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**MICHAEL LEE**  
**Case No. 66963**

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DISTRICT COURT  
CLARK COUNTY, NEVADA

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THE STATE OF NEVADA,

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Plaintiff,

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vs.

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MICHAEL LEE,

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Defendant.

CASE NO. C277650-1

DEPT. XXIII

14

BEFORE THE HONORABLE STEFANY MILEY, DISTRICT COURT JUDGE

15

FRIDAY, AUGUST 15, 2014

16

17

**TRANSCRIPT OF PROCEEDINGS**

18

**JURY TRIAL - DAY 8**

19

**APPEARANCES:**

20

For the State:

21

DAVID STANTON, ESQ.

Chief District Attorney

22

JOHN L. GIORDANI, III, ESQ.

District Attorney

23

For the Defendant:

24

NADIA VON MAGDENKO, ESQ.

STEVEN M. ALTIG, ESQ.

25

RECORDED BY: MARIA GARIBAY, COURT RECORDER

-1-

GAL FRIDAY REPORTING & TRANSCRIPTION  
10180 W. Altadena Drive, Casa Grande, AZ 85194 (623) 293-0249

1 Friday, August 15, 2014 at 9:40 a.m.

2  
3 [Outside the presence of the prospective jury]

4 THE COURT: Hi, good morning everybody.

5 MS. VON MAGDENKO: Good morning, Your Honor.

6 MR. ALTIG: Morning, Your Honor.

7 THE COURT: All right. So the record will reflect the presence of the two  
8 District Attorneys, the defense counsels as well as the defendant.

9 Before we bring the jury in for closings, is there anything we need to  
10 address?

11 MR. STANTON: Not on behalf of the State, Your Honor.

12 MS. VON MAGDENKO: Yes, Your Honor. We would request that Michael's  
13 family be allowed into the courtroom --

14 THE COURT: For closings? Why wouldn't they be?

15 MR. STANTON: They'll be allowed in after the jury comes in.

16 THE COURT: Oh, okay. That's the only timing issue? Is that it?

17 MS. VON MAGDENKO: Okay.

18 MR. ALTIG: I believe so, Your Honor.

19 MS. VON MAGDENKO: Thank you.

20 THE COURT: Oh. Then that's fine. Okay.

21 [Pause]

22 THE MARSHAL: District Court XXIII jury is present.

23 [Jury in at 9:42 a.m.]

24 THE COURT: Welcome back, ladies and gentlemen of the jury. It appears  
25 that the entire jury is here. You are here for the closing arguments in State of

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1 Nevada versus Michael Alan Lee. It's Case C277650.

2 Yesterday I give you -- I gave you the law that you will use when you  
3 go and deliberate this case. What's going to happen now is the State is going to  
4 present their closing arguments.

5 By the State?

6 MR. GIORDANI: Thank you, Your Honor.

7 CLOSING ARGUMENT BY THE STATE

8 BY MR. GIORDANI:

9 Good morning, ladies and gentlemen. In every single criminal case in  
10 every courtroom across the nation, the State has to prove two things. Number one,  
11 that a crime was committed, and number two, that the person on trial, Michael Lee,  
12 committed it.

13 The crimes we've charged here are murder by child abuse and child  
14 abuse resulting in substantial bodily harm. This is very important for the context of  
15 the entire arguments here today. These are two separate offenses charged  
16 completely separately for different dates.

17 Count one, the murder charge, deals with the transected duodenum,  
18 the peritonitis due to the blunt force trauma. Count two deals with the head trauma,  
19 the blunt force trauma delivered to Brodie's head that caused traumatic brain injury.

20 As you'll notice, the dates are different. Look at the information, the  
21 criminal charging document when you go back into the deliberation room. The  
22 dates are different for a reason. That's because we don't need to show whatsoever  
23 that the head injury contributed to Brodie's death.

24 Now I understand that was the testimony. That's up to you to decide  
25 whether it did or it did not. But it doesn't matter for purposes of the charges.



1           When we're talking about the murder charge, we're talking about the  
2 abdominal injury. When we're talking about count two, we're talking about the head  
3 injury. Keep that in mind.

4           So the elements of child abuse resulting in substantial bodily harm are  
5 listed here on the PowerPoint. As I noted, we're talking about the dates of June  
6 13th to June 14th. As you all know by now, June 15th is the day Brodie was  
7 discovered dead by Arica at 8:50 a.m.

8           What we need to show is that the defendant, the person who  
9 committed the crime, wilfully caused blunt force trauma to Brodie's head in some  
10 unknown manner and that's also important. No one was in that room except for  
11 Brodie and Michael, the defendant. No one was there, no one can say how the  
12 blow was delivered, whether he was hit with something, whether he was punched,  
13 kicked, but we know a blow was delivered. We don't have to show exactly what  
14 blow was delivered, just that blunt force trauma was caused by that man resulting in  
15 traumatic brain injury. And again I highlight it does not matter if it caused his death.

16           Count two is the murder -- or count one is murder by child abuse.  
17 Child abuse was just defined for you, so you know what that is, but it's important in  
18 this context because the child abuse murder is first degree murder by law. Nevada  
19 law defines it. Child abuse murder is so inherently dangerous child abuse that if  
20 you cause the death of a child when you're beating him, you run that risk. That's  
21 first degree murder.

22           The elements are listed here, somewhat similar as to the child abuse  
23 charge. The defendant wilfully caused blunt force trauma in some unknown  
24 manner -- same idea as with the other count -- to Brodie's abdomen. This one  
25 resulted in his death.

1 As I stated previously, it doesn't matter what the defendant intended  
2 when he beat Brodie. It only matters he intended to beat him. If he killed Brodie  
3 when he beat him, causing his death, and it was unintentional, he didn't want him to  
4 die, it doesn't matter for purposes of murder by child abuse. You beat a kid, you  
5 run the risk. Malice is implied. A malignant and abandoned heart is implied. You  
6 beat a kid, you run the risk of killing him, first degree murder.

7 As I told you, we have to determine whether the crimes were  
8 committed. Well guess what? This one's easy. Dr. Arden, Dr. Gavin agreed this  
9 was homicide. You heard Dr. Arden get up there yesterday. He said I reviewed the  
10 autopsy report, coroner's investigator's report, witness statements, a number of  
11 different items, the photos, and he didn't challenge that that was a homicide. Only  
12 thing he challenged was the timing of the injuries and whether the head trauma  
13 contributed to Brodie's death.

14 So with that said, we know that the car accident or fender bender  
15 means nothing here. It wasn't an accident. We know that the nature, severity and  
16 extent of those injuries indicate they were caused by someone else.

17 We know it wasn't the Power Wheels incident. That's an accident,  
18 right? Well, it's not an accident what happened here. Those are eliminated for you.  
19 You don't have to worry about that.

20 Most importantly in my opinion is the Bambam injuries are ruled out.  
21 Bambam injuries are inherently accidental. If this is a kid running around banging  
22 his head on stuff and banging his body on stuff, those are accidents. That's ruled  
23 out. This was homicide. You don't have to worry about that.

24 So they disagree as I said on two fundamental points; whether Brodie's  
25 head injury caused his death and the timing of the injuries. Another easy on for

1 you. Doesn't matter if the head injury caused his death. Does not matter. It's  
2 separate and distinct from the murder charge. So Dr. Arden, good for you, we  
3 agree.

4 Timing of the fatal duodenal transection is where they disagree. The  
5 timing of that fatal injury that caused Brodie's death. Dr. Gavin got up here on the  
6 stand. She told you it was approximately 24 hours. She conceded, as did Dr.  
7 Arden, that this is not a perfect science. No one can say down to the minute when  
8 injuries are inflicted unless someone's there.

9 Dr. Arden says a minimum of 48 to 72 hours prior to Brodie's death.  
10 Forty-eight to 72, minimum. I'll point out that that's inherently flawed. If it's a  
11 minimum, it should be a single number. So it should be 48 hours minimum, not  
12 seven -- 48 to 72, just doesn't work that way.

13 With that said, we have to look back to the last 72 hours of Brodie's  
14 life. We estimated time of death -- I believe Dr. Arden's opinion was around 6:00  
15 because there was some indication that Brodie may have been alive when he was  
16 placed in the bed with Arica by the defendant. Obviously she called 911 at 8:50  
17 a.m. So somewhere in between and for purposes of making it easier to explain, I'm  
18 just going to say 6 a.m.

19 So if you count backwards, at the earlier, the injury was inflicted on  
20 Sunday, June 12th at 6 a.m. Well as I told you in the opening statement, we know  
21 where Brodie was Sunday at 6 a.m. Brodie was at grandma and grandpa's.  
22 Sunday, that's the last day he's at grandma and grandpa's house.

23 If you'll recall, Alayne Opie got up and testified that was -- that is  
24 Arica's sister, Brodie's aunt. She told you she came over on Sunday, picked Brodie  
25 up at -- I believe it was 10:30 she said. She took him to a restaurant and he started

1 drinking his syrup. And he was eating food. And he was acting normal.

2 We know during the day that grandpa was around, played with him.  
3 We know grandma was around, played with him. We know he was acting normal  
4 that entire day.

5 And most importantly, you can't ignore those symptoms when we're  
6 talking about timing of the injuries. You can't ignore those. That's common sense.  
7 This kid had a transected internal organ, completely severed internal organ. If you  
8 believe that he didn't show symptoms almost immediately after that, we disagree  
9 completely. That is a little boy with an internal injury so severe that it's only seen or  
10 usually seen in major car accidents, fatal car accidents. He's showing symptoms  
11 almost immediately after that injury's inflicted.

12 Did he show pain on June 17 -- or June 12? Nobody testified to that.  
13 We had at least three people saying he was acting normal; he never indicated any  
14 pain. Grandpa said that, grandma said that. Alayne actually said that she washed  
15 Brodie's hair, palpated the scalp, touched his head, zero indication of pain. That's  
16 Sunday night.

17 Change in energy levels. Same thing. Everyone said he was acting  
18 normal. He was running around being crazy little Brodie.

19 No one testified to any vomiting on Sunday.

20 No one testified to loss of appetite. Again I'll remind you Alayne Opie  
21 told you that Sunday morning Brodie ate a full stack of pancakes and then drank  
22 the syrup. There's no change in appetite. There's no indication that there's an  
23 internal organ severed and that the food that he is eating is dumping into his  
24 abdominal cavity. That's just not possible.

25 Photo on the left is Brodie about a week before his death,

1 approximately. The photo on the right is at that diner on Sunday morning. Look at  
2 that face. There's a little cheek bruise and we know where that came from. Pretty  
3 much nothing else. A little darkening under the left eye from the pinkeye. All  
4 consistent with what the family told you.

5 So let's move closer in time 36 hours prior to his death. Well, we have  
6 two sources of information that aren't friendly to the State whatsoever, they're not  
7 friendly to police whatsoever, they're friend to the defendant. Even them, both of  
8 them, said that Brodie did not fall or injure himself on Monday night.

9 Now remember when they said that and in the context in which they  
10 said it. They didn't tell police that because neither of them cooperated. They told  
11 the court that at a previous preceding, before all of this testimony, before all of  
12 these other things come to light. They didn't know what was going on. They said  
13 no, he was fine. I'll let you determine what context that was in and what their  
14 motive was for saying that. That's up for you to decide. But keep in mind that  
15 those are two people that are friendly to the defendant, two people that want him to  
16 walk out the doors.

17 Danny Fico specifically said that night he saw, with his own eyes,  
18 Brodie eating chicken parmesan. Appetite was fine. Energy levels were fine. No  
19 indication of pain. No scream from outside that Brodie fell or hurt himself, nothing,  
20 36 hours prior to his death.

21 Jennifer Lee. She testified nothing happened at Danny's house.  
22 Yesterday conveniently right before the defense expert testified she got up and told  
23 you oh, you know, I forgot to mention previously when I was under oath on the  
24 stand that Arica told me about the head pain or said that Brodie had a headache or  
25 Brodie said he had a headache; I told Arica go to the doctor, go the emergency

1 room.

2           You didn't hear that before. You heard that yesterday. Why didn't she  
3 tell the police that? If she loves this kid and I don't doubt she loves this kid, why  
4 didn't she answer the door when they rang the doorbell 24, 36 times, whatever it  
5 was? Why didn't they call? Why didn't she call? Why didn't she say you know,  
6 now that I think about it, couple days ago I told Arica that she needed take that kid  
7 to the hospital and she completely ignored me; there was issues there. She didn't.  
8 She told you yesterday. You decide if that's truthful or not. It's your determination  
9 to make.

10           That is the change in Brodie's face within 36 hours. Who was alone  
11 with him during that time? Two people. Two people only. Arica, who all the  
12 testimony supports loved that kid, treated him right, took him to the doctor, took him  
13 to the doctor for a stuffy nose, and that guy. That guy. Those two were alone with  
14 Brodie during the operative time period.

15           I'll remind you that Arica spoke to the police for different times. The  
16 first time was on scene, it was coroner's investigator, Nancy Dahl. She couldn't get  
17 much out of her. She got as much as she could considering the state that Arica  
18 was in, which is also highly probative and relevant as to what she was thinking at  
19 the time. That was shock. You heard that testimony from everyone. She was out  
20 of her mind. Horribly horribly heartbroken.

21           She talked to police and she volunteered information. I want you to  
22 think about that. She volunteered information about ways Brodie was injured when  
23 she -- when Brodie was in her care alone. Is that what someone does when they're  
24 trying to avoid culpability for a murder? Do you say yeah, he fell, I wasn't -- wasn't  
25 quite holding on to him when he was on the ATV, he fell off, he hit his face on the

1 curb? You don't volunteer that if you have something to do with this. You don't  
2 volunteer the other accidents and trips and falls. That is a person who is in shock  
3 and who is trying to explain what happened because she doesn't know. That's  
4 what Arica was doing.

