tube essentially,

13 and the tube was transected, in other words essentially

14 cut in half, and therefore all the contents that were

15 coming from the stomach would just empty up into the

16 abdominal cavity.

17 Q. Let me ask you in separate forms. Would

18 the dissection of the duodenum be an instantaneously

19 incapacitating injury to a two-year-old child?

20 A. There would be immediate pain, but the

21 contents going out into the abdomen eventually generate

22 this inflammatory response which in turn the acute

23 peritonitis and eventually cause the death. So it

24 could be minutes to hours rather than instantaneous.

25 Q. What would be the symptoms generally

1 diagnosis would you have an independent recollection of

2 that or would referring to your report assist you in

3 your testimony?

4 A. Referring to my report would assist me.

5 MR. STANTON: With the permission of the

6 court, Your Honor, may I have the witness refer to the

7 report if she needs to during the course of

8 examination?

9 THE COURT: Yes.

10 BY MR. STANTON:

11 Q. Doctor, could you please tell the court

12 what your diagnoses were of the condition of Brodie

13 Aschenbrenner and the basis for your opinions that you

14 derived during the course of your autopsy and testing

15 postmortem?

16 A. He had acute peritonitis due to duodenal

17 transection due to blunt force injury of the abdomen.

18 Q. Let me just stop you there. What is acute

19 peritonitis?

20 A. It's an inflammation of the lining of the

21 abdomen.

22 Q. And when you say "acute", what did that

23 mean to you in a medical term from your observation?

24 A. We base the acute on what types of

25 inflammatory cells are present when we look at the

1 speaking when a child of Brodie's age that one would be

2 able to observe after the transection of the duodenum?

3 A. Abdominal pain, possibly vomiting as well

4 as fever eventually.

5 Q. When you say "pain", a child obviously

6 would be manifesting in some sort of crying or

7 fussiness?

8 A. I could imagine.

9 Q. What about the appetite?

10 A. Usually it's limited. Decreased.

11 Q. And you indicated the transection of the

12 duodenum and what its function is anatomically is

13 actually what caused the cessation of Brodie's life?

14 A. The acute peritonitis resulting from that

15 which resulted from the blunt force injury. So the

16 sequence.

17 Q. Did you find in your report and did you

18 note items consistent with that transection of the

19 duodenum in the abdominal cavity?

20 A. The presence of the fluid, the kind of

21 brown fluid that was present in the abdominal cavity,

22 is an indicator of the transection and of course the

23 development of peritonitis suggests that in some way

24 the bowels have been disrupted.

25 Q. Now, what about the location of the injury

1 and the indication that it was blunt force trauma?
 2 A. The location of the duodenal where this
 3 was torn is essentially just anterior to the spinal
 4 cord. So in your abdomen, although your bowel is loose
 5 within the abdomen, there's a point anatomically and
 6 developmentally where it stays somewhat attached to the
 7 center. So right in the middle of your abdomen might
 8 be where you'd point to it like if you had like an
 9 upset stomach, for example. But it's not at the outer
 10 part of your body, it's where your outer part of your
 11 abdomen is, it's deeper than that against where the
 12 spinal cord is. So there's essentially a point where
 13 the bowel is attached at that point and if enough force
 14 occurs, it presses that bowel up against that area and
 15 actually can cause it to tear, to lacerate essentially.
 16 Q. Now, what type of other incidents do you
 17 as a pathologist encounter transections of duodenum in
 18 children or adults for that matter?
 19 A. A motor vehicle accident, any blunt force
 20 injury to the abdomen.
 21 Q. And you're talking about severe enough
 22 blunt force trauma that someone actually dies during
 23 that automobile accident?
 24 A. Correct.
 25 MR. STANTON: May I approach, Your Honor?

1 to the injury that you just testified to, and could you
 2 explain and point to on that photograph what we're
 3 looking at.
 4 A. Certainly. They can be a little
 5 disturbing to see. Here we have --
 6 MR. McDONALD: Your Honor, which exhibit
 7 is she --
 8 THE COURT: This is Number 10. Do you
 9 want to come up, Mr. McDonald?
 10 MR. McDONALD: Yes, sir.
 11 THE COURT: Both counsel can come up if
 12 you'd like.
 13 THE WITNESS: This is the body opened at
 14 autopsy. These are the intestines I was telling you
 15 about. This is the colon pulled back and retracted
 16 because it usually lays over the top of the intestines.
 17 And then right here is the area which has hemorrhage
 18 and bleeding around it and laceration of the mesenteric
 19 vessels.
 20 Moving onto Exhibit 11 it's a close-up of
 21 that. So here is the stomach, here is the laceration
 22 of those vessels that we saw in Exhibit 10. And then
 23 as we look closer the forceps is holding the duodenum
 24 which is the tube essentially, and then this probe is
 25 inside the other aspect of the tube that should be

1 THE COURT: You may.
 2 BY MR. STANTON:
 3 Q. Prior to your testimony today did you and
 4 I have a discussion about the photographs that were
 5 taken at the autopsy that was conducted in this case?
 6 A. Yes.
 7 Q. And did you provide me file numbers that
 8 are reflected and if you could look through State's
 9 Exhibits 2 through 11 in front of you right now and
 10 tell me if you recognize them?
 11 A. Yes.
 12 Q. Do they all accurately depict the
 13 condition of Brodie Aschenbrenner as you observed him
 14 during the performance of your autopsy?
 15 A. Yes.
 16 MR. STANTON: Move for the admission of 2
 17 through 11 in evidence.
 18 MR. McDONALD: We have no objection for
 19 purposes of preliminary hearing, Your Honor.
 20 THE COURT: They will be allowed admitted.
 21 (State's Exhibits 2 - 11 were admitted.)
 22 BY MR. STANTON:
 23 Q. Now, Doctor, the exhibit number is on the
 24 front of each photograph. Could you pick up those
 25 photographs, I believe it will be 11 and 10 that speak

1 attached to one another. So they've been lacerated,
 2 essentially transected at that point.
 3 MR. McDONALD: The blue, is this in the
 4 duodenum?
 5 THE WITNESS: The part of the forceps
 6 that's holding it up. So this is the duodenum, the
 7 tube.
 8 BY MR. STANTON:
 9 Q. Doctor, let me ask you whether or not you
 10 found any injuries to the abdominal torso area of
 11 Brodie Aschenbrenner that were consistent with blunt
 12 force trauma causing the injuries you just described?
 13 A. There is evidence of blunt force trauma on
 14 the torso, but they are not in the anterior aspect and
 15 that's actually not unusual for this type of
 16 transection injury that you don't see because there's
 17 enough give to the skin and the elasticity of the skin
 18 on the outside that the energy is essentially
 19 transferred inward and doesn't necessarily cause
 20 contusion to the skin or subcutaneous area in the
 21 abdomen.
 22 Q. Can you describe for me what other
 23 injuries you observed in the abdominal area that you
 24 noted in the autopsy of Brodie?
 25 A. Cutaneously on the right flank and the

1 right hip there's a contusion and also on his back
 2 there are several patterned abrasions as well as a
 3 patterned contusion and that's externally.
 4 Q. And when you say subcutaneously, you're
 5 indicating the bruising went below the skin or into the
 6 skin?
 7 A. Correct.
 8 Q. What other injuries were you able to note
 9 anatomically in the abdomen torso area of Brodie?
 10 A. The external or internal?
 11 Q. Both.
 12 A. Externally there is in the right upper
 13 back a patterned abrasion. On the right mid back is
 14 another semi circular patterned abrasion which consists
 15 of smaller abrasions that are separated from each other
 16 kind of in a semi circular pattern and then on the left
 17 back is a contusion that has areas of parallel pressure
 18 marks in it.
 19 And then internally there was also
 20 evidence that was reviewed by a radiologist that
 21 identified fractures of one of the ribs and possible
 22 older fractures of one of the ribs, both of which were
 23 on the left side.
 24 Q. And that would be the left eighth rib was
 25 a non-displaced fracture and that there was

1 irregularities depicted in the radiology of the fifth
 2 and sixth?
 3 A. That's correct.
 4 Q. During the course of your autopsy did you
 5 make any note of any injuries in the head area of
 6 Brodie both externally and internally?
 7 A. Yes.
 8 Q. What were the findings that you observed
 9 in those areas?
 10 A. There were contusions in various states of
 11 healing on his forehead near his hairline. There were
 12 abrasions present on his lips as well as on his nose.
 13 He had a contusion on his cheek, and when I looked at
 14 the scalp -- we peel back the scalp to look at the
 15 injury underneath -- he had what we call subscalpular
 16 and subgaleal hemorrhage. And the scalp, as it peels
 17 off, there's also a thin layer of fibrous tissue that
 18 rests on the skull itself and that's called the galeal
 19 and sometimes when you have injury you can have
 20 hemorrhage in that location. And so he had extensive
 21 hemorrhage that was partly clotting over at least the
 22 right side and part of the left side of his head.
 23 Q. And did you make any findings about the
 24 condition of Brodie's brain itself?
 25 A. At that point seeing the injury I chose to

1 take the brain and send it to a specialist, a
 2 neuropathologist. So although intracranially I didn't
 3 see acute blood and I didn't see subarachnoid
 4 hemorrhage, there are injuries that can occur at a
 5 microscopic level that a specialist can review and that
 6 was in fact identified.
 7 Q. In fact, from the results of that
 8 subsequent testing that you reviewed when it came back
 9 to your office and before your report was finalized and
 10 signed by you?
 11 A. Correct. I usually will take a summary
 12 piece of whatever highlight conclusion the
 13 neuropathologist came to and add it in as part of the
 14 diagnosis where it's appropriate.
 15 Q. In layperson's terms your assessment of
 16 the injuries to Brodie's head was that he had
 17 hemorrhaging in both the left and right hemisphere of
 18 his head?
 19 A. It's on top of the skull, though. It's
 20 not intracranial.
 21 Q. Did you determine that the brain itself
 22 had been swollen?
 23 A. Correct.
 24 Q. And why or how does that occur regarding
 25 the trauma external and the fact that the brain had

1 swelling inside as well?
 2 A. The blunt trauma that occurred to the
 3 outside of the brain obviously caused the injury that
 4 we're talking about in terms of the subscalpular and
 5 the subgaleal hemorrhage. The injury itself causes
 6 enough inertia such that the brain being the soft item
 7 inside of a hard skull can move around inside of there
 8 and cause actually what's called like a rotational
 9 injury and that rotational injury can cause damage to
 10 the neurons that are present within the brain that can
 11 be seen microscopically rather than grossly upon just
 12 visualizing the brain.
 13 Q. Let me go to the next area of your report
 14 about blunt force injuries of the head and neck outside
 15 of the scalp you just described. Were you able to
 16 determine in an anatomical fashion where there were
 17 blunt force contusions on Brodie's head and neck?
 18 A. I mentioned where they are specifically.
 19 There's some contusions on the left forehead, the left
 20 cheek, there's some abrasions also present, and then
 21 there's a lot of the galeal hemorrhage that's really on
 22 both sides but a little more prominent on the right
 23 than the left.
 24 Q. And you had an indication in your report
 25 about the clotting of these. Do you recall that?

1 A. Yes, the early clotting.
 2 Q. What did that mean to you regarding the
 3 time of these injuries?
 4 A. To me these injuries are a little older
 5 than the injury to the abdomen.
 6 Q. Now, if you could, under subsection five,
 7 letter F in your pathological diagnosis, there was a
 8 pressure mark on the right ear. Can you tell me about
 9 that?
 10 A. Yes. On the right ear and the left there
 11 appeared to be pressure marks present.
 12 Q. What do you mean by pressure marks?
 13 A. It appears that there was a change in the
 14 livor pattern that was there. Livor mortis is when the
 15 blood pools, the blood settles into the body, it'll
 16 settle in the most dependent portions where the body is
 17 laying at the time and within that there appeared to be
 18 marks that were absent of having that livor area and a
 19 possible abrasion, but because it was in the livor it
 20 was a little difficult to discern that.
 21 Q. What gave you the idea or the impression
 22 medically that you determined them to be pressure
 23 marks?
 24 A. Because there's an absence of the livor in
 25 those areas and with that there was a question of an

1 abrasion on one of them.
 2 Q. Let me ask you about the frenulum. First
 3 anatomically where is that on our bodies?
 4 A. As you lift up your lips up or down and
 5 you look in the mirror, between your gum and your teeth
 6 there's a tiny piece of tissue that's there between the
 7 two and that's called the frenulum.
 8 Q. And what was the condition of Brodie's
 9 frenulum?
 10 A. There was a hole in it. So it goes up and
 11 down and if you look through it side to side there was
 12 a hole in it and a little bit of hemorrhage adjacent to
 13 it. However, it wasn't an acute laceration so it
 14 suggests an injury did occur because it's supposed to
 15 be intact and whole, but it probably occurred at
 16 another point in time.
 17 Q. Could you tell how long prior to his death
 18 that that occurred?
 19 A. I could not.
 20 Q. And there's a number of other injuries of
 21 his other extremities, his arms, his legs, hips,
 22 thighs, lower legs and feet?
 23 A. There are contusions and abrasions, some
 24 of the abrasions have crusting on them, scabbing that
 25 occurred. So they are in various states of healing.

1 Q. Now, what did you determine as far as the
 2 cause of death in this case?
 3 A. The cause of death was the acute
 4 peritonitis due to the duodenal transection due to the
 5 blunt force injury of the abdomen.
 6 Q. Dr. Gavin, what's the manner of death?
 7 A. The manner of death is homicide.
 8 Q. Why did you come to that conclusion?
 9 A. These injuries are not what you see in an
 10 accident situation for a two-year-old child. The
 11 amount of energy or blunt force it would take to
 12 transect the abdomen is closer to that you'd see in a
 13 car accident than just a child falling --
 14 Q. And, Dr. Gavin --
 15 A. -- for example.
 16 Q. -- when you made the determination of
 17 homicide you're making that assessment of the nature,
 18 that is the recency of these injuries, the number of
 19 frequency and the total exam; is that correct?
 20 A. Correct.
 21 Q. And that your opinion from a medical
 22 degree of certainty that the injuries that caused
 23 Brodie's death were non-accidental in nature?
 24 A. In my opinion.
 25 MR. STANTON: Pass the witness.

1 THE COURT: Counsel.
 2
 3 BY MR. McDONALD: CROSS-EXAMINATION
 4 Q. Doctor, you mentioned that you're not a
 5 board certified forensic pathologist.
 6 A. That's correct.
 7 Q. What does it take to become a board
 8 certified forensic pathologist?
 9 A. There's an examination.
 10 Q. Now, you've worked here at the Clark
 11 County coroner's office for you said approximately two
 12 years?
 13 A. Correct.
 14 Q. Approximately how many autopsies have you
 15 done at our coroner's office here in Clark County?
 16 A. Last year was 292 autopsies and I'm not
 17 sure what the quote is this year yet. It's probably
 18 similar in over 200, 250 perhaps.
 19 Q. Those are all you did yourself?
 20 A. Oh, yes.
 21 Q. Now, you talked about the blunt force
 22 trauma to transect the duodenum, correct?
 23 A. Correct.
 24 Q. Are you able to tell from the autopsy
 25 whether that blunt force, if indeed there was force

1 pressed upon, did it come from the front or the back?
 2 A. It's hard to tell the direction. It's
 3 less likely that it came from directly from the back.
 4 It's more likely it came from the front or the sides.
 5 Q. The front or the sides?
 6 A. Uh-huh.
 7 Q. But you didn't see any evidence of injury
 8 to the skin in the abdominal area?
 9 A. It's not uncommon that that's the true --
 10 Q. I'm just asking you didn't see any?
 11 A. That is correct.
 12 Q. And it's your opinion that it takes a
 13 tremendous amount of force to cause the damage that you
 14 saw?
 15 A. Correct.
 16 Q. Force consistent with an automobile
 17 accident is what you said?
 18 A. It can be close to that significant, that
 19 is what I said.
 20 Q. Now, you also talked about contusions that
 21 were in various stages of healing, correct?
 22 A. Correct.
 23 Q. Could you tell us here today -- and if you
 24 have to review the photographs you can -- do you have
 25 any idea when those contusions occurred?

1 A. Possibly.
 2 Q. Well, go ahead and do so.
 3 A. They look like they're relatively recent.
 4 Q. And recent as in three, four days ago?
 5 A. It could be.
 6 Q. It could be four days ago?
 7 A. It could be. It could be sooner.
 8 Q. Or sooner?
 9 A. Uh-huh.
 10 Q. What about the right hip?
 11 A. It looks approximately the same.
 12 Q. It could be up to four days ago?
 13 A. Up to.
 14 Q. Four days prior to the --
 15 A. Death. To death.
 16 Q. Now, you also talked about -- and I can't
 17 pronounce all these words -- subscalpular?
 18 A. Correct.
 19 Q. And that I assume is up in the hairline
 20 area?
 21 A. Actually it can be anywhere underneath
 22 your skin on your skull.
 23 Q. Okay. So on the head. And you found
 24 those all over the skull or in a specific area?
 25 A. It was all over the skull but greater on

1 A. The various ones on the body?
 2 Q. Yes.
 3 A. No. It's hard to date a contusion
 4 specifically.
 5 Q. Could a contusion last for a week?
 6 A. They would be in usually a different
 7 shade, a different color if they've been there for a
 8 week's time --
 9 Q. Well, you said usually.
 10 A. Yes.
 11 Q. You had no prior history with this
 12 individual, correct?
 13 A. Correct.
 14 Q. You don't know how long it took for his
 15 body to process a contusion so to speak?
 16 A. Correct.
 17 Q. So could some of those contusions on his
 18 body had been there longer than a week?
 19 A. Possibly.
 20 Q. What was the injury to the right flank?
 21 A. A contusion.
 22 Q. Was it in a stage of healing?
 23 A. I don't recall.
 24 Q. If you could review those exhibits or your
 25 report would that help you refresh your recollection?

1 the right than other areas.
 2 Q. Greater on the right?
 3 A. Side of the head.
 4 Q. And again those injuries, could those
 5 injuries have occurred up to four, five days prior to
 6 his demise?
 7 A. No. I looked at those histologically and
 8 those are probably about 24 hours before his demise.
 9 Approximately.
 10 Q. Okay. You said histologically.
 11 A. Uh-huh.
 12 Q. Can you put that in layman's term?
 13 A. Under the microscope.
 14 Q. So you did say something about looking at
 15 the cells under the microscope?
 16 A. Correct.
 17 Q. And what were you looking for?
 18 A. In this case you look for the presence of
 19 red blood cells, you look for the presence of
 20 macrophages, and those cells, whether or not the red
 21 blood cells are starting to clot and break down,
 22 whether or not the macrophages are present and have any
 23 iron present in them, those help you indicate timing.
 24 Because we know the sequence of events that it takes
 25 for different types of cells in the body to come out to

1 try to heal injury that's occurred.
 2 Q. And that's standard for every person, that
 3 timeline?
 4 A. It's what's been documented in all of our
 5 textbooks. So it's a standard approach. The timing of
 6 those different ones has been argued.
 7 Q. Okay. So there isn't a total agreement
 8 then on the timing?
 9 A. There's a standard text in terms of when
 10 those particular cells come out.
 11 Q. All right. So based upon that you
 12 determined those injuries to be how old?
 13 A. Approximately 24 hours.
 14 Q. Approximately 24 hours from the time of
 15 demise?
 16 A. Correct.
 17 Q. Now, you sent was it the brain or part of
 18 the brain to a neurological pathologist?
 19 A. I sent the entire brain to a
 20 neuropathologist.
 21 Q. Is that somebody outside the Clark County
 22 coroner's office?
 23 A. Yes.
 24 Q. Who did you send it to?
 25 A. Dr. Bennett Omalu.

1 Q. Is he in Clark County?
 2 A. No.
 3 Q. Where is he?
 4 A. He's located in California.
 5 Q. Bennett Omalu?
 6 A. Yes.
 7 Q. Do you know how to spell Omalu?
 8 A. O-m-a-l-u.
 9 Q. Southern California, northern?
 10 A. I'm not sure.
 11 Q. You don't know the city he is in?
 12 A. We have that information at the office if
 13 you need it.
 14 Q. Okay. So you sent him the brain, the
 15 entire brain?
 16 A. Yes.
 17 Q. So you weren't present when he did any
 18 testing on it?
 19 A. He sends off his sections that he chooses
 20 to take to his laboratory and then will examine those
 21 microscopic sections and then generate his report.
 22 Q. So your office didn't do any of that
 23 testing?
 24 A. Not the sectioning or the special stains
 25 or the staining of any of the slides.

1 Q. So only one lab looked at it?
 2 A. As far as I'm aware.
 3 Q. Okay. As far as you had written in your
 4 report that there was brain trauma, correct?
 5 A. Correct.
 6 Q. And how did you reach a conclusion whether
 7 that occurred?
 8 A. The blunt force injury to the head with
 9 the subscalpular hemorrhage that I looked at underneath
 10 the microscope.
 11 Q. So you said there were several contusions
 12 on the head.
 13 A. Correct.
 14 Q. Now, did you take samples from all of
 15 those and look under the microscope?
 16 A. No.
 17 Q. Which ones did you look under the
 18 microscope at?
 19 A. The galeal hemorrhage and the subscalpular
 20 hemorrhage directly.
 21 Q. Those are the only ones you analyzed under
 22 the microscope?
 23 A. Correct.
 24 Q. So it's your opinion that the blunt force
 25 trauma that caused the transection of the duodenum,

1 could that have occurred 48 hours or more prior to time
 2 of death?
 3 A. No.
 4 Q. All right. What do you base that upon?
 5 A. Looking at it under the microscope and
 6 seeing what cells are present at the time that I took
 7 the sections which is at the time of death essentially.
 8 At or around the time of death.
 9 Q. So you said the cells that come out, they
 10 come out at a rate, a standard rate.
 11 A. It's scientific evidence that has been
 12 generated what the sequence is that these cells come
 13 out to protect the body.
 14 Q. Did anybody else review your findings
 15 before you wrote your report?
 16 A. All of our cases are reviewed as overall Q
 17 and A, but they don't go through the slides, the other
 18 doctors, they don't go through all the other details.
 19 We just discuss the cases.
 20 Q. With the other forensic pathologists?
 21 A. Correct.
 22 Q. What did you preserve for a future
 23 testing; do you recall?
 24 A. The toxicology? Is that what you're
 25 referring to?

1 Q. No. Did you preserve any of the matter,
2 material that you analyzed?
3 A. Yes. In terms of the slides.
4 Q. And those were kept at your office?
5 A. The slides are at our office, yes.
6 Q. You talked about a fracture to a rib?
7 A. Correct.
8 Q. You wrote that in your report?
9 A. From the forensic -- well, from the
10 radiologists, rather.
11 Q. You're not a radiologist?
12 A. That's correct.
13 Q. So your office took x-rays and then the
14 radiologist comes in and reviews them?
15 A. Correct.
16 Q. Are you able to tell me based upon your
17 medical training how old that injury was?
18 A. No.
19 Q. Can anybody tell us how old that injury
20 was?
21 A. The radiologist based on his experience
22 may be able to tell you that from looking at the
23 radiographs.
24 Q. And then there was at the fifth and sixth
25 rib, you noted it in your report, correct?