5 Why not exaggerate? On the other hand, why not exaggerate it? If  
6 you're culpable, why not say yeah, he fell off the ATV, he hit his head so hard, I  
7 know that's what did it, oh my god, I feel horrible? Common sense. She's not  
8 giving that information and if she is giving that information, she's going to  
9 exaggerate.

10 Most importantly, why not point the finger at the only other person who  
11 was alone with Brodie? Why not say that's the guy that did it, it's him. You didn't  
12 hear that testimony. Now you heard a number of different statements through  
13 different witnesses that things were getting weird between Arica and Michael, the  
14 dynamic between Brodie and Michael were getting -- was getting odd. You heard  
15 that, but never once did you hear Arica or any of those family members point their  
16 finger and say that guy did it. That's probative. That tells you something.

17 What about the defendant? There was testimony regarding a number  
18 of injuries that occurred within approximately the last week of Brodie's death that  
19 were actually explained. They were explained by the defendant. All of those  
20 injuries happened when Brodie was with the defendant or some other uninterested  
21 party.

22 Remember the fat lip that we talked about yesterday I believe. Brodie  
23 fell on a sippy cup. Who was present for that? Arica was in the restroom. She  
24 heard a bloodcurdling scream from Brodie and walks out and see his fat lip and the  
25 defendant next to him, and the defendant says he fell; he hit his face on the sippy

1 cup.

2           What about the upper lip that was cut? Remember the prior injury?  
3 Who was he alone with at that time? The defendant. What was the defendant's  
4 story? The wood fell on him. Not me.

5           What about that statement you heard elicited from defense counsel  
6 that Bum hurt head and Bum was Brodie's nickname for the defendant? How do  
7 you explain that away? We were wrestling. Something must have happened. Not  
8 intentional, we were just wrestling.

9           What about the lump on the head? You heard a little bit about there  
10 was a lump on the back of Brodie's head, obviously separate and distinct from the  
11 severe traumatic brain injury on the left and right sides. Arica asked the defendant.  
12 Must have fell and hit his head on the sandbox, maybe Lily did it, something, they  
13 were over there grandparents' house playing.

14           What about the significant bruising that Arica saw on Tuesday morning  
15 when she woke up to take Brodie and go with the defendant to Shark Reef? That's  
16 when these serious injuries started to occur. And what did he say? Said he fell at  
17 Danny's house. Not intentional, he fell at Danny's house.

18           How do we know that's not true? Two different people, two people  
19 hostile to the State and friendly with the defendant that said that didn't happen.

20           You'll be instructed or you were instructed yesterday. You'll be able to  
21 take those jury instructions back with you. I encourage you to read them. There's  
22 one in there that I'd like to highlight and that's the common sense instruction as we  
23 call it. Essentially what it tells you is the law instructs you not to check your  
24 common sense at the door. Bring it back there with you. There was a lot of  
25 testimony yesterday regarding macrophages, neutrophils, blue and pink and purple

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1 on the slides. Use your common sense. As I stated earlier, there's no way that  
2 kid's not symptomatic. We can argue about a few hours here and there. Look at  
3 the big picture here.

4 Remember they were arguing about potty training. There was stress  
5 levels there. There was an increased level of stress between the defendant and  
6 Arica over one person, and that was over Brodie.

7 You heard about very early on, April 2011, is when Brodie started  
8 mysteriously bruising. Jennifer Lee was around Brodie at the time because she  
9 was babysitting him, but more importantly you heard that the defendant was the  
10 one that would go over there, spend a little time with his sister, nephews and  
11 Brodie, and then take him home. Those are all opportunities, those are all times  
12 where the defendant is alone with Brodie.

13 Remember the argument four days before Brodie's death. The  
14 argument that was so significant that Arica talked to her mom about it, talked to her  
15 sister about it. There was a chance, a good chance that they were about to break  
16 up and it was all about Brodie. You didn't hear testimony about other kinds of  
17 arguments. It was always about Brodie.

18 The defendant didn't have kids of his own. Maybe he tried his  
19 darndest in the beginning to make this work, but his frustration got the best of him.

20 Everyone told you Arica loved that kid. She took him to the doctor 11  
21 different times over the course of seven months. Brodie was anti-Mike from all the  
22 witnesses. Everyone that got up there who was around Brodie and the defendant  
23 said that something was going on between them; they were not getting along.

24 That's Brodie speaking. That's Brodie telling you who was beating  
25 him. That's the only way he could do it, his demeanor and his actions. Cry and

1 scream when that guy gets near him. Freak out and lose his mind when that guy  
2 gets near him and tried to hold his hand. That's Brodie telling you who killed him.

3 Again I'll highlight for count two, the substantial bodily harm, who was  
4 alone with him during the operative time period? The defendant. Who was alone  
5 with him during the operative time period that the fatal injury occurred? The  
6 defendant. The head injury, we know now, happened after Monday night dinner,  
7 some point before Tuesday morning, because Brodie woke up on Tuesday, per  
8 Arica, and had a headache; his head hurt. That's the first sign of symptoms. Arica  
9 wasn't alone with him Monday night. The defendant was.

10 The duodenum. Remember the hair salon, they did -- they ran these  
11 errands throughout the day on Tuesday. They went to Shark Reef, they went to a  
12 number of different places. They got to the hair salon. Brodie's fast asleep already  
13 showing symptoms from the head injury. He's exhausted, didn't want to walk. He's  
14 fast asleep in the back in the center, facing forward in his car seat. She gets out,  
15 she closes the door gently so she doesn't wake her sleeping baby. She comes  
16 back within five minutes and that kid's screaming at the top of his lungs. Once  
17 again the defendant is alone with him and the defendant blames it on something  
18 else; says when you closed the door, he started freaking out. That's when that fatal  
19 injury was inflicted. That's within the operative time period.

20 Brodie starts vomiting later. Brodie won't eat his lasagna. Mom has to  
21 force feed him the lasagna. She wants him to eat.

22 Those injuries are not accidental. Those injuries are not inflicted by  
23 Arica. They're inflicted by one person and one person alone.

24 Those injuries are not accidental. They're not inflicted by Arica. One  
25 person and one person alone inflicted them.

1 Those injuries. No accidental. Not inflicted by Arica.

2 Those injuries. Definitely not accidental. Definitely not inflicted by  
3 Arica.

4 I'll remind you one more time it doesn't matter whether there was an  
5 intent to kill. It matters who beat him, who intended to beat him, and who caused  
6 his death. Find that defendant guilty of both those counts. Thank you.

7 THE COURT: All right, by the defense, are you ready to present?

8 MR. ALTIG: Yes, Your Honor. I just need to do one thing with the computer  
9 real quick.

10 THE COURT: Of course.

11 [Pause]

12 MR. ALTIG: Thank you.

13 CLOSING ARGUMENT BY THE DEFENSE

14 BY MR. ALTIG:

15 Ladies and gentlemen of the jury, first I would like to thank you for your  
16 service -- hold on one second, please.

17 [Colloquy between counsel]

18 MR. ALTIG: Want to thank you for your service here -- over the last two  
19 weeks. I know that the State is thankful for it. I know the Judge is thankful for it. I  
20 know Michael is very thankful for it.

21 You know sitting through a jury trial for two weeks has a lot of impact  
22 on you and your families. Seeing the pictures you had to see has a lot of impact on  
23 you. I know we're all very thankful for your service and we appreciate everything  
24 you've done in this case.

25 Now if I can get the PowerPoint working, we'll begin with the closing

1 statements.

2 [Colloquy between counsel]

3 MR. ALTIG: Your road to a not guilty verdict is fairly straight. The path to  
4 that not guilty verdict is illuminated by four very simple questions. Let's look at  
5 those questions.

6 When did Brodie suffer the injuries that ultimately took his death (sic)  
7 would be the first question. Who had access to Brodie when those injuries  
8 occurred, were inflicted. Who inflicted the injuries on Brodie be the third question.  
9 The last question is how those injuries were to Brodie.

10 There's no smoking gun in this case. It's all circumstantial evidence.  
11 There's really no direct evidence. No one got up here and said we saw Michael hit  
12 Brodie. No one ever said that. In fact, you had the opposite of that where even  
13 Brodie's family said no one's ever seen Michael hit him, no one's ever seen Michael  
14 discipline him, no one's ever seen anything like that, so you have the exact  
15 opposite. The case is built on entirely circumstantial evidence and it's up to you as  
16 the jury to put the puzzles of that circumstantial evidence together and if you can  
17 develop a picture that you feel comfortable with, then you render your verdict.

18 Let's start considering the four questions. When did Brodie suffer the  
19 injuries that ultimately took his life. There are two different timelines that you need  
20 to consider. There's a timeline that was produced by Dr. Arden and there's a  
21 timeline that was produced by Dr. Gavin. Two distinct and different timelines.

22 Dr. Arden says the timeline is between Sunday early morning and  
23 Monday early morning. Dr. Gavin says Tuesday 8:30 give or take a few hours.

24 What's interesting is that when Dr. Gavin testified, Dr. Gavin was clear  
25 that both the injuries happened at the same time. The same thing that Dr. Arden

1 said, the injuries occurred at the same time. They didn't occur on different days,  
2 they occurred at the same incident, same time.

3 Remember the question; when did Brodie suffer the injuries that  
4 ultimately took his life. And you got to consider the two timelines regarding when  
5 Brodie suffered those injuries and you have to determine which timeline you accept.

6 The Judge is going to instruct you on and did instruct you on expert  
7 witness testimony and how you weigh that testimony and what you consider. So  
8 let's take a look at the experts and see which one's better qualified to render those  
9 opinions and which one you would accept as more qualified.

10 Dr. Arden took the stand and told you he had decades of experience in  
11 forensic pathology. He's worked in Washington, DC, New York City, Suffolk  
12 County, New York, Delaware, West Virginia. He's been board certified since 1985.  
13 He was a specialist in pediatric forensic pathology, testifies for both the prosecution  
14 and the defense, that he can has -- had his own consulting practice since 2004 and  
15 he has 20 years as a government forensic pathologist.

16 Dr. Gavin took the stand and she told you this was her first job as a  
17 forensic pathologist, that she's been with the Clark County Coroner's for two years  
18 prior to this autopsy -- prior to Brodie's autopsy, that she's not board certified and  
19 this was her first solo transected duodenum autopsy.

20 You can look at the facts also to determine which timeline you accept  
21 as true. You don't look just the qualifications, you can look at the facts of the case.  
22 And we know the following facts based upon the testimony that we heard in this  
23 case.

24 Monday morning Brodie complains of a headache. There is a bump  
25 and some mild bruising. He doesn't look right. He has droopy eyes. He won't play

1 at the pool. He's not acting like Brodie and he won't eat his Little Caesars pizza at  
2 the pool on Monday morning.

3 Jen Lee tells Arica she should take Brodie to the doctor. Those facts  
4 only fit within Dr. Arden's timeline that the injuries had occurred sometime between  
5 Sunday morning and Monday morning. Not Dr. Gavin's.

6 You can also look to Monday afternoon evening. You heard from Jen  
7 Lee and Jen Lee told you on Monday evening at the baseball game Brodie wouldn't  
8 eat.

9 You also heard from Danny Fico. Danny Fico told you he believed that  
10 Brodie did eat. We were talking about a three time span between now and then.  
11 As the State clearly pointed out, Danny didn't give a statement to the police, there  
12 was nothing for him to go in and read and remember what happened, he's going  
13 based off his memory only from three years before. He was mistaken. Jen clearly  
14 told you Brodie didn't eat that Monday night and he still wasn't acting like himself.  
15 Those facts also only fit into Dr. Arden's timeline for those injuries, not into Dr.  
16 Gavin's.

17 Tuesday morning, we know Brodie's still complaining of a headache,  
18 the bruising's filling in, it's developing, it's getting worse, he's not acting like himself  
19 again. That was the testimony that we had from I think Danny Fico when he arrived  
20 -- when Arica and Brodie and Michael all arrive at Michael's work before they went  
21 off to go run some errands and do some things and have a fun day. Those facts  
22 also only fit into Dr. Arden's timeline. If you believe Dr. Gavin, Dr. Gavin's saying  
23 something's just then happening to Brodie right at that particular point and we know  
24 something was happening from well before that because of the way that Brodie was  
25 acting and the things that people saw going on with Brodie.

1 We can really stop there to determine whose timeline you should  
2 believe. It's quite apparent that the only timeline the facts fit is Dr. Arden's. His  
3 qualifications and experience would lean towards Dr. Arden and the facts of the  
4 case would lean towards Dr. Arden.

5 Brodie suffered the injury that ultimately took his life during the timeline  
6 established by Dr. Arden. According to that timeline, the injury must have occurred  
7 between Sunday early morning and Monday early morning. The answer to  
8 question one is very simple; Brodie must have suffered his injury between Sunday  
9 and Monday morning.

10 Now we look at the second question; who had access to Brodie when  
11 the injuries were inflicted. Sunday early morning to Monday early morning. Sunday  
12 we know that Brodie was at grandma and grandpa's house. We saw the pictures,  
13 we heard the testimony. And he was there until about 8:00 p.m. Sunday evening.

14 At that point that's when Arica came and picked Brodie up from  
15 grandma and grandpa's house and took her home. Took him home I mean. Brodie  
16 was with Arica and Michael the rest of the time.

17 We also know that Brodie was starting to bruise on his face when they  
18 stopped by Michael's work at 8:30 in the morning on Monday morning. So we know  
19 his injury had to occur sometime between 8 p.m. Sunday and 8:30 Monday  
20 morning.

21 What we want to look at is what happened between those hours of  
22 Sunday at 8:00 p.m. and Monday morning at 8:30. Arica told us what happened  
23 when she testified. Brodie got tangled up in the curtains, pulled the curtain rod  
24 down on himself again. Something that he did quite often, but he did it again she  
25 said.

1 She also testified that she went into Brodie's room alone with -- and to  
2 take care of a situation with Brodie. Michael didn't go into that room. Michael  
3 wasn't in the room punishing Brodie. It was Arica that went into the room alone  
4 with Brodie when he got tangled up in the curtains and pulled the rod down on top  
5 of himself.

6 Grandma and grandpa weren't alone with Brodie. Michael wasn't  
7 alone with Brodie. Arica was the only person alone with Brodie during the timeline  
8 established by Dr. Arden. That answers question two. Arica's the only person that  
9 was alone with Brodie during Dr. Arden's timeline.

10 Question number three, who inflicted the injuries on Brodie? Again,  
11 there's no direct evidence so let's look at the circumstantial evidence and see how it  
12 leads us to Arica.

13 Not a single person tells the police that they believe Michael did this.  
14 Not a single person tells the police they ever saw Michael hit Brodie. Not a single  
15 person saw Michael discipline Brodie. Arica even told you Michael never even hit  
16 Arica.

17 Not a single person tells the police when they're questioned that they  
18 concerned about Michael. Not grandma, not Arica, not grandpa, not Arica's sister,  
19 no one. In fact, what you've learned is that they actually bring Michael over to  
20 grandma and grandpa's house for a few days after the incident and he's living there  
21 with grandma and grandpa in the home with them. Is that the conduct of someone  
22 who believes that Michael's the person that did this to their grandson?

23 Arica's changed her story from what she originally told the police to  
24 what she's told you here at trial today. Those were painstakingly gone through, the  
25 inconsistencies when she was cross-examined. I'm not going to go through all of



1 them here. But it was very -- a very big change in story. One of the important  
2 changes is she comes in the trial here today saying she's thinking about getting a  
3 nanny cam, she was considering getting a nanny cam because of these injuries.  
4 That's the first time she's ever said that. She never told the police that and you  
5 heard that on cross-examination.

6 And I ask you a question to think about whether or not that's a valid  
7 statement by Arica. If she was considering getting a nanny cam and had been  
8 doing that and she was concerned that Michael was doing something to her son,  
9 then why on Monday night is she leaving her son alone with Michael? And why on  
10 Tuesday night is she leaving her son alone with Michael? It doesn't make any  
11 sense, Arica's statements.

12 And can you believe what Arica's saying? I'd ask you consider this. If  
13 the police aren't looking at Michael as the person who perpetrated this offense,  
14 then who were they looking at? Who is the only other person that was alone with  
15 Brodie? They're looking at Arica.

16 And let's look at their conduct to see if Arica's the one who inflicted the  
17 injuries to Brodie. Remember, Brodie was taken to the doctor -- I believed it was 12  
18 times. The State might be right, it may have been 11 times during a seven-month  
19 period of time. He was taken for the sniffles, he was taken because he was  
20 bruising too easily, and he was taken there the day after a car accident when he  
21 had no apparent injuries. She took him to the doctor.

22 Monday before Brodie's death. There's bruising on his face and a  
23 bump on his head. He's saying he has a headache. He's not acting right. He won't  
24 eat. Does she take him to the doctor then? No.

25 And why not? What's she trying to hide? Is she trying to hide her own

1 actions in that situation?

2 Tuesday morning. Brodie's bruising becomes worse. He's  
3 complaining of a headache still. He's not acting right. He won't eat. Does Arica  
4 take Brodie to the doctor then? No. She doesn't. What's she trying to hide? Is it  
5 her own actions and her own conduct?

6 Wednesday. Brodie bruise -- Brodie's bruises are even worse. He  
7 vomited in his bed. Does she take him to the doctor then when she wakes up in the  
8 morning time? No. She doesn't. What's she trying to hide? Is it her own actions  
9 and her own conduct?

10 When the police question Arica, what does she tell the police about  
11 Brodie's bruises? She tried to explain the bruises away. She tells them well this  
12 happened, you know, grandpa plays this typewriter game that's what those bruises  
13 are from, this bruise happened from this time, this bruise happened from that time.  
14 She doesn't say to the police I don't know how the bruises happened or I believe  
15 that Michael did it. She tries to explain the bruises away is what she's trying to do.

16 Why would she do that? Why would she explain the bruises away? Is  
17 she trying to hide her own conduct? No.

18 Also, look at how they both treated Mike -- how both Arica and Michael  
19 treated Brodie the night that he passed away. We know Michael wakes up Arica  
20 and tells her that Brodie vomited in his bed. If Michael's the kind of guy that's going  
21 to beat the kid to death and had beaten him like that, is he going to let the kid sit in  
22 his own vomit or is he going to go wake up his mom and tell him that -- tell her that  
23 he's vomited and you need to take care of your son and go clean him up? That's  
24 what he does. That's a sign of someone who cares.

25 When Michael leaves for work that morning at 5 a.m., he finds Brodie

1 on the couch, gets him some Gatorade, and then takes him and lays him down with  
2 his mom in bed. Let's look to see what Arica did.

3 The night that Brodie dies, Arica takes Brodie's clothes off, lays Brodie  
4 on the couch with a towel, doesn't give him anything to drink and then she goes  
5 back to bed herself. And then she sleeps until the time that she would normally  
6 wake up. This is her son who she says over a few days has been progressively  
7 getting more bruised, is complaining of headaches, isn't eating and throwing up at  
8 night and she's taking him and just laying him on the couch and going back to be  
9 herself. Is that the sign of a person that cares about their child and is concerned  
10 about their child?

11 Who was acting more concerned? Michael was.

12 Who was acting like they didn't care about Brodie's wellbeing? Arica  
13 was.

14 That answers questions number three that Arica is the person that  
15 inflicted the injuries on Brodie.

16 Now we're going to look at how Arica inflicted those injuries on Brodie.  
17 Remember that Arica said to you about what happened on Sunday night, or on  
18 Sunday during the day. She said she read through Michael's phone. She saw text  
19 messages between Michael and his sister where Michael talked about he was  
20 going to leave Arica and Arica was upset about and questioned Michael about  
21 those text messages.

22 Remember when she testified here before you, she also said -- these  
23 are her words and not Michael's, but she sat here and said there was issues  
24 between the two of them involving Brodie. There was issues of Brodie being potty  
25 trained and Brodie being rambunctious and that was creating issues between the --

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1 between her and Michael. Those are her words, not Michael's words. And in her  
2 words, she's basically blaming her son for the breakdown of that relationship.

3 She's already angry with Brodie because of the interference with the  
4 relationship. She comes home, Brodie's wrapped up in the curtain rods again. The  
5 curtain rod falls down on him. She goes in the room to take care of the situation  
6 with Brodie.

7 She testified she had to pull him out of the curtains. Right? This is an  
8 interesting thing because you saw the deep fingernail marks on Brodie's body. We  
9 got to see who put them there, who put those fingernail marks there. We know that  
10 just a day or so before, Arica had her nails done. She got brand new nails, acrylic  
11 nails, fake nails put on. We also talked to Dr. Gavin and we asked about the acrylic  
12 fingernails because the State had the -- the Detective Collins get up there and talk  
13 to you about DNA, not finding DNA on Brodie's injuries, especially and specifically  
14 on those fingernail marks.

15 They said there was no DNA found there and Dr. Gavin said acrylic  
16 fingernails wouldn't necessarily leave DNA in those marks. That's why they're  
17 important and also at the risk of sounding sexist and I don't want to sound sexist,  
18 what man when they're angry gouges somebody with their fingernails? That is not  
19 something that you ordinarily see a man do.

20 Did anybody ever consider testing the curtain rod for Brodie's DNA?  
21 No. Did anyone ever check the curtain rod for Brodie's hair or blood from where he  
22 may have been hit by Arica with the curtain rod? No. Does anyone check to see if  
23 the curtain rod matches any injuries on Brodie's abdomen area? No. Never  
24 checked it.

25 Believe the facts show that Arica caused the injuries to Brodie and did

1 nothing to get him help, even after seeing his health deteriorate from Sunday night  
2 until Wednesday morning. However prior to this she took him to the doctor 11  
3 times in seven-month period of time for all different sorts of ailments, but during this  
4 timeframe when his health is deteriorating, he's bruised up, things are going on like  
5 that, she doesn't take him to the doctor. Is that simply to hide her actions?

6 Is there reasonable doubt in this case? Yes, there is, and let's talk  
7 about that for a moment.

8 Now you've heard about all these different inconsistencies with Arica's  
9 statement, with the family statements, with everybody's statements. I've talked  
10 about probably 30 to 40 of them just now and I haven't gone over all of them.

11 Inconsistencies alone, if they're sufficient enough to you, one could  
12 raise reasonable doubt. When you pile 30, 40, 50, 60 of them on top of each other,  
13 that should be sufficient to raise reasonable doubt.

14 I also want to talk to you for a second about jury instruction number  
15 three. It is the instruction that the State uses when they're talking about the  
16 charging of the injuries. The State talked about the dating on the -- on their  
17 information. And they talk about when they -- when they charged the murder  
18 allegation, count one, what they say in their instruction -- and you have a copy of it  
19 and you can read it for yourself when you're back there -- is that the injury, the  
20 duodenum -- the transected duodenum occurred on or between June 14th and  
21 June 15th. That's the murder charge.

22 If you believe Dr. Arden's timeline -- and Dr. Arden took time to sit up  
23 here and explain to you exactly why he felt the timeline was where it was. He  
24 looked at all the slides, he did all the measurements and took all the different things  
25 and if you believe Dr. Arden's timeline, you can't convict Mr. Lee of murder. Dr.

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1 Arden's timeline sets the injuries on the 13th or the 12th, not the 14th or 15, so you  
2 couldn't convict Michael Lee of murder just based on the State's pleading of the  
3 document as well.

4 Also, the State talked about the child abuse allegation. I believe the  
5 testimony from Dr. Gavin and Dr. Arden were consistent with one another and that  
6 the head injury did not cause Brodie's death. I believe that Dr. Gavin even said  
7 that. She said the injury did not cause it. It may have been a contributing factor,  
8 but it did not cause it and that's exactly what Dr. Arden said as well.

9 The State gets a chance to come back up and talk to you. They get a  
10 chance to come back up and talk to you about how everything that I said is wrong,  
11 how everything that I said is not consistent with the facts. You're the jurors. You  
12 get to decide that. What's consistent and what's not.

13 Sitting over here is Michael Lee. Michael Lee is an innocent man.  
14 He's not guilty of murder. He's not guilty of child abuse. They haven't  
15 demonstrated a single piece of direct evidence that suggest that he is, and  
16 circumstantial evidence can go many different ways, not just at Michael.

17 And with that, I'd ask that you now walk down that roadway, that  
18 straight roadway. I'd ask that you walk down illuminated path and you go back and  
19 deliberate and you check that box that says not guilty. Thank you.

20 THE COURT: Before you do rebuttal, counsel, can I give the jury a 10-  
21 minute break to use the restroom, please?

22 Ladies and gentlemen of the jury, please come back in 10 minutes.  
23 You're admonished not to converse amongst yourselves or with anyone any  
24 subjected connected the trial, do not read, watch or listen any report of or  
25 commentary on the trial, and do not form or express an opinion on this case.

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1 Thank you.

2 [Jury out at 10:26 a.m.]

3 THE COURT: Okay. You can go off.

4 [Off the record at 10:26 a.m.]

5 [Proceedings resumed at 10:37 a.m.]

6 [Outside the presence of the jury]

7 MR. STANTON: Yes, Your Honor.

8 THE COURT: All right.

9 [Pause]

10 THE MARSHAL: District Court XXIII jury is now back in.

11 [Jury in at 10:38 a.m.]

12 THE COURT: Are we back on?

13 THE MARSHAL: Judge, this is -- we're back in C277650, Michael Lee.

14 THE COURT: All right, and the Court will note the presence of the District  
15 Attorneys, the defendant and his attorneys, as well as the entirety of the jury.

16 And whenever you're ready, let's I guess let everyone in the courtroom  
17 and then you can start with your rebuttal.

18 MR. STANTON: Thank you, Your Honor.

19 REBUTTAL ARGUMENT BY THE STATE

20 BY MR. STANTON:

21 Ladies and gentlemen, in child murder cases, the irony is contrary to  
22 what counsel said that this is a case built on circumstantial evidence. The most  
23 compelling evidence in this case is from Brodie himself. Not only by his behavior  
24 but by his body at autopsy. Because he tells you, number one, he was murdered.  
25 And number two, he tells you who murdered him.

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1 Now, his body tells you that he was the victim of significant physical  
2 abuse over a period of time. Now we focused somewhat unfairly so on two injuries,  
3 the injuries to the head and the injuries to the abdomen. But he has a lot more  
4 injuries. And the most compelling evidence in this case and I would submit to you  
5 simply uncontroverted is the distinction between Bambam injuries and  
6 non-accidental physical abuse.

7 Every single person who took this witness stand in this trial told you  
8 that what you see at autopsy are not Bambam injuries. Every single person.

9 Even the defendant's sister, as you saw when I showed her the  
10 photographs at autopsy, had a physical reaction to what she was seeing. No one  
11 had seen those before. No one. That is because they are indicative of physical  
12 abuse, child abuse, intentionally inflicted upon this child. And as I just heard  
13 counsel's argument to you is that's the murder. That's the killer right in front of you.  
14 And the evidence that he has and suggests that you follow is Dr. Arden. I'm going  
15 to embrace that for a moment.

16 I want you to believe everything Dr. Arden said. He's true -- it's  
17 absolutely true -- and remember he said 48 to 72 but more likely 72. In fact, without  
18 reference to any specific articles, he says there's articles that says those injuries  
19 could be up to a week old. So that's true.

20 Exhibit 79. Brodie in this photograph, if you're to believe the defense  
21 theory, is a dead boy walking. Because this is midmorning on Sunday. Minimum  
22 72 hours is 6 a.m. before this photograph was taken.