1 last name. But I note it when they're present and I
2 note it in my report.
3 Q. And do you gather information from the
4 detectives prior to starting the autopsy?
5 A. It usually occurs simultaneously when
6 we're working on the case.
7 Q. So while you're actually conducting the
8 autopsy?
9 A. So we'll get a morning report where we'll
10 hear about what the background is and why the case was
11 brought in and the detective won't be there for that,
12 that's based on our investigator information. And the
13 detective may be present at the autopsy, they usually
14 are, and then if I have questions or he has questions,
15 we can talk back and forth at that time.
16 Q. Do you recall if either the detective or
17 the captain asked you any questions during the autopsy?
18 A. I don't remember what questions may or may
19 not have occurred at that time. It's possible.
20 Q. Do you dictate the autopsy report as
21 you're performing it?
22 A. No, I don't do it as I'm performing it.
23 After I finish I dictate my case.
24 Q. All right. Did the detective tell you or
25 did the captain tell you that the child had been in a

1 A. Again from the radiologist's consultation.
2 Q. So you didn't review any x-rays yourself?
3 A. I looked at the x-rays and given the
4 nature of the case I decided that a consultation would
5 be necessary.
6 Q. But you're not able today to sit here and
7 tell us when that occurred?
8 A. Correct.
9 Q. Are you able to tell us whether those
10 fifth and the sixth occurred simultaneously or at
11 different times?
12 A. No, I'm not.
13 Q. Would a radiologist be able to tell us?
14 A. I'm not certain.
15 Q. Did you take the exam to become board
16 certified here in Nevada?
17 A. No, you don't take it in Nevada. You take
18 it in Tampa and I haven't taken it.
19 Q. Performing the autopsy did you have any
20 conversations with any representatives of law
21 enforcement, the Henderson Police Department prior to
22 conducting the autopsy?
23 A. They are present at the autopsy and two of
24 them were present, Detective Collins and I believe it
25 was a captain that was present as well, I forgot his

1 motor vehicle accident within three weeks of his
2 demise?
3 A. Yes. I don't remember if it was the
4 detective that told me or I found that out through my
5 investigator, but I was aware that the child had been
6 in an accident.
7 Q. Did you review any of the reports from the
8 accident?
9 A. Yes.
10 Q. What did you review?
11 A. I believe it was an incident report and
12 also the pediatrician visit.
13 Q. You reviewed the incident report?
14 A. I believe so.
15 Q. Do you recall anything about the incident
16 report?
17 A. I remember that he was in a car seat but
18 that's what I remember.
19 Q. Do you recall that the mother represented
20 that the car seat was broken as a result of the
21 accident?
22 A. Yes, I recall as you're saying that.
23 Q. The pediatrician, you reviewed
24 pediatrician reports?
25 A. Correct. The records that were sent to me

1 by the pediatrician.
 2 Q. Do you know if you were sent all the
 3 records?
 4 A. I don't know. We request all them, we
 5 subpoena that information and I assume that they sent
 6 them.
 7 Q. Did anyone tell you that the victim had
 8 pulled down the curtain and the rod had struck him in
 9 the back?
 10 A. I heard that I think again either from our
 11 investigator or the detective what I'd known about
 12 that.
 13 Q. Did you ever see the rod or the curtains?
 14 A. No.
 15 Q. Could that have --
 16 A. The picture of the rod or the curtains
 17 could be in our investigative. I don't recall it off
 18 the top of my head.
 19 Q. Could that curtain rod have caused the
 20 parallel lines as you saw on the back?
 21 A. I haven't seen them precisely so I'd have
 22 to match them up to compare them. So to my
 23 recollection I don't remember that curtain rod, but if
 24 I look at the pictures again I probably could make a
 25 comparison and decision based on that.

1 necessarily matter the size of the hole. It's the fact
 2 that the contents themselves are going into the
 3 abdominal cavity and it's the response --
 4 Q. Well, the size of the hole --
 5 MR. STANTON: Objection, Your Honor.
 6 Counsel is asking the question before the witness is
 7 finished answering.
 8 MR. McDONALD: I'm sorry.
 9 THE COURT: Okay. Wait until she
 10 finishes.
 11 BY MR. McDONALD:
 12 Q. I apologize. Go right ahead.
 13 A. It doesn't matter the size of the hole,
 14 it's the fact of the abdominal contents going into the
 15 cavity and that's causing the peritonitis and it's that
 16 reaction that ends up making the person sick.
 17 Q. Well, wouldn't the size of the hole
 18 regulate the amount of matter that is emptying into the
 19 abdominal cavity?
 20 A. The amount that gets into the abdominal
 21 cavity isn't relevant either because it's the reaction
 22 to something that's not supposed to be there that
 23 causes the problem that causes the peritonitis that
 24 causes the death.
 25 Q. So it's not uncommon for someone to have

1 Q. Could the motor vehicle accident have
 2 caused a partial tear to the duodenum?
 3 A. A motor vehicle accident can cause that.
 4 But the timing is off in this particular case.
 5 Q. It can cause it to partially tear, not
 6 transect fully?
 7 A. It can cause a partial tear but there
 8 would be symptoms at that time.
 9 Q. Could it be symptoms like an upset
 10 stomach?
 11 A. They can have an upset stomach.
 12 Q. It would be like flu-like symptoms?
 13 A. It's possible.
 14 Q. And then as the partial tear -- the way I
 15 understand it is that matter instead of processing out
 16 it's coming from the stomach into the abdominal cavity?
 17 A. Yes. It doesn't even go into -- he
 18 wouldn't necessarily have normal bowel movements. He
 19 would be vomiting, he wouldn't want to eat.
 20 Q. Depending on the extent of the --
 21 A. Well, it's the peritonitis that develops
 22 regardless about the size of the transection. People
 23 can get it from diverticula and they can develop
 24 peritonitis and it can be very painful with abdominal
 25 distension. It happens very quickly. It doesn't

1 peritonitis for in excess of two weeks before expiring?
 2 A. They can have it for -- that's correct,
 3 but they're usually sick, a fever, abdominal pain, not
 4 eating, could be vomiting, may not have normal bowel
 5 movements.
 6 Q. And those are some of the symptoms that a
 7 person may have, correct?
 8 A. That's correct.
 9 Q. They wouldn't necessarily have to have all
 10 those symptoms?
 11 A. Usually they have a majority of them.
 12 Q. And that comes from just your education
 13 from the text books?
 14 A. Education. I have seen that when I was in
 15 medical school. I have seen people with peritonitis
 16 present. I've seen children with peritonitis present.
 17 I've seen adults die from peritonitis as well as
 18 children.
 19 Q. You don't necessarily have to have as you
 20 mentioned a transection of the duodenum to incur
 21 peritonitis?
 22 A. That's correct.
 23 Q. It can happen from problems with your
 24 pancreas?
 25 A. That's correct.

1 Q. How about your gall bladder?

2 A. Correct. It can do that with the gall

3 bladder as well.

4 Q. A fracture of the ribs, fracture of the

5 rib, what symptoms would a person typically have from

6 that?

7 A. It depends on the person, it depends on

8 the extent of the fracture. If this was a

9 non-displaced fracture that he's discussing they may

10 have pain localized. If it's a displaced fracture they

11 may have more severe symptoms.

12 Q. Now, the radiologist determined it was a

13 non-displaced?

14 A. Correct.

15 Q. Were you advised by anyone that

16 approximately four to five days prior to his demise

17 that he was riding on a battery operated quad, went off

18 the curb and allegedly hit his face into an automobile?

19 A. I don't recall that.

20 Q. Nobody ever told you that, gave you that

21 information?

22 A. I don't recall it.

23 Q. Would it be something that you would put

24 in your report if someone did tell you?

25 A. I usually leave some of that material to

1 line is.

2 Q. Like blunt force trauma?

3 A. It's possible.

4 Q. Did you estimate an age of that injury?

5 A. I did not.

6 Q. Are you able to?

7 A. I'm not.

8 Q. Is anybody capable of doing that?

9 A. I don't know.

10 Q. You reviewed the pediatrician's reports or

11 files?

12 A. What I was given.

13 Q. What you subpoenaed, correct?

14 A. What was given to me by subpoena.

15 Q. And that there was an indication that this

16 child bruised a lot or bruised easily?

17 A. Yes.

18 Q. Did that cause you any concern?

19 A. He did what I feel to be the proper

20 evaluation, he looked at the platelet levels and he

21 looked at some clotting information to see whether or

22 not there was any kind of abnormality. It's what I

23 know to be a preliminary investigation of that issue

24 and all of that seemed to be within normal limits.

25 Q. But there's other testing that can be

1 the investigative reports. Occasionally I'll take

2 pieces of that and put it into the summary, but it may

3 or may not. I don't know whether I would have chose to

4 put it in or not.

5 Q. All right. It's been testified here that

6 the victim here had a habit of biting his lower lip.

7 Would that have caused the injury that you were

8 speaking about earlier?

9 A. He has one abrasion just beneath his lower

10 lip and that could be from his teeth pressing on the

11 lower lip as he's biting his lip.

12 Q. Okay. You also talked about the part that

13 had a hole in it?

14 A. The frenulum takes a lot of pressure to be

15 able to do that and you can't get your frenulum in

16 between your teeth.

17 Q. Right. No, I'm not talking about that.

18 I'm just saying you said it takes a lot of pressure.

19 A. Yes.

20 Q. So if I pulled I guess on my upper or

21 lower lip, that's a type of pressure that you're

22 talking about?

23 A. No. It's usually like a smothering

24 situation or some kind of force of the lip being

25 pressed up against the jaw at that point where the gum

1 done, correct?

2 A. There are some other tests that could have

3 been done.

4 Q. But this was just preliminary testing?

5 A. My impression. I'm not a clinician, but

6 that's my impression.

7 Q. Of the 800 or so autopsies that you've

8 done how many involve the transection of the duodenum?

9 A. I have only seen a couple cases and I've

10 only done this case.

11 Q. This is the first one you did yourself?

12 A. Myself.

13 MR. McDONALD: I'll pass the witness, Your

14 Honor.

15 REDIRECT EXAMINATION

16 BY MR. STANTON:

17 Q. What is hypoxia?

18 A. That means lack of oxygen.

19 Q. Was that a contributing factor to Brodie's

20 death?

21 A. It was noted to be present, but it was

22 superseded in my opinion by the acute peritonitis and

23 all the other injuries we've been discussing.

24 Q. And the hypoxia was due to the swollen

25 brain?

1 A. Yes.
 2 Q. Now, counsel asked you about the review of
 3 pediatrician records, that is the ABC Pediatrics, the
 4 treating pediatric group of physicians that treated
 5 Brodie during his life?
 6 A. I don't know the organization that the
 7 pediatrician belongs to so I assume given that we
 8 subpoenaed his pediatrician that that was the one who
 9 was caring for him in his life.
 10 Q. And those records reflect the mother
 11 presented Brodie soon after the automobile accident
 12 that counsel referred to and that the doctors found no
 13 injuries to Brodie of note at all regarding that car
 14 accident?
 15 A. That's correct.
 16 MR. STANTON: Nothing further.
 17
 18 RE-CROSS EXAMINATION
 19 BY MR. McDONALD:
 20 Q. You don't know what type of examination
 21 the doctor did on that date, correct?
 22 A. I do not.
 23 MR. McDONALD: No further questions, Your
 24 Honor.
 25 MR. STANTON: Nothing further.

1 MR. McDONALD: No, Your Honor.
 2 THE COURT: Thank you.
 3 MR. STANTON: May this witness be excused?
 4 THE COURT: Yes.
 5 MR. STANTON: State would call Arica
 6 Foster.
 7 THE COURT: Those are proposed?
 8 MR. STANTON: These have been admitted.
 9 THE CLERK: Raise your right hand.
 10 Do you solemnly swear to tell the truth,
 11 the whole truth and nothing but the truth, so help you
 12 God?
 13 THE WITNESS: Yes.
 14 THE CLERK: Please speak into the
 15 microphone, state your first and last name and spell
 16 each for the record.
 17 THE WITNESS: Arica Foster, A-r-i-c-a,
 18 F-o-s-t-e-r.
 19 MR. STANTON: May I begin?
 20 THE COURT: Yes.
 21
 22
 23
 24
 25

1 THE COURT: I have a question. What's
 2 done to preserve the evidence that you look at on
 3 the -- are there microscopic photos taken or anything
 4 of the cells that you look at to preserve it?
 5 THE WITNESS: I have not taken photos.
 6 Once we take the tissue from the body we put it in a
 7 fixative and then we also can take, once it's in that
 8 fixative, and put it into the literally small plastic
 9 cassettes. Those cassettes themselves are transported
 10 under chain of custody to Quest Laboratories where they
 11 embed them and generate the glass slides that we would
 12 look at under the microscope. So once they generate
 13 those glass slides those are again maintained in
 14 custody, chain of custody, brought to us and then we
 15 review them under our microscope.
 16 FURTHER REDIRECT EXAMINATION
 17 BY MR. STANTON:
 18 Q. So when you say "fixative", that's some
 19 kind of --
 20 A. Basically it takes out the water and puts
 21 in something to make more solid, the tissue more solid
 22 so that you can cut a thin piece to put on the glass
 23 slide.
 24 THE COURT: Any other questions?
 25 MR. STANTON: No, Your Honor.

1 ARICA FOSTER,
 2 having been first duly sworn, did testify as follows:
 3 DIRECT EXAMINATION
 4 BY MR. STANTON:
 5 Q. Miss Foster, as you testify here today how
 6 old are you?
 7 A. Twenty-four.
 8 Q. And you are Brodie's mother?
 9 A. Yes.
 10 Q. Do you recognize Michael Lee in the
 11 courtroom today?
 12 A. Yes.
 13 Q. Could you please tell me where he is in
 14 the courtroom and an article of clothing that he's
 15 wearing this afternoon?
 16 A. He's on the left-hand side wearing a red
 17 T-shirt.
 18 MR. STANTON: May the record reflect the
 19 identification of the defendant?
 20 THE COURT: It shall.
 21 BY MR. STANTON:
 22 Q. When did you first meet the defendant?
 23 A. In October.
 24 Q. Of last year?
 25 A. Yes, sir.

1 Q. And at some point after that did you begin
2 a relationship with him?
3 A. That's correct.
4 Q. And at some point did he move in with you
5 and your son Brodie?
6 A. Yes.
7 Q. When did that occur?
8 A. February of last year. February.
9 Q. Of this year?
10 A. Yes.
11 Q. And did you guys collectively, the
12 defendant, your son and yourself, live somewhere here
13 in the valley?
14 A. Yes.
15 Q. Where did you live?
16 A. On Sunridge Heights Parkway.
17 Q. And what was the name of the apartment
18 complex?
19 A. Avalon.
20 Q. And did you live in a particular building
21 and apartment?
22 A. Yes.
23 Q. What was that?
24 A. 2900 Sunridge Heights, apartment 1416.
25 Q. I want to direct your attention to the

1 Sunday before Brodie's death. Did you have occasion to
2 drop your son off or have cause to have him dropped off
3 at your mother's house?
4 A. The Sunday before did I drop him off?
5 Q. Yes. The Sunday of that week.
6 A. I picked him up.
7 Q. I'm sorry. You picked him up. When did
8 you drop him off there?
9 A. On Saturday morning.
10 Q. And what time on Saturday did you drop him
11 off?
12 A. Around 10:30 or 11:00 a.m.
13 Q. And what time did you pick him up Sunday
14 evening?
15 A. We left my mom's about 7:00, 7:30.
16 Q. Did you have occasion to observe Brodie
17 that evening, that is Sunday evening, either at your
18 mom's house or at your home when you got home?
19 A. Yes.
20 Q. And how was Brodie physically and how was
21 he acting?
22 A. He was fine. He was happy, glad to be
23 home.
24 Q. Did you see any signs of injury about his
25 person that Sunday evening?

1 A. No. He had a little chapped lip,
2 underneath his lip was a little bit chapped.
3 Q. And you're pointing to your lower lip?
4 A. Yes, sir.
5 Q. Did you see any other bruises on him?
6 A. He had a tiny dime size bruise on his
7 cheek.
8 Q. You're pointing to your right cheek. Is
9 that where Brodie had it on his right cheek?
10 A. I don't remember if it was his right or
11 left.
12 Q. But in the cheek area on his face?
13 A. Yes, sir.
14 Q. Did you notice any other injuries?
15 A. No, sir.
16 Q. Did you see Brodie in the state where he
17 was naked?
18 A. Yes.
19 Q. And what caused you to see him Sunday
20 evening naked?
21 A. Putting him in his pajamas.
22 Q. When he went to bed that evening?
23 A. Yes.
24 Q. Was there anything about his demeanor,
25 that is how he was behaving, that caused you concern?

1 A. No, sir.
2 Q. Was the defendant at your home that
3 evening, that is Sunday evening?
4 A. Yes.
5 Q. And he was there full-time?
6 A. Yes.
7 Q. Where did you know the defendant to work?
8 A. America's Mart gas station.
9 Q. What was his shift and what were the days
10 of week that he worked?
11 A. He was off on Monday and Tuesday. He
12 usually went into work very early, probably around
13 six a.m. and then he'd get home between five and seven
14 at night usually.
15 Q. I want to direct your attention to the
16 next day, Monday, specifically in the evening. Did
17 there come a time where you knew that Brodie your son
18 and the defendant went to Danny Fico's house?
19 A. After I got home from work he told me that
20 they went there.
21 Q. And did you notice anything unusual about
22 Brodie's condition that evening when you saw him for
23 the first time?
24 A. I didn't see him after I got home from
25 work. I went to bed.

1 Q. What did you see the next day, if
2 anything, on Brodie that caused you concern?
3 A. Bruises to Brodie's head, he had two
4 bruises on his forehead.
5 Q. And did you ask the defendant what
6 happened to your son?
7 A. Yes.
8 Q. What was his response?
9 A. He fell leaving Danny's.
10 Q. Danny Fico's house?
11 A. Correct.
12 Q. And that Brodie fell?
13 A. Yes.
14 Q. Did he give any further explanation?
15 A. No, sir.
16 Q. What was Brodie's demeanor like on Tuesday
17 morning?
18 A. He was very upset and mad and didn't want
19 to be around Mike.
20 Q. Did you notice anything about the bruising
21 on his cheek and any of the other bruising on his face
22 that morning?
23 A. Brodie had a little scratch on his back.
24 Q. And was the bruise that you observed
25 Sunday evening still there or in a different condition?

1 A. The Shark Reef.
2 Q. And is that at Mandalay Bay?
3 A. Yes, sir.
4 Q. Prior to getting to Mandalay Bay did you
5 stop anywhere?
6 A. Yes.
7 Q. Where did you stop?
8 A. At America's Mart gas station where Mike
9 worked.
10 Q. Did the defendant tell you to do or not to
11 do something when you arrived at his place of
12 employment?
13 A. He told me not to bring Brodie out.
14 Q. Why?
15 A. Because he looked like somebody beat him.
16 Q. How was he dressed, Brodie?
17 A. He had on a pair of Jordan shorts, a pair
18 of Jordan sneakers, a black T-shirt and a hat.
19 Q. Baseball cap hat?
20 A. (No audible answer.)
21 Q. Is that a yes?
22 A. Yes, sir.
23 Q. When the defendant told you not to take
24 him out into the store did he express a particular area
25 in the store he didn't want you to take Brodie to?

1 A. It was darker.
2 Q. Did you notice any other injuries besides
3 the ones you just mentioned on the face and his back?
4 A. Brodie had a little bit underneath I
5 believe his left eye, it was a little bit black.
6 Q. And you hadn't seen that before?
7 A. It was starting to show up on Monday. He
8 had pink eye. Brodie had pink eye.
9 Q. And was that pink eye something that was
10 diagnosed earlier?
11 A. Yes, sir. On Friday.
12 Q. And you started noticing on Monday that he
13 had darkening under one of his eyes?
14 A. Yes, sir.
15 Q. Do you remember what eye that was?
16 A. No, sir.
17 Q. Were you off Tuesday? Take your time.
18 A. Yes, I was off on Tuesday.
19 Q. So that would be the day that both you and
20 the defendant had days off?
21 A. Correct.
22 Q. On that Tuesday did you have plans that
23 you, your son and the defendant went on a trip?
24 A. Yes, sir.
25 Q. Where were you going?

1 A. By where he worked at.
2 Q. Where did he work at?
3 A. Over by the car wash.
4 Q. Did you take him to the car wash?
5 A. No, sir.
6 Q. Where did you take him?
7 A. Inside of the gas station.
8 Q. Did you meet anybody inside of the gas
9 station that you had known before?
10 A. Yes, Danny Fico.
11 Q. You had known him and had met him
12 previous?
13 A. Correct.
14 Q. Did Mr. Fico ask you about the condition
15 of Brodie when you were in the store?
16 A. Yes. We talked about his cheek. He had
17 pointed out his cheek.
18 Q. Mr. Fico brought it up to you?
19 A. Yes.
20 Q. It was the bruise on his cheek?
21 A. Yes.
22 Q. What did he ask you about it?
23 A. He just made a comment about look at his
24 bruise.
25 Q. Did you explain to him how he got the

1 bruise?
 2 A. No. I just made a comment that his
 3 forehead is bruised too.
 4 Q. What happened when you arrived at Mandalay
 5 Bay in regards to how Brodie was acting?
 6 A. Brodie didn't want to hold Mike's hand.
 7 Q. He didn't want to hold the defendant's
 8 hand?
 9 A. Correct.
 10 Q. Was that consistent how he behaved at the
 11 Mandalay Bay Shark Reef?
 12 A. Correct.
 13 Q. The entire time?
 14 A. Yeah.
 15 Q. After you left the Shark Reef where did
 16 you go?
 17 A. To the Circus Circus.
 18 Q. Was that part of the social activities
 19 that you all were engaged in that day?
 20 A. Correct.
 21 Q. And once again what was Brodie's demeanor
 22 towards the defendant while at Circus Circus?
 23 A. Brady didn't want Mike near him.
 24 Q. How did the defendant react as far as
 25 interacting with Brodie and you?

1 A. Yeah.
 2 Q. How was he acting towards Brodie when
 3 Brodie wet his pants?
 4 A. He was pretty much ignoring him.
 5 Q. What happened as far as him being with you
 6 and Brodie walking around after McDonald's?
 7 A. Brodie just wanted him to walk ahead. He
 8 didn't really walk with us.
 9 Q. The defendant didn't?
 10 A. (No audible answer.)
 11 Q. Is that correct?
 12 A. Correct.
 13 Q. When you left the Mandalay Bay, McDonald's
 14 area you said you went to a hair salon?
 15 A. Correct.
 16 Q. Did you drive there?
 17 A. Mike drove. I was the passenger.
 18 Q. Where was Brodie?
 19 A. In the back seat in his car seat.
 20 Q. Is that behind you or behind the
 21 defendant?
 22 A. In the center.
 23 Q. Can you reach Brodie as he was seated from
 24 either the driver's side or the passenger side without
 25 getting out of the car?

1 A. He was getting frustrated but he just
 2 walked ahead of us.
 3 Q. Didn't walk with you?
 4 A. No, sir.
 5 Q. After you left Circus Circus where did you
 6 go?
 7 A. We went to the place where I got my hair
 8 done.
 9 Q. That's the hair salon?
 10 A. Correct.
 11 Q. Was that before or after McDonald's?
 12 A. McDonald's was during Circus Circus.
 13 Q. Tell me what happened at McDonald's
 14 involving Brodie.
 15 A. Brodie was sopping through his pants
 16 because I put a swimmer diaper on him instead of a
 17 pull-up.
 18 Q. Were you trying to potty train your son at
 19 this time?
 20 A. Yes, sir.
 21 Q. He wet himself at McDonald's?
 22 A. Yes.
 23 Q. How did the defendant react to that?
 24 A. He was just cranky.
 25 Q. He was cranky towards you?

1 A. Yes. From both.
 2 Q. When you went into the hair salon how long
 3 were you in there?
 4 A. Five minutes.
 5 Q. When you went in what was Brodie doing?
 6 A. Sleeping.
 7 Q. When you came out what was he doing?
 8 A. Screaming.
 9 Q. Did you ask the defendant what happened?
 10 A. He just said -- yes. He said he woke up.
 11 Q. Brodie did?
 12 A. Yes.
 13 Q. When did he tell you Brodie woke up in
 14 relationship to when you went into the hair salon?
 15 A. When I shut the car door.
 16 Q. How was the defendant acting towards you
 17 and to Brodie when he was screaming inside the car?
 18 A. He was just frustrated.
 19 Q. Was there an issue that had existed for
 20 the prevailing months between you and the defendant and
 21 Brodie regarding his potty training?
 22 A. Yes.
 23 Q. Can you describe that to us.
 24 A. Mike was frustrated because Brodie
 25 wouldn't potty train. He used to tell me that I need

1 to get him potty trained.
 2 MR. STANTON: Your Honor, I don't know who
 3 it was but someone behind defense counsel made an
 4 audible comment or gesture after the witness's last
 5 answer. I'd ask the court to instruct anybody not to
 6 make any audible noises and if they do that you will
 7 remove them from the courtroom.
 8 THE COURT: Okay. I've got marshals
 9 there. They're listening. Let's all be reverent.
 10 BY MR. STANTON:
 11 Q. Ma'am, after you left the hair salon where
 12 did you go next?
 13 A. To the bank.
 14 Q. And same thing as who is driving and where
 15 all the parties are in the car?
 16 A. Correct. Everything was the same.
 17 Q. And after the bank where did you go?
 18 A. To Best Buy.
 19 Q. Let me ask you about some events that
 20 occurred at Best Buy. Did Brodie tell you that he
 21 wanted to do something when he was in Best Buy as far
 22 as how he was feeling?
 23 A. He wanted me to carry him.
 24 Q. And did he tell you whether or not he was
 25 tired?