23 As he looks at you in that photograph, he's dying. And if you believe  
24 that, and you believe that's what the evidence shows, I on behalf of the State, urge  
25 you to check both boxes of not guilty.



1 But of course that's not what happened. He's not a dead boy. Because  
2 after he finishes his syrup and that pancake, that dissected duodenum after it -- the  
3 stomach digests this pancake and the syrup, the remaining, the part that the body  
4 doesn't use turns into fecal matter and is transferred out of his stomach not into his  
5 intestines, because Mr. Arden says they're dissected. Not torn, dissected.  
6 Completely separated.

7 And that photograph is in evidence. You can see the dissection. You  
8 heard Dr. Gavin show you the photographs of literally the abdominal cavity's put out  
9 where she show with forceps the severity of that.

10 This young man is dying as you look at him because he suffered blunt  
11 force trauma not only to his head but to his stomach significant enough and typical  
12 for fatal automobile accidents. Yet no one ever sees him have a type of injury like  
13 that. Falls, punches. No one ever hears him complain of any symptoms after the  
14 time period that they assess.

15 Now remember, Mr. Arden talked to you about an article that he read  
16 and just before they were done with his examination he said an example of a two  
17 and a half year old boy, there was a paper that was published. I referred to it as the  
18 Osuka paper. And he said to be fair, this child was in a hospital being diagnosed  
19 for medical personnel for a period of five days. But he said to be fair the child was  
20 immediately symptomatic. The child knew or was displaying signs and remember  
21 what Arden said the exact or similar injuries that Brodie had. That child was  
22 immediately symptomatic. They just couldn't tell what it was for five days.

23 Well sir, tell us what was the background of what happened in that  
24 case; what's the etiology. I don't remember. Well let me help you out a little bit.  
25 That child was shoved into the corner of a coffee table that dissected his

1 duodenum.

2 So as you see Brodie right here, he's dying and something similar to  
3 that or to a fatal automobile accident has occurred to that young man. And that's  
4 why I say none of that makes sense.

5 You are the sole province of finding what the facts are. And I would  
6 submit to you that Dr. Gavin, her testimony timed these two injuries, head,  
7 abdominal, differently.

8 Counsel just got up and said she testified consistently with Dr. Arden  
9 that they were committed at the same time. I leave that to your memory and to  
10 your notes as about what occurred. But it's my recollection Dr. Gavin directly  
11 stated that five to seven hours is the low end for the abdominal injuries and up to  
12 24. And she said the head injuries were 24 hours approximately old, nothing  
13 recent, and therefore indeed her testimony showed those as being different.

14 Counsel says that Ms. Foster comes in and testifies for the first time  
15 about wanting a nanny cam. Remember Arica's testimony was that she told that  
16 told Detective Collins; Detective Collins on the 17th of June, two days afterwards.  
17 So she did say that before.

18 And counsel got up here and talked to you about Michael is the one  
19 that's treating Brodie appropriately. Look at the behavior of Arica and the  
20 defendant. The assertion that when he finds Brodie covered in vomit in his bed,  
21 this caring man, the person seated in front of you, his behavior is what? What does  
22 a caring person that cares about that young boy covered in vomit in his room, what  
23 would you do? What would a caring person do? How about pick that young man  
24 up and take care of him. Clean him up.

25 What does he do? He wakes the mother up. And you heard Arica

1 testify to what -- in the manner in which he said, hey, your son threw up everything,  
2 you need to go clean him up.

3 Counsel says that she -- Arica's hiding the injuries, hiding what she's  
4 doing. Remember what happened when they went to the defendant's place of  
5 employment, something I didn't hear in closing arguments about evidence that's  
6 uncontroverted to you. Who wanted to take Brodie outside into the public when he  
7 had bruises all over his face? The killer? Arica Foster who wants to now hide the  
8 bruises and damages that she's inflicted on the child she presumably hates? No.  
9 She says I have nothing to hide.

10 So I take him out and who's the person that didn't want to take him  
11 out? That guy. Tells her on two occasions -- in fact, he doesn't even go into the  
12 same part of the store where Danny Fico is working. He went to the car wash.

13 And counsel talks about no one checked on the curtain rod. I -- once  
14 again, you are the finders of fact. I would harken back to the testimony of both the  
15 crime scene analyst as well as Detective Collins. They impounded several items.  
16 You saw pictures of them. Curtain rods. Ruler in the playroom of Brodie in a  
17 basket with -- excuse me, with other toys. There was a plastic coat hanger that  
18 was in a closet.

19 And I asked Detective Collins did you conduct an investigation as to  
20 whether or not any of those implements were used as to the pattern injuries that  
21 were shown on Brodie? And he said no, we could not exclude or include any of  
22 those.

23 Pattern injuries are those injuries that have a specific design to them,  
24 as opposed to blunt force trauma with no definitive instrument used.

25 If you believe that Arica Foster in any way, shape or form in your mind

1 is the killer of Brodie or the author of any of those injuries, listen to Exhibit 8. That  
2 is the 911 call. It's admitted into evidence and you'll have a computer to play this.  
3 If you have any doubt whatsoever, listen to that. Because once again, if you  
4 believe the defense theory, you're listening to the killer. And I will simply say that it  
5 is entirely inconsistent with someone who did not care about Brodie, did not love  
6 him the way you saw and heard in this courtroom.

7 Let me talk to you about this head injury. This is a head injury that at  
8 the time that Nancy Dahl, the coroner's investigator comes to the scene -- and let  
9 me just set the table a little bit for this. No one is permitted at this crime scene to  
10 touch the body. That is the province of the coroner's office through the coroner's  
11 investigator's office. You heard Detective Collins and Ms. Dahl testify in that  
12 regard.

13 By the palpation just by Ms. Dahl touching Brodie's head, do you recall  
14 what her testimony was? That it was soft and mushy. And that was an alarm bell  
15 to Ms. Dahl, a very trained person in investigating abusive cases that end up in  
16 death of children.

17 The same injury that would have been present by Dr. Arden's  
18 testimony when his hair is washed Sunday evening. Because remember, he's  
19 dying. He's got a transected duodenum and Dr. Arden says these injuries are the  
20 same date.

21 So Merridee Moshier, a nurse of 25 years, 25 years, that is involved in  
22 bathing this child along with Alayne from head to toe, lotioning him, washing their  
23 hair, no one feels that. Putting lotion on Brodie's body, no complaints of abdominal  
24 pain. No complaints of nauseousness. None of that.

25 And counsel put on a slide evidence that supports that the injuries

1 were occurring. For the first time yesterday, for the first time we heard that  
2 testimony in this case. And that comes from Jennifer Lee.

3 Now, once again, if you're to believe the defense theory, Ms. Lee came  
4 in here and told you when they recalled her that she knows on Monday, the day of  
5 the pool, that Brodie's not eating, that he's complaining of a headache, and that  
6 she's so concerns (sic) about Bradie's -- Brodie's condition she tells the mother to  
7 take him to the hospital.

8 What would you think a person -- and once again, her own words  
9 under oath, how did you feel about Brodie on June of 2011, I loved that boy. On  
10 June 15th when Brodie's dead and she find out about it, don't you think someone  
11 that loved Brodie and had that information and if it was truthful would have told the  
12 police that? The next day, a week from then, a month from now?

13 In fact, up until today's date, ladies and gentlemen, Jennifer Lee hasn't  
14 told anybody until called by the defense. And the only time she ever gave a  
15 statement is when I compelled her pursuant to a subpoena.

16 Exhibit 66. That is a hand, ladies and gentlemen. And I'm going to ask  
17 you to do -- keep in mind two things about that. Number one is it's unmistakably  
18 because of the scalloped, the number, where the thumb would be of what's right  
19 underneath the skin. And the internal organs as you go from anatomically from  
20 what you just saw inside Brodie's body, you have the lower abdomen, but you also  
21 have his rib. His eighth rib was fractures. Another injury that we haven't talked a  
22 lot about. But once again indicative of child abuse.

23 As you heard Dr. Gavin talk about that rib fracture and no contradiction  
24 from the defense expert, that is a pressure injury. That pops the rib off the spine.  
25 It's not a mid-bone fracture.

1 And his ears. Brodie's ears. Remember the bruising on them. Back in  
2 the jury room, squeeze your ear as hard as you can, hard as you can, and one  
3 thing will never happen, you won't bruise it.

4 Brodie was murdered. But not by Arica. By that man sitting right in  
5 front of you. And I respectfully submit the evidence is overwhelming to that effect.  
6 Hold him accountable and convict him of first degree murder.

7 THE COURT: All right, Jason. And who's taking the alternates?

8 All right. Please swear Jason and the other marshal in to take charge  
9 of the jurors.

10 [The clerk swore in the officers to take charge of the jury during deliberations]

11 [The jury retired to deliberate at 10:57 a.m.]

12 THE COURT: All right, counsel, please leave us numbers in case we get a  
13 verdict or they have questions.

14 MR. ALTIG: Yes, Your Honor.

15 THE COURT: And if you don't hear from us, we'll let them deliberate till five  
16 and then we'll let them go until Monday.

17 MR. STANTON: Thank you, Your Honor.

18 MR. ALTIG: Thank you.

19 [Off the record at 10:57 a.m.]

20 [Proceedings resumed at 1:43 p.m.]

21 THE MARSHAL: Be seated, come to order.

22 THE COURT: All right, counsel, good afternoon. We have a verdict.

23 Are we on the record?

24 THE COURT RECORDER: Yes, Your Honor.

25 THE COURT: So we're on for the verdict in State of Nevada versus Lee,

1 C277650.

2 [Pause]

3 THE COURT: All right, Jason. It looks like we have everyone in the  
4 courtroom. Can you please bring in the jury?

5 THE MARSHAL: Yes, Judge.

6 [Pause]

7 THE MARSHAL: District Court XXIII jury is present.

8 [Jury in at 1:47 p.m.]

9 THE COURT: All right, the record will reflect the presence of the District  
10 Attorneys on this case, the defendant and his attorneys, as well as the jury.

11 Ladies and gentlemen of the jury -- Mr. Foreperson, did you reach a  
12 verdict?

13 THE FOREPERSON: Yes.

14 THE COURT: Could you please give the verdict to the marshal?

15 All right, I'm going to give the verdict to the clerk and have her read the  
16 verdict.

17 THE CLERK: District Court, Clark County, Nevada, The State of Nevada,  
18 plaintiff, versus Michael Alan Lee, defendant, Case Number C-11-277650-1,  
19 Department XXIII. Verdict. We, the jury in the above entitled case, find the  
20 defendant, Michael Alan Lee, as follows: Count 1, Murder, guilty of first degree  
21 murder by child abuse. We, the jury in the above entitled case, find the defendant,  
22 Michael Alan Lee, as follow: Count 2, child abuse and neglect with substantial  
23 bodily harm, guilty of child abuse and neglect with substantial bodily harm. Dated  
24 this 15th day of August, signed by your foreperson, Ray McIntosh.

25 THE COURT: You need to inquire if this is verdict of the jury.

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1 THE CLERK: Ladies and gentlemen of the jury, are these your verdicts as  
2 read, so say you one so say you all?

3 THE JURY: Yes.

4 THE COURT: All right, does either side wish to have the jury polled before  
5 the clerk records the verdict?

6 MR. STANTON: No, Your Honor.

7 MR. ALTIG: No, Your Honor.

8 THE COURT: All right. Ladies and gentlemen, based upon the verdict there  
9 will be a second stage to this proceeding. There will be what's called the penalty  
10 phase and I believe the attorneys talked a little bit about it when they were  
11 addressing all of you.

12 Counsel, my intention was to hold the penalty phase Monday at one or  
13 are you prepared to go now?

14 MR. STANTON: We're prepared either to go now or Monday, whatever the  
15 Court's pleasure.

16 MR. ALTIG: Your Honor, I'd ask that we do it on Monday. We talked about I  
17 have a -- an engagement at 3:00 today that I would like to attend and --

18 THE COURT: And I'm sorry. You're right. I did.

19 Is that agreeable to the State if we do Monday at one?

20 MR. STANTON: Yes, Your Honor, and for the Court and the jury, the State's  
21 presentation would last several -- just a couple hours on Monday.

22 THE COURT: Okay.

23 MR. ALTIG: Thank you.

24 THE COURT: All right, ladies and gentlemen of the jury, thank you for your  
25 time and attention and again you have not been discharged as jurors at this time so



1 please it's -- do not talk about this case. Please remember over the course the  
2 weekend it's important that you don't talk about this case with anyone, you don't do  
3 any independent research on your own, and that you keep a fair and open mind  
4 and don't form or express an opinion -- I mean don't form or express an opinion on  
5 what you believe the sentence should be until you come into court on Monday and  
6 hear all the evidence which will be presented to you. Thank you very much for your  
7 diligence and we will see you Monday at 1:00.

8 [Jury out at 1:50 p.m.]

9 THE COURT: All right, I don't know if we should -- I mean we need to  
10 address a few things. You want to do it outside the presence of everyone -- as far  
11 as just scheduling on Monday?

12 MR. STANTON: That's fine with the State, Your Honor. We can do it now --

13 THE COURT: I will obviously need to admonish the defendant.

14 MR. STANTON: Uh-huh.

15 THE COURT: Do you want me to do it now so he can think of -- about it over  
16 the course the weekend or when --

17 MR. ALTIG: Sure.

18 THE COURT: -- we start on Monday?

19 MR. ALTIG: Can do it now.

20 THE COURT: All right.

21 THE MARSHAL: Be seated.

22 THE COURT: All right. Mr. Lee, sir, there is going to be a penalty phase in  
23 this case and I need to go over the following information. Please give it some  
24 serious consideration over the course the weekend.