1 A. He said he was tired.
 2 Q. How did he normally tell you, what was the
 3 words that Brodie used?
 4 A. Night night.
 5 Q. And did he tell you that?
 6 A. Yes, sir.
 7 Q. What was Brodie's behavior like inside the
 8 store?
 9 A. He was being rambunctious. He didn't
 10 really want to be walking around.
 11 Q. In fact, you had to put him in timeout on
 12 two separate occasions?
 13 A. Correct.
 14 Q. After you left Best Buy where did you go?
 15 A. Home.
 16 Q. And do you know what time you arrived at
 17 home?
 18 A. I don't remember.
 19 Q. Would it have been afternoon or evening?
 20 A. Late afternoon.
 21 Q. What was the plan and what did you do as
 22 far as the evening plans when you got home?
 23 A. I just started cleaning, Brodie was
 24 helping me. And cooked dinner.
 25 Q. What did you have for dinner that night

1 that you were preparing?
 2 A. Lasagna.
 3 Q. What if anything occurred with the
 4 defendant while you were preparing the evening meal?
 5 A. He left to go to the gas station.
 6 Q. How long was he gone?
 7 A. Maybe an hour.
 8 Q. Did you call him or have communication
 9 with him while he was at his place of employment?
 10 A. I called him after dinner was done. Like
 11 after I had cooked it.
 12 Q. He didn't go there to go work, did he?
 13 A. No, sir.
 14 Q. Why did he go there as you understood it?
 15 A. Somebody called him.
 16 Q. When you talked to him how did you
 17 communicate or get ahold of him?
 18 A. Called his cell phone.
 19 Q. What did you tell him when you called on
 20 the cell phone?
 21 A. I said dinner was ready.
 22 Q. Did he come home?
 23 A. Yes. A little bit later. About 10
 24 minutes.
 25 Q. Had Brodie already finished eating?

1 A. Yes. And I had already put him to bed.
 2 Q. Had you finished eating?
 3 A. No.
 4 Q. Did you have the evening meal with the
 5 defendant?
 6 A. Yes.
 7 Q. And Brodie is already in bed?
 8 A. Correct.
 9 Q. In his pajamas?
 10 A. In a T-shirt and underwear or a pull-up.
 11 Q. Now, when you put him to bed did you close
 12 his bedroom door?
 13 A. I left it cracked open.
 14 Q. After Brodie went to bed and you had the
 15 evening meal did you leave the home that evening?
 16 A. Yes, sir.
 17 Q. Where did you go?
 18 A. To my mom's house and then to the store.
 19 Q. Did you tell the defendant that you were
 20 going to do that?
 21 A. Yes, sir.
 22 Q. How did he react to that?
 23 A. At first he was annoyed that I was going
 24 to leave.
 25 Q. And he expressed that to you?

1 A. He said why didn't you go earlier.
 2 Q. And why did you need to go to your mom's
 3 and to the store?
 4 A. I had to go to my mom's to drop off some
 5 papers from the car wreck that I had been in that I
 6 just got in the mail and I had to go to the store --
 7 THE COURT: I'm sorry. Could you repeat
 8 that. Papers for what?
 9 THE WITNESS: A car wreck that we had been
 10 into. Brodie and I.
 11 BY MR. STANTON:
 12 Q. And you had received some paperwork that
 13 you needed scanned and emailed?
 14 A. Correct.
 15 Q. So you went to your mom's house to do
 16 that?
 17 A. Correct.
 18 Q. And you said you went to the store. Why
 19 did you go to the store?
 20 A. We needed milk.
 21 Q. For whom?
 22 A. Brodie.
 23 Q. And you told all this to the defendant?
 24 A. Correct.
 25 Q. Do you remember what time you left your

1 Q. When you got back to your home would it be
 2 approximately nine p.m. or thereabouts?
 3 A. Yes, sir.
 4 Q. When you walked in the home where was the
 5 defendant?
 6 A. Sitting on the couch.
 7 Q. What was he doing?
 8 A. Watching TV.
 9 Q. And did you notice anything about the
 10 condition of Brodie or his door to his bedroom at this
 11 time?
 12 A. I didn't check on him. I thought he had
 13 just been sleeping.
 14 Q. Did you do anything as far as turning on
 15 something when you put Brodie to bed?
 16 A. Yes. A Bob the Builder movie.
 17 Q. And were you playing that when you put him
 18 to bed?
 19 A. Yes.
 20 Q. So you don't have any recollection of
 21 checking on Brodie when you got back or whether or not
 22 the bedroom door to his room was opened or shut?
 23 A. No, sir.
 24 Q. Did you go to bed that evening?
 25 A. Yes, sir.

1 house?
 2 A. I believe around eight.
 3 Q. Eight p.m.?
 4 A. Correct. I don't remember the exact time.
 5 I believe that it was around eight p.m.
 6 Q. What time did you get back?
 7 A. About an hour later.
 8 Q. During that time period of approximately
 9 an hour did the defendant ever contact you?
 10 A. Yes, sir.
 11 Q. How many times?
 12 A. Once when I first left and -- two times.
 13 Q. Once when you first left?
 14 A. And then once when I was pulling back into
 15 the apartment complex.
 16 Q. And what was the demeanor of the defendant
 17 when he called you both times?
 18 A. First time he sounded fine. He asked me
 19 to get Triple A batteries and then the second time he
 20 asked where I was and what was taking so long.
 21 Q. So he was irritated with you when you were
 22 arriving?
 23 A. Correct.
 24 Q. What was he irritated about?
 25 A. Me taking long.

1 Q. What time did you go to bed?
 2 A. Ten, 10:30 maybe.
 3 Q. What time did the defendant go to bed?
 4 A. The same time.
 5 Q. Did you check on Brodie before you went to
 6 bed?
 7 A. No, sir.
 8 Q. Did you notice anything about the
 9 condition of the door to his bedroom?
 10 A. Not that I remember right now.
 11 Q. Were you woken up during the night?
 12 A. Yes, sir.
 13 Q. By who?
 14 A. Michael.
 15 Q. The defendant?
 16 A. Yes.
 17 Q. What did he tell you?
 18 A. That Brodie was throwing up. That he had
 19 went -- Mike had went to use Brodie's bathroom and
 20 something smelled bad and Brodie was throwing up.
 21 Q. Did you go check on Brodie?
 22 A. Yes, sir.
 23 Q. And was the door to his bedroom opened or
 24 shut?
 25 A. Opened.

1 Q. And when you get in there did you see
2 Brodie?
3 A. Yes.
4 Q. Where was he?
5 A. On his bed.
6 Q. Was he awake or asleep?
7 A. He was awake.
8 Q. And did you notice the condition of his
9 bed?
10 A. He had thrown up.
11 Q. More than once?
12 A. He had thrown up a lot.
13 Q. On the bed itself? Take your time.

14 THE COURT: Do you need a break?
15 THE WITNESS: Yes.
16 THE COURT: We are going to take a five
17 minute recess.
18 (Off the record.)
19 MR. STANTON: Thank you, Your Honor.
20 BY MR. STANTON:
21 Q. Ma'am, I think the last question I asked
22 you about was that Brodie had thrown up on the bed.
23 A. Yes, sir.
24 Q. When you were woken up by the defendant
25 did he ask you to do anything about Brodie and his

1 condition?
2 A. I don't remember.
3 Q. Did he ask you to clean up Brodie?
4 A. I don't remember right now. I'm sorry.
5 Q. What did Brodie tell you about how he was
6 feeling?
7 A. He told me that his head hurt.
8 Q. His head hurts?
9 A. (No oral response.)
10 Q. Is that a yes?
11 A. Yes.
12 Q. And what did you do as far as taking care
13 of Brodie and his room and his condition of his bed?

14 A. Picked up Brodie and brought him into the
15 bathroom and just wiped his face off and just wiped him
16 down a little bit. And then I got a towel and laid it
17 on the couch and laid Brodie on the couch with a
18 blanket over him and then I laid with him.
19 Q. I'm sorry?
20 A. And I laid with him until he fell asleep.
21 Q. And what did you do with the bedding?
22 A. I put it in the washing machine.
23 Q. And when you were with Brodie lying with
24 him on the couch did you turn on the TV?
25 A. Yes.

1 Q. What did you turn the TV onto?
2 A. Cartoons.
3 Q. How about the movie in his room?
4 A. It wasn't playing anymore.
5 Q. Was that unusual?
6 A. Yes.
7 Q. It normally continues to play?
8 A. Yes.
9 Q. How long did it take or how long did you
10 lie down with Brodie on the couch?
11 A. He fell asleep almost immediately.
12 Q. And what did you do?
13 A. That's when I went and stripped his
14 bedding and put it in the washing machine.
15 Q. And after you did that what did you do?
16 A. I went and laid back down in bed.
17 Q. To your bed?
18 A. Yes.
19 Q. Was the defendant there?
20 A. Yes.
21 Q. Do you know what time of morning it was at
22 this time?
23 A. After one a.m.
24 Q. Did the defendant say to you when you got
25 into bed anything?

1 A. Yes.
2 Q. What did he tell you?
3 A. He asked why I was going to leave the
4 living room TV on.
5 Q. And what did you do?
6 A. Went and shut it off.
7 Q. What was the next thing that you remember
8 occurring?
9 A. Mike laying Brodie in bed with me when he
10 went to work in the morning.
11 Q. Do you remember what time that was?
12 A. No, sir.
13 Q. Do you remember looking at Brodie when he
14 laid Brodie in bed with you?
15 A. I remember glancing over at him.
16 Q. What do you remember about his condition?
17 A. I just recall Mike having him just in a
18 blanket and then just laying him down, but then we
19 rolled over and I went to bed.
20 Q. Was it dark out?
21 A. Yes.
22 Q. So early in the morning?
23 A. Yes.
24 Q. But you don't recall what time it was?
25 A. No.

1 Q. What time did the defendant usually get up
2 to go to work?
3 A. Five.
4 Q. Did you hear the defendant leave that
5 morning?
6 A. No.
7 Q. But Brodie was placed in your bed by the
8 defendant?
9 A. Yes.
10 Q. You went back to sleep?
11 A. Yes.
12 Q. What happened next?
13 A. I woke up and I rolled over and it looked
14 like Brodie was about to fall off the bed so I rubbed
15 his back.
16 Q. What did you do?
17 A. I rubbed his back.
18 Q. Do you remember what time of morning this
19 was?
20 A. 8:50, almost nine I believe.
21 Q. And was there anything unusual when you
22 rubbed his back?
23 A. He was cold.
24 Q. And what did you do at that time?
25 A. I jumped to the other side of the bed to

1 check on him and then I kept saying Brodie, Brodie.
2 And then I grabbed my phone and I called 9-1-1.
3 Q. And, Miss Foster, let me ask you a
4 question. There was a car accident that you were
5 involved in where Brodie was in a car with you.
6 A. Okay.
7 Q. Is that correct?
8 A. Yes.
9 Q. From the Wednesday morning the events that
10 you were just testifying how long before that day did
11 that car accident occur?
12 A. At least two weeks before that.
13 Q. And did you take him to the hospital?
14 A. I took him to ABC Pediatric.
15 Q. In relationship to when the car accident
16 occurred --
17 A. The next morning.
18 Q. And you expressed a concern to the doctors
19 about Brodie's condition outside of the car accident?
20 A. Yes.
21 Q. What did you ask the doctors, what were
22 you concerned about?
23 A. Brodie bruising too easily.
24 Q. And they said that they were going to run
25 some tests?

1 A. Correct.
2 Q. Did the doctor tell you as the mother of
3 Brodie after his examination from the car accident any
4 concern that he had suffered any injury?
5 A. No.
6 Q. Did he ever act any differently up until
7 the time that you picked him up from your mother's
8 house on Sunday evening before his death that he was
9 acting differently than Brodie did on a regular basis
10 from the car accident to that Sunday evening?
11 A. No, sir.
12 Q. My final question to you, Miss Foster, is
13 did you in any way harm Brodie from Sunday evening to
14 when you just rubbed his back on the next morning?
15 A. No, sir.
16 MR. STANTON: Pass the witness.
17 THE COURT: Counsel.
18 MR. McDONALD: Thank you, Your Honor.
19
20 BY MR. McDONALD: CROSS-EXAMINATION
21 Q. Do you recall the accident, the automobile
22 accident occurred on May 26th?
23 A. I don't remember the date.
24 Q. Would that sound about right to you?
25 A. Yes, sir.

1 Q. Do you recall that it was about two
2 o'clock in the afternoon?
3 A. Yes, sir.
4 Q. Do you recall telling the police that you
5 had been hit from behind?
6 A. Yes, sir.
7 Q. That caused you to hit the vehicle in
8 front of you?
9 A. No, sir.
10 Q. It caused you to hit your head somewhere
11 in the interior of the car?
12 A. Yes.
13 Q. You don't recall where you hit your head?
14 A. On the window. The side window.
15 Q. Do you recall telling the police that
16 Brodie's car seat broke?
17 A. Yes, sir.
18 Q. How did it break? What was broken?
19 A. On the left-hand side on the top it had
20 broke off the styrofoam. It came undone.
21 Q. Did you replace that car seat?
22 A. No, sir.
23 Q. There was quite a bit of damage to the
24 back of your car, correct?
25 A. Yeah.

1 Q. Did you take it to have it repaired?
 2 A. No.
 3 Q. Did you go to a medical facility that
 4 afternoon or early evening May 26th?
 5 A. Yes.
 6 Q. Where did you go?
 7 A. UMC Hospital.
 8 THE COURT: Where was that? I'm sorry?
 9 THE WITNESS: UMC Hospital.
 10 BY MR. McDONALD:
 11 Q. UMC on West Charleston?
 12 A. On the other side -- yes.
 13 Q. So not a Quick Care, but UMC emergency

14 room?
 15 A. Yes.
 16 Q. Did you sustain any injuries in the
 17 automobile accident?
 18 A. I jerked my neck.
 19 Q. What about your head?
 20 A. It was fine.
 21 Q. Did you lose consciousness when your head
 22 hit the side window?
 23 A. No.
 24 Q. And Brodie never complained of any
 25 injuries on May 26th, the day of the automobile

1 accident to you?
 2 A. No.
 3 Q. And when you took him to the doctor on
 4 May 27th did the doctor do any x-rays?
 5 A. No.
 6 Q. Doctor just examined him in the room when
 7 you were present?
 8 A. Yes.
 9 Q. About how long was the doctor in the room
 10 with you and Brodie?
 11 A. Ten or fifteen minutes.
 12 Q. Now, you had told I believe it was the
 13 detectives that Brodie had had some flu-like symptoms a
 14 couple weeks before his demise, correct?

15 A. Yes.
 16 Q. Did you take him to the pediatrician?
 17 A. I don't remember.
 18 Q. Were you concerned about his flu-like
 19 symptoms?
 20 A. Yes.
 21 Q. And by flu-like symptoms would that be a
 22 fever?
 23 A. No, sir. Diarrhea.
 24 Q. Diarrhea. How about any vomiting?
 25 A. No, sir.

1 Q. How many days did he have diarrhea?
 2 A. I don't remember.
 3 Q. You don't remember that?
 4 A. No.
 5 Q. Any more than a couple days or you have no
 6 recollection?
 7 A. Maybe two.
 8 Q. When you went to the doctor on May 27 Mike
 9 had asked you to ask the pediatrician about why Brodie
 10 bruised so easily, didn't he?
 11 A. What was the question again?
 12 Q. The reason you asked the doctor about
 13 Brodie bruising so easily is because Mike had asked you
 14 to inquire?
 15 A. No, sir.
 16 Q. Mike had told you you needed to take
 17 Brodie to the doctor after that car accident, correct?
 18 A. No, sir.
 19 Q. Brodie experienced a lot of bruising,
 20 didn't he?
 21 A. Yes, sir.
 22 Q. Brodie had an accident when he was riding
 23 his little quad and you were walking the dog on the
 24 Friday before his demise, correct?
 25 A. Yes, sir.

1 Q. And he fell off of the little quad?
 2 A. Yes, sir.
 3 Q. And hit his face on a car?
 4 A. No, sir.
 5 Q. What did he hit his face on?
 6 A. He hit his cheek on the curb.
 7 Q. So on the concrete?
 8 A. Yes.
 9 Q. It wasn't unusual for Brodie to have
 10 accidents like that, was it?
 11 A. No.
 12 Q. The dog would knock him down?
 13 A. Yes.
 14 Q. He would jump off of things and get a
 15 bloody nose?
 16 A. He never had a bloody nose.
 17 Q. He never had a bloody nose?
 18 A. No.
 19 Q. To the best of your recollection he never
 20 had a bloody nose?
 21 A. Not that I can remember.
 22 Q. Now, did you take him to the doctor when
 23 his chin hit the concrete?
 24 A. No, sir. It was his cheek.
 25 Q. His cheek hit the concrete. He had had

1 stitches in his eyelid at one time, right?
 2 A. Yes, sir.
 3 Q. How did that occur?
 4 MR. STANTON: Objection, relevance, Your
 5 Honor, and time frame, foundation.
 6 THE COURT: I think it's all relevant.
 7 BY MR. McDONALD:
 8 Q. Do you recall when that occurred?
 9 A. Yes. It was about a month and a half
 10 before everything happened.
 11 Q. Do you recall how that occurred?
 12 A. Yes.
 13 Q. How was that?
 14 A. Mike and Brodie and his nephews and I were
 15 at the park, I had Mike's nephew on the swing, Mike had
 16 Brodie and he hit his face running on a piece of park
 17 equipment.
 18 Q. Brodie was running and he hit his face on
 19 a piece of park equipment?
 20 A. He tripped and fell.
 21 Q. So nobody pushed Brodie?
 22 A. No.
 23 Q. And that caused him to have a laceration
 24 that required stitches?
 25 A. Yes, sir.

1 Q. Got back about 7:30?
 2 A. Yes.
 3 Q. And had Brodie already eaten dinner?
 4 A. Yes, I believe so.
 5 Q. Your stepdad was barbecuing hamburgers
 6 that night, wasn't he?
 7 A. Yes.
 8 Q. Did Brodie eat?
 9 A. Yes.
 10 Q. And you never left the house Sunday night
 11 to go anywhere?
 12 A. Not that I remember.
 13 Q. How about Mike, did he leave the house
 14 Sunday night?
 15 A. Not that I remember.
 16 Q. Now, Brodie was at your parents' Sunday
 17 morning, correct?
 18 A. Yes.
 19 Q. You went and had your hair done Sunday
 20 morning before you went to work?
 21 A. Yes.
 22 Q. Did you have your hair dyed?
 23 A. Yes.
 24 Q. And they somehow inadvertently overcharged
 25 you?

1 Q. Do you recall where he went for that?
 2 A. I can't remember. A hospital in
 3 Henderson.
 4 Q. So that would have been like early May?
 5 A. Yes, sir.
 6 Q. You picked up your son on Sunday night at
 7 your mother's house, correct?
 8 A. Yes.
 9 Q. And the only bruising you noticed was that
 10 small bruise on the cheek?
 11 A. Yes.
 12 Q. No other bruising?
 13 A. He had two tiny little marks on his chest.
 14 Q. So he didn't have any bruising on his
 15 forehead Sunday night?
 16 A. I don't think he did.
 17 Q. You don't think he did? What about the
 18 chin where he hit the concrete, was that still --
 19 A. He didn't hit his chin. His cheek.
 20 Q. I'm sorry. So that small bump is what he
 21 sustained when he fell off his quad and hit the curb?
 22 A. Yes. It was just a little light bruise.
 23 Q. So you took him back to the apartment
 24 where you resided with Michael on Sunday night?
 25 A. Yes.

1 A. Yes.
 2 Q. Now, on Monday morning Mike had plans to
 3 go to the Whitney Ranch community pool with his sister
 4 and his two nephews, correct?
 5 A. Yes.
 6 Q. You and Brodie had not planned to go,
 7 correct?
 8 A. Yes, we had.
 9 Q. You had? So you went to the America's
 10 Mart to pick up some ice, right?
 11 A. Yes.
 12 Q. And you and Brodie went inside?
 13 A. Yes.
 14 Q. Now, Brodie was diagnosed with pink eye on
 15 the Friday when he had the accident with the quad,
 16 right?
 17 A. Yes.
 18 Q. But still you planned to take a small
 19 child with pink eye to a community pool?
 20 A. Yes.
 21 Q. The pool irritated his eyes, didn't it?
 22 A. Yes.
 23 Q. The doctor had not told you to keep the
 24 child away from swimming pools or water getting in his
 25 eyes?

1 A. Not that I remember.
 2 Q. Doctor prescribed medication for the pink
 3 eye, didn't he?
 4 A. Yes.
 5 Q. You worked a part-time job while you were
 6 residing with Mr. Lee, correct?
 7 A. Yes.
 8 Q. And your shifts were approximately four
 9 hours?
 10 A. Depends.
 11 Q. Well, did you work eight hour days too?
 12 A. Usually two days a week for eight hours,
 13 the rest were four.
 14 Q. Where did you work at?
 15 A. For a company called Market Source. I
 16 sold T Mobile.
 17 Q. And you would work at various locations
 18 depending on where they needed you?
 19 A. Yes, sir.
 20 Q. So you had to work on Monday?
 21 A. Yes.
 22 Q. Monday, June 13th do you remember what
 23 your hours were?
 24 A. Four to eight.
 25 Q. Was Brodie asleep when you left for work?

1 A. Yes.
 2 Q. Had you put him down for that nap?
 3 A. Yes.
 4 Q. Do you recall when you put him down?
 5 A. No.
 6 Q. Do you recall what time you left for work?
 7 A. Around 3:30.
 8 Q. Do you recall which location you worked
 9 at?
 10 A. No.
 11 Q. Do you recall getting home on Monday
 12 night?
 13 A. Vaguely right now.
 14 Q. Do you recall Mike and Brodie sitting on
 15 the couch watching Transformers when you came in the
 16 front door?
 17 A. No.
 18 Q. Do you recall Brodie getting off the couch
 19 and running over to greet you at the door?
 20 A. Not on Monday I don't.
 21 Q. I'm sorry?
 22 A. No.
 23 Q. No you don't recall that?
 24 A. (No oral response.)
 25 Q. Do you recall putting him to bed after you

1 got home Monday night?
 2 A. I don't remember right now.
 3 Q. When did you plan to go to the Shark Reef
 4 at Mandalay Bay?
 5 A. What do you mean?
 6 Q. Well, did you plan it Sunday, Monday
 7 night?
 8 A. Tuesday morning.
 9 Q. When you were at the Shark Reef at
 10 Mandalay Bay Brodie wasn't in a stroller, he was
 11 walking, correct?
 12 A. Yes.
 13 Q. And Mike was holding him so he could see
 14 into the glass to see the fish and sharks?
 15 A. Once.
 16 Q. Do you recall you, Mike and Brodie posing
 17 for a couple of photographs at the Shark Reef?
 18 A. Yes.
 19 MR. McDONALD: May I have these marked.
 20 May I approach the witness?
 21 THE COURT: You may.
 22 BY MR. McDONALD:
 23 Q. Arica, I am showing you what's been marked
 24 as Defense Proposed Exhibits A and B. If you could
 25 take a moment and view those and tell me when you're

1 done. Do those depict yourself, Brodie and Michael?
 2 A. Yes.
 3 Q. Do you recall when those pictures were
 4 taken?
 5 A. At the Shark Reef.
 6 Q. When you were leaving or when you first
 7 got there?
 8 A. When we got there.
 9 MR. McDONALD: I move for admission of A
 10 and B.
 11 MR. STANTON: No objection.
 12 THE COURT: They will be admitted.
 13 (Defendant's Exhibits A & B were
 14 admitted.)
 15 BY MR. McDONALD:
 16 Q. When you went to Circus Circus had that
 17 been planned prior to going to the Shark Reef?
 18 A. No.
 19 Q. So once you were done at the Shark Reef
 20 you and Mike discussed going to Circus Circus?
 21 A. Yes.
 22 Q. And Brodie was in his stroller at Circus
 23 Circus, wasn't he?
 24 A. Yes.
 25 Q. He wasn't walking?

1 A. No.
 2 Q. When Brodie was at Circus Circus did he
 3 tell you he was tired?
 4 A. Yes.
 5 Q. Would Brodie get cranky when he was tired?
 6 A. Yes.
 7 Q. So he was cranky at Circus Circus?
 8 A. Yes.
 9 Q. So after that you went to Fantastic Sam's?
 10 A. Yes.
 11 Q. And then to the bank?
 12 A. Yes.
 13 Q. Was that a drive-thru?
 14 A. Mike went in.
 15 Q. And you and Brodie stayed in the car?
 16 A. Yes.
 17 Q. And then to the Best Buy?
 18 A. Yes.
 19 Q. About how much time had elapsed from the
 20 time that you were at Circus Circus and you got to Best
 21 Buy?
 22 A. Thirty, forty minutes.
 23 Q. Forty minutes?
 24 A. Maybe.
 25 Q. Do you recall which Best Buy you went to?

1 A. Yes.
 2 Q. He didn't lay down for a nap?
 3 A. No.
 4 Q. Mike left?
 5 A. Yes.
 6 Q. So it was just you and Brodie there?
 7 A. Yes.
 8 Q. And you made dinner?
 9 A. Yes.
 10 Q. And you called Mike to find out how much
 11 longer he was going to be down at the America's Mart,
 12 correct?
 13 A. No. I told him dinner was ready.
 14 Q. I'm sorry?
 15 A. No. I didn't. I told him dinner was
 16 ready.
 17 Q. All right. You called him when dinner was
 18 ready to find out when he was coming back?
 19 A. Just to tell him it was ready.
 20 Q. You didn't ask him when he was coming
 21 back, you just told him dinner was ready, correct?
 22 A. Yeah.
 23 Q. Do you recall what time it was that Mike
 24 had left to go down to the station?
 25 A. No.

1 A. Yes.
 2 Q. Which one?
 3 A. By the Galleria Mall.
 4 Q. So it took 30 or 40 minutes to get from
 5 Circus Circus to Fantastic Sam's to the bank and then
 6 to Best Buy?
 7 A. Somewhere around there, yes.
 8 Q. And was Brodie still telling you that he
 9 wanted to go night night?
 10 A. He had fell asleep between Circus Circus
 11 and Fantastic Sam's.
 12 Q. But he woke up when you got out of the car
 13 at Fantastic Sam's, correct?
 14 A. Yes.
 15 Q. Did he stay awake to the bank and to Best
 16 Buy?
 17 A. Yes.
 18 Q. Was he cranky?
 19 A. A little bit.
 20 Q. About what time did you guys get home from
 21 Best Buy?
 22 A. Early afternoon -- late afternoon I mean.
 23 Q. And that's when you started cleaning?
 24 A. Yes.
 25 Q. And Brodie was helping you clean?

1 Q. But it's your recollection that he had
 2 left because someone had called him?
 3 A. Yes.
 4 Q. So he was gone for a few hours?
 5 A. Not a few hours. Maybe an hour.
 6 Q. Maybe an hour. And in that hour you fed
 7 Brodie?
 8 A. Yes.
 9 Q. Did you give him a bath before he went to
 10 bed?
 11 A. No.
 12 Q. And about what time did you put him to
 13 bed?
 14 A. 7:30.
 15 Q. Was Mike back before you put him to bed?
 16 A. No.
 17 Q. So when Mike got back the two of you just
 18 ate lasagna?
 19 A. Yes.
 20 Q. And did he take a shower?
 21 A. Possibly. I don't remember.
 22 Q. Do you remember what time you went to bed
 23 on Tuesday night?
 24 A. Yeah. Probably around 10:00.
 25 Q. You say probably around 10:00. Was that

1 the usual time you'd go to sleep?
 2 A. Yes.
 3 Q. Now, when Mike came in to tell you that
 4 Brodie had been sick, he had Brodie in his arms, didn't
 5 he?
 6 A. No.
 7 Q. When you cleaned Brodie up what was he
 8 wearing?
 9 A. His underwear and I took his shirt off.
 10 Q. So you removed his shirt. Did you see any
 11 injuries when you removed his shirt?
 12 A. No.
 13 Q. No injuries at all?
 14 A. I didn't notice anything. I was half
 15 asleep and it was still kind of dark in the house.
 16 Q. Well, you took him in the bathroom to
 17 clean him up, didn't you?
 18 A. Yes.
 19 Q. You turned the light on in the bathroom?
 20 A. Yeah.
 21 Q. So it wasn't dark in the bathroom,
 22 correct?
 23 A. Correct.
 24 Q. You didn't have any problems seeing Brodie
 25 at that time, did you?

1 the edge of the bed and you pulled him back to the
 2 center next to you?
 3 A. No.
 4 Q. You don't recall telling them that?
 5 A. I don't remember talking to anybody about
 6 that.
 7 Q. You don't recall that happening?
 8 A. Not right now, no.
 9 THE COURT: Could you reask that question.
 10 BY MR. MCDONALD:
 11 Q. You don't recall that happening?
 12 THE COURT: Before that one.
 13 BY MR. MCDONALD:
 14 Q. Do you recall waking up after Mike had
 15 placed Brodie in the bed with you seeing Brodie near
 16 the edge of the bed and you reached out and pulled him
 17 back towards you to the center of the bed?
 18 A. No.
 19 MR. MCDONALD: I think I asked you don't
 20 recall that happening at all.
 21 THE COURT: Okay.
 22 BY MR. MCDONALD:
 23 Q. You only recall waking up at 8:50,
 24 correct?
 25 A. Yes.

1 A. No, I didn't notice anything.
 2 Q. You took him out to the couch and did you
 3 arrange the couch in any special way?
 4 A. I just put a towel down.
 5 Q. And you stayed with him for five, ten
 6 minutes?
 7 A. Yes. He fell right back asleep.
 8 Q. Did he drink anything?
 9 A. No, sir.
 10 Q. Mike has to be at work at six a.m.,
 11 correct?
 12 A. Yes.
 13 Q. And about how far is it from the apartment
 14 that you two resided in to his place of employment?
 15 A. About a mile, mile and a half away.
 16 Q. And he would drive to work?
 17 A. Yes.
 18 Q. So you estimate it would take about five
 19 minutes to get to work?
 20 A. Yes.
 21 Q. So you recall Michael bringing Brodie in
 22 at about 10 to 6:00 and laying him on the bed?
 23 A. Yes.
 24 Q. Now, do you remember telling the
 25 detectives that you had woken up and Brodie was over on

1 MR. MCDONALD: Court's indulgence.
 2 BY MR. MCDONALD:
 3 Q. Brodie was about two and a half years old,
 4 correct?
 5 A. Yes.
 6 Q. Was he speaking at two and a half?
 7 A. A little bit. Not like tons, but enough.
 8 Q. If you were to ask him something was he
 9 able to answer you?
 10 A. Depends on what it was.
 11 Q. Well, if you asked him how did you get
 12 that cut, would he be able to tell you?
 13 A. No.
 14 Q. Did he ever tell you that Spanky the dog
 15 had knocked him down?
 16 A. He said Spanky did it.
 17 Q. Spanky did it?
 18 A. Uh-huh.
 19 Q. And that would have been in response to
 20 your question as to what had happened?
 21 A. Uh-huh.
 22 Q. Is that a yes?
 23 A. Yes.
 24 Q. Had the pediatrician ever told you to take
 25 Brodie to a neurologist?

- 1 A. He suggested it at one point if his
2 balance wasn't better.
3 Q. At what point was that that the
4 pediatrician suggested that?
5 A. It wasn't his pediatrician. It was the
6 person that did his tubes.
7 Q. Okay. When were his tubes done?
8 A. It would have been a year ago.
9 Q. So they were done in November of 2010?
10 A. Same month Mike and I moved in together.
11 Q. So February of 2011?
12 A. Yes.
13 Q. Do you recall who did that procedure?
14 A. I don't remember his name.
15 Q. So it was that person that advised you to
16 take Brodie to a pediatric neurologist?
17 A. Yes.
18 Q. Do you know why that person suggested
19 that?
20 A. Because I was asking about him, about his
21 balance.
22 Q. Brodie had a lot of trouble with his
23 balance, didn't he?
24 A. He was clumsy.
25 Q. He would fall down?

- 1 A. Yes.
2 Q. Just be standing one moment and fall down
3 the next?
4 A. No.
5 Q. Okay. Standing and start to walk and fall
6 down?
7 A. He'd be walking.
8 Q. And fall?
9 A. And trip over things like his own feet.
10 Q. Did you ever take Brodie to a pediatric
11 neurologist?
12 A. No. My pediatrician said not to worry
13 about it.
14 Q. So you discussed it with the pediatrician?
15 A. Yes.
16 Q. You never saw Mike hit Brodie, did you?
17 A. No.
18 Q. And Mike never hit you?
19 A. No.
20 Q. Did Brodie ever tell you that Mike had hit
21 him?
22 A. He told me one time the bump hurt head.
23 He used to call Mike bump.
24 Q. Bump hurt head?
25 A. Yes.

- 1 Q. Did he tell you what had happened?
2 A. No.
3 Q. When was that that he said bump hurt head?
4 A. I don't remember exactly when. A couple
5 weeks before Brodie passed away.
6 Q. Did you ask Mike about that?
7 A. Yeah. Mike was standing there.
8 Q. Were you concerned about it?
9 A. For a minute, yes.
10 Q. What alleviated your concern?
11 A. He told me they were wrestling and he hit
12 his head.
13 Q. Did Mike wrestle with Brodie?
14 A. They played.
15 Q. They would play wrestling in the
16 apartment?
17 A. Sometimes.
18 Q. Did Brodie enjoy wrestling?
19 A. No.
20 Q. He did not?
21 A. Not usually.
22 Q. Brodie liked to get up on things and jump
23 off of them, didn't he?
24 A. Yes.
25 Q. Did you tell Mike not to wrestle with

- 1 Brodie?
2 A. I told him not to be rough with him.
3 Q. Did he comply?
4 A. When I was around, yes.
5 Q. By wrestling do you mean holding him
6 and --
7 A. Just playing around wrestling.
8 Q. That's what I'm asking you. What is
9 wrestling to you?
10 A. Just like roughhousing, playing. I don't
11 know.
12 Q. You're not talking about punching
13 somebody, are you?
14 A. No.
15 Q. You're not talking about kicking somebody?
16 A. No.
17 Q. Or picking something up and hitting
18 something?
19 A. Like picking him up and tossing him on the
20 couch like play wrestling.
21 Q. Things that adults sometimes do with small
22 children?
23 A. Yes.
24 Q. Did Brodie ever complain to you that he
25 had pain like where his ribs would be?

1 A. No.
 2 Q. Never, ever?
 3 A. No.
 4 Q. Did he ever complain about his stomach
 5 bothering him?
 6 A. Like in his whole life?
 7 Q. Well, let's say the last couple months of
 8 his life.
 9 A. No.
 10 MR. McDONALD: I will pass the witness,
 11 Your Honor.
 12 MR. STANTON: Just one question.

13
 14 REDIRECT EXAMINATION

15 BY MR. STANTON:
 16 Q. Counsel just asked you a series of
 17 questions about Mike the defendant's habit and custom
 18 about what time he went to work, that it was six
 19 o'clock that he would go to start work and how far you
 20 lived away and it took five minutes. Do you remember
 21 those questions?
 22 A. Yes.
 23 Q. Then counsel asked you that on Wednesday
 24 morning when the defendant put Brodie in bed, he said
 25 that must have been 5:50 a.m.?

1 THE COURT: Thank you. Arguments.
 2 MR. STANTON: Submit it and reserve, Your
 3 Honor.
 4 THE COURT: Mr. McDonald, any arguments?
 5 MR. McDONALD: Yes. I understand the
 6 standard is slight or marginal evidence. We have
 7 unfortunately the demise of a two-and-a-half-year-old
 8 child. We have testimony from the pathologist. The
 9 pathologist herself can't say exactly when injuries
 10 occurred. There isn't any direct evidence that the
 11 mother of the child ever saw the accused do anything
 12 other than wrestle with the child.
 13 Though they have pled this as a murder and
 14 an abuse and neglect with substantial bodily harm,
 15 quite frankly there isn't even slight or marginal
 16 evidence that the defendant is the one who caused the
 17 harm to the child. There are periods of time when the
 18 mother, specifically Tuesday night, is home with the
 19 child. The child is in bed before the defendant
 20 returns home. The defendant alerts the mother to the
 21 child vomiting, the mother gets up, cleans the child,
 22 observes the child in the bathroom and is telling us
 23 she didn't see any evidence of injury at that time.
 24 And once again I know the standard is low,
 25 but I don't believe the State has even met that

1 A. Oh, no.
 2 Q. You don't have any idea what time it was
 3 that he put him to bed?
 4 A. No.
 5 MR. STANTON: Nothing further.
 6 MR. McDONALD: I'll pass the witness, Your
 7 Honor.
 8 THE COURT: Can she be excused?
 9 MR. STANTON: Yes, Your Honor.
 10 MR. McDONALD: Yes, Your Honor.
 11 THE COURT: Thank you. You're excused.
 12 MR. STANTON: Judge, that would be the
 13 State's case for today.

14 THE COURT: Mr. McDonald.
 15 MR. McDONALD: Your Honor, I've explained
 16 to Mr. Lee the purpose and standard at a preliminary
 17 hearing, his constitutional rights at the preliminary
 18 hearing. We're not going to present witnesses or
 19 evidence today. If you want to query the defendant on
 20 that you certainly can.
 21 THE COURT: They've explained all that to
 22 you; is that correct?
 23 THE DEFENDANT: Yes. My attorney
 24 explained everything.
 25 MR. McDONALD: Thank you.

1 standard at this preliminary hearing, Your Honor. I'd
 2 ask that the charges be dismissed against Mr. Lee.
 3 MR. STANTON: Judge, I'll begin with my
 4 comments to address Mr. McDonald's factual assessment
 5 of what occurred at the preliminary hearing. To say
 6 that there's been no testimony about when these
 7 injuries were inflicted belies the uncontroverted
 8 testimony of Dr. Gavin in two critical areas.
 9 Number 1, as she testified Brodie died of
 10 a combination of two things. The major item was blunt
 11 force trauma significant and equal to that of a fatal
 12 car accident that rips an internal organ that causes a
 13 fatal infection. She timed that injury based upon the
 14 circumstances of the symptoms that that child would
 15 exhibit after that injury was inflicted. So to say
 16 that those injuries and the fatal injury was not
 17 presented within the time vacuum belies the obvious
 18 record.
 19 The second ancillary artifact of death of
 20 Brodie was hypoxia of the brain, a deprivation of
 21 oxygen to the brain due to the swelling of the brain.
 22 The timing of that injury once again in an
 23 uncontroverted fashion is the subgaleal hemorrhage in
 24 the skull area that was timed within 24 hours of death
 25 which we generally know to be sometime at eight a.m. on

1 Wednesday or earlier.
 2 There are three options in this case based
 3 upon an absolute medical certainty of Dr. Gavin.
 4 Number 1, it's a homicide. This child died at the
 5 hands of another human being and critically that it's
 6 non-accidental trauma. So one of three things took
 7 place. The defendant murdered this child, the mother
 8 murdered this child or they both did. Now, what we
 9 have in this case is the mother of this child and the
 10 care and concern that you saw of what and how she cared
 11 for this child under oath. With that testimony, Judge,
 12 I would submit that there's only one of three options

13 that exist based upon this evidentiary presentation and
 14 that the defendant committed the charge that's set
 15 forth in the criminal complaint and ask that you bind
 16 him over.

17 THE COURT: I have some problems with the
 18 case, with the amount of knowledge that I've been given
 19 here this afternoon. I believe that the burden is
 20 slight or marginal. This is a tragedy. The testimony
 21 is uncontroverted that the death was a homicide at the
 22 hands of another. The question of who did it is a big
 23 question. At this point in time with all of the
 24 testimony, and we haven't heard from the defendant,
 25 which at this point in time I don't think you can

1 un-ring a bell, but with the testimony of the friend
 2 questioning the bruising, with the testimony that we
 3 have I believe that the burden has been met. I think
 4 by the slightest and slimmest of margins and there's a
 5 lot of stuff here that I don't know and of course I'm
 6 not the one who is able to ask the questions. I
 7 believe that slight or marginal evidence has been shown
 8 that murder and child abuse with substantial bodily
 9 harm has been met and we'll hold the defendant to
 10 answer to the charges in the Eighth Judicial District
 11 Court.

12 He is ordered to appear for his initial

13 arraignment on --

14 THE CLERK: November 21st, 10:30, lower
 15 level, this case is tracked to Department 23.

16 THE COURT: I am going to reduce the bail
 17 in this matter to \$50,000 cash or surety.

18 MR. STANTON: Judge, do you know that the
 19 defendant is on parole?

20 THE COURT: Nope. Fill me in.

21 MR. STANTON: The defendant has 11
 22 convictions for robbery and burglary with a deadly
 23 weapon. At the time of these offenses he was on parole
 24 and has a parole tail.

25 THE COURT: Bail will stand as it was. I

1 didn't know that. Thank you.

2

3

4

(The proceedings concluded.)

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* * * * *

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ATTEST: Full, true and accurate
 transcript of proceedings.

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Lisa Brenske
 LISA BRENSKE, CSR No. 186

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<p>V</p> <p>vacuum [1] 140/17</p> <p>Vaguely [1] 122/13</p> <p>valley [1] 85/13</p> <p>various [5] 54/10 58/25 61/21 62/1 121/17</p> <p>vault [1] 47/7</p> <p>Vegas [1] 7/1</p> <p>vehicle [5] 49/19 72/1 74/1 74/3 112/7</p> <p>verbiage [1] 17/9</p> <p>versus [1] 4/4</p> <p>very [5] 18/5 74/24 74/25 88/12 89/18</p> <p>vessels [2] 51/19 51/22</p> <p>victim [2] 73/7 78/6</p> <p>videotape [2] 35/17 35/20</p> <p>view [1] 123/25</p> <p>visit [1] 72/12</p> <p>visualizing [1] 56/12</p> <p>vomiting [5] 48/3 74/19 76/4 114/24 139/21</p> <p>VON [1] 1/24</p>	<p>W</p> <p>wait [2] 28/21 75/9</p> <p>waiting [1] 35/15</p> <p>waking [2] 131/14 131/23</p> <p>walk [4] 94/3 95/7 95/8 134/5</p> <p>walked [2] 94/2 103/4</p> <p>walking [7] 33/1 95/6 98/10 115/23 123/11 124/25 134/7</p> <p>want [17] 4/10 13/24 23/25 36/4 36/10 36/13 51/9 74/19 85/25 88/15 89/18 91/25 93/6 93/7 93/23 98/10 138/19</p> <p>wanted [5] 35/7 95/7 97/21 97/23 126/9</p> <p>wants [2] 4/25 5/17</p> <p>was [339]</p> <p>wash [6] 23/19 23/20 23/22 33/6 92/3 92/4</p> <p>washed [1] 11/6</p> <p>washing [2] 106/22 107/14</p> <p>wasn't [18] 17/11 17/13 20/6 32/20 32/21 38/4 38/6 40/21 58/13 107/4 116/9 119/6 123/10 124/23 124/25 129/21 133/2 133/5</p> <p>watch [2] 7/17 38/12</p>	<p>X</p> <p>x-rays [4] 69/13 70/2 70/3 114/4</p> <p>Y</p> <p>Yankee [2] 26/1 38/8</p> <p>Yankee/Indian [1] 38/8</p> <p>yard [1] 13/6</p> <p>yeah [27] 9/22 10/14 15/9 16/18 19/15 20/18 26/14 26/22 27/8 27/18 29/6 30/1 32/22 33/8 37/8 39/3 40/14 41/17 42/11 42/15 93/14 95/1 112/25 127/22 128/24 129/20 135/7</p> <p>year [16] 7/3 7/19 9/9 23/25 25/10 41/1 45/22 47/19 59/10 60/16 60/17 84/24 85/8 85/9 133/8 139/7</p>

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 80/11 85/12 124/1


CLERK OF THE COURT

1 **INFO**
2 DAVID ROGER
3 Clark County District Attorney
4 Nevada Bar #002781
5 DAVID L. STANTON
6 Chief Deputy District Attorney
7 Nevada Bar #003202
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

12 I.A. 11/21/2011 DISTRICT COURT
13 10:30 A.M. CLARK COUNTY, NEVADA
14 P. MCDONALD, ESQ.

15 THE STATE OF NEVADA,)
16)
17 Plaintiff,)

18 -vs-)

19 MICHAEL ALAN LEE,
20 #1699107)

21 Defendant.)

Case No: C-11-277650-1
Dept No: XXIII

INFORMATION

22 STATE OF NEVADA }
23 COUNTY OF CLARK } ss.

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

26 That MICHAEL ALAN LEE, the Defendant(s) above named, having committed the
27 crimes of MURDER (Category A Felony - NRS 200.010, 200.030, 200.508) and CHILD
28 ABUSE & NEGLECT WITH SUBSTANTIAL BODILY HARM (Category B Felony -
NRS 200.508, 0.060), on or between the 13th day of June, 2011 and the 15th day of June,
2011, within the County of Clark, State of Nevada, contrary to the form, force and effect of
statutes in such cases made and provided, and against the peace and dignity of the State of
Nevada,

///

///

1 COUNT 1 - MURDER

2 did, on or between June 14, 2011 and June 15, 2011, then and there, without
3 authority of law and with malice aforethought, willfully and feloniously kill BRODIE
4 ASCHENBRENNER, a minor child being approximately 2 years of age of age, by
5 subjecting the said BRODIE ASCHENBRENNER to acts of child abuse, to-wit: by striking
6 the said BRODIE ASCHENBRENNER in the abdominal area and/or did cause blunt force
7 trauma to BRODIE ASCHENBRENNER'S abdominal area in an unknown manner, all of
8 which resulted in the death of said BRODIE ASCHENBRENNER.

9 COUNT 2 - CHILD ABUSE & NEGLECT WITH SUBSTANTIAL BODILY HARM

10 did, on or between June 13, 2011 and June 14, 2011, wilfully, unlawfully,
11 feloniously, and knowingly neglect, cause, or permit a child under the age of 18 years, to-
12 wit: BRODIE ASCHENBRENNER, being approximately 2 years of age, to suffer
13 unjustifiable physical pain and substantial bodily harm, by striking the said BRODIE
14 ASCHENBRENNER in the head and/or did cause blunt force trauma to BRODIE
15 ASCHENBRENNER'S head in an unknown manner and/or after determining that the said
16 BRODIE ASCHENBRENNER had suffered head injuries, Defendant did fail to seek
17 medical care for the said BRODIE ASCHENBRENNER.