25 At the time of the penalty phase, you have the right to state in an

1 unsworn manner anything that you feel would be important to relate to the jury in  
2 mitigation of your sentence. You're instructed, however, that the right to make an  
3 unsworn statement is not without bounds. You may not discuss the issue of guilt or  
4 innocence as the jury has already determined guilt. You may not lie with impunity  
5 during your unsworn statement and you are not allowed to contradict the  
6 evidentiary facts.

Should you go beyond the bounds of giving a statement setting forth remorse, apology, chagrin, plans or hopes for the future, the Court may allow comment by the prosecutor or allow a reopening of the case for additional cross-examination or may itself make comments to the jury regarding your unsworn statement in mitigation of your sentence.

Again you are allowed to make remarks of remorse which are not belied by the evidence, apologies or excuses for your acts, pleas for leniency and your plans or hopes for the future.

15 Sir, do you understand your right to address the jury in mitigation of  
16 sentence?

17 THE DEFENDANT: Yes, ma'am.

17 THE COURT: All right. And I'm sure your counsel will discuss it with you  
18 further over the weekend.  
19

20 Anything else we need to address before I see you Monday at one?

21 MR. STANTON: Not for the State, Your Honor.

22 MR. ALTIG: No thank you.

23 THE COURT: All right. Thank you.

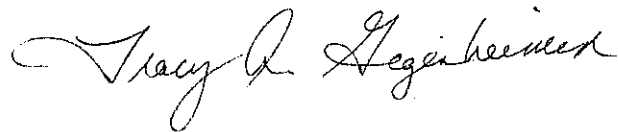
24 And the clerk is going to record the verdict in the minutes, please.

25 [Pause]

1 THE COURT: I think we can go off the record. We're just letting everyone  
2 out of the courtroom.

3 [Proceedings concluded at 1:53 p.m.]

4 ATTEST: I hereby certify that I have truly and correctly transcribed the audio/visual  
5 proceedings in the above-entitled case to the best of my ability.

6   
7

8 Tracy A. Gegenheimer, CER-282, CET-282  
9 Court Recorder/Transcriber  
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5 DISTRICT COURT  
6 CLARK COUNTY, NEVADA  
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8 THE STATE OF NEVADA,

9 Plaintiff,

10 vs.

11 MICHAEL LEE,

12 Defendant.  
13

CASE NO. C277650-1

DEPT. XXIII

14 BEFORE THE HONORABLE STEFANY MILEY, DISTRICT COURT JUDGE

15 MONDAY, AUGUST 18, 2014

16  
17 **TRANSCRIPT OF PROCEEDINGS**  
18 **JURY TRIAL - DAY 9**

19 **APPEARANCES:**

20 For the State:

DAVID STANTON, ESQ.  
Chief District Attorney  
JOHN L. GIORDANI, III, ESQ.  
District Attorney

21  
22  
23 For the Defendant:

NADIA VON MAGDENKO, ESQ.  
STEVEN M. ALTIG, ESQ.

24  
25 RECORDED BY: MARIA GARIBAY, COURT RECORDER

-1-

GAL FRIDAY REPORTING & TRANSCRIPTION  
10180 W. Altadena Drive, Casa Grande, AZ 85194 (623) 293-0249

Monday, August 18, 2014 at 1:06 p.m.

[Outside the presence of the jury]

THE MARSHAL: -- Judge Smiley presiding. Please be seated and come to order.

THE COURT: Hi. Good afternoon.

MR. ALTIG: Good afternoon, Your Honor.

THE MARSHAL: Judge, this is --

THE COURT: C277650, State v. Lee. Good --

THE MARSHAL: It is.

THE COURT: Good afternoon. It's the time set for the penalty hearing, but I just received a stipulation pursuant to NRS 175.552(2) waiving the penalty hearing and agreeing to have the sentencing imposed by the trial judge.

MR. ALTIG: Yes, Your Honor. I did speak with Mr. Lee yesterday regarding that particular issue and Ms. Von Magdenko and I spoke with the State after that. All the parties agreed that they would stipulate to the waiver of that. I believe that Mr. Lee believes it's in his best interest to do that and so I prepared the stipulation and order and signed by all parties which is a requirement of the statute.

THE COURT: Yes.

MR. ALTIG: So it is in writing signed by everybody.

THE COURT: All right. And Mr. Lee, did your attorneys discuss this with you? By law you have a right to a penalty hearing where the jury would make a determination as to your sentence on the murder charge --

THE DEFENDANT: Yes, ma'am.

THE COURT: -- and you're waiving that and asking that the Court instead

1 you in the murder charge; is that correct?

2 THE DEFENDANT: Yes, ma'am.

3 THE COURT: All right. And did they explain -- I don't know whether there's  
4 pros or cons to doing it, but did they explain the pros and cons to you and answer  
5 any questions you may have?

6 THE DEFENDANT: Yes, they did.

7 THE COURT: All right. Is there anything else before I sign it?

8 MR. STANTON: No, Your Honor. I appreciate you asking those questions.

9 THE COURT: All right. Thank you.

10 Okay. So I have signed it. I need to formally let the jury go. So I'm  
11 going to bring them in, thank them for their service and let them go. And I don't  
12 know if the jury wants to talk to the attorneys, but if they want to, do you all want to  
13 talk to the jury?

14 MR. STANTON: I think Mr. Giordani's going to be the representative on  
15 behalf of the State if any of the jurors would like to speak.

16 THE COURT: Okay.

17 MR. ALTIG: And I would like to speak with them if they have any desire to  
18 speak to me.

19 THE COURT: Okay.

20 You guys seem to get along well enough. I mean, any problem with  
21 you guys going in together to speak to the jury?

22 MR. GIORDANI: No --

23 MR. ALTIG: No.

24 MR. GIORDANI: We're okay.

25 MR. STANTON: I can see in some occasions that would be difficult.

-3-

1 THE COURT: Yeah, more than you think.

2 MR. STANTON: Yeah.

3 THE MARSHAL: District Court XXIII jury is present.

4 [Jury in at 1:09 p.m.]

5 THE COURT: All right. Welcome back, ladies and gentlemen. Thank you for  
6 coming here today. When we left off on Friday, your jury reached a verdict as to the  
7 guilt or the innocence of the defendant and you were asked to come back today for  
8 a penalty hearing. Essentially what you would be asked to decide today would be  
9 the sentence that Mr. Lee would receive with respect to the murder charge.

10 I appreciate you guys coming back for -- today but there's been some  
11 changes. The statute does allow obviously the jury to make the decision in a  
12 murder case such as this, but the statute also allows for the defendant and the State  
13 if they so desire to ask that the Judge render the sentence on the murder charge  
14 and that's what's happened here today.

15 I'm sorry we couldn't get a hold of you in time to tell you, you didn't need  
16 to come down here, but I needed to formally let you guys go anyways. I am aware  
17 of all the time you guys have spent on this case. We're now in the very beginning of  
18 the third week and I know that all the parties think you've been very diligent in  
19 listening to the evidence in this case and you take -- took the same diligence back to  
20 the jury room to decide upon a verdict.

21 So you are going to formally be dismissed as jurors at this time. Now  
22 before you leave the building, you need to make sure you go down to jury services  
23 and check out. What this means is you're free to talk about this case with anyone  
24 you would like to talk about it with, okay? So all the restrictions have now been  
25 lifted.

The only thing I ask if any of you have a couple extra minutes and want to hang around, I know that the attorney for the State and the attorney for the defense would like to speak with you. Now they're not going to come in and attack you or second guess your verdicts and everything else. That's not the purpose, but -- you know, having once been a trial lawyer, it's really a learning process because ultimately each side comes in and they know what they believe of the evidence and how they perceive the evidence, but what really it comes down to and what ultimately matters is how the jury perceived the evidence. And so it's very helpful to both sides to get your opinion and your -- I mean your insight because you're ultimately the ones who made the decision in this case.

You are under no obligation to stay around. So if you -- if you're done, ready to go, go ahead go down to jury services and check out. I want to thank everyone for their time and have a wonderful day.

MR. ALTIG: Thank you.

[Jury excused at 1:12 p.m.]

THE COURT: Okay. Given -- one housekeeping matter I need to address. Given the jury's verdict in this case which will mandate a term in prison, the defendant will be remanded without bail pending sentencing.

MR. ALTIG: Okay. And, Your Honor, would he be pending sentencing remain here at the Clark County Detention Center -- he's already serving a sentence in NSP. Will he be released to go back to serve his sentence and be brought back down for the sentencing?

THE COURT: I don't know.

(Indiscernible) he'll go back to the prison? He'll have to do his PSI.

MR. STANTON: It depends on the length of time that you order the



1 sentencing date.

2 THE COURT: A couple months, probably.

3 THE CLERK: October 20th, 9:30 for sentencing.

4 MR. STANTON: Then I believe he'll be sent back to NSP.

5 THE COURT: Yeah.

6 MR. ALTIG: Thank you.

7 THE COURT: Okay.

8 MR. ALTIG: He was asking that he be sent back so --

9 THE COURT: Yeah, and then obviously he'll be brought back for sentencing.

10 All right.

11 MR. ALTIG: Thank you.

12 THE COURT: Thank you and let me go see if the jury wants to chat with

13 either one.

14 MR. ALTIG: Thank you.

15 THE COURT: Thank you.

16 [Proceedings concluded at 1:12 p.m.]

17 ATTEST: I hereby certify that I have truly and correctly transcribed the audio/visual  
18 proceedings in the above-entitled case to the best of my ability.

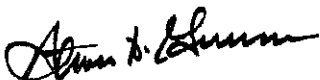
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21 Tracy A. Gegenheimer, CER-282, CET-282  
22 Court Recorder/Transcriber

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CLERK OF THE COURT

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DISTRICT COURT  
CLARK COUNTY, NEVADA

8 THE STATE OF NEVADA,

9 Plaintiff,

10 vs.

11 MICHAEL ALAN LEE,

12 Defendant.

CASE#: C277650

DEPT. XXIII

13  
14 BEFORE THE HONORABLE STEFANY MILEY, DISTRICT COURT JUDGE  
15 WEDNESDAY, SEPTEMBER 3, 2014

16 **RECORDER'S TRANSCRIPT OF PROCEEDINGS**  
17 **DEFENDANT'S MOTION FOR JUDGMENT ON ACQUITTAL; DEFENDANT'S**  
18 **MOTION FOR NEW TRIAL**

19 APPEARANCES:

20 For the State:

DAVID L. STANTON  
Chief Deputy District Attorney  
JOHN L. GIORDANI, III., ESQ.  
Deputy District Attorney

22 For the Defendant:

STEVEN M. ALTIG, ESQ.  
NADIA VON MAGDENKO, ESQ.

24  
25 RECORDED BY: MARIA GARIBAY, COURT RECORDER

1 WEDNESDAY, SEPTEMBER 3, 2014 AT 9:53 A.M.

2  
3 THE COURT: All right. Good morning, everyone. So, we're here -- we  
4 actually two motions filed by the Defendant which is a motion for judgment of  
5 acquittal and also a motion for a new trial by the defense. This is your -- and I also  
6 have an opposition by the State. Defense, it's your underlying motion.

7 MR. ALTIG: Yes, Your Honor, thank you. Steve Altig appearing for Michael  
8 Lee, Your Honor.

9 I may -- I did make a visual presentation. It helps me explain the  
10 argument a little bit better and helps me explain the argument a little bit better --

11 THE COURT: Sure.

12 MR. ALTIG: -- and help me understand it.

13 Your Honor sat through the trial. I'm not going to belabor the facts of  
14 the case a whole lot, and I understand you're prepared and you will have read all the  
15 motions in limine. So, if I can just briefly -- on this form, Your Honor, I outlined  
16 basically the timeline of events that occurred and were testified to.

17 The State pled on the 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> certain conduct occurred. In  
18 gray is other conduct that the State proved through circumstantial evidence that  
19 occurred during the trial. This was the testimony of the witnesses when they had  
20 access to Brodie when certain events happened and all the circumstantial the State  
21 produced.

22 The issue that arose is when the State pled the murder allegation they  
23 pled that the allegation for the murder occurred on either the 14<sup>th</sup> or 15<sup>th</sup>. So, what  
24 we have from the pleading of the murder allegation, nothing on the 13<sup>th</sup> can be  
25 considered or could have been considered by the jury when they arrived at their

1 verdict. It was only conduct that occurred on the 14<sup>th</sup> or the 15<sup>th</sup>.

2           The State also presented an expert witness. That was Dr. Gavin. I  
3 think -- we also presented our own expert witness, but taking the evidence in the  
4 light most favorable to the State, that it would take their expert opinion the one that  
5 was testifying correctly and what the jury would have looked at. Dr. Gavin, on cross-  
6 examination, testified that the time of death was approximately 6:30 a.m. on June  
7 15<sup>th</sup> of 2011 and that the injury that caused the death occurred she said at least  
8 about 24 hours prior to the time of death. So, by taking Dr. Gavin's testimony 24  
9 hours prior to the time of death would have been 6:30 a.m. on June 14<sup>th</sup>, there was  
10 absolutely no evidence produced at all, whether it be circumstantial or direct, that  
11 there was any conduct and any access to Brodie that anything could have occurred  
12 between the Defendant and Brodie.

13           THE COURT: Weren't they living together?

14           MR. ALTIG: They were, Your Honor, but they presented testimony that there  
15 was time that he was left alone with Brodie, there was time that he had access to  
16 Brodie by himself. There was no evidence presented that he had anything -- any  
17 access to Brodie during that time period at all.

18           THE COURT: Other than the fact they lived in the same residence.

19           MR. ALTIG: In the same residence with the other party present.

20           THE COURT: And I don't think there was any testimony that he was  
21 anywhere other than that residence at 6:30 am.

22           MR. ALTIG: There wasn't, Your Honor, but there was another person that  
23 was present and that would have been Arica, and Arica did not testify that he had  
24 any time alone with Brodie during that time; that Arica was there the entire time. So,  
25 there was no testimony that anything -- that he had any access to Brodie by himself.