18
19
20 BY



21 DAVID ROGER
22 DISTRICT ATTORNEY
23 Nevada Bar #002781

24 Names of witnesses known to the District Attorney's Office at the time of filing this
25 Information are as follows:

26 <u>NAME</u>	<u>ADDRESS</u>
27 ASCHENBRENNER, Dustin	2600 S. Montana, Butte, MT
28 BENJAMINS, F.	HPD #720

1	COLLINS, G.	HPD #324
2	CUSTODIAN OF RECORDS or Designee	Clark County Coroner's Office
3	CUSTODIAN OF RECORDS or Designee	Clark County Detention Center
4	CUSTODIAN OF RECORDS or Designee	HPD Communications
5	CUSTODIAN OF RECORDS or Designee	HPD Records
6	FOSTER, Arica	C/O CCDA'S Office
7	GAVIN, Dr. Lisa	Clark County Coroner's Office
8	HOLDEN, Melissa	410 E. Naples Dr., #6, LV, NV
9	KESTERSON, G.	HPD #1627
10	MOSHIER, Merriddee	C/O CCDA'S Office

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DA#11FH1653X/djj
HPD EV#1110917
MURDER; CHILD ABUSE & NEGL W/SBH - F
(TK8)

ORIGINAL

FILED

DEC 12 4 14 PM '11

John A. Lohman
CLERK OF THE COURT

PETN
PATRICK E. McDONALD, ESQ.
Nevada Bar No. 3526
STEVEN B. WOLFSON, CHTD.
601 S. Seventh Street
Las Vegas, Nevada 89101
Tel: (702) 385-7227
Fax: (702) 385-5351
Attorney for Petitioner

DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

MICHAEL ALAN LEE,
#1699107,

Defendant.

Case No: C277650
Dept No: XXIII

Date of Hearing:
Time of Hearing:

PETITION FOR WRIT OF HABEAS CORPUS

TO: THE HONORABLE JUDGE OF THE EIGHTH JUDICIAL DISTRICT COURT OF
THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK:

The Petition of MICHAEL ALAN LEE, by and through his attorney of record, PATRICK
E. McDONALD, of the law firm of STEVEN B. WOLFSON, CHTD., respectfully shows:

1. That he is a duly qualified, practicing and licensed attorney in the City of Las Vegas,
County of Clark, State of Nevada.
2. That Petitioner is the Defendant in the above entitled matter;
3. Petitioner makes this application for Writ of Habeas Corpus; that the Petitioner is
restrained of his liberty; that the place where the Petitioner is imprisoned actually or constructively
imprisoned and restrained of his liberty is the High Desert State Prison; that the officer by whom he
is imprisoned and restrained is Dwight Neven, Warden.

....

....

RECEIVED

DEC 12 2011

CLERK OF THE COURT

C-11-277650-1
PWNC
Petition for Writ of Habeas Corpus
1718226



33

1 4. That the imprisonment and restraint of said Petitioner is unlawful in that: there was
2 insufficient evidence presented at the Preliminary Hearing in order to bind the counts of Murder and
3 Child Abuse & Neglect with Substantial Bodily Harm over to District Court.

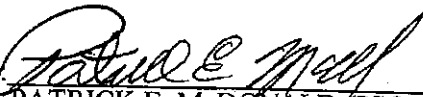
4 5. No other Petition for Writ of Habeas Corpus has heretofore been filed on behalf of
5 Petitioner in this particular issue.

6 6. This Petition is based upon the records and pleadings on file herein, the Memorandum
7 of Points and Authorities attached hereto, and upon such other grounds and evidence as may be
8 adduced at a hearing on this Writ.

9 WHEREFORE, the Petitioner prays that this Honorable Court enter an Order directing the
10 County Clerk to issue a Writ of Habeas Corpus directed to Warden Dwight Neven, commanding him
11 to appear before Your Honor, and return the cause for restraint of the Petitioner.

12 RESPECTFULLY SUBMITTED this 12th day of December, 2011.

13 STEVEN B. WOLFSON, CHTD.

14
15 By: 
16 PATRICK E. McDONALD, ESQ.
17 Nevada Bar No. 3526
18 601 South Seventh Street
19 Las Vegas, Nevada 89101
20 Attorney for Petitioner
21
22
23
24
25
26
27
28

1 **NOTICE OF HEARING**

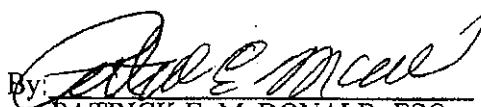
2 TO: STATE OF NEVADA, Plaintiff

3 TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff

4 YOU WILL PLEASE TAKE NOTICE that the foregoing **PETITION FOR WRIT OF**
5 **HABEAS CORPUS** will be heard on JAN. 4, 2012, 2011, at 9:30 a.m. in
6 Department No. ~~XXII~~ of District Court.

7 RESPECTFULLY SUBMITTED this 12th day of December, 2011.

8 STEVEN B. WOLFSON, CHTD.

9
10 By: 
11 PATRICK E. McDONALD, ESQ.
12 Nevada Bar No. 3526
13 601 South Seventh Street
14 Las Vegas, Nevada 89101
15 Attorney for Petitioner

14 **DECLARATION**

15 STATE OF NEVADA }
16 COUNTY OF CLARK } ss:

17 PATRICK E. McDONALD, ESQ., being first duly sworn upon his oath, deposes and says:

18 1. I am an attorney duly licensed to practice law in the State of Nevada; I am the
19 Attorney hired to represent the Defendant in the instant matter, and I am familiar with the facts and
20 circumstances of this case.

21 2. That the Preliminary Hearing was heard on November 8, 2001.

22 3. That the Preliminary Hearing Transcript was filed on November 23, 2011.

23 4. That the evidence presented by the State at the Preliminary Hearing does not support
24 a bind over on Count 1 - Murder and Count 2 - Child Abuse and Neglect with Substantial Bodily
25 Harm.

26 5. That I am the attorney of record for Petitioner in the above matter; that I have read
27 the foregoing Petition, know the contents thereof, and that the same is true of my own knowledge,
28 except for those matters therein stated on information and belief, and as to those matters, I believe

1 them to be true; that Petitioner, MICHAEL ALAN LEE, personally authorizes me to commence this
2 Writ of Habeas Corpus action.

3
4 
PATRICK E. McDONALD, ESQ.

5
6 SUBSCRIBED and SWORN to before
me this 12th day of December, 2011.

7
8 
9 NOTARY PUBLIC in and for said
County and State



10
11 **MEMORANDUM OF POINTS AND AUTHORITIES**
12 **IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS**

13 COMES NOW, Petitioner, MICHAEL ALAN LEE, by and through his attorney, PATRICK
14 E. McDONALD, ESQ., of the law office of STEVEN B. WOLFSON, CHTD., and submits the
15 following Points and Authorities in Support of Defendant's Petition for a Writ of Habeas Corpus.

16 **I.**

17 **FACTS**

18 On October 20, 2011, the State of Nevada filed a Criminal Complaint against MICHAEL
19 ALAN LEE (hereinafter "Petitioner") charging him with: Count 1 - Murder (Felony - N.R.S.
20 200.010, 200.030, 200.508), and Count 2 - Child Abuse and Neglect with Substantial Bodily Harm
21 (Felony - N.R.S. 200.508, 200.060).

22 This matter went before the Honorable David S. Gibson in Henderson Justice Court,
23 Department No. 3, for a Preliminary Hearing on November 8, 2011, to determine if there was
24 sufficient probable cause to hold Petitioner, MICHAEL ALAN LEE, for further criminal
25 proceedings. At the conclusion of the Preliminary Hearing the Petitioner was bound up on both
26 counts.

27 It is the Petitioner's contention that the Judge erred holding the Petitioner to answer on
28 Counts 1 and 2, as there was no slight or marginal evidence presented. Therefore, Judge Gibson

1 should not have found sufficient evidence to support these charges.

2 The standard at a preliminary hearing for the finding of probable cause to support a criminal
3 charge may be based on "slight or even marginal evidence." Even with such a low standard, the
4 evidence presented did not meet this standard at the Preliminary Hearing.

5 The first witness called by the State was Merridee Moshier, the grandmother of Brodie
6 Aschenbrenner. Ms. Moshier testified that during her visit with Brodie on Sunday, she observed

7 Brodie naked from head to toe and the only injuries she observed on him was the bruise on his cheek
8 and his lips being chapped as he was always sucking on his lips. (PHT at Page 13). Ms. Moshier
9 further described Brodie as a wild child, stating that he would climb up on her counters and tables
10 and jump off. (PHT at Page 16). She further testified that she had informed detectives that it
11 wasn't unusual for Brodie to crash himself into the tub. He and his cousin would climb up on the
12 tub and use it as a slide. (PHT at Page 17).

13 Ms. Moshier was also questioned if she recalled telling the detective about the granite
14 countertops in the kitchen. (PHT at Page 18). A portion of Ms. Moshier's testimony follows:

15 BY MR. McDONALD:

16 Q. Do you recall telling the detective about the granite
17 countertops in the kitchen?

18 A. Correct.

19 Q. And that the height of the countertop was approximately the same
20 height as the top of Brodie's forehead or his head?

21 A. It was just a little bit higher than his temple. Right
22 before this happened he went through a huge growth spurt.

23 Q. And he had a habit of hitting his forehead into the granite
24 countertops?

25 A. I wouldn't call it a habit.

26 Q. Well, it happened, correct?

27 A. It happened, yes.

28 Q. It happened with some degree of frequency, correct?

A. What's frequent?

Q. Well, at least when he'd spend those weekends there it would
happen?

1 A. Not every weekend.

2 Q. You described how his lower legs always had bruises because

3 he was so wild?

4 A. Yeah.

5 Q. In fact, you called him the bruiser?

6 A. We called him the wild child. I also called him Bamm-Bamm and I called

7 Lilly Pebbles like the Flintstones.

8 Q. Now, counsel for the State had shown you some photographs

9 earlier.

10 A. Yes.

11 Q. And it's your testimony of what appeared to be injuries on

12 those photographs, you never saw any of that on your grandson

13 on Sunday evening?

14 A. No.

15 Q. So not even the mark on the cheek that you referred to?

16 A. There was a little mark on his cheek like his little fingertip

17 size. But whatever was in the picture, that wasn't it. Those

18 were -- it was like a yellowing little bruise the fingertip size

19 on his cheek.

20 Q. And was there any bruising on his arms or his legs that Sunday night?

21 A. Not his arms. He could have had a few, you know, just on his

22 were on his legs I wouldn't be surprised because - - -

23 Q. Because it was typical for Brodie to have bruises, right?

24 A. On his lower legs.

25 Q. That's what I'm speaking of.

26 A. Yeah. He's a boy.

27 Q. And he also would have bruises on his face, wouldn't he?

28 A. From time to time.

25 The State then called Danny Fico to the witness stand. Mr. Fico was questioned about

26 Petitioner and Brodie's visit with him on Monday evening to watch the baseball game. He testified

27 that earlier in the morning, Petitioner, Arica and Brodie had come into the store to purchase some

28 ice before going to the community pool. (PHT at Page 37). He noticed that Brodie had the same

1 bruise on his cheek that Ms. Moshier had testified to. A portion of Mr. Fico's testimony follows:

2 BY MR. McDONALD:

3 Q. Michael Lee came into the, is it called America's Mart?

4 A. Yes.

5 Q. On the morning of Monday, June 13th, correct?

6 A. Yes.

7 Q. And did you know at that time that he was on his way to the
8 Whitney Ranch community pool?

9 A. Yes.

10 Q. And he purchased some ice?

11 A. Yeah. I don't remember what he purchased. He purchased
12 some things.

13 Q. Was Brodie with him?

14 A. Yes.

15 Q. Was Arica with him?

16 A. Yes.

17 Q. Was Brodie acting normal?

18 A. Yes.

19 Q. Was he crying, was he upset?

20 A. No.

21 Q. Did you notice those bruises that morning that you identified
22 when the prosecutor had those pictures in front of you?

23 A. Yes.

24 Mr. Fico further testified that he contacted Petitioner later in the day to invite Petitioner and
25 Brodie to watch the Yankee/Indian game being on television. (PHT at Page 38). Mr. Fico H
26 testified that there were other people present at his residence that evening. His father, Jennifer Lee,
27 Jennifer's children and her husband. Mr. Fico testified that when Petitioner and Brodie arrived,
28 Brodie had the same bruises that he saw earlier that day on Monday morning. He stated that while
at his residence, Brodie was playing with Petitioner's two nephews and he was mostly focused on

1 watching the game. He testified that after the game was over, they went to Petitioner's sister's
2 house and Mike and Brodie met him over there. (PHT at Page 39).

3 Mr. Fico testified that the next day, Tuesday, June 14th, he saw Mike, Arica and Brodie again
4 at the store. They told him they were going to Shark Reef. He was asked if on Tuesday morning
5 Brodie still had the same bruises that he saw Monday night, to which he stated yes. It was at that
6 point he questioned Arica about the bruise on Brodie, and she acted as if she didn't really know.

7 (PHT at Page 42).

8 The State next called a pathologist, Dr. Lisa Garvin. Dr. Garvin testified that she could not,
9 with a degree of certainty, say exactly when the injuries occurred which caused Brodie's death. She
10 further testified that Brodie's injuries were consistent the force one may experience from that of an
11 automobile accident. (PHT at Page 74). A portion of Dr. Gavin's testimony follows:.

12 BY MR. McDONALD:

13 Q. Could the motor vehicle accident have caused a partial tear to the duodenum?

14 A. A motor vehicle accident can cause that. But the timing is off in this particular
15 case.

16 Q. It can cause it to partially tear, not transect fully?

17 A. It can cause a partial tear but there would be symptoms at that time.

18 Q. Could it be symptoms like an upset stomach?

19 A. They can have an upset stomach.

20 Q. It would be like flu-like symptoms?

21 A. It's possible.

22 Q. And then as the partial tear -- the way I understand it is that matter instead of
23 processing out it's coming from the stomach into the abdominal cavity?

24 A. Yes. It doesn't even go into -- he wouldn't necessarily have normal bowel
25 movements. He would be vomiting, he wouldn't want to eat.

26 Dr. Gavin further testified that:

27 A. It doesn't matter the size of the hole, it's the fact of the abdominal contents
28 going into the cavity and that's causing the peritonitis and it's that reaction
that ends up making the person sick.

Q. Well, wouldn't the size of the hole regulate the amount of matter that is
emptying into the abdominal cavity?

1 A. The amount that gets into the abdominal cavity isn't relevant either because
2 it's the reaction to something that's not supposed to be there that causes the
3 problem that causes the peritonitis that causes The death.

4 Q. So it's not uncommon for someone to have peritonitis for in excess - of two
5 weeks before expiring?

6 A. They can have it for -- that's correct, but they're usually sick, a fever,
abdominal pain, not eating, could be vomiting, may not have normal bowel
movements.

7 Q. And those are some of the symptoms that a person may have, correct?

8 A. That's correct.

9 Q. They wouldn't necessarily have to have all those symptoms?

10 A. Usually they have a majority of them.

11 Q. And that comes from just your education from the text books?

12 A. Education. I have seen that when I was in medical school. I have seen people
13 with peritonitis present. I've seen children with peritonitis present. I've seen
adults die from peritonitis as well as children.

14 Q. You don't necessarily have to have as you mentioned a transection of the
15 duodenum to incur peritonitis?

16 A. That's correct.

17 When Dr. Gavin was questioned as to whether anyone had advised her that approximately
18 four to five days prior to his demise, that Brodie was riding on a battery operated quad, went off the
19 curb and allegedly hit his face into an automobile, she did not recall being told that. Dr. Gavin also
20 testified that Brodie had one abrasion just beneath his lower lip and that could be from his teeth
21 pressing on the lower lip as he's biting his lip, which Ms. Moshidee earlier testified that Brodie did
22 quite often. She further testified that she had only seen a couple of cases like this but this was the
23 only one she had done by herself. (PHT at Page 80).

24 During the testimony of Arica Foster, the mother of Brodie Aschenbrenner, she admitted that
25 she never saw Petitioner do anything other than wrestle with the child in a playful manner.

26 From Arica's own testimony there are large periods of time when Arica Foster, specifically
27 Tuesday night, was home with the child alone, including the morning hours prior to his death. Ms.
28 Foster even testified that the evening prior to Brodie's death when she was cleaning him up after

1 vomiting, that she never noticed any injuries on the child. Further, her testimony that Danny Fico
2 questioned her about the bruising on Brodie, does not support probable cause, by either "slight or
3 marginal" evidence, that Petitioner committed the acts which led to his death. Relevant testimony
4 from Arica Foster follows **(PHT at Page 92)**:

5 BY MR. MCDONALD:

6 Q. Did Mr. Fico ask you about the condition of Brodie when
you were in the store?

7 A. Yes. We talked about his cheek. He had pointed out his
8 cheek.

9 Q. Mr. Fico brought it up to you?

10 A. Yes.

11 Q. It was the bruise on his cheek?

12 A. Yes.

13 Q. What did he ask you about it?

14 A. He just made a comment about look at his bruise.

15 Q. Did you explain to him how he got the bruise?

16 A. No. I just made a comment that his forehead is bruised too.

17 Mr. Fico observing the bruises, in no way indicated that it was Petitioner who caused these
18 injuries. Though Arica testified that she didn't know what caused them, does not establish probable
19 cause that Petitioner committed violent acts upon Brodie.

20 Ms. Foster also testified to several other relevant matters. First, Ms. Foster testified as
21 follows as to the events of that evening. **(PHT at Page 99)**:

22 BY MR. STANTON:

23 Q. What if anything occurred with the defendant while you were
24 preparing the evening meal?

25 A. He left to go to the gas station.

26 Q. How long was he gone?

27 A. Maybe an hour.

28 Q. Did you call him or have communication with him while he
was at his place of employment?

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A. I called him after dinner was done. Like after I had cooked it.

Q. He didn't go there to go work, did he?

A. No, sir.

Q. Why did he go there as you understood it?

A. Somebody called him.

Q. When you talked to him how did you communicate or get a hold of him?

A. Called his cell phone.

Q. What did you tell him when you called on the cell phone?

A. I said dinner was ready.

Q. Did he come home?

A. Yes. A little bit later. About 10 minutes.

Q. Had Brodie already finished eating?

A. Yes. And I had already put him to bed.

Arica testified that she had come home, Petitioner left and she alone with Brodie, in fact, he was in bed when Petitioner returned and she continued to have the evening meal with the Petitioner.

By Arica's own testimony, and the time frame given by Dr, Gavin, she was the person who had been alone with Brodie in those 24 hours preceding his death. Arica testified that after her meal with Petitioner, she had gone to her mother's house, and then to the store to buy some milk for Brodie. Further testimony is as follows (PHT at Page 103):

BY MR. McDONALD:

Q. When you walked in the home where was the defendant?

A. Sitting on the couch.

Q. What was he doing?

A. Watching TV.

Arica stated that upon her return, she did not check on Brodie as she believed that he was sleeping. She stated that she and Petitioner went to bed together around 10:00, 10:30 p.m. She

1 testified that around 1:00 a.m., Petitioner advised her that Brodie was sick and had been vomiting.

2 A portion of Arica's testimony follows (PHT at Page 105):

3 Q. When you were woken up by the defendant did he ask you to
4 do anything about Brodie and his condition?

5 A. I don't remember.

6 Q. Did he ask you to clean up Brodie?

7 A. I don't remember right now. I'm sorry.

8 Q. What did Brodie tell you about how he was feeling?

9 A. He told me that his head hurt.

10 Q. His head hurts?

11 A. (No oral response.)

12 Q. Is that a yes?

13 A. Yes.

14 Q. And what did you do as far as taking care of Brodie and his
15 room and his condition of his bed?

16 A. Picked up Brodie and brought him into the bathroom and just
17 wiped his face off and just wiped him down a little bit. And then
18 I got a towel and laid it on the couch and laid Brodie on the couch
19 with a blanket over him and then I laid with him.

20 Q. I'm sorry?

21 A. And I laid with him until he fell asleep.

22 Arica testified that she and Brodie had been in an automobile accident about two weeks prior
23 to his demise and that as a result, Brodie's car seat had broken. A portion of her testimony follows
24 (PHT at Page 111):

25 Q. Do you recall the accident, the automobile accident occurred
26 on May 26th?

27 A. I don't remember the date.

28 Q. Would that sound about right to you?

A. Yes, sir.

Q. Do you recall that it was about two o'clock in the afternoon?

1 A. Yes, sir.
2 Q. Do you recall telling the police that you had been hit from
3 behind?
4 A. Yes, sir.
5 Q. That caused you to hit the vehicle in front of you?
6 A. No, sir .
7 Q. It caused you to hit your head somewhere in the interior of the
8 car?
9 A. Yes.
10 Q. You don't recall where you hit your head?
11 A. On the window. The side window.
12 Q. Do you recall telling the police that Brodie's car seat broke?
13 A. Yes, sir.
14 Q. How did it break? What was broken?
15 A. On the left-hand side on the top it had broke off the
16 Styrofoam. It came undone.
17 Q. Did you replace that car seat?
18 A. No, sir.
19 Q. There was quite a bit of damage to the back of your car,
20 correct?
21 A. Yeah.
22 Q. And Brodie never complained of any injuries on May 26th, the
23 day of the automobile accident?
24 A. No.
25 Q. Doctor just examined him in the room when you were
26 present?
27 A. Yes.
28 Q. About how long was the doctor in the room with you and

1 Brodie?

2 A. Ten or fifteen minutes.

3 Moreover, Arica testified that Brodie was a clumsy child, who fell often and bruised very
4 easily. A portion of her testimony follows (PHT at Page 115):

5 Q. Brodie experienced a lot of bruising, didn't he?

6 A. Yes, sir.

7 Q. Brodie had an accident when he was riding his little quad
8 and you were walking the dog on the Friday before his demise, correct?

9 A. Yes, sir.

10 Q. And he fell off of the little quad?

11 A. Yes, sir.

12 Q. And hit his face on a car?

13 A. No, sir.

14 Q. What did he hit his face on?

15 A. He hit his cheek on the curb.

16 Q. So on the concrete?

17 A. Yes.

18 Q. It wasn't unusual for Brodie to have accidents like that, was it?

19 A. No.

20 Q. The dog would knock him down?

21 A. Yes.

22 Q. He would jump off of things and get a bloody nose?

23 A. He never had a bloody nose.

24 Q. He never had a bloody nose?

25 A. No.

26 Q. To the best of your recollection he never had a bloody nose?

27 A. Not that I can remember.

28 Q. Now, did you take him to the doctor when his chin hit the concrete?

- 1 A. No, sir. It was his cheek.
2 Q. His cheek hit the concrete. He had stitches in his eyelid at one time, right?
3 A. Yes, sir.
4 Q. How did that occur?

5 MR. STANTON: Objection, relevance, Your Honor, and time frame, foundation.

6 THE COURT: I think it's all relevant.

7 BY MR. MCDONALD:

- 8 Q. Do you recall when that occurred?
9 A. Yes. It was about a month and a half before everything happened.
10 Q. Do you recall how that occurred?
11 A. Yes.
12 Q. How was that?
13 A. Mike and Brodie and his nephews and I were at the park,
14 I had Mike's nephew on the swing, Mike had Brodie and
15 he hit his face running on a piece of park equipment.
16 Q. Brodie was running and he hit his face on a piece of park equipment?
17 A. He tripped and fell.
18 Q. So nobody pushed Brodie?
19 A. No.

20 There was testimony presented that Brodie had a black eye on Monday and Tuesday before
21 his death. However, Arica testified that she had taken Brodie to the community pool, after he was
22 diagnosed with pink eye on the previous Friday. Prior (PHT at Page 120). She stated that it was her
23 that took Brodie, with pink eye, to a community pool, and that the swimming pool irritated his eyes.

24 When questioned by the State, Arica made it appear that Brodie was grumpy during their trip
25 to the Shark Reef, among other places, on Monday, due to some fault of Petitioner, However, when
26 questioned, Arica testified as follows (PHT at Page 124):

27 BY MR. MCDONALD:

- 28 Q. When you went to Circus Circus had that been planned prior
to going to the Shark Reef?

1 A. No.
2 Q. So once you were done at the Shark Reef you and Mike
3 discussed going to Circus Circus?
4 A. Yes.
5 Q. And Brodie was in his stroller at Circus Circus, wasn't he?
6 A. Yes.
7 Q. He wasn't walking?
8 A. No.
9 Q. When Brodie was at Circus Circus did he tell you he was
10 tired?
11 A. Yes.
12 Q. Would Brodie get cranky when he was tired?
13 A. Yes.
14 Q. So he was cranky at Circus Circus?
15 A. Yes.
16 Q. So after that you went to Fantastic Sam's?
17 A. Yes.
18 Q. And then to the bank?
19 A. Yes.
20 Q. Was that a drive-thru?
21 A. Mike went in.
22 Q. And you and Brodie stayed in the car?
23 A. Yes.

24 The period where Petitioner went into the bank, once again gives her an opportunity to be
25 alone with Brodie. She further testified that Brodie was very cranky. (PHT at Page 126):

26 BY MR. McDONALD:

27 Q. So it took 30 or 40 minutes to get from Circus Circus to
28 Fantastic Sam's to the bank and then to Best Buy?
A. Somewhere around there, yes.

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Q. And was Brodie still telling you that he wanted to go night night?

A. He had fell asleep between Circus Circus and Fantastic Sam's.

Q. But he woke up when you got out of the car at Fantastic Sam's, correct?

A. Yes.

Q. Did he stay awake to the bank and to Best Buy?

A. Yes.

Q. Was he cranky?

A. A little bit.

She testified that they had returned home from Best Buy in the late afternoon. She stated she then started cleaning and Brodie was helping her. As cranky and tired as he was, she didn't put him down for a nap as she testified to, but instead, she kept him awake and he helped her clean. This seems strange for a small child who had been sleepy and cranky and asking to go "night night" only moments before their arrival at home. Shortly thereafter, Petitioner received a call and left to go to his place of employment, and it was just Arica and Brodie there alone. She stated that she made dinner and called Petitioner to tell him dinner was ready. (PHT at Page 128).

The following portion of Arica's testimony would negate the inference of either slight or marginal evidence that probable cause exists to believe that it was Petitioner who committed these acts against Brodie, and tend to cause one to wonder if it wasn't in fact Arica who committed these offenses. (HT at Page 128):

BY MR. McDONALD:

Q. When you cleaned Brodie up what was he wearing?

A. His underwear and I took his shirt off.

Q. So you removed his shirt. Did you see any injuries when you removed his shirt?

A. No.

Q. No injuries at all?

1 A. I didn't notice anything. I was half asleep and it was still kind of
2 dark in the house.
3 Q. Well, you took him in the bathroom to clean him up, didn't you?
4 A. Yes.
5 Q. You turned the light on in the bathroom?
6 A. Yeah.
7 Q. So it wasn't dark in the bathroom, correct?
8 A. Correct.
9 Q. You didn't have any problems seeing Brodie at that time, did you?
10 A. No, I didn't notice anything.
11 Q. You took him out to the couch and did you arrange the couch in any special
12 way?
13 A. I just put a towel down.

14 By her own testimony, she did not observe any injuries to Brodie at that time. It was
15 following this incident that she and Petitioner went to bed together and the following morning
16 Petitioner, on his way to work, placed Brodie next to Arica on the bed before he left. Arica testified
17 that she awoke around 8:50 am., notice that Brodie was at the edge of her bed and rubbed his back.
18 She felt that he was cold and non responsive, and that's when she called 911.

19 Arica testified that Brodie was very clumsy and although she had been previously advised
20 to take Brodie to a neurologist, she neglected to so. If this was in fact the cause for Brodie's
21 bruising, why wouldn't she seek help for her child in an attempt to keep him from getting injured
22 all the time. Arica was questioned about whether Brodie was always bruised and if she had ever
23 seen Petitioner either strike or harm Brodie, she testified as follows (PHT at Page 133):

24 BY MR. McDONALD:

25 Q. Brodie had a lot of trouble with his balance, didn't he?
26 A. He was clumsy.
27 Q. He would fall down?
28 A. Yes.

1 Q. Just be standing one moment and fall down the next?
2 A. No.
3 Q. Okay. Standing and start to walk and fall down?
4 A. He'd be walking.
5 Q. And fall?
6 A. And trip over things like his own feet.

7 Q. Did you ever take Brodie to a pediatric neurologist?
8 A. No. My pediatrician said not to worry about it.
9 Q. So you discussed it with the pediatrician?
10 A. Yes.
11 Q. You never saw Mike hit Brodie, did you?
12 A. No.
13 Q. And Mike never hit you?
14 A. No.

15 She stated that the only physical activity she had ever observed was Petitioner and Brodie
16 wrestling playfully. It would appear by the record, that the substantial periods of time in which, even
17 Arica testified, that Brodie was alone for a period of time long enough to sustain the injuries, was
18 when he was in her care. She cleaned Brodie up, observed no injuries, and then went to bed with
19 Petitioner. She stated she looked over at Brodie the morning he was placed in her bed, he was fine,
20 and several hours later, the child suddenly and mysteriously died.

21 Petitioner submits that there was no evidence, either slight or marginal, to bind him over on
22 these charges, as there is no probable cause to believe that it was Petitioner who committed any acts
23 of abuse against Brodie Aschenbrenner.

24 At the Preliminary Hearing, even the State argues that it is questionable as to who actually
25 committed these crimes against Brodie that caused his death. Mr. Stanton's testimony follows in
26 part (PHT at Page 141):

27 BY MR. STANTON:

28 This child died at the hands of another human being and critically

1 that it's non-accidental trauma. So one of three things took place. The
2 defendant murdered this child, the mother murdered this child or they
3 both did. Now, what we have in this case is the mother of this child
4 and the care and concern that you saw of what and how she cared for
5 this child under oath. With that testimony, Judge, I would submit that
6 there's only one of three options that exist based upon this evidentiary
7 presentation and that the defendant committed the charge that's set
8 forth in the criminal complaint and ask that you bind him over.

9 The State, by Mr. Stanton's own argument admits that the evidence against Petitioner does
10 not establish probable cause to support a reasonable inference that Petitioner committed these
11 offenses. Mr. Stanton explicitly states: "there are three options that exist based upon the testimony
12 and arguments presented at the Preliminary Hearing." That statement alone "one of three options,"
13 reflects that even the State realizes that there was no finding of probable cause at the Preliminary
14 Hearing to support the criminal charges based on "slight or even marginal evidence" to bind
15 Petitioner over on these charges.

16 Following the State's closing argument, Judge Gibson even admitted in his finding that the
17 evidence against Petitioner was by the "slightest and slimmest" of probable cause to support a
18 criminal charge that it was Petitioner who committed these offenses. Judge Gibson's statement
19 follows in part (PHT at Page 141):

20 THE COURT:

21 I have some problems with the case, with the amount of knowledge
22 that I've been given here this afternoon. I believe that the burden is
23 slight or marginal. This is a tragedy. The testimony is uncontroverted
24 that the death was a homicide at the hands of another. The question
25 of who did it is a big question. At this point in time with all of the
26 testimony, and we haven't heard from the defendant, which at this
27 point in time I don't think you can un-ring a bell, but with the
28 testimony of the friend questioning the bruising, with the testimony
29 that we have I believe that the burden has been met. I think by the
30 slightest and slimmest of margins and there's a lot of stuff here that
31 I don't know and of course I'm not the one who is able to ask the
32 questions. I believe that slight or marginal evidence has been shown
33 that murder and child abuse with substantial bodily harm has been
34 met and we'll hold the defendant to answer to the charges in the
35 Eighth Judicial District Court.

36 Based upon the fact that there was no probable cause, either "slight" or "marginal",
37 presented at the Preliminary Hearing that it was Petitioner who committed these acts against this
38 child, these charges simply cannot stand against Petitioner.

I.

LEGAL ARGUMENT

The Defendant understands that the finding of probable cause to support a criminal charge may be based on "slight or even marginal evidence...because it does not involve a determination of the guilt or innocence of the accused." Sheriff v. Hodes, 96 Nev. 184 (1980). "To commit an accused for trial, the State is not required to negate all inferences which might explain his conduct, but to present enough evidence to support a reasonable inference that the accused committed the offense." Kinsey v. Sheriff, 87 Nev. 361 (1971).

An inference is a deduction which the reason of the jury (trier of the facts) makes from the facts proved, without an express direction of law to that effect. While the inference drawn need not be a necessary inference, it still remains that the inference must be reasonable, not unreasonable or so remote as to be unwarranted. Probable cause requires that there shall be more evidence for guilt than against.

State v. Von Brincken, 86 Nev. 769, 773, 476 P.2d 733 (1970).

To establish probable cause at a preliminary hearing, the evidence presented must support a reasonable inference that the defendant probably committed the offense charged. Sheriff, Clark County v. Cunha, 93 Nev. 567, 571 P.2d 112 (1977). Probable cause requires that the evidence be weighed by the magistrate toward guilt, but the facts must be such that would lead a person of "ordinary caution and prudence to believe and conscientiously entertain a strong suspicion." Graves v. Sheriff, Clark County, 88 Nev. 436, 498 P.2d 1324 (1972).

To sustain a prosecution to trial in district court, there must either be an indictment or information filed based upon probable cause that the Defendant committed the offense charged. N.R.S. 171.206, 172.155. Slight or marginal evidence must be shown regarding each element of the crime charged to support a finding of probable cause. Sheriff, Washoe County v. Middleton, 112 Nev. 956, 921 P.2d 282 (1996) ("At preliminary hearing stage, the state's burden with respect to the corpus delicti is the same as its burden to show probable cause."); Domingues v. State, 112 Nev. 683, 917 P.2d 1364 (1996) (In determining whether a crime has been committed, the elements of the crime, the corpus delicti, must be established in order to hold a defendant for trial).

1 In the instant matter, the burden of proof necessary in order to hold Petitioner to answer in
2 the district court was not met by the States at the preliminary hearing as it was not supported by
3 substantial and competent evidence. Even on a murder charge the quantum of proof necessary in
4 order to hold an accused to answer in the district court is only that it appear to the magistrate, from
5 substantial and competent evidence, that an offense has been committed and that the defendant
6 committed it; when the evidence is in conflict at the preliminary examination it is the function of the

7 magistrate to determine the weight to be accorded the testimony of the witnesses, and so long as an
8 inference of criminal agency can be drawn from the evidence it is proper for the magistrate to draw
9 it, thereby leaving to the jury at the trial the ultimate determination of which of the witnesses are
10 more credible. Bryant v. Sheriff, Clark County, 86 Nev. 622, 472 P.2d 345 (1970).

11 In Azbill v. State, 84 Nev. 345, 350, 440 P.2d 1014 (1968), the court held:

12 "If a death is thought to be caused by criminal means and a person is charged with
13 a crime for causing that death, before he can be held for trial two things must be
14 proved by sufficient legal evidence before a grand jury if an indictment is sought or
15 before a magistrate if a complaint is filed and a preliminary hearing is held. They are
16 (1) the fact that a crime has been committed; and (2) probable cause to believe that
17 the person charged committed it."

18 "In proving the crime, which is otherwise known as the corpus delicti two elements must be
19 established (1) the fact of death; and (2) the criminal agency of another responsible for that death.
20 Beasley v. Lamb, 79 Nev. 78, 80, 378 P.2d 524 (1963)."

21 An open murder complaint charges murder in the first degree and all necessarily included
22 offenses. NRS 175.501; Parsons v. State, 74 Nev. 302, 329 P.2d 1070 (1958); State v. Oschoa, 49
23 Nev. 194, 242 P. 582 (1926).

24 At a preliminary hearing on such charge, the degree of proof required to hold a person to
25 answer in the district court is only that it appears to the magistrate, from legal, competent evidence,
26 that an offense has been committed and that the defendant committed it. Goldsmith v. Sheriff, 85
27 Nev. 295, 454 P.2d 86 (1969).

28 In the case at bar, the evidence presented by the State does not support a bind over on the
Counts of Murder and Child Abuse and Neglect with Substantial Bodily Harm as the elements were
not established as to the fact of death; or that there was probable cause to believe that Petitioner

1 committed these offenses.

2 **A. THE STATE FAILED TO PROVE BY SLIGHT OR MARGINAL EVIDENCE**
3 **THAT THE PETITIONER WITH INTENT COMMITTED THE CRIMES**
4 **ALLEGED**

5 To withstand a Writ of Habeas Corpus, the Court must find that the State presented sufficient
6 legal evidence at the preliminary hearing or at the grand jury proceedings to show (1) probable cause
7 that a crime was committed and (2) probable cause to believe that the defendant charged committed
8 that crime. Frutiger v. State, 111 Nev. 1385, 907 P.2d 158 (1995); see also Lamb v. Holsten, 85
9 Nev. 566, 459 P.2d 771 (1969); NRS 172.155. "The purpose of the preliminary proceedings is to
10 weed out groundless or unsupported charges of grave offenses and to relieve the accused of the
11 degradation and the expense of a criminal trial." State v. VonBrincken, 476 P. 2d 733 (Nev. 1970).

12 It is foreseeable that after an independent review of the evidence presented at the preliminary
13 hearing, the district court would find the justice court erroneously determined probable cause existed.
14 Higher courts often review lower courts decisions and overturn those decisions. This is such a
15 situation. In the instant case, the State failed to prove by slight or marginal evidence that it was the
16 Petitioner who maliciously with intent committed the crimes alleged.

17 In the instant case, the State failed to prove by slight or marginal evidence that the Petitioner
18 maliciously with intent committed the crimes alleged, as there was **absolutely no evidence** presented
19 by the State to make a determination that probable cause existed to believe that Petitioner committed
20 the offenses he has been charged with. In fact, as above noted, both the State as well as Judge
21 Gibson, distinctly admit that the question as to whom these alleged acts were committed by, is a big
22 one.

23 As to Count 1 of Murder, there was no evidence presented at the Preliminary Hearing that
24 Petitioner committed the unlawful killing of a human being with malice aforethought, either express
25 or implied, as there was no showing of probable cause that it was Petitioner who committed any of
26 the alleged acts. Therefore, the Petitioner cannot be held to answer for this crime. There is clearly
27 insufficient evidence, either "slight" or "marginal," to establish that the Defendant committed Count
28 1, Murder.

 As to Count 2 of Child Abuse and Neglect with Substantial Bodily Harm, there was

1 absolutely no evidence presented that Petitioner had the intent to abuse, neglect or endanger a child
2 by willfully causing a child less than 18 years of age to suffer unjustifiable physical pain or mental
3 suffering as a result of abuse or neglect, or to be placed in a situation where the child may suffer
4 physical pain or mental suffering as the result of abuse or neglect.

5 As outlined in the above Statement of Facts, there are substantial periods of time that Arica
6 Foster, the week prior to and more specifically on the night prior to his death, is at home and alone
7 with the child. Arica puts the child to bed prior to Petitioner returning home. After Petitioner alerts
8 Arica that the child had vomited, she got up, cleaned him up and laid him on the couch, and returned
9 to bed. By her own testimony, she did not observe any injuries to the child when she was in the
10 bathroom cleaning him up. Petitioner leaves for work the next morning and the child is again left
11 alone with Arica and a short time later the child is reported deceased.

12 Clearly there is insufficient evidence to establish that the Defendant committed Count 2,
13 Child Abuse and Neglect with Substantial Bodily Harm.

14 The State bears the burden of proof to establish a finding of probable cause at the Preliminary
15 Hearing to support the criminal charges based on "slight or even marginal evidence" to bind
16 Petitioner over on these charges.

17 The State, by Mr. Stanton's own argument, admits that the evidence against Petitioner does
18 not establish probable cause to support a reasonable inference that Petitioner committed these
19 offenses. Mr. Stanton explicitly states: "there are three options that exist based upon the testimony
20 and arguments presented at the Preliminary Hearing." That statement alone "one of three options,"
21 reflects that even the State realizes that there was no finding of probable cause at the Preliminary
22 Hearing to support the criminal charges against Petitioner based on "slight or even marginal
23 evidence" to bind him over on these charges. If there are three options which exist, it is irrefutable
24 that probable cause has not been shown by the evidence presented at the preliminary hearing, that
25 Petitioner possessed intent to commit or that he did commit the crimes he has been charged with,
26 by either "slight" or "marginal" evidence. If probable cause had been shown by evidence either
27 "slight" or "marginal," only one option would exist, not three options as rightfully pointed out by
28 Mr. Stanton. .

1 Moreover, following Mr. Stanton's statement, Judge Gibson thereafter makes the same
2 admission. Judge Gibson states: "The question of who did it is a big question." Judge Gibson then
3 goes on to state "I think by the slightest and slimmest of margins and there's a lot of stuff here that
4 I don't know and of course I'm not the one who is able to ask the questions. I believe that slight or
5 marginal evidence has been shown that murder and child abuse with substantial bodily harm has
6 been met and we'll hold the defendant to answer to the charges in the Eighth Judicial District Court."

7 Clearly, Judge Gibson's finding to bind Petitioner over on these charges is reversible error.
8 What Judge Gibson is basically saying is that, well I believe that a crime has been committed, there
9 is a big question as to who committed it, and as I'm not the one who can ask questions, we'll just
10 go ahead and hold Petitioner to answer to the charges in District Court. The "big question" as to
11 who committed these acts completely negates "slight" or "marginal" evidence supporting probable
12 cause that Petitioner committed these crimes.

13 Further, the statement made by Judge Gibson that "At this point in time with all of the
14 testimony, and we haven't heard from the defendant, which at this point in time I don't think you can
15 un-ring a bell, but with the testimony of the friend questioning the bruising, with the testimony that
16 we have, I believe that the burden has been met,". That only applies to the element of death by
17 criminal agency, not as to who perpetrated the criminal act. To decide that probable cause was met
18 as to the identity of the perpetrator is not supported by, and is contrary to the evidence, and the
19 record discloses a substantial conflict therein.

20 There is a substantial conflict in the matter which is clearly disclosed on the record at the
21 Preliminary Hearing. Mr. Stanton states "So one of three things took place. The defendant murdered
22 this child, the mother murdered this child or they both did. Now, what we have in this case is the
23 mother of this child and the care and concern that you saw of what and how she cared for this child
24 under oath. With that testimony, Judge, I would submit that there's only one of three options that
25 exist based upon this evidentiary presentation and that the defendant committed the charge." What
26 Mr. Stanton, as well as Judge Gibson, are implying is that well we are still really not sure who
27 committed these acts, but since the mother got on the stand and testified and Petitioner did not, it had
28 to have been him.

1 Petitioner would submit that the finding to bind him over on the charges based upon the fact
2 that Arica testified and he did not, is clearly contrary to the law that an accused persons failure to
3 testify cannot be held against them. Considering the totality of the circumstances, Arica would have
4 no reason to be afraid to present testimony against Petitioner in this matter as she is not the one
5 accused of murder or child abuse. If Arica did in facts commit the acts which resulted in the death
6 of her son, it is not unreasonable to believe that she could testify in a manner which would attempt
7 to shift the blame further away from her.

8 As the State has failed to present any evidence either "slight" or "marginal," the charges
9 against Petitioner were improperly bound over for trial and should be dismissed.

10 **B. THE STATE FAILED TO PRESENT ANY EVIDENCE THAT THE**
11 **PETITIONER HAD ANY INFERENCE OF INTENT TO COMMIT**
12 **THE OFFENSES HE HAS BEEN CHARGED WITH**

13 It is the burden of the State to prove that Petitioner committed the offenses he has been
14 charged with and that he had intent to commit any of these crimes. In this case at bar, the State has
15 not met that burden.

16 To constitute a crime there must be unity of act and intent. In every crime or public offense
17 there must exist a union, or joint operation of act and intention, or criminal negligence. N.R.S.
18 193.190. Intention is manifested by the circumstances connected with the perpetration of the
19 offense, and the sound mind and discretion of the person accused. N.R.S. 193.200.

20 Therefore, probable cause must have been shown, by the evidence presented at the
21 preliminary hearing that Petitioner possessed intent to commit the crimes he has been charged with
22 for the charges to have been properly bound over for trial. There was insufficient evidence presented
23 which supported any criminal intent by Petitioner.

24 Intent is an essential element to support a charge. If no such intent is shown, then the charge
25 cannot stand as no showing of intent was made. Consequently, at the preliminary hearing the State
26 should have been required to present evidence that Petitioner had intent to commit the criminal acts
27 that he has been charged with.

28 As to the charge of Murder, the State failed to present any evidence supporting this elements
of this offense and therefore failed to show probable cause that Petitioner possessed the intent to

1 commit or that he did commit murder.

2 The statute which governs the elements to substantiate a charge of Murder are outlined in
3 N.R.S. 200.010 "Murder" defined, is the unlawful killing of a human being:

- 4 1. With malice aforethought, either express or implied;
- 5 2. Caused by a controlled substance which was sold, given,
6 traded or otherwise made available to a person in violation of chapter
7 453 of NRS; or
- 8 3. Caused by a violation of NRS 453.3325.

9 Ê The unlawful killing may be effected by any of the various means
10 by which death may be occasioned.

11 No evidence was presented at the Preliminary Hearing to demonstrate that the Petitioner
12 committed murder. Though the standard is probable cause, slight or marginal evidence, this standard
13 has not been meet. There hasn't been any evidence to show that it was Petitioner who committed the
14 acts which lead to the death of Brodie Aschenbrenner. As such, the count of Murder was improperly
15 bound over for trial and Count 1 should be dismissed.

16 It is also the State's burden to present sufficient evidence to support a finding of probable
17 cause that the Petitioner had the intent to commit or that he did commit the offense of Child Abuse
18 and Neglect with Substantial Bodily Harm to warrant a bind-over on this charge. N.R.S. 200.508
19 is the governing statute regarding abuse, neglect or endangerment of child; Penalties; definitions.
20 N.R.S. 200.508 states:

21 1. A person who willfully causes a child who is less than 18 years of age to
22 suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect
23 or to be placed in a situation where the child may suffer physical pain or mental
24 suffering as the result of abuse or neglect:

25 (a) If substantial bodily or mental harm results to the child:

26 (1) If the child is less than 14 years of age and the
27 harm is the result of sexual abuse or exploitation, is
28 guilty of a category A felony and shall be punished by
imprisonment in the state prison for life with the
possibility of parole, with eligibility for parole
beginning when a minimum of 15 years has been
served; or

(2) In all other such cases to which subparagraph (1) does not apply, is guilty of
a category B felony and shall be punished by imprisonment in the state prison for a
minimum term of not less than 2 years and a maximum term of not more than 20

1 years; or

2 (b) If substantial bodily or mental harm does not result to the
3 child:

4 (1) If the person has not previously been
5 convicted of a violation of this section or of a
6 violation of the law of any other jurisdiction that
7 prohibits the same or similar conduct, is guilty of a
category B felony and shall be punished by
imprisonment in the state prison for a minimum term
of not less than 1 year and a maximum term of not
more than 6 years; or

8 (2) If the person has previously been convicted of
9 a violation of this section or of a violation of the law
10 of any other jurisdiction that prohibits the same or
11 similar conduct, is guilty of a category B felony and
shall be punished by imprisonment in the state prison
for a minimum term of not less than 2 years and a
maximum term of not more than 15 years,

12 È unless a more severe penalty is prescribed by law for an act or
13 omission that brings about the abuse or neglect.

14 2. A person who is responsible for the safety or welfare of a child and who
15 permits or allows that child to suffer unjustifiable physical pain or mental suffering
as a result of abuse or neglect or to be placed in a situation where the child may suffer
physical pain or mental suffering as the result of abuse or neglect:

16 (a) If substantial bodily or mental harm results to the child:

17 (1) If the child is less than 14 years of age and the
18 harm is the result of sexual abuse or exploitation, is
19 guilty of a category A felony and shall be punished by
20 imprisonment in the state prison for life with the
possibility of parole, with eligibility for parole
beginning when a minimum of 10 years has been
served; or

21 (2) In all other such cases to which subparagraph
22 (1) does not apply, is guilty of a category B felony and
23 shall be punished by imprisonment in the state prison
for a minimum term of not less than 2 years and a
maximum term of not more than 20 years; or

24 (b) If substantial bodily or mental harm does not result to the
25 child:

26 (1) If the person has not previously been
27 convicted of a violation of this section or of a
28 violation of the law of any other jurisdiction that
prohibits the same or similar conduct, is guilty of a
gross misdemeanor; or

1 (2) If the person has previously been convicted of
2 a violation of this section or of a violation of the law
3 of any other jurisdiction that prohibits the same or
4 similar conduct, is guilty of a category C felony and
5 shall be punished as provided in NRS 193.130,

6 È unless a more severe penalty is prescribed by law for an act or
7 omission that brings about the abuse or neglect.

8 3. A person does not commit a violation of subsection 1 or 2 by virtue of the
9 sole fact that the person delivers or allows the delivery of a child to a provider of
10 emergency services pursuant to NRS 432B.630.