1 There was no testimony of anything like that. So, the record was devoid of any  
2 circumstantial evidence that Michael had any contact with Brodie during that time  
3 period.

4 THE COURT: Other than the fact that he lived in the residence.

5 MR. ALTIG: Yeah. With another party who was present during that  
6 timeframe.

7 THE COURT: Okay. Anything else, counsel?

8 MR. ALTIG: That's it.

9 THE COURT: By the State.

10 MR. STANTON: Your Honor, as a procedural matter, I was in receipt of a file  
11 stamped reply that was filed on August 29<sup>th</sup> that appears to be a reply to both the  
12 motion for judgment of acquittal and motion for a new trial. I ask that this Court  
13 order stricken from the reply any citations to the underlying facts of the trial that are  
14 at least proclaimed to be contained in the reply. I think it's improper in the sense  
15 that no record was provided with the initial motion about the -- I'm assuming what  
16 they have but I don't know is JAVS or some video recording of certain testimony.  
17 That is not part of the record for purposes of this motion. It obviously is part of the  
18 record for the trial, but until that is provided to counsel, me, so that I can  
19 corroborate, confer, and to determine whether the quotes in here were taken out of  
20 context, which I believe some of them to be completely inaccurate and several of  
21 them to be out of context, it's improper to put that in front of the Court as the record  
22 and then ask from a factual basis that that portion of the reply be stricken.

23 In addition, Your Honor, in answering counsel's question, I would  
24 disagree with two fundamental concepts that are articulated both orally today and in  
25 both the motions, number one of which is that there has to be some sort of

1 indication that the Defendant be alone with the child in order for these injuries to be  
2 inflicted. There was no testimony to that effect and that obviously belies common  
3 sense that these injuries could have been inflicted while both the parents were at  
4 home and the other parent, in this particular case, Arica, the mother, could have  
5 been asleep or otherwise not around when the injuries were inflicted.

6           So, the concept of articulating when the Defendant was alone with the  
7 child I think is relatively straight forward both in the record and in the Court's  
8 memory of what occurred in this case. But it doesn't answer the question that  
9 they've posed. Just because both of them were in the home doesn't mean that this  
10 child couldn't have been beaten and murdered in a fashion that he was.

11           Secondarily, the doctor's -- trying to frame this trial in that the doctor's --  
12 their Dr. Arden, which the jury summarily rejected at least in part his testimony, isn't  
13 the core of the testimony and to say, okay, let's rely on Dr. Gavin, well that's simply  
14 not true because Arden also provided very critical information for the State, and that  
15 is two things: Number one, that this child died from a dissected duodenum and  
16 number two, that that injury is non-accidental in nature. He specifically indicated  
17 that in his review of Dr. Gavin's autopsy and findings, the massive number of  
18 findings that are made at an autopsy, he only disagreed with one aspect -- well  
19 actually two -- the minor contribution to the head injury which Dr. Gavin said was a  
20 minor contributor to the child's death and, number two, the aging of both injuries. So  
21 -- but his testimony is critical in the sense that he agreed that this child was  
22 murdered, and I don't think at the end of the day it makes much difference  
23 whatsoever about the timing of the injuries. The question is, was this child  
24 murdered and who committed the murder on the child.

25           So, even if you were to take the facts of Dr. Arden's testimony, this child

1 was -- could have been murdered on any time period 48 hours or 72 hours. That  
2 falls directly within the timing of what the State alleged in our Information, and  
3 contrary to what's stated in the motion and argued today, is there were numerous  
4 times when the Defendant was alone with the child during that 48 and 24 hour time  
5 period where the fatal injury was inflicted.

6 And so for the reasons of -- it's a slightly different analysis on the  
7 motion for acquittal as opposed for a motion for a new trial as far as what the Court  
8 sits in the position, but the fundamental basis is the same and that both motions  
9 should be denied summarily.

10 MR. ALDIG: Your Honor, just a brief response.

11 THE COURT: Mm-mmh.

12 MR. ALDIG: The State alleges that Dr. Arden's testimony in some ways --  
13 and substantiates and agrees with the State's theory of the case. It does not at all.

14 As I have already laid out, the State by the way they pled the murder  
15 allegation, they chose to plead it in a certain way. They pled on these three days.  
16 What they did where they pled the child abuse occurred on the 13<sup>th</sup> or 14<sup>th</sup>,  
17 excluding all other days. With regard to the murder, they argued and pled that the  
18 murder occurred -- the murder occurred on the 14<sup>th</sup> and the 15<sup>th</sup> excluding all other  
19 days. Dr. Arden's testimony was clear. Forty-eight to 72 hours prior to the time of  
20 death was the act that caused the death which would have been on the 13<sup>th</sup>, in the  
21 early morning hours of the 13<sup>th</sup> of June.

22 So, from a legal standpoint, Dr. Arden's testimony and his opinions do  
23 not substantiate the case's burden. The State chose to plead it in a certain way.  
24 They pled the act occurred on the 14<sup>th</sup> or 15<sup>th</sup>. Dr. Arden's testimony would exclude  
25 any conduct that occurred on the 14<sup>th</sup> or 15<sup>th</sup>. Taking Dr. Gavin's testimony as I've

1 already argued and displayed to Your Honor, there is no evidence whatsoever that  
2 there was any alone time, any contact, anything like that. They had testimony from  
3 Arica that there were certain periods of time when Michael was alone. She even  
4 said she had never witnessed Michael be physical with Brodie in any way, and the  
5 State presented circumstantial evidence that there were be times that Brodie was  
6 alone when this incident could have occurred.

7 I think in the State's -- on the State's benefit even Dr. Gavin's testimony  
8 you take what she testified to, that it was at least 24 hours prior to the time of death  
9 that you could possibly include the conduct and the alone time that happened -- that  
10 it occurred on Monday evening on the 13<sup>th</sup>. However, because the State chose to  
11 plead the murder allegation the 14<sup>th</sup> and 15<sup>th</sup>, that isn't relevant. The only thing  
12 that's relevant is the timing and the things that happened on the 14<sup>th</sup> and 15<sup>th</sup>.

13 So, I believe with the way that they pled it, with the testimony that was  
14 presented, and his lack of testimony that was presented, I believe that there is  
15 insufficient evidence to substantiate the jury's judgment of conviction or the jury's  
16 verdict. We'd ask that a judgment of acquittal enter or in the least I believe that the  
17 testimony of Dr. Gavin and the evidence that was presented is conflicting of one  
18 another and would be therefore justifying a new trial.

19 THE COURT: Mr. Stanton, anything else?

20 MR. STANTON: No, Your Honor.

21 THE COURT: All right. I'm going to deny the motion for acquittal. The Court  
22 does find that the totality of the evidence supports the jury's -- the totality of the  
23 evidence to support this jury's decision was overwhelming. The Court looks at the  
24 evidence that was presented during the course of the trial.

25 There was evidence presented during the course of the trial that Arica



1 had taken the child to the doctor numerous times over the course of the child's life  
2 and that sometime before the day of death but after the time the Defendant began to  
3 cohabitate with the mother that the child started to have bruising of unexplained  
4 origin that were different or more numerous perhaps then the bruising he had from  
5 being the child that got banged up. There was evidence presented as to the  
6 condition of the child the weekend before the death which is there was testimony the  
7 jury obviously found credible from the aunt that indicated that she didn't notice any  
8 of the injuries on the child.

9           There was testimony from the grandmother who is a nurse, there was  
10 testimony from the grandfather, and all of them indicated that they did not notice any  
11 of the significant injuries that were obviously apparent at the time of the child's  
12 death. There was evidence presented by the mother as to -- mother and the other  
13 family members as to the child's increasingly I'd say panicked reaction or showing of  
14 increased -- increased showing of emotion whenever the Defendant was around.

15           There was testimony presented as to how -- there was testimony  
16 presented by Dr. Gavin who the jury seemed to place weight on that narrowed down  
17 the time period for the injuries that caused the death, and there was also testimony  
18 that put two people around the child at the time of the injuries causing death, that  
19 being the mother and the Defendant in this particular case. And it appears that the  
20 jury found the mother to be credible in that she did not cause the fatal injuries to the  
21 child. I'm also going to deny the motion for a new trial.

22           MR. ALDIG: Thank you.

23           THE COURT: And as far as the State's request on the reply, I agree. It's  
24 difficult to ascertain what exactly is being cited to.

25           ...

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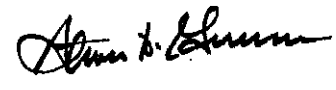
MR. STANTON: Thank you, Your Honor.

MS. VON MAGDENKO: Thank you, Your Honor.

[Proceedings concluded at 10:06 a.m.)

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

  
PATRICIA SLATTERY  
Court Transcriber

  
CLERK OF THE COURT

1 RTRAN

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3  
4 DISTRICT COURT  
5 CLARK COUNTY, NEVADA  
6

7 STATE OF NEVADA,

8 Plaintiff,

CASE NO. C277650-1

9 vs.

DEPT. NO. XXIII

10 MICHAEL ALAN LEE,

11 Defendant.  
12

13  
14 BEFORE THE HONORABLE STEFANY A. MILEY, DISTRICT COURT JUDGE

15 MONDAY, OCTOBER 20, 2014

16 RECORDER'S TRANSCRIPT OF PROCEEDINGS RE:

17 SENTENCING  
18  
19

20 APPEARANCES:

21 For the Plaintiff:

JOHN L. GIORDANI, III, ESQ.  
Deputy District Attorney

22  
23 For the Defendant:

STEPHEN M. ALTIG, ESQ

24  
25 RECORDED BY: MARIA L. GARIBAY, COURT RECORDER

1 MONDAY, OCTOBER 20, 2014, 9:35 A.M.

2  
3 THE MARSHAL: Top of page 10, C277650-1, Lee.

4 THE COURT: Hi. Good morning.

5 MR. GIORDANI: Good morning, Your Honor. As you can see, he was not  
6 transported.

7 MR. ALTIG: Good morning, Your Honor, Steve Altig appearing for  
8 Ms. Von Magdenko.

9 THE COURT: He's in prison; isn't he?

10 MR. GIORDANI: That's right.

11 MR. ALTIG: He is.

12 MR. GIORDANI: We've -- Mr. Stanton is across the street. He spoke to the  
13 prison. They say they can get him down here tomorrow or Wednesday, whatever  
14 works for the Court.

15 THE COURT: Wednesday's fine. That's my next criminal. Does that work for  
16 you, Mr. Altig?

17 MR. GIORDANI: Well, and Judge, if tomorrow is an option, we'd request that,  
18 'cause we have 5 out-of-state witnesses that are sitting here. If it's something the  
19 Court can't do, I understand. We can do Wednesday, but we'd like to get them out.

20 THE COURT: We have 5 out-of-state witnesses. Civil is not very long  
21 tomorrow; is it?

22 [The Court and Law Clerk confer.]

23 THE COURT: Do you want to do it at 1:00 tomorrow in the afternoon?

24 MR. GIORDANI: There you go. Sure. Yeah, that'd be great.

25 MR. ALTIG: It should be fine. I checked with Ms. Von Magdenko. She said

1 either day was fine, but I was checking for the morning. But I would imagine 1:00  
2 o'clock should be okay.

3 THE COURT: Well, I have a civil calendar tomorrow and I'm afraid it's going  
4 to go long.

5 MR. ALTIG: One o'clock should be fine, Your Honor.

6 MR. GIORDANI: Thank you, Judge.

7 THE CLERK: October 21<sup>st</sup>, at 1:00 p.m.

8 THE COURT: So you're going to make sure he's here.

9 MR. GIORDANI: Yes, actually.

10 THE COURT: Okay, sounds good.

11 MR. GIORDANI: Thank you.

12 PROCEEDINGS CONCLUDED AT 9:37 A.M.

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21 ATTEST: I do hereby certify that I have truly and correctly transcribed the  
22 audio/video recording in the above-entitled case to the best of my ability.

23

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25

  
MARIA L. GARIBAY  
Court Recorder/Transcriber

  
CLERK OF THE COURT

1 RTRAN

2  
3  
4 DISTRICT COURT  
5 CLARK COUNTY, NEVADA  
6

7 THE STATE OF NEVADA,

8 Plaintiff,

9 vs.

10 MICHAEL ALAN LEE,

11 Defendant.  
12

CASE#: C277650

DEPT. XXIII

13 BEFORE THE HONORABLE STEFANY MILEY, DISTRICT COURT JUDGE  
14 TUESDAY, OCTOBER 21, 2014

15 **RECORDER'S TRANSCRIPT OF PROCEEDINGS**  
16 **SENTENCING**

17 APPEARANCES:

For the State:

DAVID L. STANTON  
Chief Deputy District Attorney  
JOHN L. GIORDANI, III., ESQ.  
Deputy District Attorney

20 For the Defendant:

STEVEN M. ALTIG, ESQ.  
NADIA VON MAGDENKO, ESQ.

22 ALSO PRESENT:

Victim Impact Speakers:

DUSTIN ASCHENBRENNER  
ARICA FOSTER  
BRAD MOSHIER

25 RECORDED BY: MARIA GARIBAY, COURT RECORDER

1 TUESDAY, OCTOBER 21, 2014 AT 1:01 P.M.

2  
3 THE COURT: All right. Good afternoon.

4 So, this is the time set for sentencing. Counsel, is there any legal  
5 cause or reason why we should not go forward today?

6 MR. ALTIG: No, Your Honor.

7 MR. STANTON: No, Your Honor.

8 THE COURT: All right. I noticed we have speakers. Are they going to speak  
9 last?

10 MR. STANTON: Yes, Your Honor.

11 THE COURT: All right. By the State, this is by way of jury verdict. And I did  
12 receive the State's sentencing memorandum which I reviewed prior to coming into  
13 Court.