11 4. As used in this section:

12 (a) "Abuse or neglect" means physical or mental injury of a
13 nonaccidental nature, sexual abuse, sexual exploitation, negligent
14 treatment or maltreatment of a child under the age of 18 years, as set
15 forth in paragraph (d) and NRS 432B.070, 432B.100, 432B.110,
16 432B.140 and 432B.150, under circumstances which indicate that the
17 child's health or welfare is harmed or threatened with harm.

18 (b) "Allow" means to do nothing to prevent or stop the abuse or
19 neglect of a child in circumstances where the person knows or has
20 reason to know that the child is abused or neglected.

21 (c) "Permit" means permission that a reasonable person would
22 not grant and which amounts to a neglect of responsibility attending
23 the care, custody and control of a minor child.

24 (d) "Physical injury" means:

25 (1) Permanent or temporary disfigurement; or

26 (2) Impairment of any bodily function or organ of
27 the body.

28 (e) "Substantial mental harm" means an injury to the intellectual
or psychological capacity or the emotional condition of a child as
evidenced by an observable and substantial impairment of the ability
of the child to function within his or her normal range of performance
or behavior.

Likewise, no evidence was presented at the Preliminary Hearing to demonstrate that the
Petitioner willfully caused a child less than 18 years of age to suffer unjustifiable physical pain or
mental suffering as a result of abuse or neglect or placed a child in a situation where the child may
suffer physical pain or mental suffering as the result of abuse or neglect. The standard is probable
cause, slight or marginal evidence, however, this standard has not been met. There hasn't been any
evidence to show that it was Petitioner who committed the acts which lead to the death of Brodie

1 Aschenbrenner. As such, the count of Child Abuse and Neglect with Substantial Bodily Harm was
2 improperly bound over for trial and Count 2 should be dismissed.

3 **C. PETITIONER SHOULD NOT BE REQUIRED TO STAND TRIAL FOR**
4 **MURDER OR CHILD ABUSE AND NEGLECT WITH SUBSTANTIAL**
5 **BODILY HARM BECAUSE THE STATE FAILED TO PROVIDE**
6 **SUFFICIENT EVIDENCE SUPPORTING ALL THE ELEMENTS OF**
7 **THE ALLEGED OFFENSES**

8 In establishing the corpus delicti of murder two elements must be established: (1) The fact
9 of death; and (2) the criminal agency of another responsible for that death, Tertrou v. Sheriff, Clark
10 County, 89 Nev. 166, 509 P.2d 970, 1973 Nev. LEXIS 459 (1973).; there must be sufficient evidence
11 to establish the corpus delicti independent of confessions and possibly admissions. Hooker v.
12 Sheriff, Clark County, 89 Nev. 89, 506 P.2d 1262, 1973 Nev. LEXIS 429 (1973).

13 In Hooker, Defendant sought review of an order of the Eighth Judicial District Court, Clark
14 County (Nevada), which denied his pre-trial petition for a writ of habeas corpus. Defendant had been
15 charged with the murder of his wife, a violation of Nev. Rev. Stat. § 200.010.

16 Ordered to stand trial for the murder (NRS 200.010) of his wife, appellant sought pre-trial
17 habeas relief in the district court. Appealing from an order denying that relief, his sole contention
18 is that the evidence introduced before the magistrate was insufficient to establish probable cause. The
19 supreme court agreed. The court reversed the order and ordered that defendant be freed from custody
20 unless within a reasonable time the State elected to bring a new charge.

21 The death of a human being may be brought about by any one of four means: (1) natural
22 causes; (2) accident; (3) suicide; or (4) criminal means.

23 In establishing the corpus delicti of murder two elements must be established (1) the fact of
24 death; and (2) the criminal agency of another responsible for that death. Beasley v. Lamb, 79 Nev.
25 78, 80, 378 P.2d 524 (1963).

26 If a criminal complaint is filed charging a person with the death of another and a preliminary
27 hearing is held, (1) probable cause to believe that a crime has been committed; and (2) probable
28 cause to believe that the person charged committed it must be proved by sufficient legal evidence.
NRS 171.206.

In Hooker, the fact of death was conceded by both parties. However, the appellant contends

1 that evidence is totally lacking to establish that the death was caused by the criminal agency of
2 another. The State's own witness testified that the gunshot wound could have been self inflicted. The
3 only connection, established by the prosecutor, between the accused and the alleged homicide is the
4 appellant's spontaneous statement. Even if we were to assume such statement to be incriminating,
5 standing alone, it does not meet the test. There must be "sufficient evidence to establish the corpus
6 delicti independent of confessions and possible admissions, ..." Azbill v. State, 84 Nev. 345, 351,
7 440 P.2d 1014, 1018 (1968); Hicks v. Sheriff, 86 Nev. 67, 464 P.2d 462 (1970).

8 Once the corpus delicti is determined to have been proved by sufficient evidence, confessions
9 and admissions may be considered in establishing probable cause to show that it was the particular
10 defendant charged who was the criminal agency causing the death. In re Kelly, 28 Nev. 491, 83 P.
11 223 (1905). In Hooker, the court found that there was no evidence independent of the appellant's
12 spontaneous declaration to indicate that the criminal agency of another was responsible for the death.
13 Proof of the corpus delicti could have been established by direct evidence, People v. Watters, 259
14 P. 442 (Cal. 1927); partially by direct and partially by circumstantial evidence or totally by
15 circumstantial evidence. State v. Ah Chuey, 14 Nev. 79 (1879); State v. Loveless, 17 Nev. 424, 30
16 P. 1080 (1883); People v. Clark, 233 P. 980 (Cal.App. 1925); Hartman v. State, 206 S.W.2d 380
17 (Tenn. 1947); People v. Scott, 1 Cal.Rptr. 600 (Cal.App. 1959). None of these avenues were utilized
18 by the state. The evidence before the magistrate was insufficient to establish probable cause of the
19 corpus delicti of murder.

20 Accordingly the court reversed the order of the lower court, and ordered that appellant be
21 freed from custody unless within a reasonable time the state elects to bring a new charge.

22 In the case at bar, the State did not present evident sufficient to support the elements to
23 establish the corpus delicti of murder, (1) the fact of death; and (2) the criminal agency of another
24 responsible for that death. Petitioner should not be required to stand trial for the count of Murder
25 as the State failed to provide evidence supporting all of the elements of the alleged offense.
26 Moreover, there was absolutely no probable cause to support that it was Petitioner who committed
27 the offense based on "slight or even marginal evidence."

28 Finally, at the preliminary hearing, the State failed to provide sufficient evidence supporting

1 the essential elements of Count 2, the offense of Child Abuse and Neglect with Substantial Bodily
2 Harm.

3 NRS 205.508 provides, among other things, that: an individual may be convicted of felony
4 child abuse or neglect if she "willfully causes a child who is less than 18 years of age to suffer
5 unjustifiable physical pain or mental suffering as a result of abuse or neglect or to be placed in a
6 situation where the child may suffer physical pain or mental suffering as the result of abuse or

7 neglect." N.R.S. 200.508(1). Therefore, probable cause must have been shown, by the evidence
8 presented at the preliminary hearing, that abuse or neglect occurred for this case to have been
9 properly bound over for trial.

10 N.R.S. 200.508(4)(a) defines abuse and neglect. That statute states in pertinent part:

11 "Abuse or neglect" means physical or mental injury of a nonaccidental nature.
12 [emphasis added].

13 "Physical injury" means: (1) Permanent or temporary disfigurement; or (2)
14 Impairment of any bodily function or organ of the body.

15 Additionally, N.R.S. 432B.070 defines mental injury. That statute states:

16 "Mental injury" means an injury to the intellectual or psychological capacity or the
17 emotional condition of a child as evidenced by an observable and substantial
18 impairment of his ability to function within his normal range of performance or
19 behavior.

20 Consequently, at the preliminary hearing the State should have been required to present some
21 sort of evidence that the child was harmed by abuse or neglect, or in other words, that a physical or
22 mental injury occurred to the child. The State failed to present any evidence supporting this element
23 of the crime. There was absolutely no evidence presented that a physical or mental injury occurred
24 as a result of abuse and as such this count was improperly bound over for trial.

25 However, there was no sufficient evidence presented supporting the elements of the offense
26 charged. As the State failed to produce evidence supporting all of the elements of the alleged
27 offense, the count of Child Abuse and Neglect with Substantial Bodily Harm should not stand.
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III.

CONCLUSION

WHEREFORE, based upon the foregoing facts and argument, Petitioner prays that this Honorable Court issue a Writ of Habeas Corpus.

DATED this 12th day of December, 2011.

STEVEN B. WOLFSON, CHTD.

By: 

PATRICK E. McDONALD, ESQ.
Nevada Bar No. 3526
601 South Seventh Street
Las Vegas, Nevada 89101
Attorney for Petitioner

DISTRICT COURT
CLARK COUNTY, NEVADA
CLERK OF THE COURT

STATE OF NEVADA,

Plaintiff,

vs.

CASE NO. C277650
DEPT NO. XXIII

MICHAEL ALAN LEE,

Defendant.

NOTICE RESETTING DATE and TIME OF HEARING

Please be advised that the date and time of the hearing set before Honorable Stefany A. Miley has been changed. PLEASE TAKE NOTICE that at the Court's request, the above matters have been reset from January 4, 2012 at 9:30 am to January 30, 2012 at 11:00 a.m.

DATED this 12th day of December, 2011.

HONORABLE STEFANY A. MILEY

By: Carmen Alper
Judicial Executive Assistant to
Honorable Stefany A. Miley**CERTIFICATE OF FACSIMILE**

I hereby certify that on the 12th day of December 2011, I caused a copy of the foregoing Notice of Resetting Date and Time of Hearing to be faxed to the following: Tom Carroll, Esq. at (702) 455-6980 and to Patrick E. McDonald, Esq. at (702) 385-5351.

By: Carmen Alper
Judicial Executive Assistant to
Honorable Stefany A. MileySTEFANY A. MILEY
DISTRICT JUDGEDEPARTMENT TWENTY THREE
LAS VEGAS NV 89101-2408

ORIGINAL

FILED

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John L. Johnson
CLERK OF THE COURT

ROC
PATRICK E. McDONALD, ESQ.
Nevada Bar No. 3526
STEVEN B. WOLFSON, C. TD.
601 South Seventh Street
Las Vegas, Nevada 89101
Tel: (702) 385-7227
Fax: (702) 385-5351
Attorney for Petitioner

DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

MICHAEL ALAN LEE
699107,

Defendant.

Case No: C277650
Dept No: XXIII

Date of Hearing:
Time of Hearing:

RECEIPT OF COPY

RECEIPT OF COPY of PETITION FOR WRIT OF HABEAS CORPUS is hereby

acknowledged this 2 day of Dec, 2011.

Erin McCarty
DISTRICT ATTORNEY

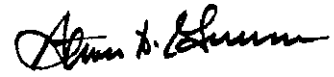
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CLERK OF THE COURT


CLERK OF THE COURT

1 **NOTC**
2 **DAVID ROGER**
3 **Clark County District Attorney**
4 **Nevada Bar #002781**
5 **ANDREA RACHIELE**
6 **Chief Deputy District Attorney**
7 **Nevada Bar #009158**
8 **200 Lewis Avenue**
9 **Las Vegas, Nevada 89155-2212**
10 **(702) 671-2500**
11 **Attorney for Plaintiff**

7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**

9 **THE STATE OF NEVADA,**
10 **Plaintiff,**

11 **-vs-**

12 **MICHAEL ALAN LEE,**
13 **#1699107**
14 **Defendant.**

CASE NO: C-11-277650-1

DEPT NO: XXIII

15 **NOTICE OF EXPERT WITNESSES**
16 **[NRS 174.234(2)]**

17 **TO: MICHAEL ALAN LEE, Defendant; and**

18 **TO: P. MCDONALD, ESQ., Counsel of Record:**

19 **YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the STATE OF**
20 **NEVADA intends to call the following witnesses in its case in chief:**

21 **1. BECKWITH, K., P #1739, Crime Scene Analyst, Henderson Police Department,**
22 **or Designee: He is an expert in the area of the identification, documentation, collection and**
23 **preservation of evidence and will give opinions related thereto. He is expected to testify**
24 **regarding the identification, documentation, collection and preservation of evidence in this**
25 **case.**

26 **///**

27 **///**

28 **///**

1 2. BENJAMINS, F., P #720, Detective, Henderson Police Department, or Designee:
2 She will testify as an expert in homicide investigation, preservation and processing of
3 evidence from crime scenes, knowledge of injuries and cause and manner of death; and the
4 investigation done in this case.

5 3. COLLINS, G., P #324, Detective, Henderson Police Department, or Designee: He
6 will testify as an expert in homicide investigation, preservation and processing of evidence
7 from crime scenes, knowledge of injuries and cause and manner of death; and the
8 investigation done in this case.

9 4. Forensic DNA Analyst, Bexar County Criminal Laboratory, 7337 Louis Pasteur
10 Dr., San Antonio, TX: He/She will testify as an expert in all aspects of DNA including the
11 statistical assessment of DNA findings and the specific DNA conclusions in this case.

12 5. GAVIN, Dr. Lisa, Clark County Coroner's Office: She is an expert in the area of
13 forensic pathology and will give scientific opinions related thereto. She will testify as to the
14 findings, conclusions and contents of his autopsy of BRODIE ASCHENBRENNER, and to
15 the content and his report and photos at autopsy.

16 6. MCCONNELL, C., P #1749, HPD, or Designee: He is an expert in the area of the
17 identification, documentation, collection and preservation of evidence and will give opinions
18 related thereto. He is expected to testify regarding the identification, documentation,
19 collection and preservation of evidence in this case.

20 7. LNU, Paramedic, Henderson Fire and Rescue Unit #98, or Designee: He is a
21 paramedic with Henderson Fire & Rescue and is an expert in emergency treatment and
22 response and is expected to testify as to the observations and diagnosis of BRODIE
23 ASCHENBRENNER.

24 8. TREATING MD or PA, ABC Pediatrics, 10950 S. Eastern Ave., Ste 100,
25 Henderson, or Designee: He/She will testify to the medical care and treatment of BRODIE
26 ASCHENBRENNER for the time period prior to Brodie's death.

27 9. WHITE, C., P #856, Forensic Analyst, HPD, or Designee: is an expert in forensic
28 examination of computers, cell phones, and wireless technology, including, but not limited

1 to, hardware, software, forensic examination of software, stored files of all kinds, date
2 recovery, hidden date, hacking and wireless communications and is expected to testify
3 thereto.

4 The substance of each expert witness' testimony and a copy of all reports made by or
5 at the direction of the expert witness has been provided in discovery.

6 A copy of each expert witness' curriculum vitae, if available, is attached hereto.

7
8
9 BY



DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

10
11
12
13 CERTIFICATE OF FACSIMILE TRANSMISSION

14 I hereby certify that service of the above and foregoing, was made this 14th day of
15 December, 2011, by facsimile transmission to:

16
17 P. MCDONALD, ESQ.

18 385-5351

19
20 BY: /s/ D. Jason

21 Employee of the District Attorney's Office
22
23
24
25
26
27
28

Lisa Gavin, M.D., M.P.H.

1704 Pinto Lane, Las Vegas, NV 89106 ♦ 702.455.3210 ♦ LGavin@co.clark.nv.us

Current Position Medical Examiner, 2009 to present

Office of the Coroner/Medical Examiner, Clark County, Las Vegas, Nevada

Training & Education

Forensic Pathology Fellowship, 2008 to 2009

Office of the Chief Medical Investigator, Albuquerque, New Mexico

Surgical Pathology Fellowship, 2007-2008

Hartford Hospital, Hartford, Connecticut

Anatomic & Clinical Pathology Residency, 2002 – 2007

Hartford Hospital, Hartford, Connecticut

Post-Sophomore Fellowship in Pathology, 2001 – 2002

University of Connecticut Health Center, Farmington, Connecticut

Medical Degree, 2001

University of Connecticut School of Medicine, Farmington, Connecticut

Master Degree of Public Health, 1994

Columbia University School of Public Health, New York, New York

Bachelor of Arts, 1991

Mount Holyoke College, South Hadley, Massachusetts

Research Experience

Polyoma Virus Hemorrhagic Cystitis in an Otherwise Normal Child, 2008

Hartford Hospital Department of Pathology & Department of Pediatric Infectious Disease

Metastatic Testicular Choriocarcinoma in a Young Male with Abdominal Pain, 2007

*Hartford Hospital Department of Pathology & University of Connecticut
Department of Internal Medicine*

Inter-observer Variability in Diagnosing Colon Biopsies as Indefinite for Dysplasia, 2006

Hartford Hospital Department of Pathology

Susceptibility of Streptococcus Pneumoniae to Moxifloxacin and Other Antimicrobial Agents, 2004

Hartford Hospital Department of Pathology & Laboratory Medicine

Awards & Scholarship

Dr. Beckett Book Award, 2007

Martin Berman Immunopathology Award, 2007

Bloomberg Award for Psychiatry, 2001

Memberships

American Academy of Forensic Sciences (2009 to present)

American Society of Clinical Pathology (2003 – 2008, 2010)

United States and Canadian College of Pathologist (2005 – 2007)

College of American Pathologist (Delegate 2003 – 2007)

Connecticut Society of Pathologists (CSP) Delegate (2003 – 2007)

Next Page > > >

Lisa Gavin, M.D., M.P.H.

1704 Pinto Lane, Las Vegas, NV 89106 ♦ 702.455.3210 ♦ LGavin@co.clark.nv.us

Connecticut Society of Pathologists Presentations

Malignant Peritoneal Mesothelioma in 17 year-old male, January 2006
Focal Nodular Hyperplasia, June 2004

Resident & Fellow Topics

Two Unusual Neuropathology Cases, January 2008
Testicular Germ Cell Tumors, October 2007
Waldenstroms Macroglobulinemia, October 2005
Minimal Change Disease & Focal Segmental Glomerular Sclerosis, October 2004
Crescentic Glomerulonephritis or Rapidly Progressive Glomerulonephritis, January 2004
Mitral Valve Prolapse and Sudden Death, July 2003

Previous Work Experience

Teacher of "Correlated Medical Problem Solving" Course, 2001 – 2002
University of Connecticut School of Medicine, Farmington Connecticut
Manager of South Marshall Street Pediatric Clinic, 1995 – 1997
Salvation Army, South Marshall Street, Hartford Connecticut
Administrative Assistant to the Director of Admissions & Career Development
and to the Director of Academic & Student Affairs, 1992 – 1994
Columbia University School of Public Health, New York, New York
Tutor and Evaluator of children with learning disabilities, 1988 – 1994 & 1996 – 1997
Milford, Connecticut & Farmington, Connecticut
Coordinator of Infant Registration Project, 1991 – 1992
New York City Department of Health: Office of Child Health Planning, New York, New York

Service Work

- Annual Host for summer high-school student tours of Hartford Hospital Department of Pathology
- Education of Medical Students & Residents on rotation in Hartford Hospital Department of Pathology
- Guest speaker for Public Relations Department at Hartford Hospital for local middle-school children
- Guidance to Medical Technician Students interested in future careers in Medicine
- Editor of personal statements and resumes

Medical License

State of New Mexico, 2008 – 2011
State of Nevada, 2009 – 2011

Eligible For Anatomic Pathology,
Clinical Pathology and Forensic Pathology Boards

 *** TX REPORT ***

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1 NOTC

2 DAVID ROGER
 Clark County District Attorney
 Nevada Bar #002781
 3 ANDREA RACHIELE
 Chief Deputy District Attorney
 Nevada Bar #009158
 200 Lewis Avenue
 5 Las Vegas, Nevada 89155-2212
 (702) 671-2500
 6 Attorney for Plaintiff

7 DISTRICT COURT
 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,

10 Plaintiff,

11 -vs-

12 MICHAEL ALAN LEE,
 #1699107

13 Defendant.

CASE NO: C-11-277650-1

DEPT NO: XXIII

14 NOTICE OF EXPERT WITNESSES
 15 [NRS 174.234(2)]

16
 17 TO: MICHAEL ALAN LEE, Defendant; and

18 TO: P. MCDONALD, ESQ., Counsel of Record:

19 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the STATE OF
 20 NEVADA intends to call the following witnesses in its case in chief:

21 1. BECKWITH, K., P #1739, Crime Scene Analyst, Henderson Police Department,


CLERK OF THE COURT

1 **NOTC**
2 DAVID ROGER
3 Clark County District Attorney
4 Nevada Bar #002781
5 ANDREA RACHIELE
6 Chief Deputy District Attorney
7 Nevada Bar #009158
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10 Plaintiff,
11 -vs-
12 MICHAEL ALAN LEE,
13 #1699107
14 Defendant.

CASE NO: C-11-277650-1
DEPT NO: XXIII

15 NOTICE OF WITNESSES
16 [NRS 174.234(1)(a)]

17 TO: MICHAEL ALAN LEE, Defendant; and

18 TO: P. MCDONALD, ESQ., Counsel of Record:

19 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the STATE OF
20 NEVADA intends to call the following witnesses in its case in chief:


21 <u>NAME</u>	<u>ADDRESS</u>
22 BECKWITH, K.	HPD #1739
23 BLAZVICK, Melissa, or Designee	Smith's, 1000 N. Green Vly Pkwy, Hen., NV
24 BOYD, Annette, or Designee	Sunridge Heights Apartments, 25 2900 Sunridge Hgts., Henderson, NV
26 BURTON, Kathleen	C/O P. McDonald, Esq., 601 S. 7 th St., LV
27 BUTLER, Amanda	C/O CCDA's Office, VWAC unit

28 ///

1	CARTER, Candice	NV Dept of Parole & Probation,
2		215 E. Bonanza, LV, NV
3	COLLINS, G.	HPD #324
4	CUSTODIAN OF RECORDS or Designee	ABC Pediatrics, 10950 S. Eastern, Ste 100,
5		Henderson, NV
6	CUSTODIAN OF RECORDS or Designee	Bexar County Criminal Laboratory,
7		7337 Louis Pasteur Dr., San Antonio, TX
8	CUSTODIAN OF RECORDS or Designee	Henderson Fire & Rescue, 240 Water St.,
9		Henderson, NV
10	DAHL, Nancy	Clark County Coroner's Office
11	ENGEL, M.	HPD #1254
12	FICO, Danny	C/O P. McDonald, Esq., 601 S. 7 th St., LV
13	FORENSIC DNA SPECIALIST	Bexar County Criminal Laboratory,
14		7337 Louis Pasteur Dr., San Antonio, TX
15	FOSTER, Arica	C/O CCDA's Office, VWAC unit
16	GAVIN, Dr. Lisa	Clark County Coroner's Office
17	HAMILTON, John	C/O P. McDonald, Esq., 601 S. 7 th St., LV
18	HOSAKA, M.	HPD #777
19	LEE, Gary	C/O P. McDonald, Esq., 601 S. 7 th St., LV
20	LEE, Jennifer	C/O P. McDonald, Esq., 601 S. 7 th St., LV
21	LNU, Paramedic	Henderson Fire & Rescue Unit #98
22		240 Water St., Henderson, NV
23	MCCONNELL, C.	HPD #1749
24	MCKENNA, D.	HPD #277
25	MITCHELL, C.	HPD #949
26	MOSHER, Merridee	C/O CCDA's Office, VWAC unit
27	MOSIER, Brad	C/O CCDA's Office, VWAC unit
28	OPIE, Alayne	C/O CCDA's Office, VWAC unit

1 PANET-SWANSON, M. HPD #649
2 RASMUSSEN, T. HPD #954
3 SMITH, Nicole C/O CCDA's Office, VWAC unit
4 TREATING MD or PA ABC Peciatics, 10950 s. Eastern, Ste 100,
5 Henderson, NV
6 WHITE, C. HPD #856
7 YUREK, T. HPD #880

8 These witnesses are in addition to those witnesses endorsed on the Information and
9 any other witness for which a separate Notice has been filed.
10
11
12

13 BY 
14 DAVID ROGER
15 DISTRICT ATTORNEY
16 Nevada Bar #002781

17 CERTIFICATE OF FACSIMILE TRANSMISSION

18
19 I hereby certify that service of the above and foregoing, was made this 14th day of
20 December, 2011, by facsimile transmission to:

21 P. MCDONALD, ESQ.
22 385-5351
23

24 BY: /s/ D. Jason
25 Employee of the District Attorney's Office
26
27
28

 *** TX REPORT ***

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1 **NOTC**

2 DAVID ROGER
 3 Clark County District Attorney
 Nevada Bar #002781
 4 ANDREA RACHIELE
 Chief Deputy District Attorney
 Nevada Bar #009158
 5 200 Lewis Avenue
 Las Vegas, Nevada 89155-2212
 (702) 671-2500
 6 Attorney for Plaintiff

7 **DISTRICT COURT**
CLARK COUNTY, NEVADA

9 **THE STATE OF NEVADA,**
 10 Plaintiff,

CASE NO: C-11-277650-1

11 -vs-

DEPT NO: XXIII

12 **MICHAEL ALAN LEE,**
 13 #1699107

14 Defendant.

15 **NOTICE OF WITNESSES**
[NRS 174.234(1)(a)]

17 **TO: MICHAEL ALAN LEE, Defendant; and**

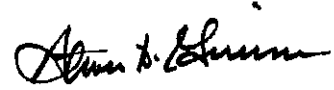
18 **TO: P. MCDONALD, ESQ., Counsel of Record:**

19 **YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the STATE OF**

20 **NEVADA intends to call the following witnesses in its case in chief:**

21 NAME

ADDRESS


CLERK OF THE COURT

RWHC
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
DAVID STANTON
Chief Deputy District Attorney
Nevada Bar #003202
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

DISTRICT COURT
CLARK COUNTY, NEVADA

In the Matter of Application,
of
MICHAEL ALAN LEE,
#1699107
for a Writ of Habeas Corpus.