14 MR. STANTON: Your Honor, the sentencing memorandum was to outline to  
15 this Court what cannot be credibly argued this afternoon as any mitigation regarding  
16 a couple things.

17 Number one is the Defendant's involvement in those 11 prior felonies.  
18 One cannot reasonably assert what his role was in those; that it was some minor  
19 role; that he was the wheel person; that he was acting under the influences of some  
20 other people. He was an active primary participant in at least 11 robberies of where  
21 each robbery had multiple victims, mostly female, where he used a weapon in  
22 virtually every single one. There are two that jump out at the State. One was -- in  
23 preparation for the penalty phase in front of a jury we interviewed, and I highlighted  
24 her by name in the PSI, she had been a bank teller for approximately 20 years.  
25 And I remember as she was walking out of my office I asked her, by the way, how

1 many times have you been robbed in your career as a teller? And she said this  
2 would have been the seventh. And I go, oh, I'm sorry to hear that. And she says  
3 but I'll never forget this one. And I asked her why not. She says because it was the  
4 most violent.

5           The other case involves this Defendant, not any co-Defendant co-  
6 conspirator, taking the butt end of a very large serrated knife and striking a female  
7 victim for no need during a robbery and used extremely vulgar language about  
8 commanding her to do specific acts to facilitate the robbery during that. No attempts  
9 to escape, call police, just a uncalled for violent act to scared and frighten victims.  
10 And each one was a separate and distinct robbery of a commercial establishment:  
11 banks, restaurants, businesses. It made no difference. And of course the nature of  
12 these robberies were ones that were done with ski masks and both confederates  
13 bringing in weapons, usually the Defendant armed with a knife, co-Defendant with a  
14 12 gauge pump shotgun.

15           He is on parole at the time that this murder took place. And the other  
16 thing -- the second thing about that is really adduced at the trial. The other non-  
17 credible claim that can be asserted here is that the abuse that murdered Brodie was  
18 done in a sporadic one time event.

19           As this Court heard the evidence that Brodie not only his fatal injuries  
20 were inflicted over some time but by two different incidents, one to the head and the  
21 other to the abdomen, but the compelling testimony of the history of Brodie's life  
22 especially in the last couple months of his life when the Defendant entered the  
23 picture and his behavior towards the Defendant drastically change because that  
24 young boy unable to articulate it in the way that we could, was by his behavior and  
25 by his body, showing evidence that the Defendant was abusing him physically and



1 violently for a period of time. From the State's prospective that is a compelling piece  
2 of evidence to draw a distinction between the people that sit as the Defendant does  
3 facing sentencing for murder of a child. It's a different, I think, assessment when  
4 someone in a rage over a particular incident while criminal and first degree murder  
5 that's different to assess than someone that does chronic physical abuse of the  
6 same child over a protracted period of time. And that's what we have in this case.

7           Your Honor, a couple other comments briefly is there is zero credit for  
8 time served because the Defendant has served and is serving his time for the 11  
9 robbery counts that are reflected in the PSI. So, he's entitled to zero credit as  
10 reflected in the PSI.

11           You are about to hear at the end of the sentencing the impact to the  
12 family which is broad, deep, and severe and I think those people are the best to  
13 articulate that. But the damage that was caused in this case is immense. There  
14 was a very loving family on that side of the family that cared for this child deeply and  
15 their loss or the loss to them is compelling. The Division recommends life without  
16 the possibility of parole, and while there is not much of a reason articulated in there,  
17 I think from the Division's at least and my experience is probably generated because  
18 of his performance on parole and the nature of the violence of the prior acts. And so  
19 I would think from their perspective, their assessment of the risk that this Defendant  
20 poses to the community is extensive and I would suggest massive, and the State  
21 would concur in that.

22           I cannot think that a risk of this man being free again in society can ever  
23 be reduced or lessened. His behavior speaks for itself. Your Honor, he had the  
24 privilege of parole. He had served an extensive amount of time in prison and that  
25 had no effect on him. He can't argue or suggest to this Court that it was based upon

1 youthful age and indiscretion. This is a man who had served his time and should  
2 know and did know the consequences of his behavior and yet that ran unabated.  
3 Therefore, the risk, I would suggest, long term let alone the simple punishment for  
4 beating this young man to death speaks for itself and demands that life without be  
5 the just sentence in this case and that's the State's recommendation to the Court.  
6 Thank you.

7 THE COURT: All right. By the defense.

8 MR. VON MAGDENKO: Your Honor, I would just like to say that in this case  
9 there was actually no evidence presented to the jury of chronic abuse of the  
10 Defendant by Brodie. The family had said repeatedly if they ever thought that  
11 Michael was abusing Brodie they never would have left him with Brodie. Also, the  
12 grandmother was a mandatory reporter. So, if she ever thought Michael had been  
13 abusing him prior to this evening at issue where he died, she never would have left  
14 him in the care with Michael.

15 There's no evidence of any premeditation to kill or inflict these injuries.  
16 And so based upon that, we would request that the Court consider parole, life with  
17 parole.

18 THE COURT: All right. Anything else from the defense? Mr. Lee, is there  
19 anything you would you like to say, sir?

20 THE DEFENDANT: Your Honor, I respect your decision in whatever you  
21 come to but I in no way can accept responsibility for something I had nothing to do  
22 with. Thank you, Your Honor.

23 THE COURT: Thank you. The first speaker, please.

24 MR. STANTON: Dustin Aschenbrenner.

25 **DUSTIN ASCHENBRENNER**

1 [having been called as a speaker and being first duly sworn, testified as follows:]

2 THE COURT CLERK: Thank you. Please be seated and please state your  
3 full name, spelling your first and last name for the record.

4 THE VICTIM IMPACT SPEAKER: Dustin Aschenbrenner, D-U-S-T-I-N  
5 A-S-C-H-E-N-B-R-E-N-N-E-R.

6 MR. STANTON: May I begin, Your Honor?

7 THE COURT: You may.

8 MR. STANTON: I just have a couple questions and then I know you have  
9 some comments for the Court this morning.

10 Dustin, you asked me in the years that you and I have talked over the  
11 phone and in person that you came down and attended the trial and you asked to  
12 come down and speak both before the jury or the judge as it ultimately turned out; is  
13 that correct?

14 THE VICTIM IMPACT SPEAKER: Absolutely.

15 MR. STANTON: And where do you live, sir?

16 THE VICTIM IMPACT SPEAKER: I live in Butte, Montana.

17 MR. STANTON: And that's where you work as well?

18 THE VICTIM IMPACT SPEAKER: Yes.

19 MR. STANTON: And you have some comments that you'd like to give to  
20 Judge Miley this morning?

21 THE VICTIM IMPACT SPEAKER: I do.

22 MR. STANTON: Thank you, sir, if you would go ahead.

23 THE VICTIM IMPACT SPEAKER: My name's Dusty Aschenbrenner. I'm  
24 Brodie's proud father. I -- Brodie was -- is my one and only child. The murder of my  
25 little boy has absolutely devastated me and my whole entire family.

1           From the start, I mean, he was such a beautiful little guy. I mean, I  
2 couldn't wait to see his eyes open for the first time. He had the most beautiful blue  
3 eyes I'd ever seen in my life and the most heartwarming smile. I was super excited  
4 to be a father for the first time to a little boy to carry on my name and scared, you  
5 know. No instructions come with babies, as we know, and overwhelmed. It forced  
6 me to grow up becoming a dad with all the new responsibilities. Brodie was Brodie.  
7 Brodie was beautiful. He loved dancing. I can't tell you how many times I had him  
8 in my house and he'd be dancing to the music. We'd go into his bed with the TV  
9 shows, the cartoons on the TV, and giggling. I have a riding lawnmower and he'd  
10 run away and disappear on me and I'd go find him and he'd be out there sitting in  
11 the lawnmower waiting for me to take him for a ride. He loved it. He was very, very,  
12 very innocent, very beautiful.

13           I don't know how to go about telling everything I miss about him. I  
14 mean, I'm from Montana. I do a lot of outdoor stuff like hunting and fishing and  
15 camping and that kind of stuff and those are the things that I always looked forward  
16 to passing on and teaching to my son and I'll never have that chance. That was  
17 taken from me. School, sports, you know, I mean, I'll never get to his baseballs  
18 games. I had high hopes he going to be my famous little Yankee baseball player.  
19 It's everything. It's school pictures, I mean, I'll never get to see him evolve into the  
20 young man that I wanted him to be. Helping him with homework, dressing him up  
21 for Halloween. These are things I'm missing out on. Christmas, birthdays, dying  
22 Easter eggs. I mean, where does it end? I'll never get to see him go to prom for his  
23 first time; I'll never get to see -- I'll never get to see any of that. It was taken from  
24 me. I wanted to show Brodie how to stand up and be the good man, you know,  
25 pass on the rights and wrongs of life and it was robbed from me.

1           After Brodie passed away, I came to Nevada, to Vegas, for my first time  
2 and it ruined me. I mean, it was around Father's Day weekend and I got to see my  
3 son for the last time in the morgue on Father's Day. That's something -- it ruined me  
4 and it ruined my whole entire family for the rest of my life. Me and my dad, I mean,  
5 we can't -- I try to embrace Father's Day and whatnot but it's really, really hard.  
6 I about took my own life shortly after and I've been going to extensive counseling  
7 and I'm trying to put my life back on track. It's our job as men to protect the women,  
8 the children, and the old people; I truly believe that, and I'll never get to pass on that  
9 trait. I just want the justice that my son deserves.

10       THE COURT: Thank you. Anything else, Mr. Aschenbrenner? Anything  
11 else?

12       MR. STANTON: None from the State, Your Honor.

13       MR. ALTIG: No questions, Your Honor.

14       THE COURT: Sir, thank you for your time. You're free to step down, sir.

15       The next witness, please, or the next victim --

16       MR. STANTON: Your Honor, the State next calls Arica Foster.

17                                   **ARICA FOSTER**

18       [having been called as a speaker and being first duly sworn, testified as follows:]

19       THE COURT CLERK: Thank you. Please be seated. Please state your full  
20 name, spelling your first and last name for the record.

21       THE VICTIM IMPACT SPEAKER: Arica Foster, A-R-I-C-A, last name  
22 Foster, F-O-S-T-E-R.

23       THE COURT: Whenever.

24       MR. STANTON: Thank you, Your Honor.

25           Ms. Foster is Brodie's mother. You have some comments that you

1 would like to address to the Court this morning.

2 THE VICTIM IMPACT SPEAKER: Yes, sir.

3 MR. STANTON: If you would so present them now. Thank you.

4 THE VICTIM IMPACT SPEAKER: Judge Miley, my favorite thing in life -- this  
5 is going to be hard for me to get through this just to talk about my son to anyone and  
6 everyone that will listen at work, at the park, doing anything. I describe him just as  
7 he is, the most amazing little boy I've ever seen in my life. And I don't just say it  
8 because he was son; I say it because from the second I looked into his eyes and  
9 they sparkled blue I just knew that he was special and he was amazing. Brodie, at  
10 the age of three months, only three months, developed the most perfect laugh that  
11 anybody's ever heard. It wasn't just a laugh like a giggle; it was a belly laugh, like  
12 anything that I was doing was just the funniest thing in the world.

13 I have just like a 20 second long video of Brodie laughing. Is there any  
14 way we can play it? I have it on a DVD.

15 MR. STANTON: I don't think there's a way to play that. I'm sorry, Judge. I  
16 didn't know.

17 THE COURT: I am sorry. I don't have the equipment.

18 THE VICTIM IMPACT SPEAKER: No, it's fine. Can we play the laugh on one  
19 of our phones?

20 THE COURT: Is there any objections to that?

21 MS. VON MAGDENKO: No objection, Your Honor.

22 THE COURT: All right, sure, if you have one. Okay.

23 THE VICTIM IMPACT SPEAKER: This is just really -- it's a 31 second clip of  
24 Brodie and I playing on the couch one day.

25 [The Victim Impact Speaker plays video from cell phone]

1 THE COURT: Thank you. And I hate to do this to you but I need for you to  
2 turn the phone off because it messes up our recording equipment, please. Thank  
3 you.

4 THE VICTIM IMPACT SPEAKER: That is the sound that was taken from me,  
5 that was taken from my family. That was the best sound in the entire world. Not  
6 only did Brodie laugh way too early like that but he crawled too early, he walked too  
7 early, he ran too early, and he was so smart. He got into everything. Brodie's papa,  
8 which was one of his favorite people in the world, installed safety locks in the kitchen  
9 and Brodie was standing watching. Right after he installed the safety lock, Brodie  
10 went right over like, um, what's this for, and just immediately undid it.

11 Everyone loved Brodie. Even strangers loved Brodie. He was  
12 rambunctious and silly and there's nothing as a mom that he could do that made my  
13 angry no matter how naughty it was. He could run around in the bathroom and grab  
14 the toilet paper and dance around in it. It was funny. He didn't know not to love  
15 people. His favorite thing to do was put on dance performances when we were  
16 cleaning the house. Nobody knew about it but Brodie and I because it's extremely  
17 embarrassing. He'd line up his stuffed animals and we'd turn on the music and we'd  
18 sing in the remote control. Why? Because it's fun. He loved it. Anything that  
19 Brodie loved to do I loved to do with him.

20 Brodie's favorite things in life were cheese pizza, Sponge Bob, the  
21 Wiggles song, his backpack that he carried with him almost all the time. He put  
22 everything in his backpack, things he shouldn't have, things he should have. He just  
23 loved it. Brodie loved snacks. He loved his friend and his cousin that is seven  
24 months younger than her, Lilly. Lilly still tells us all the time to go pick up Brodie  
25 from heaven. Why did we leave him there. And if you ask my nephew, Eric, which

1 is five years older than Brodie, Brodie also loved the Yankees. He loved my mom's  
2 Chihuahuas a whole lot more than those Chihuahuas loved him. I don't know how  
3 else to explain my son. He was beautiful and happy, healthy; my son was healthy.