Case No. C277650

Dept No. XXIII

RETURN TO WRIT OF HABEAS CORPUS

DATE OF HEARING: JANUARY 4, 2012
TIME OF HEARING: 11:00 A.M.

COMES NOW, DOUGLAS C. GILLESPIE, Sheriff of Clark County, Nevada, Respondent, through his counsel, DAVID ROGER, District Attorney, through DAVID STANTON, Chief Deputy District Attorney, in obedience to a writ of habeas corpus issued out of and under the seal of the above-entitled Court on the 12th day of December, 2011, and made returnable on the 4th day of January, 2012, at the hour of 11:00 o'clock A.M., before the above-entitled Court, and states as follows:

1. Respondent denies the allegations of Paragraph(s) 3 and 4 of the Petitioner's Petition for Writ of Habeas Corpus.

2. Paragraph(s) 1, 2, 5 and 6 do not require admission or denial.

//

3. The Petitioner is in the actual custody of DOUGLAS C. GILLESPIE, Clark County Sheriff, Respondent herein, pursuant to a Criminal Information, a copy of which is attached hereto as Exhibit 1 and incorporated by reference herein.

Wherefore, Respondent prays that the Writ of Habeas Corpus be discharged and the Petition be dismissed.

DATED this 21st day of December, 2011.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar # 002781

BY /s/ David Stanton

DAVID STANTON
Chief Deputy District Attorney
Nevada Bar #003202

POINTS AND AUTHORITIES

The instant petition should be denied in its entirety for two (2) principle reasons. First, the "facts" set forth in the petition are misleading and selectively edited to support their argument. In the critical areas of this case, the selective factual presentation in the writ paints an inaccurate picture of the facts presented. Second, the writ fails to accurately state the law regarding child abuse murder in Nevada.

The instant Petition concedes, as it must, that Brodie Aschenbrenner was murdered. The Petition makes several inaccurate representations of what evidence was introduced at the Preliminary Hearing. The following are but a few of these examples.

The most critical involve the medical testimony of Dr. Lisa Gavin who performed the autopsy on Brodie and determined the cause and manner of Brodie's death. First, the Petition claims: "Dr. Gavin testified that she could not, with a degree of certainty, say exactly when the injuries occurred which caused Brodie's death." Petition, pg. 8, lns 8-9. A claim repeated and argued by Mr. McDonald at close of the Preliminary Hearing. PHTr. pg. 139, lns. 5-12. In fact, Dr. Gavin was able to testify, from a medical degree of certainty that

1 the primary cause of Brodie's death (acute peritonitis) occurred within "minutes to hours"
2 from his death. PHTr. pp. 46/47; 47, ln. 23-24. This blunt force trauma was the type and
3 severity seen in fatal automobile collisions. PHTR. pg. 49, lns. 19-24. There were numerous
4 injuries to Brodie's abdomen that are consistent with such a fatal injury. They include
5 significant blunt force abrasions and a fractured rib. GJTr. g. 53.

6 The secondary cause of Brodie's death was swelling of the brain from repeated and
7 severe blows to his head. GJTr. pp. 54-56; pg. 80-81. These injuries occurred with Brodie's
8 last twenty-four (24) hours of life. GJTr. pp. 63-64; pg. 65, ln. 13. Thus, the timing of the
9 fatal injuries was clearly testified to and was not imprecise.

10 Next, the Petition strongly suggests and cites to Arica's testimony about a pre-
11 existing car accident could have been the source of the injuries to Brodie. Petition cites, at
12 length to this testimony but makes no direct argument as to the relevance of this testimony.
13 The mere fact that this was cited by the in the petition begs the question why? The answer is
14 compelling but completely avoided in the petition. In fact, both Dr. Gavin and Brodie's
15 mother clearly ruled that event as having no cause and effect to the fatal injuries in this case.
16 PHTr pg. 81, lns. 2-15. (Dr. Gavin); PHTr. p. 113-114 (Arica Foster).

17 Further, the Petition claims, repeatedly, that the mother of Brodie (Arica) was, at
18 times, alone with Brodie when these fatal injuries could have been inflicted. For example
19 the Petition states: "By Arica's own testimony, and the time frame given by Dr. Gavin, she
20 was the person who had been alone with Brodie in those twenty-four (24) hours preceding
21 his [Brodie's] death." Petition, pg. 11, lns 18-19. Again: "It would appear by the record that
22 the substantial periods of time in which, [sic] even Arica testified, that Brodie was alone for
23 a period of time long enough to sustain the injuries, was when he was in her care." Petition,
24 pg. 19, lns 16-18; *see also* Petition, pg. 24, lns 5-11. This claim is clearly belied by the
25 actual record of the Preliminary Hearing. The fact that the petition purposefully decides not
26 to mention it, does not morph that into a fact.

27 //

28 //

1 Incredibly, the Petition fails to mention that Petitioner was not only left alone with
2 Brodie, but that the timing of these events is more compelling about when the fatal injuries
3 were inflicted.

4 This Court would have had no accurate knowledge of the events leading up to
5 Brodie's death relying on the petition's statement of facts. In fact, it is uncontroverted that
6 Petitioner was also alone with Brodie on numerous occasions, These occasions are critical in

7 light of the manner and cause of Brodie's death and the motive that exists for the repeated
8 and severe beatings. After the Mandalay Bay Shark Reef visit, all three (Brodie, Arica &
9 Petitioner) traveled by car to a couple of businesses to run errands. On one occasion, Arica
10 went into her hair salon to get some money back since she had previously overpaid for some
11 services. PHTr. pg. 96. No where in the petition does the testimony of this event exist,
12 however, it is quite compelling what actually occurred. Arica testified as follows:

13 Q: When you went into the hair salon how long were you in there?

14 A: Five minutes.

15 Q: When you went in what was Brodie doing?

16 A: Sleeping.

17 Q: When you came out what was he doing?

18 A: Screaming.

19 PHTr. pg. 96, lns 2-8.

20 Yet the Petition repeatedly argues that Arica, Brodie's mother, was the one (1) person
21 alone with Brodie during that last twenty-four (24) hours of his life and therefore was the
22 person who inflicted the fatal beating injuries to Brodie.

23 Petitioner was also alone when the mother went out for approximately an hour during
24 Tuesday evening to go to her mother's home and to the store to purchase milk for Brodie.
25 GJTr. pp. 100-103. Petitioner was annoyed and angry that he was left with Brodie. GJTr.
26 pg. 102, lns 16-25.

27 Incredibly, the Petition fails to mention that when Brodie is suffering signs of his fatal
28 beating, vomiting, he was "found" by the petitioner alone. GJTr. 104. Further, when taking

1 care of Brodie (Petitioner played no role in caring for Brodie when he was vomiting) the
2 relevant testimony was:

3 Q: What did Brodie tell you about how he was feeling?

4 A: He told me that his head hurt.

5 GJTr. pg. 106, lns 5-7.

6 Another compelling fact omitted from the instant Petition is the behavior exhibited by

7 Brodie towards the Petitioner during the last day of his life. On several occasions Brodie did
8 not want to be near the Petitioner. One example was this:

9 Q: Once again what was Brodie's demeanor towards the defendant
10 at Circus Circus?

11 A: Brady [Brodie] didn't want Mike [Petitioner] to be near him.

12 GJTr. pg. 93, lns 21-23.

13 One would think that a two (2) year old child who is being beaten to death might
14 exhibit behavior during the time period reflecting who their abuser is. In fact, Brodie did –
15 he didn't want to have anything to do with Petitioner. These uncontroverted facts are
16 somehow irrelevant to the sufficiency analysis and argument set forth in the Petition.

17 Another example:

18 Q: What happened when you arrived at Mandalay Bayin regards to
19 how Brodie was acting?

20 A: Brodie didn't want to hold Mike's [Petitioner] hand.

21 Q: He didn't want to hold the defendant's hand?

22 A: Correct.

23 Q: Was that consistent how he [Brodie] behaved at the Mandalay
24 Bay Shark Reef?

25 A: Correct.

26 Q: The entire time?

27 A: Yeah.

28 GJTr. pg. 93, lns 4-14.

//

1 Once again, facts clearly omitted from the factual presentation in the instant petition.
2 Once again the following passage was conveniently omitted from the petition that directly
3 contradicts the assertions made in the petition. Petition, pg. 18-19. Here, the petition quotes
4 a lengthy passage of Arica's testimony, yet stops just short of the next portion of Arica's
5 testimony that is extremely relevant and directly contradicts the entirety of the petition's
6 argument. Arica's omitted testimony (on cross-examination by Mr. McDonald) is as
7 follows:

8 Q: Did Brodie ever tell you that Mike had hit him?

9 A: He told me one time the bump hurt head. He used to call
10 Mike bump.

11 Q: Bump hurt head?

12 A: Yes.

13 Q: Did he tell you what had happened?

14 A: No.

15 Q: When was that he said bump hurt head?

16 A: I don't remember exactly when. A couple weeks before he
17 Brodie passed away.

18 Q: Did you ask Mike about that?

19 A: Yeah. Mike was standing there.

20 Q: Were you concerned about it?

21 A: For a minute, yes.

22 Q: What alleviated your concern about it?

23 A: He [Mike] told me they were wrestling and he hit his head.

24 Q: Did Mike wrestle with Brodie?

25 A: They played.

26 Q: They would play wrestling in the apartment?

27 A: Sometimes.

28 Q: Did Brodie enjoy wrestling?

 A: No.

PHTr. pp. 134-135.

Motive. There was substantial evidence that Petitioner was frustrated with Brodie not being potty trained fast enough. Further, Brodie had an episode where he wet himself at McDonald during the last day of his life. PHTr. pg. 94; pg. 96-97; to read the petition, none of these events ever happened. An unfortunate characteristic of child abuse is the frustration created, in the abuser's mind, from the failure to be potty trained. Yet, the petition wants this Court to view the evidence at Preliminary Hearing as Brodie's biological mother, for absolutely no reason, begins to savagely beat to death her own son.

The petition argues: "Arica testified that Brodie was very clumsy and although she had previously advised to take Brodie to a neurologist, she neglected to do so." Petition pg. 18, lns 18-20. Once again, the complete testimony sheds a completely different and more accurate explanation to these events.

Q: Did you ever take Brodie to a pediatric neurologist?

A: No. My pediatrician said not to worry about it.

Q: So you discussed it with the pediatrician?

A: Yes.

PHTr. pg. 134, lns. 10-15 (emphasis added).

The quoted portion of Arica's actual testimony explains why: "my pediatrician said not to worry about it." Thus, Arica did not neglect to bring Brodie to the doctor; she was advised by Brodie's doctor that it was not necessary!

The petition cites to the testimony of Merridee Moshier, Brodie's grandmother. If you were to read the Petition's "factual statement" one would be left with the false impression that she testified Brodie was a very clumsy child and was constantly getting bruises. Ms. Moshier testified to much more than that. The critical aspect of her testimony, not surprisingly, is completely absent from the petition. Ms. Moshier is a registered nurse with a double masters degree. She has worked in the Intensive Care Unit (ICU) at UMC and has been around children throughout her twenty-seven (27) year nursing career. She was the last adult person, outside of Petitioner and Arica, to care for Brodie before he died. On

1 Sunday evening she bathed and applied lotion to Brodie's naked body. PHTr. pp. 11-12.
2 She had the ability to observe him from head to tow and any injuries that were on his body.
3 When she was shown State's exhibits 2-4, the photos of Brodie at autopsy, she adamantly
4 denied that she had never seen anything like the nature, severity and most of the injuries
5 depicted in those photographs. Thus, to suggest, as the petition clearly does, that the entirety
6 of the relevant testimony of Ms. Moshier was that Brodie was clumsy and bruises a lot is
7 simply a gross mischaracterization of the record. Her testimony clearly shows that Brodie
8 was delivered to Arica and Petitioner, with a few minor bruises and he was otherwise in
9 excellent health and full of vigor.

10 The petition states that "Mr. Stanton's testimony follows in part ..." Petition, pg. 19,
11 line 25. So the record is clear, Mr. Stanton did not testify at the Preliminary Hearing.
12 Further, the citation to the State's closing arguments proves the point and highlights the
13 exact reasons why the instant petition must be denied in its entirety. There is not evidence to
14 suggest that Arica inflicted any of numerous and fatal injuries to her own child. Once again
15 a highlight of critical testimony noticeably absent from the instant petition's rendition of
16 facts:

17 Q: My final question to you, Miss Foster, is did you in any way
18 harm Brodie from Sunday evening to when you just rubbed his
back on the next morning [when Brodie was found dead]?

19 A: No, sir.

20 GJTr. 111, lns 12-15.

21 The entire basis of the instant petition argues that Brodie was murdered, but the
22 evidence at preliminary hearing establishes that it was his mother, Arica and not the
23 Petitioner who murdered Brodie. Yet, that exact question was asked of Arica, under oath,
24 and yet was not mentioned, at all, in the petition.

25 **SUFFICIENT EVIDENCE PRODUCED AT PRELIMINARY HEARING**

26 The petition argues: "there was **absolutely no evidence** presented by the State to
27 make a determination that probable cause existed to believe that Petitioner committed the
28 offenses he has been charged with." Petition, pg. 23, lns 17-19 (emphasis in original). The

1 entirety of the petition's argument is merely to repeat this phrase, in one form or another,
2 throughout the "legal analysis" portion of the petition. The petition is devoid of any actual
3 legal analysis of the facts adduced at the preliminary hearing and the law.

4 It is a simple principle of criminal law regarding the State's burden at a preliminary
5 hearing. The Nevada Supreme Court held:

6 A preliminary examination is not a trial. At the preliminary
7 examination, where the state is charged only with the burden of
8 showing that a crime has been committed and that the accused
9 probably committed it, the quantum of proof is not so great as at
10 the trial, where the state's burden is to prove guilt beyond a
reasonable doubt. Moreover, we have held that to commit a
defendant for trial the state is not required to negate all
inferences but need only present enough proof to support a
reasonable inference that the accused committed the offense.

11 *Whittle v. Sheriff, Clark County*, 87 Nev. 614, 616, 491 P.2d 1282, 1283 (1971) (emphasis
12 added).

13 Next, the petition completely misstates and apparently misunderstands the law
14 regarding murder. Petitioner complains that no evidence was produced to establish "intent."
15 The petition cites, in four (4) pages, to the language of NRS 200.010 (Murder) and NRS
16 200.508 (Child Abuse with Substantial Bodily Harm) but makes no argument on how the
17 law has been misapplied by Judge Gibson. Petition, pg. 26-30. The entirety of the argument
18 is largely incoherent as it says nothing. This is best shown by the argument expressed as
19 follows: "The statute which governs the elements to substantiate a charge of Murder are [sic]
20 outlined in NRS 200.010." Petition, pg. 27, lns. 2-3. In fact, the elements are not found in
21 NRS 200.010. NRS 200.010 defines malice and the relationship that malice has to the
22 offense of murder.

23 The elements of murder, as defined and charged in the criminal complaint before
24 Judge Gibson are found in NRS 200.030. First degree murder is statutory defined to include
25 the act of child abuse. One need not look far (or hard for that matter) to find the reasoning
26 and basis for these definitions. The Nevada Supreme Court has held:

27 "It is unnecessary to analyze murder by means of child abuse in
28 terms of deliberation and premeditation because the soundest
view is simply that a murder perpetrated by an enumerated

means is first-degree murder by force of statute, without legal concern with or factual inquiry into willfulness, deliberation, and premeditation.

Collman v. State, 116 Nev. 687, 714, 7 P.3d 426, 443 (2000).

Likewise, the petition's "analysis" as it relates Count 2 -- Child Abuse with Substantial Bodily Harm merely cites the statute and makes the broad allegation that no evidence was presented to support this charge. Once again, there petition is devoid of any factual or legal analysis at all. The State cannot meaningfully and intelligently reply to an argument that does not undertake any such legal/factual analysis. The only response from the State, based upon what the petition actually states is: yes, we presented sufficient evidence to establish the elements as reflected in the preliminary hearing transcript.

CORPUS DELICTI DOCTRINE

The Corpus Delicti doctrine has relevant applications under two circumstances: (1) when the sole basis of a criminal prosecution is based upon the defendant's confession to police; and (2) in a criminal case when an issue exists as to whether a person died (missing body cases) or, if they did die, whether the death was the result of criminal agency (*See Frutiger, et al*).

The argument made in this section of the petition is completely nonsensical since this case has no application to with the corpus delicti doctrine. The first prong, as outlined above, is irrelevant since the Defendant's statement was not admitted at the Preliminary Hearing and the doctrine has never been applied at a Preliminary Hearing. The second prong cannot possibly be relevant as the argument is inherently inconsistent with the petition itself. As the Petition states several times, the uncontroverted medical testimony presented at the preliminary hearing conclusively establishes that Brodie was murdered. His death was of non-accidental trauma intentionally inflicted upon a two (2) year old boy. The issue, if one exists, is not whether a crime committed, but who committed the crime. The corpus delicti doctrine has nothing to do with this inquiry or analysis at all.

Petition's citation to *Hooker, Beasley* and others compound the confusion further. All of the cases cited to in the petition speak to one of the two issues outlined above regarding

1 the corpus delicti doctrine. Criminal agency is conceded and argued in the petition that the
2 person criminally liable for Brodie's death is the biological mother, Arica. Thus, the Petition
3 itself contradicts any claim that the corpus delicti doctrine applies in this case.

4 Simply put, this argument makes no factual or legal sense.

5 **CONCLUSION**

6 The instant Petition fails to fully cite to the facts produced at the Preliminary Hearing.

7 The selective edited portions cited in the petition are misleading and incomplete. Brodie
8 Aschenbrenner was murdered. The evidence produced at the Preliminary Hearing clearly
9 establishes that petitioner is his killer. The instant petition should be denied in its entirety.

10 DATED this 21st day of December, 2011.

11 Respectfully submitted,

12 DAVID ROGER
13 Clark County District Attorney
14 Nevada Bar # 002781

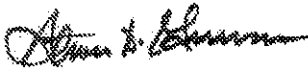
15 BY /s/ David Stanton
16 DAVID STANTON
17 Chief Deputy District Attorney
18 Nevada Bar #003202

19 **CERTIFICATE OF FACSIMILE TRANSMISSION**

20 I hereby certify that service of Return To Writ Of Habeas Corpus, was made this 21st
21 day of December, 2011, by facsimile transmission to:

22 PATRICK MCDONALD, Esq.
23 385-5351

24 BY: /s/ R. Johnson
25 R. Johnson
26 Employee of the District Attorney's Office
27
28


CLERK OF THE COURT

1 **INFO**
2 **DAVID ROGER**
3 **Clark County District Attorney**
4 **Nevada Bar #002781**
5 **DAVID L. STANTON**
6 **Chief Deputy District Attorney**
7 **Nevada Bar #003202**
8 **200 Lewis Avenue**
9 **Las Vegas, Nevada 89155-2212**
10 **(702) 671-2500**
11 **Attorney for Plaintiff**

12 I.A. 11/21/2011
13 10:30 A.M.
14 P. MCDONALD, ESQ.

DISTRICT COURT
CLARK COUNTY, NEVADA

15 THE STATE OF NEVADA,

Plaintiff,

-vs-

16 MICHAEL ALAN LEE,
17 #1699107

Defendant.

Case No: C-11-277650-1
Dept No: XXIII

INFORMATION

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

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

22 That MICHAEL ALAN LEE, the Defendant(s) above named, having committed the
23 crimes of MURDER (Category A Felony - NRS 200.010, 200.030, 200.508) and CHILD
24 ABUSE & NEGLECT WITH SUBSTANTIAL BODILY HARM (Category B Felony -
25 NRS 200.508, 0.060), on or between the 13th day of June, 2011 and the 15th day of June,
26 2011, within the County of Clark, State of Nevada, contrary to the form, force and effect of
27 statutes in such cases made and provided, and against the peace and dignity of the State of
28 Nevada,

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EXHIBIT "I" FILED VIA.COM DOCUMENT CONVERTER:TEMP234526527


1 COUNT 1 - MURDER

2 did, on or between June 14, 2011 and June 15, 2011, then and there, without
3 authority of law and with malice aforethought, willfully and feloniously kill BRODIE
4 ASCHENBRENNER, a minor child being approximately 2 years of age of age, by
5 subjecting the said BRODIE ASCHENBRENNER to acts of child abuse, to-wit: by striking
6 the said BRODIE ASCHENBRENNER in the abdominal area and/or did cause blunt force
7 trauma to BRODIE ASCHENBRENNER'S abdominal area in an unknown manner, all of
8 which resulted in the death of said BRODIE ASCHENBRENNER.

9 COUNT 2 - CHILD ABUSE & NEGLECT WITH SUBSTANTIAL BODILY HARM

10 did, on or between June 13, 2011 and June 14, 2011, wilfully, unlawfully,
11 feloniously, and knowingly neglect, cause, or permit a child under the age of 18 years, to-
12 wit: BRODIE ASCHENBRENNER, being approximately 2 years of age, to suffer
13 unjustifiable physical pain and substantial bodily harm, by striking the said BRODIE
14 ASCHENBRENNER in the head and/or did cause blunt force trauma to BRODIE
15 ASCHENBRENNER'S head in an unknown manner and/or after determining that the said
16 BRODIE ASCHENBRENNER had suffered head injuries, Defendant did fail to seek
17 medical care for the said BRODIE ASCHENBRENNER.

18
19
20 BY



DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

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23
24 Names of witnesses known to the District Attorney's Office at the time of filing this
25 information are as follows:

26 <u>NAME</u>	<u>ADDRESS</u>
27 ASCHENBRENNER, Dustin	2600 S. Montana, Butte, MT
28 BENJAMINS, F.	HPD #720

1	COLLINS, G.	HPD #324
2	CUSTODIAN OF RECORDS or Designee	Clark County Coroner's Office
3	CUSTODIAN OF RECORDS or Designee	Clark County Detention Center
4	CUSTODIAN OF RECORDS or Designee	HPD Communications
5	CUSTODIAN OF RECORDS or Designee	HPD Records
6	FOSTER, Arica	C/O CCDA'S Office
7	GAVIN, Dr. Lisa	Clark County Coroner's Office
8	HOLDEN, Melissa	410 E. Naples Dr., #6, LV, NV
9	KESTERSON, G.	HPD #1627
10	MOSHIER, Merriddee	C/O CCDA'S Office
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27	DA#11FH1653X/djj	
28	HPD EV#1110917	
	MURDER; CHILD ABUSE & NEGL W/SBH - F	
	(TK8)	