4 Since I've I lost my son, every day is a struggle. It's not just certain  
5 things. I can't even go down -- in Walmart down the back to school aisle because he  
6 should be in kindergarten this year; he should be playing. On the morning of June  
7 15 when I rolled over to check on my sick son and I discovered him, it shattered my  
8 world and not just the one thing and not just two, it shattered my family, it shattered  
9 our bond. I have a hard time doing -- joining my family for get togethers because it  
10 hurts too bad to get brought up. I don't mind talking about the fun times that we all  
11 had, but the realization that he's really gone it tears your heart out every time.

12 At age of 27 my biggest fear in life it shouldn't be the truth. The truth is  
13 I don't know all the things that happened to my son. You can ask Stanton, you can  
14 ask his team, you can ask the DA, you can ask the detectives. I have a hard  
15 enough time dealing with him just being gone and knowing that somebody caused it.  
16 I just -- I can't imagine why somebody would ever hurt him. I don't trust people now.  
17 I don't hang out with my old friends.

18 Brodie has a one year old brother now, a spitting image of him. It's not  
19 fair to Brodie's past or his future that he can't be here. He can't teach his brother  
20 things. My friend, my best friend now has a six year old and she has a one year old  
21 and I look at her and I am jealous, extremely jealous because she has that because  
22 it was ripped away. I fantasize about them playing together or what life would be  
23 like. I don't even want to have a wedding because my son can't be there. It's not  
24 whole; nothing's whole. I leave work with panic attacks. There's just nothing.

25 The sound, the words I miss most is I love you Mommy. Brodie would



1 tell me I love you Mommy every night and he'd give me a kiss. It was our routine  
2 every night. I'd kiss every one of his stuffed animals. The same thing happens with  
3 my son, Hunter, now. I give him a kiss and I tell him goodnight. The biggest  
4 difference is I tell him please play with his brother in his dreams and get to know him  
5 because that's all he has. Brodie doesn't get to spend time with his family. He  
6 doesn't get to grow up with his cousins; he gets nothing. It's done. My family's  
7 tortured by this every day; I'm tortured by this every day.

8           These are his blue eyes, this is the last Halloween that I got with him,  
9 and this is my dad's graduation with everybody in my family. My dad was wearing a  
10 Sponge Bob shirt to represent my son. He should be standing here. Like I said,  
11 Brodie gets nothing. His life was ended. For what? We'll never know. He gets  
12 nothing. I don't think that Michael Lee should either. That's everything.

13           THE COURT: Thank you. Anything further?

14           MR. STANTON: No, Your Honor.

15           THE COURT: Thank you, ma'am. The last speaker, please.

16           MR. STANTON: Brad Moshier, Your Honor.

17                           **BRAD MOSHIER**

18           [having been called as a speaker and being first duly sworn, testified as follows:]

19           THE COURT CLERK: Thank you. Please be seated. Please state your  
20 name, spelling your first and last name for the record.

21           THE VICTIM IMPACT SPEAKER: Brad Moshier, B-R-A-D, the last name is  
22 M-O-S-H-I-E-R.

23           MR. STANTON: May I begin, Your Honor?

24           THE COURT: Mm-mmh.

25           MR. STANTON: Mr. Moshier, I asked you and you volunteered to address

1 the Court on behalf of the family; is that correct?

2 THE VICTIM IMPACT SPEAKER: Yes.

3 MR. STANTON: Do you have some comments to give to Judge Miley this  
4 afternoon?

5 THE VICTIM IMPACT SPEAKER: Thank you for letting me speak.

6 The impact on the family is far beyond anything a lot of people could  
7 even imagine. Quite a few of the family members are dealing with PTSD. We hear  
8 about soldiers and people coming back from the war dealing with it, you know, do  
9 things, you know, not being able to go into certain stores and cook certain items  
10 without having panic attacks or just not being able to function. There's some foods  
11 that we don't eat in our house anymore. My wife used to make really a great  
12 lasagna. Well that was Brodie's last meal. So, it's not eaten at our house. We don't  
13 talk about it. Just the smell of it in a restaurant turns your stomach. You start  
14 having cold sweats. You wake up in the middle of the night and can't breathe;  
15 you're choking; nightmares and long periods of not sleeping. This is what every one  
16 of our family members go through on a daily weekly basis.

17 My wife is a nurse. Since Brodie's death, I've graduated from nursing  
18 school. I'm a pediatric nurse. Sometimes little babies walk in and your stomach  
19 flips because you know some of the marks on their bodies are not normal and you  
20 just want to -- you almost retch at the thought of what's going on to that little child.  
21 Even just walking through the hospital on a normal basis, even if you're not a  
22 pediatric nurse there's certain sound and smells that just make your stomach flip. I  
23 don't think that that there's one family member that is not dealing with some type of  
24 traumatic stress disorder.

25 Lilly, our grandchild, our youngest granddaughter, we don't know what

1 actual effects it's going to have on her in the long term. You heard my daughter say  
2 she keeps asking us to go get Brodie from heaven. We just can't do that. I'm not  
3 sure what it's actually going to do to her when she gets older. It's something that  
4 you wonder every day.

5 I still have nightmares about what Brodie went through in the last  
6 couple hours of his life; I know my wife does, I know my daughters do, and we just  
7 couldn't -- we weren't there for him and we don't know why, why it happened. We  
8 can't answer those questions.

9 My family will never recover from this. There is no closure. People talk  
10 about getting closure. There is none. Even though this may be over for right now, it  
11 still will not have closures. We still have to deal with the fact that for many years  
12 there has not been a Christmas tree in our house; no decorations. My wife and I  
13 just can't put 'em up. There's always going to be something missing especially with  
14 his birthday as close to Christmas as it was. We just miss our little man. I really  
15 don't know what else to say, but there is no closure. That's all.

16 THE COURT: Thank you. Anything else?

17 MR. STANTON: Nothing further, Your Honor.

18 THE COURT: All right. Thank you, Mr. Moshier.

19 MR. STANTON: That's our last speaker, Your Honor. Thank you.

20 THE COURT: All right. Mr. Lee, sir, the Court finds you guilty of first degree  
21 murder by child abuse, a felony. In accordance with the laws of the state of Nevada,  
22 the Court assesses a \$25 administrative assessment fee. DNA was previously  
23 taken and will not be required again.

24 Sir, you are sentenced to life without the possibility of parole. This will  
25 run consecutive to your sentence in C199242 and you are not entitled to any credit

1 for time served as you were on parole at the time of this event. Thank you.

2 MR. STANTON: Thank you, Your Honor.

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[Proceedings concluded at 1:34 p.m.)

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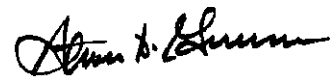
21 ATTEST: I do hereby certify that I have truly and correctly transcribed the  
22 audio/video proceedings in the above-entitled case to the best of my ability.

23

24

25

*Patricia Slattery*  
PATRICIA SLATTERY  
Court Transcriber

  
CLERK OF THE COURT

1 RTRAN

2  
3  
4 DISTRICT COURT  
5 CLARK COUNTY, NEVADA  
6

7 STATE OF NEVADA,

8 Plaintiff,

9 vs.

10 MICHAEL ALAN LEE,

11 Defendant.  
12

CASE NO. C277650-1

DEPT. NO. XXIII

13 BEFORE THE HONORABLE STEFANY A. MILEY, DISTRICT COURT JUDGE

14 MONDAY, OCTOBER 27, 2014

15 **RECORDER'S TRANSCRIPT OF PROCEEDINGS RE:**

16 **FURTHER PROCEEDINGS: CLARIFICATION OF SENTENCE ON COUNT 2**  
17

18 **APPEARANCES:**

19 For the Plaintiff:

JOHN L. GIORDANI, III, ESQ.  
Deputy District Attorney

21 For the Defendant:

STEPHEN M. ALTIG, ESQ.  
NADIA VON MAGDENKO, ESQ.

23 HARMONY T. LETIZIA, ESQ.  
24 Deputy Public Defender

25 RECORDED BY: MARIA L. GARIBAY, COURT RECORDER

1 MONDAY, OCTOBER 27, 2014, 11:04 A.M.

2  
3 THE MARSHAL: Bottom of page 1, C277650-1, Lee.

4 THE COURT: Hi. Good morning.

5 MR. GIORDANI: Good morning, Judge.

6 THE COURT: Hi. Good morning. And thanks for coming back here after we  
7 sentenced Mr. Lee. We sentenced him on count one, which is the first-degree  
8 murder by child abuse, because that was the only one on the PSI. But going back  
9 on the verdict form, he was convicted on two counts.

10 MR. GIORDANI: That is correct, Judge.

11 MS. VON MAGDENKO: Yes, Your Honor.

12 MR. GIORDANI: I think -- if I may?

13 THE COURT: Yeah.

14 MR. GIORDANI: Typically, I don't want to say this Court will do it, but it's a  
15 tendency of Court's to -- when someone is sentenced to life without the possibility of  
16 parole, to just run the other count concurrent and be done with it. I would suggest  
17 that that's not appropriate in this case, Judge. We pled it and we had numerous  
18 arguments during trial and closing arguments about this being a separate and  
19 distinct conduct. What this Defendant did to Brodie, and specifically with regard to  
20 his head, it could've stopped there and Brodie would not be dead at this point. But  
21 he continued as you know. I won't rehash all the facts, but he delivered that fatal  
22 blow to Brodie's abdomen at some point after the head wounds that were inflicted.

23 Based upon that, Judge, the State's requesting that it runs consecutive  
24 and you run it the max time on that count for all the reasons I just stated.

25 THE COURT: And, I'm sorry, on count two; what's the potential on that one?

1 MR. GIORDANI: Eight to twenty, Judge.

2 THE COURT: Eight to twenty. All right. Counsel for the defense.

3 MS. VON MAGDENKO: I don't have anything, Your Honor.

4 THE COURT: Anything else?

5 MR. ALTIG: Your Honor, I would ask to run concurrent to the life without the  
6 possibility of parole. It's the harshest punishment he could receive under that  
7 particular crime and for that particular sentence. And I'd ask Your Honor to consider  
8 running it concurrently. I know that you've already ran the life without consecutive to  
9 the sentence he's serving on the robbery case he's already serving. So I'd ask that  
10 this one run concurrently.

11 THE COURT: All right. Sir, you've already been sentenced on count one,  
12 and you did receive life without the possibility of parole on that count. Sir, the Court  
13 also finds you guilty on child abuse and neglect with substantial bodily harm, a  
14 felony. You are sentenced to a minimum term of 96 months, a maximum sentence  
15 of 240 months. Count two will run consecutive with count one. And the credit for  
16 time served was already previously calculated. Do we need to do it again?

17 MR. GIORDANI: It was at zero, Judge.

18 MR. ALTIG: It was zero.

19 MR. GIORDANI: He was on parole.

20 THE COURT: 'Cause he was on parole at the time of the event.

21 MR. ALTIG: That's correct.

22 THE COURT: All right. Thank you. So if you haven't done it, I'm going to  
23 need an updated judgment of conviction.

24 MR. GIORDANI: Understood. Thank you, Judge.

25 MS. VON MAGDENKO: And, Your Honor, we'd like to do an oral motion to

1 withdraw. We've already contacted the Public Defender's Office who's here to see if  
2 they can be counsel for the appeal.

3 THE COURT: For the appeal.

4 MS. VON MAGDENKO: That's correct, Your Honor.

5 THE COURT: Okay. And so you guys are prepared to file the notice of  
6 appeal?

7 MS. LETIZIA: We are. Mr. Brooks from our office, who's the head of the  
8 appellate team, is already ready to go on that.

9 THE COURT: All right. That's fine. The Public Defender's Office will be  
10 substituting in for post-conviction relief. Thank you.

11 MR. ALTIG: Thank you.

12 MS. VON MAGDENKO: Thank you.

13 MR. GIORDANI: Thank you, Your Honor.

14 PROCEEDINGS CONCLUDED AT 11:07 A.M.

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22 ATTEST: I do hereby certify that I have truly and correctly transcribed the  
23 audio/video recording in the above-entitled case to the best of my ability.

24

25

  
MARIA L. GARIBAY  
Court Recorder/Transcriber



1                                   **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2  
3                   MICHAEL LEE,

)                   No. 66963  
)  
)

4                                   Appellant,

5   vi.  
6   )

7                   THE STATE OF NEVADA,

8                                   Respondent.  
9                                   )

10                                   **APPELLANT'S APPENDIX VOLUME VII PAGES 1324-1398**

11                   PHILIP J. KOHN  
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16                                   **CERTIFICATE OF SERVICE**

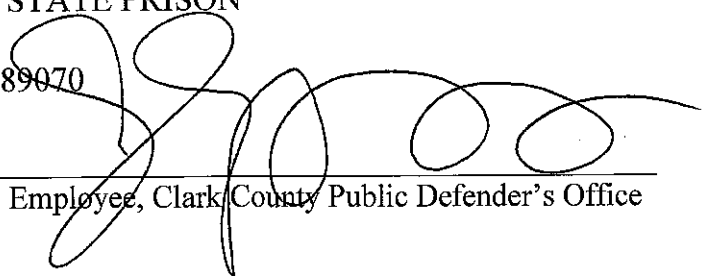
17                                   I hereby certify that this document was filed electronically with the Nevada  
18                   Supreme Court on the 20th day of Sept, 2015. Electronic Service of the  
19                   foregoing document shall be made in accordance with the Master Service List as follows:

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22                                   I further certify that I served a copy of this document by mailing a true and  
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24                   MICHAEL A LEE  
25                   NDOC # 81950  
26                   c/o HIGH DESERT STATE PRISON  
27                   PO Box 650  
28                   Indian Springs, NV 89070

28                   BY  \_\_\_\_\_  
                                 Employee, Clark County Public Defender's Office